THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 17

Case No. 9418 — Case No. 10,120

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MENDELL—NEPTUNE

Case No. 9,418—Case No. 10,120

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FEDERAL CASES.

BOOK 17.

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

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

Case No. 9,418.

Ex parte MENDELL.

In re BUTLER.

[1 Lowell, 506;[1] 4 N. B. R. 302 (Quarto, 91).]

District Court, D. Massachusetts. 1870.

BANKRUPTCY—MONEY LOANED—PREFERENCE—MORTGAGE.

1. One who lends money to a retail trader within four months of his bankruptcy, and when he was actually insolvent, on a mortgage of his stock in trade, is bound to make some inquiry into his object in raising the money; and if upon the slightest inquiry he could have discovered that the whole purpose was to prefer a creditor, his mortgage may be avoided by the assignee.

[Cited in Ex parte Packard, Case No. 10,650; Ex parte Ames, Id. 323; Bucknam v. Goss, Id. 2,097.]

[Cited in Noble v. Scofield, 44 Vt. 284.]

2. Clauses one and two of the thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 534)], considered. A mortgage given to raise money to pay a creditor by way of preference comes within clause two of section thirty-five.

[Cited in Swan v. Robinson, 5 Fed. 296.]

The stock of goods which came to the possession of the assignee was mortgaged to the petitioner, and by order of court the stock was sold at auction, and the money was paid into the registry subject to all lawful liens. The mortgagee petitioned to have it paid out to him, and the assignee opposed the petition, on the ground that the mortgage was voidable by him under the second clause of the thirty-fifth section of the bankrupt act. The evidence tended to show that Butler was a retail trader, having a shop on Tremont street, Boston, and one at North Cambridge; that his stock in the latter place was mortgaged in May, 1870, but under what circumstances was not shown at this hearing; that towards the end of June, if not earlier, he found difficulty in meeting his engagements, and some creditors did not obtain prompt payment of their accounts. He was owing one Cushman a balance of about fifteen hundred and eighty-six dollars, on a note which had been given for a stock of goods in April, 1868, and on which he had made many small payments, from time to time. Mr. Cushman asked him for another payment, and he said that he could not make it unless he borrowed the money. Kimball, a clerk or partner of Mr. Cushman, then suggested to Mendell, the now petitioner, that he might invest his money to advantage in a mortgage of Butler's stock, and to Butler that the petitioner would probably lend him the money. He brought the parties together, and the petitioner agreed to lend him $1600. The transaction was concluded, and the money advanced in Cushman's place of business, and Kimball, the clerk or partner, lent the petitioner $600 to make up the sum. The money was paid over by the bankrupt to Cushman in settlement of the old note, but it was not proved that this was done in presence of the mortgagee, or that he was, in fact, fully informed of the nature of the transaction. He made no inquiry into the condition of the mortgagor's affairs, but relied mainly as to security on the advice of Mr. Cushman and Mr. Kimball. Butler asked him to keep the mortgage off the record, because it would injure his credit, and he agreed that he would not record it at once, and so instructed Mr. Kimball, with whom he left the note and mortgage. The stock in trade of Butler was attached about two weeks after, and so remained until he went into bankruptcy on the 26th of August, 1870.

L. W. Howes, for mortgagee.

T. F. Nutter, for assignee.

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

LOWELL, District Judge. It is plain that the money was raised for the express purpose of paying a pre-existing debt, and the intent to prefer the creditor may be fairly inferred. The only doubt is, whether the mortgagee was a party to the fraud upon the statute, or was kept in the dark by his friends. There is evidence from which it may be argued that he must have understood the scheme, unless he were wilfully blind; but the assignee relies more particularly upon the second clause of the thirty-fifth section of the statute, as imposing such knowledge upon him by operation of law, unless he made diligent inquiry. It is strenuously urged, in opposition to this view, that the clause in question does not refer to mortgages at all, nor to preferences, whether direct or indirect, but only to sales out of the ordinary course of business of a trader.

Clauses one and two of section thirty-five are copied from the general statutes of Massachusetts (chapter 118, §§ 89, 91), with this important difference, that in both those sections the limitation was six months, whereas in clause one of the bankrupt act, relating more particularly to preferences, it is four months. Under the state statute the second clause was held to apply to preferences equally with the first. Metcalf v. Munson, 10 Allen, 491; Nary v. Meerill, 8 Allen, 451. And it is plain that the language of the second clause, taken by itself, does fairly include preferences, excepting such as are made by payments of money. But under the bankrupt act, the tendency of opinion has been that the difference in limitation shows an intention to put preferences on a different ground from other technical frauds. For instance, in a late case it was held in an action by an assignee to recover back money paid by the bankrupt to a pre-existing creditor, that the declaration was bad for alleging the payment to have been made within six months instead of four months before the bankruptcy. Bean v. Brookmire [Case No. 1,168]. I hold it still open to argument whether the thirty-ninth section does not substitute six months as the limitation in all cases, repealing to that extent the thirty-fifth section. In the case just cited, it appears to have been argued that the thirty-ninth section abolished all limitation; this argument was very properly overruled. But it may be said with a good deal of plausibility, that when congress in the thirty-ninth section made a preference an act of bankruptcy and proceeded to say, that if it was made the foundation of a petition within six months, the debtor might be adjudged a bankrupt, and if he were, the assignee might recover the money or other property, they were establishing a general rule, by means of a special example, and that that rule is, that preferences within six months may be avoided by the assignee. If so, this section, to that extent, repeals the earlier section. This is a view that has lately occurred to me, and in which I reserve my final opinion. If this construction should be ultimately adopted it will certainly reconcile some apparent discrepancies, and remove some apparent difficulties.

The precise point of this case is, whether a person advancing his own money to a trader, and taking security from him, out of the ordinary course of the trader's business, is to be held liable to reconvey the security, if the only fraud intended by the debtor is the payment of a creditor by way of preference. In Massachusetts it was held in the affirmative. Crafts v. Belden, 99 Mass. 535. But, as we have already seen, the statute of that state made no distinction between preferences and other technical frauds. Here the argument is, that if the creditor himself, who has received the preference, cannot be pursued after four months, it is very hard that one who is merely aiding him to obtain his money should be liable for two months longer. I feel the force of this objection, but the language of the act plainly includes this case, and it does not seem to come within the first clause, which contemplates that the money or property coming from the debtor should be applied by the person receiving it to the payment or security of the creditor. A transaction of the kind now in question is one step farther from the preference and fully within the second clause. In fact this mortgage was given within the four months, so that if it came within the first clause, the assignee would be entitled to recover, but it seems to me that it does not, and the assignee would be without remedy if it were not for the second clause. And I cannot believe the statute is so defective.

Taking this to be so, it is clear that the mortgage was out of the ordinary course of business of Mr. Butler, because he was a retail trader, doing a business of about one hundred dollars a day, and a mortgage of such a trader's whole stock is a confession of insolvency. Nary v. Meerill, 8 Allen. 451. If made directly to the creditor, it would have been an act of bankruptcy, as I have often decided. And both parties considered it injurious to his credit, and for that reason agreed that it should not be recorded until some necessity should arise therefor.

The petition of the mortgagee must for these reasons be dismissed. I here desire to express my preference that such cases should be brought in the form of actions at law, that a jury may decide the facts. Here the evidence tends very strongly to show that a creditor was preferred. If the creditor himself were innocent, but the debtor and mortgagee contrived the preference, the latter would be liable, though the creditor would not be. Crafts v. Belden, 99 Mass. 535. But in this case it is possible that the mortgagee was hoodwinked by the others, though the prima facie evidence is against him, and is not met, and I do not believe the truth to be so. Supposing, however, that he was not aware of the exact nature of the transaction,

the assignee could certainly recover of the creditor, who is the party benefited, and justice would seem to require that he should be the person to repay the money. If, then, the mortgagee should apply to me to direct the assignee to bring an action against the creditor, on some proper terms, I should probably make such an order.

Petition dismissed. Money to remain in court for ten days unless the mortgagee waives his right to apply to the circuit court for a revision of this decree.

Case No. 9,419.

MENDELL v. The MARTIN WHITE.

[Hoff. Op. 450.]

District Court, N. D. California. Feb. 13, 1856.

ADMIRALTY—JURISDICTION—PERSONAL INJURIES.

[Admiralty has jurisdiction of a suit in rem for damages for personal injuries caused by a collision upon navigable waters, especially where a statute of the state on the navigable waters of which the injury occurred makes the vessel liable for injuries to the person as well as to property.]

Libel in rem by J. T. Mendell against the steamer Martin White to recover damages for personal injuries sustained by the libellant in a collision of the Martin White with the vessel of which libellant was master. A claim was put in on behalf of the steamer, and exceptions filed to the jurisdiction of the court. It was not denied that the suit being for a marine tort, the cause of action was within the cognizance of the admiralty; but it was insisted that, for a personal injury upon the seas, the libel could only be brought in personam (against the owner of the vessel) and that a suit in rem (against the vessel itself) could not be sustained, the latter form of action being restricted to cases of injury to property, while for injuries to the person, the libel in personam is the only remedy.

P. W. Shepheard, for libellant.
Blanding & Della Torre, for claimant.

HOFFMAN, District Judge. By the general principles of the civil as well as the common law, the principal is responsible for the wrongful acts of his agent, done in the execution of his agency (Paley, Ag. p. 3, § 1; Poth. Obl. No. 453, 456; Domat. Civ. Law, tit. 16, § 3; Story, Ag. § 452 et seq.), and the liability is familiarly imposed as well for injuries to the person as for damages to property. On this principle depends the responsibility of owners for damages by collision and for injuries to the goods of shippers. The ship owner has ever been held liable for the tortious abduction of a minor child by the master, and this too without notice of the master's acts. Sherwood v. Hall [Case No. 12,777]; Steele v. Thacher [Id. 13,348]; Plummer v. Webb [Id. 11,234]; 7 D. Rep. 132. Although at common law the principal has been held not liable for acts of wilful and intentional wrong on the part of an agent, but only for the consequences of his negligence and unskilfullness, the maritime law carries his vicarious responsibility much further. By that law the owner is liable for all the acts of the master done in the execution of the business for which he is employed, by which third parties are injured, whether the injury was occasioned by the wilful acts, or by the negligence or want of skill of the master (Dias v. The Revenge [Case No. 3,877]); and this liability in the case of the owner of a privateer, extends not only to damages by spoliation of papers, but also for ill-treatment unnecessarily inflicted upon the persons of the captured crew (Id.; 5 C. Rob. Adm. 291; Id. 33; 1 Dod. 291). See, also, The Amiable Nancy, 3 Wheat. [16 U. S.] 456; Del Col v. Arnold, 3 Dall. [3 U. S.] 333; The Lively [Case No. 8,403]. It is therefore evident that in this case the libel, if in personam against the owners, would have been sustained, and satisfaction could have been enforced by the attachment of their property or choses in action. The Invincible [Id. 7,054]. If then the owners are personally liable as such it would seem necessarily to follow that in this as in other cases of collision, the proceedings may be directly against the ship as the offending thing.

By the civil law the owner, or exercitor, was personally responsible for the acts of the master as well ex delicto as ex contractu. If there were several, each was bound in solido for the full amount of the obligations of the master ex contractu. The maritime law introduced into this principle an important qualification. It held the owners bound in solido for the acts of the master, whether of tort or of contract, but limited the extent of their liability to the value of the ship. Such was the settled law of the Mediterranean, and such, according to Emerigon, is the established jurisprudence of the north of Europe. The Ordonnance de la Maine provides that proprietors of vessels shall be responsible for the acts of the master, but they shall be discharged by abandoning ship and freight. Whether or not this limitation applied to the obligations of the master ex contractu as well as ex delicto is disputed, but in the language of Mr. Ware it may safely be affirmed that by the general maritime law of Europe the liability of owners for the wrongful acts of the master is limited to the interest they have in the vessel, and that by abandoning the ship and freight they discharge themselves from all personal responsibility (The Rebecca [Case No. 11,619]; The Phebe [Id. 11,061]), from which the foregoing observations and citations have been taken. "If, then, this be the established principle in cases arising ex delicto, what," says Ware, J., "is the natural consequence? Is it not to render the ship herself liable to the creditor in specie? When

the law confines a creditor to a particular fund for his remuneration, it cannot be so absurd as to prohibit him from making that fund available by laying his hand on it and securing it." It was accordingly held by Judge Ware in the cases mentioned, that in a suit "founded on the wrongful acts of the master" (negligent storage of goods), the shipper may procure satisfaction for the damage by a proceeding in rem. These cases, it will be seen, nowhere recognize the distinction sought to be taken between injuries to property by the master's tort and injuries to his person; on the contrary, they seem to lay down the broad principle that in all cases of tort, where the owners are liable the ship is also liable in law, and in The Phebe [supra] it is even said that in the origin of the custom the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor.

The personal liability of the owner in this case is not denied and the general liability of the vessel in rem, in cases of collision, is not disputed. I am unable to perceive why, on general principles of the maritime law, or in reason, the ship should not be as responsible for this kind of damage as for any other. Although I have found no direct authority on this point, yet the books contain cases closely analogous. In McGrath v. The Candalero [Case No. 8,809], the court allowed damages for the detention of the crew on board of a privateer which had made a tortious seizure of the actor's vessel, and ordered that the privateer remain under attachment until the same was paid. In the case of King v. The New World, which was an appeal from this court, the supreme court sustained a libel in rem. brought by a passenger, for personal injuries received by the explosion of a boiler, and this where the passenger was "a steamboat man," and paid no fare. 16 How. [57 U. S.] 472. I think that this case sufficiently shows the inaccuracy of the statement of Browne that for injuries to property the libel is in rem, and for those to the person in personam. 2 Bro. Eq. & Adm. 201, 202.

If this question were more doubtful, the fact that the statute of California renders boats and vessels engaged in navigating the waters of this state liable for injuries to the person as well as to property, is sufficient to justify this mode of proceeding, supported as it is by the principles and analogies of the general maritime law, and recognized in other very similar cases of maritime torts. The collision in this case occurred in the waters of this bay, and the parties are all citizens and residents of California. The case is one confessedly of admiralty jurisdiction, and I see no reason why this court should not enforce the liability created by the local law. I think, therefore, that the exceptions should be overruled.

Case No. 9,420.

In re MENDELSOHN.

[3 Sawy. 342;[1] 12 N. B. R. 533.]

District Court, D. California. June 8, 1875.

RIGHT OF ATTACHING CREDITORS TO OPPOSE ADJUDICATION—ASSIGNMENT AS AN ACT OF BANKRUPTCY.

1. An attaching creditor may intervene and oppose an adjudication in involuntary bankruptcy on the ground of fraud and collusion between the petitioner and debtor.

[Cited in Re Williams, Case No. 17,706; Re Scrafford, Id. 12,557; Re Jonas, Id. 7,442; Re Austin, Id. 662.]

[Cited in Risser v. Hoyt, 53 Mich. 198, 18 N. W. 611.]

2. Even a fair general assignment for the benefit of creditors is an act of bankruptcy, because it necessarily defeats the operation of the bankrupt act [of 1867 (14 Stat. 517)].

[Cited in Globe Ins. Co. v. Cleveland Ins. Co., Case No. 5,486.]

3. Within the meaning of the law defining acts of bankruptcy an assignment, invalid under the laws of the state where made, but used as a means for giving a preference, is an act of bankruptcy.

[Cited in Re Lawrence, Case No. 8,133.]

D. Mendelsohn filed his petition praying an adjudication of bankruptcy against his brother, S. Mendelsohn. On the return day of the order to show cause, the alleged bankrupt, S. Mendelsohn, did not appear and on motion a default was entered, and thereupon an adjudication was asked for. At this stage in the proceedings certain creditors appeared and asked leave to intervene and contest the facts in the petition. They allege in their petition that they are creditors and have a lien, by attachment, on the goods of the debtor; that the proceeding for adjudication is collusive and fraudulent, and the alleged debt of the petitioning creditor a sham. The petitioning creditor objected to their being allowed to contest his petition, upon the ground that until an adjudication the case is solely between himself and the debtor. This question was reserved, and testimony was taken upon the petition of intervention and the whole case submitted. One of the acts of bankruptcy charged in the petition for adjudication was that the debtor made an assignment of his property to Messrs. Davis & Co. with intent to give a preference to one or more of his creditors and to defeat or delay the operation of the act. An assignment was in fact executed by the debtor to Davis & Co. purporting to be in trust for all his creditors. The circumstances attending this assignment were that one Stone, the agent of Davis & Co., was pressing the debtor for payment of their claim, and procured the execution of the assignment with the understanding, as he says, that Mendelsohn should remain in possession of the goods, and carry

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

on the business as before its execution; that on Monday of each week the debtor should pay $75, to be applied to the payment of creditors whose claims exceeded $100, and that Mendelsohn should provide for the payment of the small creditors himself. The arrangement was so far acted on that some $150 were paid to Stone, which is now on deposit for the benefit of the creditors who are entitled to it.

Marcus Rosenthal, for petitioning creditor.
F. G. Newlands, for intervening creditors.

HILLYER, District Judge. The first question is as to the right of these creditors having attachments to intervene and oppose the adjudication at this time. That the creditors now asking to intervene have a direct interest in opposing the adjudication is plain. They have attached the debtor's property, and if proceedings in bankruptcy do not go forward, will have a lien thereon for their security. If, however, there is an adjudication and an assignment their attachment will be dissolved, and their right to prosecute their suit to judgment suspended.

[After adjudication, it has been settled in this court, that attaching creditors may move to set it aside; that they have an interest in and a clear right to be heard and resist the proceedings on the ground that the court is without jurisdiction. Fogerty v. Gerrity [Case No. 4,895]. It was also held in that case that all other creditors are parties to and bound by the proceedings, so that, although neither the petitioning creditor nor the debtor objected to the jurisdiction, that was not sufficient to confer jurisdiction, even if it could be so conferred.] [2]

Such being the case, it cannot well be maintained that there is no relief for these attaching creditors, if it be true, as alleged, that the debt of the petitioning creditor is not a just debt, and yet the debtor colluding with him admits it, and consents to an adjudication. A court of equity would grant relief against, and annul a decree so obtained by fraud, for fraud infects and corrupts the judgments of all courts. Story, Eq. Pl. § 426. In some form, then, it must be admitted that persons whose rights are injuriously affected by a fraudulent adjudication may apply for and obtain relief. No court ought or can close its ears to this petition.

[The bankrupt law makes no provision in these cases for notice to the creditors in general, and the only necessary parties are the petitioning creditors and the debtor; yet this is no sound reason for denying the right to intervene upon good grounds being shown, such as collusion and fraud on the part of the original parties to the proceeding.] [2]

An intervener, it is said, may come in at any stage of the cause, even after judgment, if an appeal can be allowed on such judgment. Bouv. verb. "Intervention." The question is essentially one of practice, and to my mind it is better in every aspect of it, to allow the attaching creditors to come in and be heard before the adjudication, than to wait until a decree is made and compel them then to impeach it for the fraud which would have defeated it in the first instance. I think, therefore, that these parties showing that they have a direct interest in defeating an attempted fraud like the one set up, should be allowed to intervene before the adjudication for the protection of their interest.

I am aware that there have been decisions which at first blush seem to be against the practice here adopted; but on examination they will, most of them, be found not really so, and to differ from the present case either in the fact that the adjudication would not have the effect to render unavailing any security of the creditors petitioning to intervene, or that the petitioners were mere creditors with no other claim to be heard. In re Bush [Case No. 2,222]; In re Boston, H. & E. R. Co. [Id. 1,679].

Looking, then, to the evidence for and against the validity of the petitioning creditors' debt, I find that the interveners have failed in their attempt to show it to be fraudulent. That leaves for decision the question whether the assignment was an act of bankruptcy.

[2] [But this was said in a case in which certain creditors applied to have the adjudication set aside, on the ground that a certain assignment had been made by the debtor for the benefit of his creditors, to which the petitioning creditor it seems was not a party, though he assented to the assignment. Now, in this case, the adjudication in bankruptcy did not have the effect to render unavailing this assignment; if valid, against the assignee, it could still be maintained against the assignee. No want of jurisdiction was alleged, nor fraud, nor collision. What was said by the learned judge about the right of creditors to intervene before adjudication was unnecessary to the decision. In Re Boston H. & E. R. Co. [supra], a motion was made by a creditor before adjudication for leave to defend against the petition. But the court said the question, before the adjudication at least, was between the debtor and the petitioning creditors, "with which no outside party, sustaining merely the relation of a person who claims to be a creditor of the debtor, can be allowed to interfere." No want of jurisdiction was alleged, no fraud or collusion. Nor does it appear that the direct effect of the adjudication and assignment would deprive the creditor of any security which he then had for his debt. He was, as the court says, a mere creditor, with no other claim to be heard. On the whole, then, the right of the attaching creditors to appear and oppose the adjudication on the grounds alleged cannot properly be denied them, and they

[2] [From 12 N. B. R. 533.]

[2] [From 12 N. B. R. 533.]

must be heard. Of course, what has been said is not meant to convey the idea that the fact that a creditor has an attachment lien is of itself any ground for denying the adjudication; it only gives him a right to be heard. If there is no fraud or want of jurisdiction, the fact that the adjudication will dissolve his lien is no ground for its denial. And first, it is denied that the debt of the petitioning creditor is valid and just. The evidence for petitioning creditor is that the debt is made of two items, as follows: In 1873 the petitioning creditor was in partnership with J. Zacharias and his brother; the debtor bought goods of the firm. When the firm was dissolved, the petitioning creditor was charged and his brother credited on the firm books with the balance due, four hundred dollars; fifty dollars was paid on this in January, 1874, leaving three hundred and fifty dollars balance due. Afterward the petitioning creditor formed a copartnership. Rub and the debtor bought of this firm goods to the amount of over one thousand dollars. When Mr. Wentenrich came in, in July, 1874, he refused to give credit to S. Mendelsohn, and the amount due Rub and D. Mendelsohn was charged and credited as before to the extent of D. M.'s profits, viz., four hundred and ninety-seven dollars and thirteen cents. The balance of the firm debt was afterwards paid by S. Mendelsohn. There is no doubt of the existence of the firms and the purchase of the goods by the debtor as stated. I see no good ground to say that settlements were not made as stated also, and the charges made to the petitioning creditor.

[The only marks of suspicion are the fact that the debtor and petitioning creditor are brothers, and certain erasures on the ledger of Rub, Mendelsohn & Co. That the parties are brothers is a circumstance which warrants the court in scrutinizing the transaction closely, but not in inferring fraud from that alone. The clerk who made the entries swears they were made at the time they bear date, and explains the erasure, which was done by him. In the account, the whole amount due from S. M. to the firm had been charged to D. M. and credited to S. M. This was erased, and over it was written the amount agreed upon of D. M.'s profits, four hundred and ninety-seven dollars and thirteen cents. This was done, the clerk says, at the time it bears date. No plausible motive is shown or suggested for a false entry of this kind at that time. The book of original entries was shown, and the items of the account against the debtor correspond. The balance due the firm was paid by S. M. through the clerk, S. Friedman. After the last balance of one hundred and two dollars was paid, which ignored the firm account, no more payments were made. He says that for nine months past he has not seen D. M. at the store of S. M. On the other hand, the debtor stated, as they say, to Stone and to Baum, that the list he gave them was all he owed, and the debt of D. M. was not on it. The debtor denies this, and it is shown that other creditors of his were not mentioned at the time. Of course, the failure of the debtor to state this debt to Stone and Baum is not proof that it did not exist, but merely a circumstance of suspicion, and a slight one, on the general charge of collusion and fraud.

[There is not, in my mind, from the evidence, any doubt that the petitioning creditor's debt was bona fide, and arose as stated. There is no pretense of any motive for trumping up a debt of this kind in this way against his brother one and two years ago. It is an everyday thing for embarrassed debtors to conceal the true state of their affairs from creditors who are pressing for payment; they overstate their assets, and understate their debts. It seems to be true that for nine months before these proceedings were commenced these brothers had not spoken to each other. The actions of the debtor, during the three or four weeks preceding the petition, show nothing to indicate a fraudulent purpose. He undertook to pay seventy-five dollars a week for his larger creditors, and to pay off the small ones; he agrees to sign the assignment to Davis & Co., under a belief that it was, as they desired he should believe, a valid one; and finally attempts to settle at twenty-five cents on the dollar. It is hard to reconcile all this with the idea that he was meditating and arranging for a fraudulent bankruptcy proceeding at the time. The evidence for the petitioning creditor is that no part of his debts has been paid, and this is not contradicted. Friedman's evidence shows that the payments he made were on account of the firm debt, and not that of the petitioning creditor. Two acts of bankruptcy are alleged, and it is urged that neither has been proved. The first is, that the debtor made an assignment of his property to Davis & Co., with intent to give a preference to one or more of his creditors, and to defeat or delay the operation of the act. An assignment was, in fact, executed by the debtor to Davis & Co., purporting to be in trust for all his creditors. The facts are that Stone, the agent of Davis & Co., was pressing the debtor for payment of their claim, and procured the execution of the assignment with the understanding, as he says, that Mendelsohn should remain in possession of the goods, and carry on the business as before its execution; that on Monday of each week the debtor should pay seventy-five dollars, to be applied to the payment of creditors over one hundred dollars; that M. should pay the small creditors himself. The arrangement was so far acted on that some one hundred and fifty dollars were paid to Stone, which sum is now on deposit for the benefit of creditors entitled to it. When the debtor failed to make payment of the seventy-five dollars weekly, and told them he could not, he was told that the property in the store belonged to the assignee. Suit was

afterwards begun, and the store and goods attached.] [2]

The weight of authority is decidedly that even a fair general assignment for the benefit of creditors is an act of bankruptcy, because it necessarily defeats the operation of the bankrupt act, and hinders and delays creditors. But it is said that this assignment was void, and could not therefore be an act of bankruptcy, and it is clear that under the Code of California, it was not a valid assignment. But admitting the assignment to be so defective that it could not be enforced, it is, it seems to me, looking to the use made of it in this case, as much an act of bankruptcy as if it had been executed with all the forms.

The attaching creditors say they knew from the first that it was void as an assignment, but sought to make the debtor believe it was valid in order to use it as an instrument for collecting their debts. The debtor appears to have so believed, and admits it was made with a view to giving a preference to some of his creditors, and says he named six creditors to Stone, whom he wanted paid first.

Here, then, was, to all intents and purposes, a transfer of the debtor's property, and acting upon it, he paid over the agreed sum per week to the creditors entitled under the assignment to share therein. Under the thirty-ninth section "any conveyance or transfer with intent to prefer" is an act of bankruptcy. The assignment in this case, though invalid as an assignment under the laws of California, was an attempt to transfer property with intent to prefer certain creditors named by the debtor.

A construction of section 39 is inadmissible, which would permit a debtor to do that by means of an invalid instrument, which he could not do by one properly executed. The bankrupt act, cannot be defeated by omitting some of the forms in executing the assignment, and then setting up such omission in defense to proceedings in bankruptcy.

Within the meaning of the law defining acts of bankruptcy, I think this was an assignment, and made with the intent charged, so that on the whole case there must be an adjudication of bankruptcy as prayed.

Case No. 9,421.

MENDELSOHN v. The LOUISIANA.

[3 Woods, 46.] [1]

Circuit Court, D. Louisiana. April Term, 1877.

CARRIERS—INJURED IN TRANSIT—BILL OF LADING—EXCEPTIONS—LIABILITY.

Where soda, shipped on board an iron steamship at Liverpool for New Orleans, late in the winter, was transported through the Gulf in the warm weather of the early spring, and was damaged by the humidity of the hold, and loss or damage by heat and sweating were among the exceptions of the bill of lading; *held*, that the case fell within the exceptions, and the ship was not liable.

Transferred to circuit from district court, by virtue of section 60, Rev. St., the district judge having been of counsel for one of the parties.

M. Dinkelspiel and F. Michinard, for libelant.

J. D. Rouse and Wm. Grant, for claimant.

WOODS, Circuit Judge. The libel alleged the shipment on board the steamship Louisiana at Liverpool, on April 8, 1873, in good order, consigned to libelant at New Orleans, of 500 kegs of bi-carbonate of soda; that the steamship arrived on May 14, 1873, but failed to deliver the said merchandise in good order, but, on the contrary, that it was deteriorated in value thirty per cent from improper stowage and want of proper care and by water and otherwise, to the libelant's damage $1,200. The answer averred that the soda was delivered in the same order as received, and denied improper stowage or any negligence or want of care. On the contrary, it averred that the soda was well stowed and, for greater security, was put in the fore and after holds under the decks; that the weather was fine during the entire voyage and the ship tight and stanch; that she did not leak; made no water, and none got into her hold during the entire voyage, and that if the soda sustained any damage, it was caused by its inherent qualities. The exceptions in the bill of lading were as follows: "Excepting loss or damage arising from the act of God, the queen's enemies, pirates, robbers, restraints of princes, rulers or people, jettison, barratry of the master or mariners, thieves, vermin, frost, heat, sweating, decay, rain, spray, leakage, breakage or rust, coal or coal dust, fire, steam, machinery or boilers or any defect therein, collision, or any other accidents of the seas, rivers or navigation of whatsoever nature or kind."

The evidence is entirely satisfactory to my mind that the goods of the libelant were carefully and properly stowed and that the damage which they suffered was not caused by any carelessness or negligence of the master or seamen, but was caused by the sweating or humidity unavoidable in the hold of an iron ship, loaded in Liverpool in the winter or early spring, and making a voyage to New Orleans through the Gulf in the warm weather of spring. Such a cause of damage is within the exception, "sweating," and also the exception, "accident of navigation," reserved in the bill of lading; and the ship is not liable for the deterioration of the goods. Clark v. Barnwell, 12 How. [53 U. S.] 272. The libel must be dismissed at libelant's cost.

MENDELSOHN (THOMPSON v.). See Case No. 13,968.

[2] [From 12 N. B. R. 533.]

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

Case No. 9,422.

In re MENDENHALL.

[See Case No. 9,424.]

Case No. 9,423.

In re MENDENHALL.

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

District Court, D. Minnesota. Feb., 1874.

BANKRUPTCY—PRODUCTION OF BOOKS AND PAPERS —WHEN ORDERED—PLENARY POWER.

1. The district court will order the production of books and papers at the summary hearing on the return day of the order to show cause.

[Cited in Re California Pac. R. Co., Case No. 2,315.]

2. The fifteenth section of the judiciary act of 1789 [1 Stat. 82] is applicable to such cases; if not, the general scope of the bankrupt law gives plenary power.

[Cited in Re California Pac. R. Co., Case No. 2,315.]

Pending the trial of the issues made by the pleadings in the above case, which had been referred to a commissioner to take the testimony and report, the creditor, by petition to the court properly verified and supported by the affidavit of one of his solicitors, sets forth, among other things, that the "State Savings Association" is only an assumed name in which the debtor, Mendenhall, transacted business, and that the latter and the Savings Association are one and the same; and, also, that about January 1st, 1871, the Savings Association, so-called, became the entire and exclusive property of the said Mendenhall, by an agreement between him and R. J. Baldwin, at that time the only owners of the same; and that the books of the said Mendenhall and the State Savings Association are material testimony upon the issue of indebtedness charged in the petition. It is also stated that notice was served upon Mendenhall or his solicitors to produce the books, and that they had failed to do so.

On this petition and affidavit, the creditor obtained an order upon the debtor to show cause why he should not produce the books as described therein. In response thereto the debtor presents an affidavit setting forth that he is willing to produce any papers and books belonging to him relating to any matters between him and said petitioner, and is now willing so to do; that he has no books, papers or documents of any kind whatsoever relating to any matters or dealings between him and said petitioner, and never has had; and that he has never had any dealings whatever with said petitioner. And, further, that the said State Savings Association and himself are not one, and that he has not the exclusive control nor custody of the books of said association, and never has had; that said association is a corporation under the laws of the state of Minnesota, and that his only right of control and possession of any of the books or other property of said association is such as results from his being one of the corporators, and one of its officers, and that he has never done his private business in the name of said association, nor ever assumed to use that name in and about his individual business, and that the books of said association are not even in his control or possession, officially or otherwise. An affidavit of the debtors' solicitors is also presented, denying that any paper or notice demanding the production of books had been served upon them or either of them.

Beebe & Shaw, Cornell & Bradley, and C. H. Benton, for debtor.

J. Y. Page and Morrison & Cooley, for creditor.

NELSON, District Judge. The act of congress (1 Stat. 82, § 15), in substance, provides, that the courts of the United States in trial of actions at law, on motion and due notice thereof being given, shall have authority to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same in chancery. There is also authority to grant final judgment upon the issue involved in the trial, or a judgment of non suit in case the order for their production is disobeyed. This statutory provision is peculiarly stringent, and when a court is asked to enforce it, a plain case must be presented for its interposition. There is no limitation in regard to the kind of actions at law which must be on trial in order to entitle either party to the benefit of the statute, and the objection urged by the debtor's solicitor, that this is a bankruptcy proceeding, and, therefore, not within its purview, I think not tenable. The only qualification is, that the right must be such as a court of equity would sustain on a bill of discovery; if so, then the summary method provided in the statute is a substitute for the bill.

Now, while I am satisfied that the petition seeks to have the books produced for some purposes not pertinent to the issue on trial, and on that account irrelevant, still I think an examination of the testimony already introduced shows that the books of the Savings Association do contain an account with the petitioning creditor, as represented by his pass book introduced in evidence, which purports to be a statement of such account, and that it is in the power of the debtor to produce the books. If, in addition to this, it is conceded that the testimony would establish the further fact that the debtor is the sole owner of the corporate rights, claimed by virtue of the articles of association, then, irrespective of any question as to whether such an association is a corporation or not, the petitioner would be entitled, as a matter of right, to the benefit of an examination of all papers and books so far as they may relate to any business trans-

[1] [Reprinted by permission.]

action between himself and the association, and also so far as they may corroborate the witnesses in regard to any admission of Mendenhall that he was about to manage the business of the association so that he would be solely and individually responsible.

It is undisputed that there is testimony already in the case tending to establish the fact that the affairs of this association were under his sole and exclusive management, and the books and other papers are, therefore, certainly competent and proper evidence. I think a prima facie case of the materiality of these books has been made out, as the testimony now stands, and that a bill of discovery, according to the rules of equity, would be allowed.

I have thus far placed the authority to act upon the fifteenth section of the judiciary act. If incorrect in this position, I think the general scope of the bankrupt law would give plenary power to this court to compel the examination of all papers and books of the debtor, or in his possession, if pertinent to the issue, and required for the protection of the rights and interest of the petitioning creditor. The proceedings at this time seem to require the exercise by the court of this power, and I grant the order asked for.

Inasmuch as the testimony in the case is nearly closed, I will accede to the request of the debtor's solicitor and hear the case upon the evidence already taken by the commissioner and reported, and such other as may be introduced before me in connection with the books and papers, when produced. The order nisi is made absolute, and the books, &c., will be produced before me at my chambers, in St. Paul, on March 2, 1874, at 11 a. m.

[This case was subsequently heard upon motion to dismiss proceedings, which motion was denied. Case No. 9,424. Again upon the petition of a creditor to be substituted in the proceedings for the original petitioner. Motion granted. Id. 9,425.]

Case No. 9,424.

In re MENDENHALL.

[9 N. B. R. 380;[1] 19 Int. Rev. Rec. 86; 6 Chi. Leg. News, 192.]

District Court, D. Minnesota. 1874.

BANKRUPTCY—PETITION—PERMISSION TO WITHDRAW—DELAY.

A creditor filed petition to have his debtor adjudged bankrupt, and subsequently, on the creditor's debt being settled by the debtor, on the return day of the order to show cause, entered a motion to dismiss the proceedings. Another creditor presented a petition alleging the acts of bankruptcy charged were true, and praying that the motion be denied and the case proceed. *Held*, that while permission to withdraw would not prevent other creditors from instituting new proceedings, it would delay and embarrass the operation of the act, and it must, therefore, be denied.

[Cited in Re Lacey, Case No. 7,965; Re Western Sav. & Trust Co., Id. 17,442; Re Shefer, Id. 12,742.]

[This case was previously heard upon petition of the creditor asking for production of certain books. Case No. 9,423.]

On February 2d, 1874, an order to show cause was issued, upon the petition of Lydia T. Pomeroy, to have the debtor, Mendenhall, adjudged a bankrupt. The return day was fixed on February 9th, and on the 6th inst. a motion was made, by the solicitor appearing for the debtor, to dismiss all proceedings. To sustain the motion, a petition of Lydia T. Pomeroy was presented, setting forth that the debtor had fully settled her debt against him, and she asks that the proceedings instituted may be dismissed, and that she be permitted to withdraw her original petition. John Kausal, who also claims to be a creditor of the debtor, resists the motion to dismiss, and presents a petition properly verified in which he states his claim, and alleges that the debtor had committed the acts of bankruptcy charged by Lydia T. Pomeroy, and asks that the motion be denied, and that his claim be substituted at the proper time and the case proceed.

C. H. Benton, for debtor.

Cooley & Lowery and Merrick & Morrison, for creditor, Kausal.

NELSON, District Judge. The only question necessary to consider, and which will dispose of this motion to dismiss, is, can any creditor, other than the one petitioning that the debtor be adjudged a bankrupt, intervene at any time before adjudication and be heard upon an application made to the court in behalf of the debtor? I confess that on first view, it would seem that, following the analogy between ordinary actions, no third party could meddle with the proceedings which, upon the face of the pleading and papers on file, appear to be between two parties—the petitioning creditor and his alleged debtor. From an examination, however, of the objects of the bankrupt law [of 1867 (14 Stat. 517)], and the result to be accomplished by the involuntary proceedings, it at once appears that something more is to be effected by the prosecution of a suit in the bankruptcy court, than is originally sought by a suit at law.

The submission of the estate of a debtor for distribution among all his creditors—ignoring all preference—is the chief object to be attained by these proceedings, and not only the petitioner but every creditor is directly interested in compelling this distribution. The bankrupt law, in section forty-two, makes provision for a substitution of any other creditor, on the return day, or adjourned day, when the petitioner fails to appear and proceed, but this does not prohibit a creditor from asking intervention at any time, when

[1] [Reprinted from 9 N. B. R. 380, by permission.]

necessary for the purpose of preserving and protecting his interest in the estate of the debtor. If he is seeking earnestly to enforce a meritorious claim, I can see no reason why a court should not recognize his application, and allow him to intervene for the purpose of protecting his interests.

Tested by the above remarks, it seems to me the last creditor is entitled to be heard, and from the allegations in his sworn petition, which, for the purposes of this motion, must be taken as true, there can be no doubt that his intervention is just and proper, and may serve to protect the interest of all the creditors. The petitioning creditor, after instituting proceedings which, when completed, would subject the estate of the debtor to the demands of all creditors, if the allegations in her petition are true, received payment of her claim, and acknowledging an acquittance, asks a withdrawal of these proceedings. Now, while a permission to withdraw would not prevent other creditors from instituting new proceedings, I can see that not only a delay would occur which might embarrass the operation of the bankrupt law, but a combination might be formed among some of the creditors which would prevent a fair and equal distribution of the debtor's estate.

Motion to dismiss denied.

[This case was again heard upon the petition of a creditor to be substituted for the original petitioner. Case No. 9,425.]

Case No. 9,425.

In re MENDENHALL.

[9 N. B. R. (1874) 497.] [1]

District Court, D. Minnesota.

PARTNERSHIP—ASSUMING TO BE A CORPORATION—HOW LIABLE.

Where certain persons associated themselves together, assuming to be a corporation and using a corporate name, without authority of law, they are individually liable as co-partners for the debts of the association; and a creditor who has dealt with them as a corporation is not thereby estopped from setting up his claim against them individually.

[This case was formerly heard upon the petition of the creditor to have certain books and accounts produced, showing the identity of the bankrupt with the State Savings Association. The petition was granted. Case No. 9,423. It was again heard upon motion to dismiss proceedings. Id. 9,424. It is now heard upon petition of a creditor to be substituted for the original petitioner.]

The demand of the creditor who petitioned to be substituted was evidenced by a "pass book" issued to him upon a deposit with "The State Savings Association," and it was conceded that the deposit was made with the association at the time stated in the petition, but it was denied by the alleged debtor that he was individually liable, and he claimed that the association was a corporation by virtue of an act of the state of Minnesota, entitled: "An act for the incorporation of colleges, seminaries, churches, lyceums, libraries and other societies for benevolent, charitable, scientific and missionary purposes."

The following are the sections of the act (chapter 17, Comp. St. Minn.) under which it is claimed a corporation was created:

Section 56: "That any three or more persons desirous of forming a corporation for a college, seminary, church, lyceum, library or any benevolent, charitable, scientific or missionary society, shall adopt articles certifying: (1) The names of the persons concerned, and their having associated to form a body politic. (2) Their corporate name and location or place of business. (3) If a joint stock company, the amount of capital stock and the amount constituting a share; if not a joint stock company then the terms of admission to membership. (4) What officers the society or company will have, by what officers business will be conducted, and when they are to be elected, or if appointed, when and by whom such appointment is to be made; and also the number of trustees to manage the said society, and the names of the trustees for the first year of its existence, which articles shall be subscribed and sworn to by them or by their president and secretary and a majority of their associates, before some officer authorized to take the acknowledgment of deeds, and filed and recorded in the office of the register of deeds of the county where such corporation shall exist, and a duplicate thereof shall be filed in the office of the secretary of the territory (state)."

Section 57: "When such articles shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, with perpetual succession. They shall be capable in law of suing and being sued, pleading and being impleaded, answering and being answered, in all courts of law and equity. They may have a common seal, alter and change the same at pleasure; acquire and sell property, personal and real; make by-laws, rules and regulations as they may deem proper or best for the good order of the corporation: provided, that such by-laws, rules and regulations, be not contrary to the constitution and laws of the United States, or the organic act of this territory (state)."

The following articles were executed and filed:

"Articles of the State Savings Association:

"Pursuant to sections number fifty-six (56) and fifty-seven (57) of chapter number seventeen of the Compiled Statutes of the state of Minnesota, it is hereby certified that Richard J. Mendenhall, Rufus J. Baldwin and Thomas A. Murphy, of Minneapolis, Hennepin

[1] [Reprinted by permission.]

county, Minnesota, have associated to form a body politic by the corporate name of 'State Savings Association.' That the said corporation shall be a joint stock company with a capital stock of twenty-five thousand dollars, divided into two hundred and fifty shares of one hundred dollars each. The place of business of said association shall be the town of Minneapolis, Hennepin county, Minnesota. The business of said association shall be such as is usually transacted by savings institutions. The business of said association shall be managed by three trustees, to be chosen by the stockholders on the first Tuesday in January in each year. The first trustees shall be Richard J. Mendenhall, Rufus J. Baldwin and Thomas A. Murphy, who shall serve until the first annual election, and until others are chosen in their place. The trustees shall annually, immediately after their election, appoint one of their number president and one of their number secretary, whose duties shall be such as ordinarily pertain to such officers respectively, and as shall be assigned to them by the trustees. Said association shall possess all the powers enumerated in said fifty-seventh section of chapter seventeen of the Compiled Statutes of Minnesota. In witness whereof we have hereto subscribed our names this 18th day of December, A. D. 1865. Richard J. Mendenhall. Rufus J. Baldwin. Thomas A. Murphy.

"The foregoing articles of association were subscribed by the aforesaid Richard J. Mendenhall, Rufus J. Baldwin and Thomas A. Murphy, to me, personally, known and affirmed to by the said Mendenhall, and sworn to by the said Baldwin and Murphy before me, this 18th day of December, A. D. 1865. F. R. E. Cornell, Notary Public."

J. Y. Page, Merrick & Morrison, and Cooley & Lowry, for creditor.

F. R. E. Cornell, Beebe & Shaw, and C. H. Benton, for debtor.

NELSON, District Judge. Upon the application of John Kausal to be substituted in the place of the petitioning creditor, who failed to appear on the return day of the order to show cause, the debtor filed an answer denying the allegations made that he is a creditor, and has also in form denied the acts of bankruptcy charged in the original petition on file. The right of substitution must be established before the debtor can be required to try the questions presented by a denial of the acts of bankruptcy, and the court has proceeded summarily to hear the allegations of the creditor and the debtor in order to determine that issue.

Without elaborating the questions raised by the evidence, I have arrived, after an examination, at the following conclusions: What is the status of the association of which the debtor is a member? I feel less delicacy in deciding this question, from the fact that no act of the legislature of the state of Minnesota, in my opinion, exists, which can be invoked to sustain the claim made in the debtor's answer, that the articles of association created a corporation. I am, therefore, led to the conclusion that the articles executed by Mendenhall, Baldwin and Murphy, December 18th, 1865, on file in the office of the secretary of state of Minnesota, entitled: "Articles of the State Savings Association," did not authorize the exercise by said association of any corporate rights, by virtue of sections 56 and 57, c. 17, p. 286, Comp. St. Minn., and it is a misnomer to call it a corporation.

This is not a case where there have been defects in the proceedings taken to perfect the organization of a corporation, or an abuse of corporate rights, and an attempt made to take advantage of them by objection in a collateral proceeding. The point is raised upon the face of the articles of association, and the doctrine of estoppel urged does not apply; the utmost that can be claimed for these articles is, that the onus probandi is thrown upon the creditor to show that they do not create a corporation.

True, the facts show that Kausal had dealings with the association by the name designated and claimed in the articles to be its corporate name, still he is not thereby estopped from showing that it had no legal corporate existence. Even upon the strict rule contended for by the respondent's counsel, in regard to which the authorities are by no means agreed, it was necessary for this association assuming to act in a corporate capacity to show itself to be a corporation de facto as against persons who have had dealings with it. Simply showing that it had acted as such for any period of time, however long, is not sufficient. Some law, under which a corporation with the powers assumed might be lawfully created, must be shown in addition to mere user, before it can be said to exist as a corporation de facto.

The authorities cited to sustain the doctrine of estoppel in this case, relate to bodies exercising corporate powers and existing as corporations de facto within the rule above laid down. It cannot be maintained successfully that the act of the legislature authorized any such corporate capacity as is claimed here. This court, therefore, is not required to regard this association, so far as third persons are concerned, as a corporation until it shall have been otherwise decided by judicial proceedings properly instituted.

From the views above expressed, this is apparent, for there is no existing corporation de jure or de facto. Having at the outset decided that this association did not become a corporation under the laws of the state, it does not follow that the creditor has no remedy for a recovery of his deposit, because he dealt with it in its assumed corporate capacity. Not being clothed with any corporate franchises, its individual members cannot escape pecuniary responsibility by taking refuge behind any supposed privilege or sanc-

tity conferred by its efforts to become a corporation, and any creditor can treat it as a partnership, holding the members thereof personally liable for all acts done within the scope of the partnership.

It is fairly established by the testimony, I think, that previous to the deposit in the association by this creditor, Murphy and Baldwin had withdrawn, and the debt was due him from Mendenhall. He therefore has a right to be substituted in the place of the original petitioner, and the court must proceed to adjudicate on such petition.

Case No. 9,426.

MENDENHALL v. CARTER.

[7 N. B. R. 320.] [1]

District Court, W. D. North Carolina. 1872.

BANKRUPTCY—ACT OF—STOPPING PAYMENT—COMMERCIAL PAPER—CONFEDERATE CURRENCY.

1. A debtor does not commit an act of bankruptcy who stops payment of a note, given long before the passage of the bankrupt act [of 1867 (14 Stat. 517)] and does not resume payment subsequent thereto, up to the filing of the petition in bankruptcy.

[Cited in Re Brewer & Bemis Brewing Co., Case No. 1,850.]

2. A note payable in money is commercial paper, although at the time of its execution Confederate currency was the only medium of exchange in the section of the state where the note was given. Petition dismissed.

This is a creditor's petition, filed on the 24th day of June, 1871, to obtain an adjudication of bankruptcy against Thomas D. Carter. The debt of the petitioner is "for the sum of $600, money had and received of petitioner by the said Thomas D. Carter, to the use of petitioner, on the 15th day of July, 1870," etc. The petitioner further represents—"That within six calendar months next preceding the date of this petition, the said Thomas D. Carter did commit an act of bankruptcy within the meaning of said act, to wit: In that, in the month of July, 1863, the said Carter was a trader, and in the said month executed to W. A. Caldwell, cashier of the Farmers' Bank of North Carolina, his certain promissory note for the sum of $4,123.71, payable in one hundred and eighty days after date; that said note was commercial paper," etc.; that said money was used as a trader, etc.; that no part was paid up to the 17th day of May, 1871, etc.; "and therein said Carter has stopped and not resumed payment of his commercial paper within a period of fourteen days," etc.

A demurrer was filed by respondent, and upon the argument it was agreed by counsel that only the following questions of law should be considered and decided by the court: First. The respondent stopped payment before the passage of the bankrupt act, and did not resume payment subsequent thereto up to the filing of the petition. Was this an act of bankruptcy? Second. Is the note described in the petition commercial paper?

DICK, District Judge. I have not been able to find any case in our courts in which the precise point first presented has been considered and determined. On the argument, my attention was called to the case of Baldwin v. Wilder [Case No. 806], as deciding an analogous question, and the counsel insisted with much earnestness and force, that the principles there announced ought to govern the case before us. Mr. Hilliard, in his work on "Bankruptcy" (page 26), in speaking of the time when acts of bankruptcy may be committed under the English statutes, says: "An act committed before the passage of the statutes is not sufficient to support a commission," and several cases are cited as authorities. I have not had an opportunity of examining those cases to see whether they throw any light upon the question before us. In determining this case, I will, in the first place, inquire what is the fair and reasonable construction of the clause in the statute upon which this proceeding is founded; and then consider the opinion of the learned judge in the case above mentioned. The primary rule (sometimes called the golden rule) in the construction of statutes, is to give to all the plain and unambiguous words of a statute their literal and ordinary meaning, unless manifest absurdity or injustice would be caused by so doing. Another rule of great practical importance is, "that a statute must in general, on principles of obvious convenience and justice, be construed as prospective and not retrospective in its operation: it must be considered as intended to regulate the future conduct of persons, and not apply to past transactions." Broom, Com. Law, 6. This rule should be observed unless the terms of the statute plainly show a contrary legislative intent. The act of bankruptcy alleged in the petition is that the respondent "has stopped and not resumed payment of his commercial paper within a period of fourteen days." As the promissory note mentioned in the petition was not paid at maturity, the act of stopping payment occurred one hundred and eighty-three days after date, more than three years before the passage of the bankrupt law, March 2, 1867, and the non-resumption of payment continued up to the 17th day of May, 1871, just before the petition was filed. The allegation that the respondent was a trader, etc., was not denied, and is not deemed material in the construction of the statute since the amendment of the 14th July, 1870 [16 Stat. 276]; for the act of bankruptcy alleged may now be committed by any person who executes commercial paper and fails to make payment within a period of fourteen days after maturity. In re Hercules Assurance Co. [Case No. 6,402].

[1] [Reprinted by permission.]

To constitute this act of bankruptcy, two things must concur, and one necessarily precedes the other. 1. The debtor must fail to pay his commercial paper at maturity. 2. He must fail to resume payment within a period of fourteen days. If payment should be made in twenty days after suspension, this will not do away with the act of bankruptcy. The active words in the statute to express these two requirements are—"stopped or suspended" and "not resumed payment." These are plain and unambiguous words when used together, and must be separately and literally construed. The words "stopped or suspended" are sometimes used to denote not only the act of stopping, but, also, the not resuming payment; and if they were the only words used in the statute they would express both ideas. Congress has seen proper to use both expressions, and connect them together with the ordinary conjunctive conjunction. We must take it for granted that congress in framing such an important and carefully considered statute, used the words "ex industria," and with the purpose of conveying the different significations which they literally express.

The 39th section, as amended July 14th, 1870, after leaving out intermediate and inapplicable words and clauses, would read as follows: "That any person residing and owing debts as aforesaid, who, after the passage of this act, has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy," etc. In construing this section according to the plain and literal meaning of the words used, we conclude that the respondent, having stopped payment before the passage of the statute, the subsequent non-resumption of payment of his commercial paper did not constitute an act of bankruptcy.

The petitioner's counsel on the argument insisted that the non-resumption of payment by the respondent of his dishonored commercial paper subsequent to the bankrupt law was a continuous act of bankruptcy, and the case of Baldwin v. Wilder, supra, was relied on as authority, and the counsel seems to be sustained in his views by the reasoning of the learned judge in that case. We have great respect for the ability, learning, and high reputation of Judge Emmons, but we cannot adopt his opinion in the decision of the case before us. We think, as we have before indicated, that the words "stopped" and "not resumed" have distinct significations. There cannot be a condition of non-resumption without a previous stopping of payment, but the words, as used, have a different relation as to time in the transaction. A fraudulent stopping of payment is an immediate act of bankruptcy, and no subsequent resumption will free the fraudulent debtor from an adjudication of bankruptcy, if proceedings are commenced within six months. In this clause of the statute the word "stopped" refers to the time of the immediate act, and the question of non-resumption does not arise, and the words "not resumed" are not used. In the subsequent clause, where a stopping of payment which is not fraudulent is provided for, the words "stopped" and "not resumed" are both used, one with reference to the time when the paper was dishonored according to the law merchant and the other with reference to the fourteen days of grace allowed by the bankrupt law. In this case, stopping is an inchoate act of bankruptcy, which is completed by a failure to make payment for fourteen days. We think, therefore, that the stopping as well as non-resumption of payment of commercial paper must both have occurred after the 2d of March, 1867, to come within the provisions of the statute.

"Is the suspension an indivisible act, that, once committed, is not continuing? The law is full of analogies to the contrary." Baldwin v. Wilder [Case No. 806]. This terse expression of judicial opinion was cited on the argument, and ably enforced by counsel, with many analogies from the law. Even were we to admit the principle announced, it would not apply to our case. There are many acts recognized in law as continuous in their nature, but the act continued is always of the same character as when it began. Thus a nuisance is continuous, but it commences a nuisance. A permanent trespass is continuous, and may be so alleged in pleading; but it was a trespass ab origine. In our case, the stopping and not resuming payment for three years before the statute was passed was not an act of bankruptcy, and the subsequent non-resumption is not declared to be such act in the statute. I cannot concur with Judge Emmons in speaking of this act of bankruptcy. "Every fourteen days' suspension, no matter how often repeated, or how long continued, are but successive acts of bankruptcy." Why should we have successive acts of bankruptcy accruing at every period of fourteen days, when the first act under the statute will exist for six months for the purpose of commencing proceedings? I agree to the proposition that this is a remedial and beneficial statute, and should be liberally construed; but the indulged debtor under the law has some rights as well as the creditor, and a "statute of repose" is as much needed in bankruptcy matters as in any other legal proceedings.

If the act of stopping payment is fraudulent, can it be indefinitely continued by constructive succession, and proceedings be commenced ten years after the first occurrence of the act? If so, the six months' limitation in the statute is useless verbiage, and should be taken out, as it is well calculated to mislead not only merchants and traders, and those who deal with them, but also lawyers. If the limitation applies in a case where there

is fraud, it certainly ought to apply where there is no fraud. When a trader fails to pay his commercial paper when due, or within the three days of grace allowed by the custom of merchants, he is regarded as commercially insolvent. The bankruptcy law allows fourteen additional days of grace to commercial paper, and if payment is not made within that time, the maker is insolvent in contemplation of the statute. If the statute has used only the words "stopped or suspended payment of commercial paper," then three days of grace would have been allowed for payment by operation of the law merchant; and could it be properly said that every subsequent period of three days' non-payment constituted successive acts of bankruptcy, and that the six months' limitation would not apply? The additional days of grace allowed by the bankrupt law certainly cannot have the effect of rendering such limitation nugatory. We think that this six months' provision was intended by the framers of the law to operate as a limitation on bankrupt proceedings, and was prompted by the same wise and beneficent spirit of legislation which has given rise to all statutes of limitation, both in this country and in England. The act of bankruptcy which we are considering, originally, could only be committed by bankers, merchants, traders, etc., in the course of their dealing, and the provision in the statute was intended to secure punctuality, regularity and uniformity in commercial transactions. To secure this result there must be action both on the part of the debtor and the creditor. The debtor is required to pay at maturity, or within a period of fourteen days, and the creditor to demand and enforce payment within six months after the commercial paper which he holds is dishonored.

In commercial cities where the custom of merchants is well regulated, understood, and strictly enforced, a trader who fails to meet his commercial paper at maturity loses at once his financial credit, is regarded as insolvent, and is generally forced to wind up his business. This was the custom of merchants before the passage of the bankrupt law, and no injustice or injury is done to creditor or debtor by the six months' limitation, as both parties understand their rights and obligations, and no further time is needed to commence proceedings in bankruptcy. When the holder of dishonored commercial paper gives indulgence to the maker for more than six months, he shows, by such conduct, that he is either satisfied that the debtor is solvent in the ordinary sense, in having property sufficient to pay all of his debts, or he relies upon collateral securities, or he is willing to resort to the ordinary remedies furnished by the common law for the collection of his claim. Such a creditor, by allowing such indulgence to his debtor, gives him credit in the community and enables him to enter into business engagements with other parties; and it would open a wide door to injustice and oppression, if such creditor could, at any indefinite time, intimidate the debtor and his friends by threats of proceedings in bankruptcy. If this limitation is just and wise in its operation in commercial cities, it will apply with more justice and force in the rural districts, where the custom of merchants is but little understood, and can hardly be said to regulate, practically, the business transactions of merchants and traders, and much indulgence is shown by creditors.

We can carry the argument still further by referring to the condition of things produced by the amendment of July 14th, 1870. Now, any person who executes commercial paper is liable to commit the act of bankruptcy insisted on in this case. Heretofore, in the ordinary dealings among our people, promissory notes were usually secured by responsible sureties, and by the indulgence of holders, were allowed to remain overdue for many years. When this amendment is generally understood, it will have the effect of doing away with the loose credit system which has so long prevailed in many sections of the country. A man who now executes his promissory note must not only be solvent in the ordinary acceptation, in having property sufficient to pay all of his debts, but he must also be solvent in a commercial sense, in having money to meet such note at maturity, or he may be forced into bankruptcy. As the statute requires such strict punctuality on the part of the debtor, he ought to be allowed the benefit of the limitation where the creditor by negligence or designed indulgence fails, for six months, to enforce the statutory remedy. The evident policy of the statute is to make creditors, as soon as possible, avail themselves of the extraordinary remedy provided, in order that business matters may be kept in a condition of commercial solvency, and the maxim, "vigilantibus non domientibus jura subveniant," ought to apply with more force than it does to the ordinary remedies provided by the common law. Broom, Leg. Max. 692. In our construction of the statute in giving force to the literal signification of the words used, we feel that we are not obnoxious to the charge: "Qui hoeret in litera, hoeret in cortice;" for our construction gives effect to the manifest legislative intent, and is consistent with the "reason of the thing."

We find but little difficulty in disposing of the other question presented in the argument. By a statute of this state, promissory notes, payable in money, are placed on the same footing as inland bills of exchange, and are controlled and regulated by the custom of merchants. The note in this case is payable in money; and although at the time of its execution, Confederate currency was the only medium of exchange in this section of the state, the lex loci did not make such currency a legal tender in the payment of debts. The ordinance of the 18th of October, 1865, declares, in substance, that executory con-

tracts like the one before us, "shall be deemed to have been made with the understanding that they were solvable in money of the value of said currency"—"subject, nevertheless, to evidence of a different intent of the parties to the contract." [Ord. N. C. 1865–66, p. 20.] Where the nature of such contract is not set forth in the instrument, Act 1866, c. 38, allows the parties to show in evidence the property or other consideration for which the contract was executed, etc. Act 1866, c. 39, establishes a scale of depreciation of Confederate currency, etc. These statutes have been recognized as constitutional by the supreme court of this state, but they do not affect the character of this note as commercial paper. The parties may show a collateral contract, which may change its value, and it may be subject to the scale of depreciation; but still it is negotiable and payable in money, and is commercial paper. If the non-resumption of payment alleged in this case was held by me to be a continuous act of bankruptcy, I would also hold that the said ordinance and statutes so far changed the rights and obligations of the parties to this note, as to excuse the respondent for not making payment until the real value of the note was legally ascertained and established, as provided by said legislation. As I have been upon the bench of this court but a few months, and this is my first opinion in a case of bankruptcy, I am gratified that the petitioner can have an opportunity of having my decision reviewed in a higher court. It is ordered that the petition be dismissed.

MENDON SAV. BANK, Ex parte. See Case No. 9,555.

MENEDGER (HOPKINS v.). See Case No. 9,289.

MENEDGER (MATTHEWS v.). See Case No. 9,289.

Case No. 9,427.

The MENTOR.

[4 Mason, 84.] [1]

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

SEAMEN—WAGES—FORFEITURE—REMITTED—EARNED SUBSEQUENTLY—SET-OFF.

1. Wages of seamen are forfeited for gross offences; but not for slight faults, either of neglect or disobedience. There must be either an habitual neglect or disobedience, or a single act of a heinous and aggravated nature.

[Cited in The Maria, Case No. 9,074; Freeman v. Baker, Id. 5,084; Fuller v. Colby, Id. 5,149. Followed in The Almatia, Id. 254. Cited in The San Marcos, 27 Fed. 569; The Idlehour, 63 Fed. 1019.]

2. A master has power to remit a forfeiture; and his pardon is a redintegration of the seamen in the right of wages.

[Cited in The Olive Chamberlain, Case No. 10,491.]

3. Repentance and tender of amends reinstate the claim for wages.

4. If the articles prohibit any traffic by the seamen under forfeiture of wages, yet the master may remit the forfeiture.

[Cited in The San Marcos, 27 Fed. 569.]

5. A master has no right to degrade the ship's carpenter without sufficient cause.

6. Wages forfeited for an offence are only such as are earned antecedently, and not subsequently to the offence. In general, set-offs are not admissible in the admiralty.

[Cited in Pitman v. Hooper, Case No. 11,186; Smith v. Treat, Id. 13,117; The Hudson, Id. 6,831.]

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

Libel for seamen's wages on a voyage from Boston to the Sandwich Islands, Northwest Coast, and Canton in China, and thence back to Boston. There was a special answer put in by the owners, contesting the right to wages on various grounds, some applicable to all, and some to part only of the libellants. In substance it stated: (1) That the libellants, together with one Sheridan and Rodman, also mariners on board said vessel, entered into a confederacy and conspiracy to disobey and unlawfully resist the lawful authority of [Hersey] the master of said vessel, and did violently and forcibly resist his authority, whereby the lives of the officers, passengers, and crew of said ship, and the ship itself and a valuable cargo on board were greatly endangered; and the master, for that cause alone, was obliged to put into the port of St. Helena. And the respondents maintained, that according to the contract made by the libellants, as well as by the general rules of the maritime law, they had forfeited their wages by such mutinous conduct. (2) That said forfeiture was never remitted by the master; that the libellants were permitted to return home in, and assist in the navigation of, said vessel, under the express declaration of the master, and upon a condition understood and assented to by the libellants, that this should not be deemed to operate as a release or remission of any forfeiture of wages, or other penal consequences of their misconduct. (3) That the libellants ought not to recover any sum by way of wages, even if they were not forfeited by such misconduct, because the respondents had suffered damage by the misconduct and breach of duty of the libellants to an amount exceeding the sums so claimed for wages. (4) That as to the claim of Woodward, if the same were allowed at all, it should be allowed for the sum claimed; because the said Woodward had shipped to perform the duty of a carpenter at a high rate of wages; and being found incompetent to such duty, very early in the voyage relinquished his situation as carpenter, and took that of an ordinary seaman. A decree was rendered pro forma by consent of parties, in the district court, in favor of the libellants.

Bassett & Gay, for libellants.

Lemuel Shaw, for respondents.

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

STORY, Circuit Justice. The present is a suit brought by William Woodward, John H. Hemmer, Artemas Gulliver, and William Brown, for the recovery of wages alleged by them, in their summary petition, to have been earned on a long and circuitous voyage in the ship Mentor, from Boston to the Sandwich Islands, to the Northwest Coast, to Canton in China, and from thence back again to Boston. The voyage has been completed by the return of the ship to Boston, and the libel seeks a decree in rem for the wages asserted to be due. There is a very special answer put in by the owners, asserting, that all the libellants have forfeited their wages by reason of a gross combination, and endeavour to commit a revolt, on board of the ship on the homeward voyage, which is set forth in the defensive allegation with all due circumstantiality. There are other separate allegations, in respect to two of the libellants, viz. Hemmer and Woodward, which I shall have occasion hereafter to notice, when I come particularly to examine the special merits of their claims.

It need hardly be stated, that in this court, seamen, as a class of persons, are entitled to receive peculiar indulgence. Their habits of life, their incessant and laborious service, their frequent exposure to peril of no ordinary character, their intrepidity and thoughtlessness, their hardihood, sometimes approaching almost from necessity to ferocity, and their profuse and often captivating gallantry, give a colouring to their characters so mixed and variable, so full of lights and shades, that it requires the intimate knowledge of a court of admiralty duly to estimate both their frailties and their merits. They partake, in short, somewhat of the boisterousness of the element which they navigate; and their acts must be judged of, not by the courtesy, or the rigid exactions of domestic society, but by that milder judgment, which winks at their errors, and mitigates its own resentment in consideration of the provocations, temptations, and personal infirmities incident to their employment. To visit all their ill-advised, and even mischievous conduct with severe penalties, would be most discouraging to the maritime service of the country, and perhaps fatal to the safety, as well as the enterprise of our commerce. To indulge them in gross misdemeanors, without adequate correction, would be to create mutinies, and overturn the discipline of the ship, and thereby open a path to the destruction, both of the property and the persons on board. The marine law has therefore, in cases of this nature, adopted a milder course. It punishes gross and obstinate offences with a forfeiture of wages, especially if they are persisted in without repentance or amends. It treats lighter faults with an indulgent lenity, allowing compensation for any losses and expenses caused by them; passing over slight errors, unaccompanied with mischief, without notice; and correcting habitual neglect, or incompetent performance of duty, when it amounts only to levissima culpa, by a correspondent diminution of wages.

On the other hand, it is the disposition of the court to uphold, with a firm hand, a reasonable exercise of the authority committed to the master and other officers of the ship. It views a prompt and cheerful obedience of orders, on the part of the seamen, as of the deepest importance. It admits of no slight excuses for a slow or reluctant fulfilment of duty, and weighs not with a scrupulous nicety the language of the command, or the necessity of the service. Occasional harshness in manner or matter, occasional ebullitions of passion, and other infirmities, incident to nautical life, are not admitted as justifications of insubordination; but are deemed not wholly inexcusable, unless they degenerate into wanton and malicious abuse, or illegal severity.

The very necessities of the sea service require this stubborn support of authority. On the ocean the officers can have but little physical power compared with that of the crew. They may, at any time, become the victims of a general conspiracy to revolt; and unless they can subdue obstinacy and indolence by the moral influence of command, and enforce a prompt and uncomplaining obedience by punishment, the ship and cargo must soon be at the mercy of the winds and waves.

If these remarks are true in regard to voyages in general, they must apply with increased force to voyages of the description before the court, where savage countries are to be visited, and trade carried on with persons crafty, vindictive, and ferocious, and where the whole profits of the voyage depend upon vigilance, industry, and exclusive devotion to the interests of the ship.

The general matter of defence, as applicable to all the libellants, has been sufficiently established by the proofs in the cause. At the present term of the court the libellants have been tried and convicted upon an indictment for an endeavour to make a revolt on board of the ship; and by the consent of the parties the testimony brought to the knowledge of the court, upon that occasion, has been permitted to be adduced as evidence in the case now in judgment. It appears that, on the homeward voyage from Canton, while the ship was a little to the east of the Cape of Good Hope, on the 8th of June last, one of the seamen, by the name of Rodman, being dissatisfied with the usual allowance of fresh provisions on that day, sent a message to the captain, that if the crew had not more provisions allowed them, they would take it of themselves. On being sent for on account of this disrespectful language, he admitted he had used the expressions, and added, in the presence of the crew, who assembled themselves near him on the deck, that so he had said, and so they all had said, and now said. The captain then stated, that the crew had the usual al-

lowance; that he, Rodman, had been trying to make a revolt on board for some time, and that Hemmer, who was then present, was another damned rascal. Immediately another seaman, whose name was Sheridan, advanced towards the captain, and said, "We are no damned rascals." The captain put out his hand to press Sheridan back, who immediately struck the captain with his fist, in the face, several times, by which he received considerable injury, bleeding profusely at the nose. The captain then seized hold of Sheridan, who retreated backwards towards the forecastle of the ship, and in the struggle between him and the captain, both fell over the caboose, the captain being upon the top. Brown, Rodman, and Woodward then took hold of the captain, and endeavored to disengage Sheridan from him, and finally succeeded in their efforts, notwithstanding the interference of the mates. The crew were standing around at this time, manifestly countenancing and encouraging Sheridan in his conduct. The captain immediately ordered Sheridan to come aft. Several of the crew said he should not; among them were Brown, Hemmer, and Gulliver, the latter of whom began to strip off his jacket, and said, "If you are going to take anybody aft, we will see." The captain being unable, with the assistance of his officers, to enforce his order to have Sheridan brought aft, retired to his cabin, and having washed himself, came afterwards on deck, and ordered all the crew to come aft. They accordingly came; and he then required that they should deliver up Sheridan; which they strenuously refused, first generally, and afterwards upon a particular demand from each of them, separately; and stated, that Sheridan should not be delivered up. The captain then ordered Sheridan not to perform any more duty on board; and dismissed the others of the crew to their duty. A consultation was immediately had in the cabin, by the captain, officers, and passengers, as to what was best to be done upon the present exigency, and it was their unanimous opinion that the ship ought to put into the first port; they thinking that there was a deliberate conspiracy among the crew to commit a revolt. At this time, and for several days after, it blew a severe gale, so that they could not put into the Cape of Good Hope; and on this account alone the ship afterwards put into St. Helena, and there Rodman and Sheridan were put ashore and dismissed. After the affray of the 8th, the crew, with the exception of Sheridan, performed their duty as usual; but the master and officers swear, that they were always in expectation of a mutiny, and took precautions to suppress it, until after the arrival of the ship at St. Helena.

Such is a summary of the more important facts, upon which a jury of the country have passed a deliberate judgment, and with the result of that judgment I am entirely satisfied. The case appears to me to be one, in which there was an unquestionable endeavour, by the libellants, to make a revolt on board of the ship; in the first place, by a combination to support Rodman in his attempt to intimidate the captain in the discharge of his duty in the management and control of the provisions of the ship; in the second place, by assisting and encouraging Sheridan in his gross and brutal attack upon the captain; and in the last place, by their deliberate determination, after their passions were cooled, to resist orders, and to prevent Sheridan from being put in custody by way of punishment, for the enforcement of the discipline of the ship.

What then are the consequences, which the marine law attaches to offences of this nature? It is said, that they carry with them a forfeiture of all the wages of the offending seamen; and for that purpose, the language of the eminent judge, who now presides in the court of king's bench, in his excellent work on the Law of Shipping, has been cited. "It seems," says he, "that neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during a voyage, will also deprive him of his wages." [2] In a limited and restricted sense the proposition here stated may be, and doubtless is, true. But it is not a single neglect of duty, or a single act of disobedience, which ordinarily carries with it so severe a penalty. There must be a case of high and aggravated neglect or disobedience, importing the most serious mischief, peril, or wrong; a case calling for exemplary punishment, and admitting of no reasonable mitigation; a case involving a very gross breach of the stipulated contract for hire, and going, in its character and consequences, to the very essence of its provisions. The only authority, cited in support of the proposition by the learned author, shows, that it must have these limitations attached to it. Lord Stowell, in the case of The Exeter, 2 C. Rob. Adm. 261, 263, where the charges made against a mate, suing for wages, were, "drunkenness, neglect of duty, and disobedience," said, "these are certainly offences of a high nature, fully sufficient to justify the discharge, if proved. In respect to the negligence it would not be necessary to prove that it was wilful negligence; it would be sufficient if it appeared to amount to that habitual inattention to the ordinary duties of his station, that might expose the ship to danger; for the person in Robinet's station stipulates against such negligence." Here the learned judge manifestly relies on the inflamed character of the offence, and the habitual recurrence of it. In the same manner he deals with the subject of drunkenness, visiting the forfeiture, not on a single act, but upon such a habit as was conclusive proof of disability for general maritime employment. In respect to disobedience, the

[2] Abb. Shipp. pt. 4, p. 457, c. 3, § 4.

cause did not require the learned judge to advert to any such distinction, for while he spoke of disobedience to lawful command (especially in an officer), as an offence of the grossest kind, the only act of disobedience alleged, was the refusal to leave the ship upon an unjustifiable dismissal by the master, which the court treated as wholly insufficient to defeat the claim for wages. I should be sorry indeed to lay it down, as a general proposition, that any act of disobedience by a seaman, however slight, is of course to be visited with a forfeiture of wages, or will justify a master in dismissing him in the course of the voyage. Such a principle, it seems to me, would be very disastrous to the commercial interests of the country, and would involve so many difficulties in its application, that the denial of wages would soon, from the necessities of the case, with reference to the ordinary habits of seamen, introduce an essentially different contract into maritime employment. My opinion is, that the disobedience must either be an act of a very gross nature, involving serious danger, a mischief, or malignancy; or it must be habitual, and produce such a general diminution of duty, as goes to the very essence of the contract. Severe as the old maritime laws [3] were, they ought not to be construed as justifying a more extensive interpretation; and the milder spirit of modern times has introduced principles, which appear to me more fitted to preserve good order on board, and at the same time to encourage a policy, which aims at the suppression of crimes by taking away the motive for obstinate perseverance in misconduct. The Consolato del Mare (chapters 159, 160, 161) contented itself with declaring, that every seaman was bound to execute the orders of the master, without affixing any penalty to mere disobedience; but when the seaman sought a quarrel with the master, it punished him with the loss of half his wages and his goods on board; if he lifted his hands against the master, it required the crew to seize, bind, and imprison him, and punished the refusal with the loss of wages and goods; and if he struck the master in anger, it punished him with the loss of every thing. In these provisions there is a progressive severity, which does not visit every offence with a total forfeiture of wages; but reserves it only for heinous offences. If we may trust to the law of France, as expounded by Pothier, a very mitigated rule prevails in that country. It is said by him, that the master may discharge a mariner for intemperance, want of capacity, for being a blasphemer, a thief, refractory, or quarrelsome, so as to cause disorder in the ship, &c. and in such case he has no claim for wages, except for the services rendered before his discharge; he can claim none for those services he has failed to render.[4] It would not seem, from these remarks, that Pothier contemplated any general forfeiture of wages in the cases stated by him; and Valin, in his Commentaries, has not adverted to any, except so far as they are authorized by the text of the French ordinance.[5]

Those judges, in our own courts, who have been called most frequently to administer this branch of law, have certainly not felt themselves bound to inflict the forfeiture of wages for slight misbehavior, whether by disobedience or negligence; and even aggravated offences and very gross acts have been dealt with in a cautious and indulgent spirit.[6] It appears to me that there is much in the reasoning of these enlightened persons, that cannot fail to commend itself to every maritime court. I confess myself not scrupulous in admitting, that my own judgment is satisfied with the principles on which they have acted. I should be sorry to lay it down as a settled rule, that even the commission of the offence of endeavoring to make a revolt, punishable, as it is, by fine and imprisonment under our laws, is, in all cases, to be visited with a total forfeiture of wages. Cases may easily be conceived, where the seamen have, in a legal sense, committed the offence, and yet under such circumstances of gross provocation and misconduct on the part of the master, as to form a very strong excuse, addressing itself to the conscience and mercy of the court. And where seamen have been guilty of inflamed offences, and serious violations of duty, under circumstances of an aggravated nature, if they testify by their subsequent conduct a thorough repentance and contrition; if they apologize for, and offer amends for the wrong, and justify a confidence in their sincerity by subsequent, exemplary diligence, there is no stubborn rule of law that prohibits the court from mitigating the forfeiture, and giving them the whole, or a portion of their wages, according to its discretion. Such, as I understand them, are the principles incorporated into the old maritime codes, and adopted and practised upon by a pretty uniform course of opinion in the tribunals of our own country.[7] These principles appear to be countenanced by decisions of the common law in analogous cases; though it might be sufficient, on the

[3] See Laws Wisbuy, art. 24; Laws Oleron, art. 12; Cleirac ad Loc. p. 29; Roughton's Arts. 25; Clerke, Praxis Adm. 129.

[4] Pothier, Louage de Matelots, art. 209, Cush. Transl. p. 128.

[5] 1 Valin, bk. 2, tit. 7, arts. 5–8.

[6] See the cases cited under the next note 7.

[7] Drysdale v. The Ranger [Case No. 4,097]; Sprague v. Kain [Id. 13,250]; Humphreys v. The America [Id. 6,869]; Atkins v. Burrows [Id. 618]; Whitton v. The Commerce [Id. 17,604]; Thorne v. White [Id. 13,989]; Black v. The Louisiana [Id. 1,461]; Relf v. The Maria [Id. 11,692]; Dixon v. The Cyrus [Id. 3,930]; Johnson v. The Eliza [Id. 7,383]; Abb. Shipp. (note to Story's Ed. 457) 525; Laws Wisbuy, art. 25; Laws Oleron, art. 12; Roughton's Arts, 25; 15 Vin. Abr. "Mariners," A, 2, D, F; Mal. Lex. Merc. p. 104, c. 23; Moll. bk. 2, p. 242, c. 3.

present occasion, to say that the law has done nothing to repudiate them in respect to maritime contracts.[8]

In the present case, the conduct of the libellants was without any adequate excuse or apology. It is in proof, that there was a sufficiency of good provisions on board, which were dealt out to the full allowance, by the orders of the master, during the whole voyage. If, on a few occasions, any deficiency occurred, it was unknown to the master, and not designed on the part of his immediate agent. As to the times and manner, in which fresh provisions were to be furnished, he was the proper judge, and in the exercise of this reasonable discretion he does not appear to have been guilty of any error or misconduct. There was no harshness, or unfeeling denial, and no desire evinced to give the crew less than a just share of what was slaughtered. Under such circumstances, the affray of the 8th of June must be considered as having its origin in a mutinous spirit, endeavouring to work its way to improper indulgencies by intimidation and force. The necessary tendency of such conduct was to put a most valuable cargo (near 300,000 dollars in value) in jeopardy, and to place the officers and passengers in a state of anxious and inconvenient alarm. The co-operation of the libellants, in the maligant attack of Sheridan upon the captain, and their subsequent aid in screening him from punishment, by deliberate combination and active assistance, are acts of such a nature, as make the legal offence assume a very aggravated character. I think I should not perform the duty, which the law requires of me on the present occasion, if I did not pronounce, that it ought to be visited by a forfeiture of the wages antecedently earned.

An attempt has been made to carry forward the forfeiture to the time of the arrival of the ship at St. Helena, upon the ground, that the officers were obliged to employ extraordinary precautions, and that the mutinous spirit of the crew was not subdued until the leaders were dismissed at that port. But there does not appear to me any sufficient evidence to sustain this part of the case. All the crew performed their duty faithfully after the affray, during the remainder of the voyage; and the measures of the officers, however discreet, arose from suspicions from the past, and were not called for by any subsequent acts of the crew. If a forfeiture were to be inflicted under such circumstances, it would be because the fear of injury is, in contemplation of law, equivalent to the actual commission of gross offence. The forfeiture can attach to no wages except those earned antecedently to the affray.

But it has been urged, on behalf of the libellants, that admitting the forfeiture, justly attached to these wages, they are still entitled to recover them, because there has been a remitter to their original rights by the voluntary act of the captain. It is said, that he has pardoned their offence, and for the encouragement of the crew, in the discharge of their duty, has agreed to bury their past misconduct in oblivion. If this allegation were supported by the evidence, I should have no difficulty in applying the rule already hinted at in their favor. The master is the general agent of the owner, in respect to the management and navigation of the ship, and has authority, so far as affects the contract of the seamen for wages, to stipulate with them for a remission of their faults, and to reinstate them in their rights.[9] It is sound policy to intrust him with such an authority; and the maritime law upholds its exercise with a steady confidence. If it were otherwise, on many occasions the ship would be deserted, and the voyage be defeated, for want of a suitable crew to navigate her. If no subsequent good conduct could purge the forfeiture, and no services, however cheerful and constant, could redeem the fault, what motive would there be for seamen to remain by the ship, in her perils or disasters, especially when the subsequent earnings might be scarcely worth a moment's consideration.

My difficulty is, in drawing a satisfactory conclusion as to the fact of remitter, from the evidence in this case. If the master had been able to obtain other seamen at St. Helena, at a reasonable rate, and had omitted so to do, his conduct in retaining the libellants, after so gross a fault, might well be deemed, in the absence of all counter proof, a presumptive waiver of the forfeiture, and an implied forgiveness. In cases of desertion, the subsequent receiving of the offender on board, without objection, has been often admitted as equivalent to a pardon or remitter[10] and the principle, which governs in that case, may well be applied to forfeitures arising from other misdemeanors. But it is in proof, that at St. Helena no other seamen could be obtained; and the master, therefore, was compelled to retain the libellants on board, or to break up the voyage. His act of retainer therefore, after an opportunity to discharge the offenders, does not possess such a significancy, as may well be attributed to it under ordinary circumstances. Then, as to the declarations, imputed to the master on his departure from St. Helena, they are very imperfectly proved, and at most import no more than that if their subsequent conduct was good, he would use them well; but if otherwise he would put into some other port, and discharge them there. Taking these expressions in connection with the actual necessity of retaining them, they fall short of the pur-

[8] See Beale v. Thompson, 4 East, 546, 563; Miller v. Brant, 2 Camp. 590.

[9] Miller v. Brant, 2 Camp. 590.

[10] Miller v. Brant, 2 Camp. 590; Beale v. Thompson, 4 East, 546, 565; 15 Vin. Abr. "Mariners," D. F.; Atkins v. Burrows [supra]; Whitton v. The Commerce [supra].

pose of establishing a remitter or pardon. Indeed upon this occasion the crew did not make any promises of future good conduct; and never, at any time, expressed any contrition for their offence, or offered any amends. If, before their arrival at St. Helena, they had so done, it might have given a very different complexion to the cause, and have entitled them to a very indulgent consideration from the court. In the actual posture of the facts, the allegation of a remitter or pardon does not appear to me to be established in any satisfactory manner. The forfeiture remains, therefore, with its fullest legal effect.

A farther claim is made against the libellants for the actual expenses occasioned by the stopping of the ship at St. Helena, and also for demurrage during the time of her detention. Under the circumstances, I have no doubt that the call and stay at St. Helena was a very proper and justifiable act on the part of the master, and such as sound prudence dictated. But still there is some difficulty in admitting this adminicular claim for compensation. If the forfeiture of wages had been waived, the ground of claim for compensation for actual expenses and losses would undoubtedly have remained in full force; for it is not necessarily included in such a remitter. But as the forfeiture is insisted on, the question arises, whether the court ought to give a full compensation ultra the forfeiture, or draw the compensation from the forfeited fund. Now the forfeiture authorized by the marine law, in cases of this nature, is not given to the owner as a mere boon; but is designed to operate primarily as a warning penalty upon the seamen for misconduct; and secondarily, by way of compensation for the supposed or actual losses of the owner. If the forfeiture exceeds the injury to the owner, there does not seem to be any particular equity calling upon the court to go farther; if it falls short of the injury, then justice requires that the seamen should make such additional compensation as is equivalent to the unsatisfied amount of the injury. In both cases the penalty operates with great severity upon the seamen; and, for the purposes of civil justice, seems sufficiently extensive. In flagrant cases, too, the party is subjected to a criminal prosecution; and thus, in effect, may undergo a double punishment. No authority in the marine law has been distinctly pointed out, justifying the present, as a substantive claim, ultra the forfeiture of wages. I am not prepared to admit the justice or convenience of such a principle. I will not say that a case may not arise, in which the court, looking at the atrocity of the offence, may not properly visit it with the cumulated load of forfeiture and compensation. But there is an equity, addressing itself to the court on the present occasion, which cannot be overlooked. The libellants, independently of this claim, will suffer a punishment fully equal to their misconduct. I am not willing to be instrumental in making it more oppressive. My judgment accordingly is, that the demurrage and expenses at St. Helena ought to be allowed to the owners; but in case the amount does not exceed the forfeited wages, the indemnity is to be sought out of that fund. Conjectural loss of profits or of interest, in consequence of the supposed increase of the length of the voyage, has been already intimated, at the argument, to be inadmissible upon principle. If the markets had risen in price, or the ship had avoided a storm, or made her passage more speedily in consequence of the delay at St. Helena, the seamen could not have interposed these as equitable off-sets to the claim for compensation. They rest on too uncertain a basis; and are incapable of an uniform adjustment, so as to constitute an equity for both parties.

We may next proceed to the consideration of the objections which peculiarly belong to some of the libellants, and are inapplicable to the rest.

First. As to Hemmer. It is asserted in the pleadings, that he was guilty of an infraction of the ship's articles by trading with the natives of the Northwest Coast and Sandwich Islands, &c., and thereby forfeited his wages, as well as all the goods he had on board. Upon inspection of the articles, it appears that the crew are expressly prohibited from such traffic, under the penalty of a forfeiture of all their wages, and all their goods and effects on board of the ship.[11] How far the law would enforce such a penalty as to the goods or effects on board, in case an attempt were

[11] The article is in the following words: "And the master, officers, seamen, and mariners of the said ship Mentor do further contract and agree with the owners of said ship in the manner following, to wit, that neither the said master, officers, seamen, and mariners, nor any of them, shall, on any pretence or pretext whatever, purchase, sell, barter, or traffic with the natives of the Northwest Coast, or Sandwich Islands, or with any other person or persons whatever, for furs, sandal wood, or any other articles of trade of what name or nature whatever; or shall receive from the said natives or others, any furs, sandal wood, or other articles of trade as presents; hereby agreeing, that all trade and traffic at all places and times during the voyage, is to be for the exclusive benefit and profit of the owners of said ship. And the said master, officers, seamen, and mariners, hereby agree, for themselves, their heirs and assigns, that if they, or any of them, be found to have infringed this article of the agreement, they are thereby to forfeit all their wages, together with all their goods and effects on board said ship, to the use and benefit of the owners thereof. And the owners do agree, that whoever shall give information to the conviction of any one concerned in breaking this article, shall receive one half of the sum due the delinquent."

William Woodward, carpenter, $14 per month—entered 22d June, 1822; advanced before sailing $28; advanced abroad $50.

Henry Hemmer, seaman, $11 per month—entered Feb. 4th, 1823; advanced abroad $11.

William Brown, seaman, $10 per month—entered Dec. 7th, 1824; advanced abroad $17.50.

Artemas Gulliver, seaman, $11 per month—entered Jan. 26th, 1825.

made to sue for the same in a court of justice, I am not called upon to decide; and, as at present advised, I should feel no inconsiderable difficulties on the subject. Forfeitures in civil cases are generally odious, and not unfrequently mitigated in courts, professing to act in equity, as this court does, sitting in admiralty. The act of trading is substantively proved; and the seizure of the furs, which constituted the object of the traffic, was accordingly made by the master upon search, while the ship was at sea on her voyage to Canton. But after the arrival of the ship at that port, the master, upon full deliberation, released the furs, and delivered them back to the offender; and this being an act which, as agent of the ship, he was competent to do, I am of opinion that the forfeiture was remitted to all intents and purposes, and can no longer subsist as to the wages or goods. It appears, that, with the proceeds of the furs, Hemmer afterwards purchased silks at Canton, which were brought home in the ship, and landed at Boston. But this, of itself, constitutes no offence, and may be considered as presumptively licensed by the master. Hemmer's wages, therefore, since the affray, are not affected by these transactions; and as to antecedent wages, the forfeiture, if it could attach at all, could only affect wages earned at the time of the traffic, and these would be completely swallowed up in the later and efficient forfeiture, by the endeavour to make a revolt on the 8th of June.

Secondly. As to Woodward. He shipped as carpenter for the voyage; and an attempt has been made to establish that he was not competent to perform the duty. It does indeed appear, that the master was on the outward voyage dissatisfied with him, and gave a superior authority to the carpenter's mate, and employed Woodward principally, but not entirely, in the ship's common duty. But whenever business of this sort was carried on, he always assisted in the carpentry; and there is no pretence to say, that he laboured under any general incapacity. On the contrary, a person with whom he worked ashore, has spoken favorably of his capacity; and no fact, except of slowness, has been established against him. I must be permitted to say, that when a man ships in any particular capacity on board a ship, it is not for slight causes that he is to be degraded or compelled to perform other duty. He is not to be subject to the caprice, or distaste, or petulance of the master. He stipulates for fair and reasonable knowledge, and due diligence; but not for extraordinary talents. If he is guilty of fraud or misrepresentation, he is doubtless subject to all just consequences. But when he acts bona fide, and is willing to perform his duty, if he should be more tardy in his movements than other men, it constitutes no just ground for degradation. The master has shown no sufficient reason in this case for placing his own mate over him; and if he had refused, under such circumstances, to perform the additional seamen's duty imposed upon him, I am not satisfied that he would not have been entirely warranted in law. But since he was somewhat acquainted with seamanship, and performed his duty as carpenter when required, and as seaman on all other occasions, there is no legal ground upon which the full wages stipulated in his contract as carpenter ought not to be paid to him. Of course, as one of the offenders in the affray of the 8th of June, his wages antecedently earned are forfeited.

These are all the observations, which I think it necessary to make in the case; and I shall accordingly refer it to a commissioner to ascertain the wages now due to the libellants upon the principles already stated.

The defence has been very properly made, and being in its main point sustained, I do not feel myself under all the circumstances, called upon to give any costs in the case. Each party must accordingly bear his own costs. Decree accordingly.

[This cause was again heard on exceptions to the commissioner's report. Case No. 9,428.]

Case No. 9,428.

The MENTOR.

[4 Mason, 102.] [1]

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

SEAMEN—WAGES—FORFEITURE—EARNED SUBSEQUENTLY—ADVANCE—CLOTHES—HOSPITAL MONEY.

1. Where seamen had forfeited their wages by misconduct in the voyage, and afterwards earned wages, the court held that the advance wages stipulated in the shipping articles, should be a charge on the forfeited wages.

2. Money advanced in the voyage for clothes, &c., and not stipulated for, should be a charge on the unforfeited wages.

3. Hospital money should be apportioned pro rata on the wages of the whole voyage.

[Cited in Swift v. Mercantile Ins. Co., 113 Mass. 289.]

[This was a libel for seamen's wages against the ship Mentor, Hersey, master. A decree was rendered for libellants, and a reference made to a commissioner to ascertain the wages due. Case No. 9,427. It is now heard on exceptions to the commissioner's report.]

Upon the coming in of the report, several exceptions were taken to the report by Basset & Gay, for libellants. (1) That the wages advanced according to the shipping articles ought not now to constitute a charge against the seamen, to be paid out of the wages remaining due to them since the 8th of June, the time to which the forfeiture applied. (2) That money advanced by the master to the libellants in the foreign ports, and

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

principally at Canton, to buy clothes and other necessaries, should be a charge on the forfeited wages, and not on those now due. (3) That the hospital money ought to be a charge on the forfeited wages.

STORY, Circuit Justice. It is not my intention to lay down any inflexible rule, by which the court ought in all cases to be bound, in considering charges of the nature of those in controversy. In cases where the wages are forfeited, the court must exercise a wholesome discretion as to the manner in which it will grant relief, upon pecuniary charges against the seamen; and ought to look cautiously to all the circumstances mitigating, as well as inflaming, the offence. When the court pronounces the forfeiture incurred, it is incumbent upon those, who set up an equity, to have the forfeited fund charged with advances made to the offending party, to establish such equity by proof addressing itself to the discretion of the court. None has been presented in this case, which, in my judgment, ought to vary the common rule, by which forfeitures are governed. The exceptions, therefore, must be disposed of upon their general merits.

1. As to the advance wages. The shipping articles stipulate, "that two months' wages advanced before sailing, and one month's wages to be paid at Canton, is the pay the said seamen or mariners are to receive till the ship returns to her port of discharge in the United States of America." The right to such advance wages is therefore a part consideration of their contract; and if they go on the voyage, the advance so made is absolutely their due, and is not affected by any subsequent occurrences. It constitutes no personal charge against the seamen, and if by any accident in the course of the voyage, the latter is defeated, so that no freight is earned, and no wages become due, the advance is not recoverable back from the seamen. It is to be considered as a bounty upon their shipping. Now the advance wages paid at Boston and Canton must, under these circumstances, be considered as an absolute payment to the libellants, and for which the owner had no personal claim against them. He has a right to deduct the advance from the wages already earned, or first earned in the voyage; or rather, the right of the seamen to receive other compensation accrues only from the time not covered by such advance, whether it be in the inception or prosecution of the voyage. The true effect of a stipulation for advance wages is, that the owner gives the advance absolutely, if the seaman goes on the voyage, consenting to lose it, if the wages subsequently earned do not indemnify him. Under such circumstances, it appears to me that the advance wages are not a subsisting charge against the seamen; but they are a charge solely on the forfeited funds; and especially here, where more wages were earned in the voyage than gave a complete indemnity. This claim of the owner must therefore be rejected.

2. As to the advance money for clothes and other necessaries during the voyage. This is a charge, which the court will watch with peculiar solicitude. It is not sound policy to favour the advance of money to seamen in foreign ports, who are thereby often tempted to extravagance and dissipation, and their attachment to the ship and voyage materially diminished. Such advances are also usually made at a high premium; and there is always an opportunity thus given to take unjustifiable advantages of the poverty, thoughtlessness, and ignorance of seamen. Sitting, therefore, as a court of admiralty, whose duty it is in a peculiar manner to guard seamen against the effects of their own infirmities, and to uphold a firm maritime policy, I have no doubt that the obligation to watchfulness in cases of this nature, emphatically deserves our attention. We ought to see that the advances are reasonable and proper, and that the premium is such as has the sanction of general usage, or stands upon equitable principles. In such cases, the court will recognise the advance as a personal charge upon the seamen, for which the master and owner has an implied lien on the wages earned in the voyage; and has, moreover, the obligation of a personal responsibility. If the court, on the other hand, perceives that these charges are unjustifiable in amount or premium, it will either reject them altogether, leaving the party to such remedy, as the common law may afford him, or cut the demand down to a moderated charge. In the present case the advance money appears to me to have been reasonable, both in amount and premium. There is not the slightest reason to doubt, that it was such a sum as a good master, in the exercise of a reasonable discretion, might well allow for necessaries, although, by the shipping articles, he might not be bound to allow it. It ought, in my judgment, to be held in the present case, a charge upon the unforfeited wages now decreed due by the court.

3. As to the hospital money. Act July 16, 1798, c. 94 [1 Story, Laws, 554; 1 Stat. 605, c. 77], provides, "that the master or owner of every ship or vessel of the United States arriving from a foreign port into any port of the United States, shall, before such ship or vessel shall be admitted to an entry, render to the collector a true account of the number of seamen, that shall have been employed on board such vessel since she was last entered at any port in the United States; and shall pay to the collector at the rate of twenty cents per month for every seaman so employed, which sum he is hereby authorized to retain out of the wages of such seamen." It appears to me, that this deduction ought to be considered as a monthly deduction, to be apportioned upon the wages of the whole voyage; and not to be borne as a charge upon the unforfeited wages exclusively. I shall therefore direct, that a deduction of the

hospital money of twenty cents per month, and no more, shall be deducted from every month's wages due since the forfeiture on the 8th of June. Decree accordingly.

Case No. 9,429.

MENZELL v. CHICAGO & N. W. RY. CO.

[1 Dill. 531; [1] 4 Am. Law T. Rep. U. S. Cts. 58; 5 West Jur. 61.]

Circuit Court, D. Iowa. Oct., 1870.

CARRIERS — LIMITATION OF LIABILITY — SPECIAL CONTRACT—LOSS BY FIRE.

1. A contract between a railway company and the shipper of goods, limiting the common law liability of the company as a carrier, will have no greater operation given to it than the language used plainly shows the parties must have intended that it should have.

2. A special contract of this character construed; and *held* not to exempt the company for a total loss of the goods by fire, while in the warehouse of the company, at an intermediate station, on the line of transportation.

The plaintiff brought this action to recover of the defendant, the Chicago & Northwestern Railway Company, the value of certain goods which he alleges that on or about the 7th day of September, 1868, he delivered to it in Oshkosh, in Wisconsin, to be transported to Marshalltown, in Iowa. The defendant is alleged, in the petition, to be a common carrier, operating its road between these two places. The answer admits that the defendant is a common carrier, and that it was operating a line of railroad between Oshkosh and Marshalltown, but it does not admit the receipt of the goods or the value thereof, as claimed by the plaintiff. The answer also admits "that on or about September 7, 1868, at Oshkosh station, Wisconsin, the plaintiff delivered to the defendant a lot of household goods and furniture to be transported to Marshalltown, in Iowa, on the defendant's railway." And it sets up a special contract, dated September 7th, 1868, signed by the plaintiff, by which, "in consideration of the company transporting the property to Chicago station," the plaintiff "does hereby release the said company, and each and every other company, over whose lines said goods may pass to destination, from any and all damages that may occur to said goods, arising from leakage or decay, chafing or breakage, or from any other cause not the result of collision of trains, or of cars being thrown from the track while in transit." The contract gives the company the right to send the goods on arrival at their destination (Marshalltown) to a warehouse, after the lapse of a certain time, without payment of charges. After setting out this release or contract the answer alleges that in course of transportation at Chicago it was necessary to put the goods in the defendant's warehouse or freight depot at that place, and that while there the said building accidentally took fire and the goods of the plaintiff were destroyed, without any fault or neglect on the part of the defendant. No written reply is filed, because the statute of the state (adopted as the practice of this court) dispenses with a reply, and provides that "new matter in the answer shall (without any written pleading) be deemed controverted by the adverse party as upon a direct denial, or avoidance." Revision 1860, Iowa, § 2917. Under this statute the plaintiff on the trial claimed to avoid the effect of the written release or special contract set up in the answer, by insisting that it was procured by fraud or deception, he being a German and not able to read English, and not knowing or having had explained to him the nature of the instrument, and being ignorant thereof. The plaintiff also claimed that if the goods were consumed by fire, that the fire was owing to the fault or negligence of the company, in storing them in an exposed warehouse containing inflammable articles, without being duly guarded or watched. The plaintiff also insisted that this special contract is not binding upon him because there was no consideration therefor. He also maintained that as a matter of law the instrument does not undertake to exempt the company for loss by fire while the goods were in the warehouse at Chicago, an intermediate station on the line of transportation.

Certain facts admitted on the trial, or not controverted, may be here noticed. It is not denied that on the afternoon or evening of Monday, September 7, 1868, at Oshkosh, the plaintiff delivered to the defendant's agent certain boxes and packages for transportation, and that the company received them and agreed to transport them for the plaintiff to Marshalltown, Iowa. The goods arrived at Chicago on Friday, September 11th, in the afternoon, the distance being 193 miles. Chicago is the end of the Wisconsin division of the defendant's road; and the evidence shows as to goods not in bulk (like the present), that the usual course of business of the company is to reship them at Chicago, putting them into and passing them through their warehouse. The goods of the plaintiff were put by the defendants into their warehouse or freight depot, on Saturday, the 12th of September. On the afternoon of the succeeding day (Sunday) the warehouse containing the goods took fire and the goods were consumed thereby.

The trial was to a jury before DILLON, circuit judge. Both parties produced evidence in relation to the controverted questions of fact. The jury found a general verdict for the plaintiff for the value of the goods, and returned the following answers to certain questions of fact submitted to them in pursuance of the practice in the state courts of Iowa, adopted as the practice of this court; viz.:

[Question 1. Can the plaintiff read English,

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

and did he understand the nature of the special contract of Sept. 7th, 1868, set up in the answer, when he signed it? Answer. No. Q. 2. Was said contract read to him, or its nature explained to him? A. No. Q. 3. Did the plaintiff sign it in ignorance of its nature? A. Yes. Q. 4. Was the plaintiff guilty of negligence or fault, in not knowing (if such is the fact) the nature of the contract? A. No; under the circumstances. Q. 5. Did the agent who furnished the blank and required the plaintiff to sign it purposely conceal from the plaintiff the nature of the paper? A. No. Q. 6. Did the agent believe that the plaintiff did understand the paper he signed? A. No. Q. 7. If the plaintiff did not understand the contract, whose fault was it, his or the agent? or was it an accident and not the fault of either? A. The agent's, under the circumstances. Q. 7½. Did the agent know, or have cause to believe that the plaintiff could not read English? A. He had cause to believe he could not. Q. 8. Did the defendants' agent make any representation to the plaintiff as to the nature of the paper they wished him to sign? A. No. Q. 9. What did plaintiff believe the paper was when he signed it? A. A paper; the contents of which he had no definite idea, but which he understood to refer to his goods. Q. 10. Did he make inquiries concerning its character or contents? A. No. Q. 11. Did the fire in defendant's warehouse happen without any fault or neglect of the company or its agents? A. No. Q. 12. In respect to storing the goods in the warehouse and in caring for them while there, did the company pursue such a course and take such care of them as an ordinarily prudent man would have done, if the whole risk of loss had, under the circumstances, been his own? A. No.] [2]

The defendant moved for a new trial on the ground that the special findings, as well as the general verdict, were against the weight of evidence, and for other reasons.

Withrow & Wright and H. C. Henderson, for the motion.

H. E. J. Boardman, opposed.

DILLON, Circuit Judge. The motion for a new trial must be overruled. In the view I take of the case it is not necessary to consider whether the plaintiff succeeded by the fair weight of the testimony in establishing that the special contract was obtained from him by fraud. Nor is it necessary to consider whether the alleged want of any specific consideration therefor renders it inoperative, nor whether the special finding that the fire happened through the fault of the company, is so manifestly unsupported by evidence as to make it the duty of the court to set it aside.

On the admitted facts of the case, conceding the validity of the special contract on which the defendant rests, and that it is binding upon the plaintiff, and that the fire was purely accidental, it is still my opinion, as it was on the trial, that the plaintiff is entitled to recover.

By the common law a public carrier is liable to the owner of the goods, though they are without fault, on the part of the carrier, destroyed by fire while in the course of transportation. The contract between the plaintiff and the defendant is admitted in the answer to be to carry the goods from Oshkosh to Marshalltown; and the goods were burned at Chicago, an intermediate station, and while the defendant sustained towards the plaintiff the relation of a common carrier. Hence, the defendant is prima facie liable to the plaintiff for the value of his goods destroyed by the fire, but to avoid such liability the company sets up and relies upon the above-mentioned special contract, signed by the plaintiff.

The strict responsibility to which the common law holds public carriers is, in my judgment, founded upon a sound and enlightened public policy, and is salutary in its operation; and although it is admitted that it is competent for the shipper and the company, in the absence of prohibitory legislation, to make a special contract, limiting, to a reasonable extent, the common law liability of the latter, yet the courts construe these contracts somewhat strictly; at all events, give to them no greater operation than the words used plainly show that the parties must have intended they should have. Therefore, if the plaintiff, for a consideration, had knowingly entered into a contract with the company, specifically releasing it from all liability for loss of the goods by accidental fire, without fault on its part, while in transit, such a contract, it is conceded, would be binding upon the plaintiff. But did the plaintiff in this case make any such contract? This involves a construction of the special contract set up by the company. The language is, "I hereby release said company from any and all damage that may occur to said goods, arising from leakage or decay, chafing or breakage, or (and this is the language relied on) from any other cause not the result of collision of trains, or of cars being thrown from the track while in transit."

Construing this general and indefinite language conformably to the rules adopted by courts in the interpretation of contracts of this kind, it is my opinion that it does not plainly or satisfactorily appear therefrom that the parties intended thereby to exempt the company from liability for a total loss or destruction of the goods by fire while in the warehouse of the company at an intermediate station on the line of transportation; and therefore this agreement (admitting that it was knowingly entered into by the plaintiff, and founded upon a sufficient consideration) does not relieve the company from liability for the loss of the goods by fire, even though the fire were accidental, and without fault

[2] [From 5 West. Jur. 61.]

on the part of the company, its agents, or servants.

Judgment on the verdict.

Case No. 9,430.

MENZIES v. The AGNES.

[39 Hunt, Mer. Mag. 331.]

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

MARITIME LIEN—TIMBER FOR BUILDING—QUANTITY AND VALUE—BURDEN OF PROOF.

This was a libel [by William Menzies against the bark Agnes] to recover for certain timber furnished for the vessel to Erskine for building the same vessel. No direct evidence was given whether the timber was furnished to Erskine or directly to the vessel. But enough evidence was given to raise a presumption that the libelant and Erskine dealt, in respect to the lumber, on the understanding that it was supplied mainly, if not wholly, for the particular vessel.

HELD BY THE COURT (BETTS, District Judge). That this affords adequate ground for lien in favor of the vendor to the value of the material used in the vessel. But it devolves upon the libelant to establish by clear evidence the quantity and value of the material procured for and used in constructing this vessel. Decree for the libelant with reference accordingly.

[See Case No. 4,308.]

MEPHAM (BISSELL v.). See Case No. 1,450.

MERCANTILE INS. CO. (FOLSOM v.). See Cases Nos. 4,902 and 4,903.

Case No. 9,431.

MERCANTILE INS. CO. v. The ORPHAN BOY.

[3 Cin. Law Bul. 593.]

District Court, N. D. Ohio. April Term, 1878.

MARITIME LIENS—UNPAID INSURANCE PREMIUM—OWNERSHIP OF VESSEL—INSURANCE CONTRACTED FOR BY MASTER.

A master of a vessel, who has no proprietary interest in the vessel, but whose wife has such interest, insured the vessel in his own name alone. The insurance company tried to assert a lien on the vessel for the unpaid premium. *Held*, no such lien.

In admiralty.

WELKER, District Judge. The wife of David Becker was the owner of three-fourths of the Orphan Boy. He husband was the master, and acted as her general agent in the management of her part of the vessel. On the 2nd day of April, A. D. 1877, said David Becker, in his own name, took out a policy of insurance in the libelant's company for the sum of $2,000, on which he was to pay a premium of $140. That at the time of the insurance nothing was said of the ownership of the wife to any part of the vessel, or that the insurance was for her benefit; but the company supposed him to be the owner; nor was there any proof that the wife expressly authorized or directed the insurance to be made. The premium was not paid, and this libel is filed to assert a lien on the vessel for such unpaid premium.

Held: 1. That the husband, as master of the vessel, had no authority to make the insurance in his own name. 2. That the husband of the wife had no insurable interest in the wife's interest of the vessel, so as to create a lien upon the vessel for the premium. 3. That the insurance and policy being in the name of David Becker alone, and "not for the interest of all concerned," the company was only liable, if liable at all, to him, and not to the owners of the vessel in case of loss; and he having no insurable interest in the vessel, the policy could not be enforced against the libelants in case of a loss. That, where the policy itself was such as could not be enforced by the owner of the vessel, the insurance thereof created no lien on the same for the premium agreed to be paid. The libel is dismissed with costs.

Case No.9,432.

MERCANTILE TRUST CO. v. LAMOILLE VAL. R. CO. et al.

[16 Blatchf. 324.] [1]

Circuit Court, D. Vermont. May 21, 1879.

RAILROAD COMPANIES — MORTGAGE — TRUSTEE — SUIT IN STATE COURT—RECEIVER—STAY OF PROCEEDINGS—SERVICE IN STATE COURT.

1. The plaintiff, owning first mortgage bonds of a railroad company, brought this suit, in this court, to foreclose the mortgage and remove the two trustees, alleging that one was the sole trustee in a claimed preference mortgage of the same property, which he was seeking to foreclose in a court of the state, in which proceeding the other trustee had been appointed a receiver of the property, and was in possession. There were demurrers, and a plea of the pendency of those foreclosure proceedings, and a plea of the filing of a cross-bill therein by the trustees of the first mortgage, for foreclosure, on the day after the filing of the bill in this suit, in which this plaintiff was named a defendant, and on whom process was served, by an order of the state court, out of the state, before the service of the subpoena in this suit. The case was heard on the pleas set down for argument and the demurrers: *Held*, this court will not stay this suit until the proceedings in the state court shall be completed.

[Cited in Dwight v. Central Vermont R. Co., 9 Fed. 789.]

2. This court can and will proceed with this suit, although the property is in the possession of a receiver of the state court, though it will do nothing to disturb such possession, or to interfere with the receivership.

3. The service of the process of the state court on the plaintiff, as a defendant to the cross-bill, out of the state, was not effectual.

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

4. The fact that the mortgage trustees brought the cross-bill, did not draw the plaintiff in, and make him a party to it, by representation, as the trustees represent, in the suit, only the rights of such bondholders as join in it.

5. The position of the trustees is such that they cannot alone properly represent the bondholders, and no refusal by them to foreclose, after a request by the plaintiff, need be shown.

[Cited in Mercantile Trust Co. v. Portland & Ogdensburg R. Co., 10 Fed. 605.]

6. It is no objection to this suit that this court cannot settle the accounts of the receiver.

[This was a bill in equity by the Mercantile Trust Company against the Lamoille Valley Railroad Company, the Montpelier & St. Johnsbury Railroad Company, the Essex County Railroad Company, Luke P. Poland, and Albert B. Jewett, for a foreclosure of mortgage and the removal of trustees. Heard on demurrers and pleadings.]

Edward J. Phelps and Guy C. Noble, for plaintiff.

Benjamin F. Fifield, Luke P. Poland, and Harry D. Hyde, for defendants.

WHEELER, District Judge. This is a bill in equity brought by the plaintiff, as owner and holder of one hundred thousand dollars of the first mortgage bonds of the railroad of the defendants, which are railroad corporations, in behalf of itself, and all other like owners and holders who are non-residents of the state of Vermont, and wish to join therein, for a foreclosure of the mortgage, and removal of the trustees, alleging that one of the trustees is the sole trustee in a claimed preference mortgage of the same property, which he is seeking to foreclose in the state court, in which proceeding the other trustee has been appointed a receiver of the property, and is now in possession, with another person, as such receiver. Some other bondholders have become parties here with the plaintiff. Some of the defendants have demurred to the bill, and others have pleaded the pendency of those foreclosure proceedings, and a cross-bill filed therein by the trustees of the first mortgage, for foreclosure, on the day after the filing this bill in this court, in which this plaintiff was named a defendant, and on whom process was served, by an order of that court, out of the state, before the service of the subpoena in this cause. The plaintiff set down the pleas for argument, and the cause has been heard upon the pleas and the demurrers.

Before proceeding to the argument of the questions so raised, it was moved, in behalf of the defendants, that this court should stay these proceedings until those in the state court should be completed, and thereby compel the plaintiff to become a party there, if not already one, and to proceed there instead of here. But, courts have not the right to disown their jurisdiction. It is their duty to hear and determine causes properly brought before them, and to determine whether they are properly so brought, if such question arises, and not to advise or compel the parties to go elsewhere for relief, even though it should appear that the relief might better be obtained elsewhere. In Magna Charta, c. 29, it was declared by the king, for his courts: "Nulli vendemus, nulli negabimus, aut differemus, rectam, vel justitiam." This is fundamental to the duties of courts. The duty cannot be fulfilled by sending parties elsewhere for what they have a right to here, nor by compelling them to wait until some other time for what they have a right to now. If the plaintiff has a right to prosecute this suit in this court, it has, also, the right to have it proceeded with according to the course of the court, and, as question is made as to whether it has the right to so proceed, it has the right to have that question heard and determined, as may appear to be right, also. There was no proper course but to hear the parties upon the questions raised, and there is no proper way now but to pass upon them.

It is familiar learning, that, upon the demurrers, the bill is to be taken as true, and that, upon the pleas, the bill and pleas are all to be taken as true, unless inconsistent, in which case the allegations in the pleas prevail. These pleadings here raise two principal questions, both of which have been very thoroughly argued by counsel familiar with questions of this sort, and with these subjects. The first is, whether this court should proceed at all, or has jurisdiction to do so, while the property which is the subject of the controversy is in the custody of the state court, in the hands of its receivers. This question arises upon both the demurrers and the pleas, for the fact of the receivership is alleged in the bill as well as in the pleas.

That this court ought not to, and cannot lawfully, go so far with the proceedings as to take the possession of the property from that court, or as to in any manner interfere with the possession of it by that court, or its officers, is not disputable. Such a course would be contrary to the provisions of the statute of the United States (Rev. St. § 720) which prohibits the writ of injunction from being granted by any court of the United States, to stay proceedings in any court of a state, unless authorized by some law relating to bankruptcy. Although the possession might be trenched upon by some process or proceeding different from an injunction in form, still the effect would be the same as if the proceedings of the state court should be stayed, and the statute would be violated in spirit, if not in letter. And, if there were no such statute, as the jurisdiction of the two courts in this class of cases is concurrent, and not revisory one of the other, the one first acquiring jurisdiction, by proceedings involving the possession of specific property, could not, upon common and

well-settled principles, be disturbed in such possession by the other, while the proceedings involving the possession should be pending. The right to the possession of the property would be as exclusive as that to the rest of the proceedings. So, the debatable question here is, not whether this court will grant relief that will disturb the possession of the state court, for, surely, it will not do that, but whether it will hear and determine any question, or grant any relief, concerning the right to the property and not extending to the possession, while that court has possession. There is nothing, either in the letter or the spirit of the statute, that prohibits a party having a question of right, or a claim to relief, that can be determined without meddling with the possession of any court, from having the question determined or the relief granted by any court of competent jurisdiction for the purpose. Neither is there anything in the nature of things which should prevent. There could be no conflict between courts or their officers, growing out of such proceedings, nor are there any apparent evils likely to follow. Neither do the authorities go to that length. In Peck v. Jenness, 7 How. [48 U. S.] 612, Mr. Justice Grier, in delivering the opinion of the court, said, that the court having the possession of the property should have the disposition of "every question which occurs in the case," not including in the statement every question concerning the property. The cases which have followed are consistent with that distinction, and, in view of it, Watson v. Jones, 13 Wall. [80 U. S.] 679, is not at variance with the others. The right of the state court to the possession of the property during the continuance of the litigation before that court involving the possession, was sedulously respected, and the relief granted was carefully shaped to the disposition of the possession by the state court. In that case, Mr. Justice Miller, after stating the pleadings and proceedings, and that the bill contained a special prayer for relief that would interfere with the possession and disposition of the property by the state court, and that it contained a general prayer that would cover other relief said: "Under this prayer for general relief, if there was any decree which the circuit court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the Louisville chancery, that court had a right to hear the case and grant that relief." The authority of that case has not been questioned by the court which decided it, and it is not open to question here. In this case, as in that, some of the relief which the bill might cover would interfere with the possession of the state court, and some of it would not. The execution of an order of sale, under the provisions of the mortgage, or of an order for the delivery of possession, under other provisions, would have that direct effect, and, perhaps, the general prayer for relief would cover either; but, as before mentioned, it is clear that the plaintiff cannot have such relief. None can be had except that which will not interfere with the present possession. A decree of foreclosure would not. It would only cut off the equity of redemption of the plaintiff's bonds, which the mortgagors now have, and would not affect the possession at all, but only the right. Carpenter v. Millard, 38 Vt. 9; Shaw v. Chamberlin, 45 Vt. 512; Brooks v. Vermont Cent. R. Co. [Case No. 1,964]. A mortgagee, in Vermont, may have an action of assumpsit to recover his debt, an action of ejectment to recover possession of the mortgaged premises, and a suit in equity to foreclose the right to redeem, all going on at the same time, each in a different court from either of the others, and neither will interfere with the other, nor will the pendency of any of them abate either of them. The remedy in each case is distinct from that in the others. This was so at the common law.

The objection on account of the receivership cannot prevail to prevent proceeding in this cause, so far as it can go without interfering with the receivership; and a decree of foreclosure can be had, if the plaintiff is otherwise entitled to one, without involving such interference.

The other principal question is, whether the state court had the same parties before it, either actually or by representation, for the same relief, so that it had jurisdiction of the cause, before the parties were brought before this court, so as to give jurisdiction. One branch of this question is, whether the service of the process of the state court upon the plaintiff here, as a defendant to the cross-bill there, out of the state, would be effectual. A party having property within a state submits it to the laws of the state and to such proceedings as they provide for, and, if they provide for proceedings against it without personal service, or even without any service, he must, probably, submit to them; but he cannot justly be compelled to submit to any process which the laws of the state do not provide for. The laws of the state of Vermont provide for service upon non-residents, in chancery cases, by publication in a particularly specified manner. Gen. St. 249, § 21. They also provide for constructive service upon non-resident defendants whose property is attached, in actions at law (Gen. St. 296, § 48), and, also, for service in various modes upon non-resident defendants in divorce proceedings. But they nowhere provide for any order by the courts of chancery, to serve their process out of the state, nor for serving it out of the state, in the manner in which this was served, or in any other manner. Such service has often been made, sometimes where the court required it, in order that actual notice might be given, as a matter of fairness, and sometimes as a substituted service. But,

whether it is operative at all, as the only service, has been much doubted; and that question was expressly avoided and left undecided by the supreme court of the state, in Cheever v. Birchard (pamphlet opinion of Steele, J., 10). There is no known decision of the state court holding such service to be good or bad, but there are several that hold similar service in proceedings at law to be wholly void, even in suits concerning real property within the state. Propagation Society v. Ballard, 4 Vt. 119; Skinner v. McDaniel, Id. 418. The court has no jurisdiction or authority to act without the state, and it is not easy to see how it can affect any party by anything done by it, or under its order, without the state; nor how it can affect any right within the state belonging to parties without, otherwise than by proceedings under and according to the laws of the state. As viewed here, that service was not operative upon the plaintiff, nor such as it was bound to take any notice of.

But, if that service had been operative, a question whether the proceeding to which it would make the plaintiff a party was a proper one for obtaining the relief sought here, would still remain. It would have made the plaintiff a defendant to a cross-bill for the foreclosure of a mortgage securing its own debt, which might not be a very favorable position in which to obtain the affirmative relief of foreclosure in its own favor.

It is urged, however, that, because the mortgage trustees are parties, they draw the plaintiff in and make it a party, by representation, whether it will or not. The trustees hold the legal title to the mortgaged estate, but not the mortgage debt. It is quite familiar doctrine, that a mortgage is incident to the debt, which is always the principal thing. The default which would forfeit the estate would be to the bondholders owning the debt, not to the trustees holding the legal estate. The trustees could not foreclose the mortgage without the support of the bondholders, or some of them, in it. If they should undertake to do so, and no bondholder should come in and prove his bonds, they could have no complete decree. But bondholders may foreclose and have a full decree, whether the trustees will or not. At the argument, counsel very familiar with these subjects were pressed to show a case where a bondholder had undertaken to foreclose and been denied that relief, but no such case was produced; and it was admitted there were none. The bondholders have control of the bonds and the trustees have not. This is what was meant in Brooks v. Vermont Cent. R. Co., in stating that the trustees were not agents for the bondholders, and what was understood to be the effect of the authorities cited there in support of that proposition. It has been many times held, against the objection of the mortgagors that all were not joined in a proceeding to foreclose, that all need not be joined, which seems to be very plain. It is equally plain, that some must join, at some stage, in order to have a perfect decree. Suppose some do join and others do not, and a decree perfected to foreclose the right to redeem the bonds of those who do, and not of the rest. If the property should be redeemed from that decree that would not pay the other bonds, nor cut off the owners of them from their right to foreclose. If it should not be redeemed, while the right of the mortgagors to it would be extinguished, that of the holders of the bonds not foreclosed would not be, but would still remain as against those who did foreclose, and could be enforced. Wright v. Parker, 2 Aikens, 212; Langdon v. Keith, 9 Vt. 299; Belding v. Manly, 21 Vt. 550; Brooks v. Vermont Central R. Co. [Case No. 1,964]. This shows, that, when the trustees foreclose, the bondholders who join are the real parties and foreclose in behalf of their own rights, through the trustees, and that the trustees do not represent the rights of any who do not join. In an action of ejectment, depending upon the strict legal title, it would be different. There, the trustees could prevail alone, without the bondholders, but the bondholders could do nothing without the trustees. But, in equity, the real owner is regarded and the nominal owner is not. And, as this case is situated, the trustees may not represent all the rights of the bondholders as well as they would in ordinary cases. Poland, one of the trustees in the first mortgage, is sole trustee in another mortgage, claimed to have preference. The state court has the trustees of both parties to the proceedings there. With the trustees as parties alone, the only decree there could be would be, either that he should be foreclosed unless he should pay himself and the other so much by such a time, or that both should be foreclosed unless they should pay him so much by such a time. In either case he could redeem by paying himself, which would not accomplish anything. It would all be within himself. He cannot represent the plaintiffs and their opponents at the same time. Bondholders of each mortgage are made parties, it is true, and such as may fairly represent the interests common to each class, but, if so, they do not represent in fact all others of the same classes. They can only act for themselves. Whether those proceedings shall abate this suit, depends as well upon its being for the same relief in full, as upon being between the same parties, and the relief available there might fall far short of an effective foreclosure, as is sought here. This is not the fault of the trustees, but of the position in which they have been placed by those who have made them trustees.

It is said, in behalf of one demurring party, that the bill does not show any request from the plaintiff to the trustees to foreclose, and that they are not entitled to proceed in their own behalf without such request and a refusal or failure to comply. It is true, that no such request is alleged, so far as has been observed, but it is also true, for the reasons

just stated, that none would be of any avail. The trustees are not so situated that they can foreclose alone.

It is also objected, that this court cannot proceed to a decree of foreclosure in behalf of the plaintiff, because such a decree cannot be perfected without ascertaining the sum due in equity, and that this court cannot settle the accounts of the receivers, to ascertain how much there is in their hands to apply on the mortgage debt, because it has no jurisdiction over them. It is true, that this court cannot settle their accounts. It is also true, that they were not appointed in a suit to which the plaintiff was a party; if the plaintiff had been a party there, it could not maintain this suit here; they were appointed in a suit between others and the mortgagors. The sum due in equity is to be ascertained by fixing the amount lawfully due after deducting payments. The source from which the mortgagors derive means of payment, or what means they might derive if they could have their property, or how much it would pay if the plaintiff had it, or the avails of it, is of no consequence, unless the plaintiff has had it. It was the duty of the mortgagors to make payment, and that their property got into litigation is no lawful excuse for not making it. All payments which they make or procure to be made, before the accounting, will apply as payment to keep down the sum due, and all made afterwards, and before the expiration of the time of redemption, will help them redeem. If they would have their property in the custody of a court apply in either way, they must relieve it from the custody, so it can be applied, the same as if it had been attached or taken in execution, in some suit against them. This may be unfortunate, but, if so, it is due to the insolvency of the mortgagors, not to the fault of the plaintiff.

Many books and cases have been cited in behalf of the defendants, in support of their objections, in many of which there are rulings and dicta which would be strongly in their favor if the questions had arisen in the same way, and the proceedings had been to the same purpose and effect as these; more than time and space admit of specific reference to. What is said in some of them is with reference to the effect of citizenship of actual parties upon the question of jurisdiction of the federal courts; what is said in some others is in respect to foreclosure under laws which require sale of the property, and division of the avails, and not concerning a foreclosure to merely bar the equity of redemption; and in none of them, so far as observation has extended, has anything been held upon questions precisely like these, contrary to what is here held or said, which, however applicable there, would be so here.

The pleas, although not to the whole bill, are to the relief by foreclosure, and as such cannot stand; neither can the demurrers. However desirable it might be that this cause should be before a court where all interested in the property could be made parties, and all rights to it be adjusted, still, as the plaintiffs have the right to come into this court for such relief as they can have here, and they can have some relief here, the court must entertain their cause in respect to that relief. The pleas and demurrers are overruled.

MERCED MINING CO. (FREMONT v.). See Case No. 5,095.

MERCEIN (BARRY v.). See Case No. 1,062.

MERCER (BARTLETT v.). See Case No. 1,078.

Cas No. 9,433.

MERCER v. The FLORIDA.

[3 Hughes, 488.] [1]

District Court, E. D. Virginia. Jan., 1878.

COLLISION—VESSEL AT ANCHOR—CONCLUSIVE PRESUMPTION.

Where a vessel lying at anchor in a harbor on proper ground showing lights is run into by a moving steamer and damaged, the presumption of fault is conclusive against the steamer.

Libel in admiralty [by John L. Mercer against the steamer Florida] for damages for collision. The libel was for a collision by the Florida with the schooner Marion A., and by which the schooner was sunk and her cargo damaged, on the morning of February 17th, 1877, at about six o'clock, on a dark morning, at a point about seventy-five yards south by east of the Red Buoy, which is placed nearly opposite the custom-house on the Portsmouth side in Norfolk harbor. The loss was about $1,000.

HUGHES, District Judge. The cause is one of a steamer coming into a harbor studded with vessels at anchor and lined with vessels moored at the wharves, in what its witnesses called a dark night, and colliding with a vessel at anchor. A collision by a steamer running into a vessel lying at anchor anywhere, raises the presumption of fault against the steamer. Much stronger is this presumption where the collision is in a harbor at night when and where the utmost caution is required of the moving vessel. And steamers in motion are held to stricter responsibility for fault than sailing vessels in motion; because of the greater facility with which their navigators can manage them. I need not cite authority for these obvious propositions. They are well-settled laws. On the other hand, I held in The J. D. Everman Case [Case No. 7,591], that in an open roadstead several miles square, where there was no harbor master and no known or conceded line of channel, a vessel might anchor anywhere at will. While that is emphatically the case in Hampton Roads, it is not the case in the harbor of Norfolk and Portsmouth,

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

deep water in which constitutes a channel in most of the harbor of only the width of a few hundred yards. Here they have a harbor-master, who ought to be held to a very strict attention to his work and to an unremitted discharge of his duty day and night. He ought to be an active, energetic, ever-watchful, never-negligent, earnestly-faithful man to his duties. Any other sort of harbor-master will be the cause of frequent collisions, much dissatisfaction to navigators frequenting the port, and continual and indefinite injury to the commerce of the two cities. I say that a harbor-master is here who ought to be on hand to assign vessels to proper and safe places of anchorage at all times. A vessel placed at anchor by him is presumptively free from fault as to the place of lying at anchor. Vessels, indeed, must often cast anchor at times when they cannot avail of the services of the harbor-master. A vessel which casts anchor at such a time selects its place of anchorage on its own responsibility. If a vessel anchors at an improper place anywhere it is at fault, though if a steamer run into her when thus at fault the presumption is against the steamer and the burden of proof is upon the steamer to show the fault of the vessel. If a vessel chooses a wrong anchorage in a much-frequented and narrow harbor it will be held to more strict responsibility, and to be more violently in fault, because of its being in a harbor; but if she is run into by a steamer while lying there the presumption will be violently against the steamer, and the burden of proving fault in the vessel will rest still upon the steamer.

It is for the interest of all that settled rules of law on these subjects should be enforced. It will not do to say that the public interest of a city requires that steamers should be favored by the courts at the expense of smaller craft. Nor will it do on the other hand to maintain that men of small means and having small properties, like sloops and schooners, ought to be favored by the courts at the expense of wealthy companies owning great steamers. Ideas of what class of vessels do most service to the public cannot enter into the deliberations of court in cases of collision. Neither class of vessels can be allowed to proceed upon the notion that the other class has no right which it is bound to respect.

If steamers run out of the channel or too close to the edge of the channel of a harbor, and in doing so strike a vessel at anchor, it will be always held in this court to be responsible for the consequences. It has no right to try experiments of nice running in a narrow and much-frequented harbor. It must seek the middle of the channel and not swerve from it if possible.

On the other hand, vessels cannot be countenanced by the court in anchoring within the channel. Their duty is to get on the edge of it or out of it. If they obstruct the channel they must not expect to recover damages if they are run down or run into by vessels in motion. The master of a vessel may think it will do no harm for his vessel alone to anchor in the channel, it being very easy for a steamer to go around one vessel. But the exercise of such a liberty by one vessel demoralizes the whole discipline of a harbor, and no one vessel has a right to take a position in which, if a hundred other vessels took like positions there would be an obstruction of navigation. Example is always contagious, especially vicious example.

I think I have said enough to indicate that I consider this case to turn entirely upon one single question; and that is, whether the Marion A. was anchored in the channel too far from the edge of it at the time of the collision. As to the light, the Florida's witnesses only say that they did not see a light on the schooner. But the testimony of the witnesses of the schooner is positive, consistent and outspoken on that point. Captain Dehart saw the light was put up, the seaman Post testifies that it was put up, and Mr. Robert Mercer saw it hanging and burning after the collision. Nor is it worth while to consider the point made by claimant's counsel as to the lookout of the Marion A. A vessel must have proper lookouts until she is anchored, and is always held strictly to the duty of keeping a lookout when not anchored; but when once anchored the lookout, who is an officer of navigation on a vessel in motion, becomes then a mere watchman for purposes of patrol, protection, and warning on the anchored vessel. So that the case turns solely upon the question, where was this schooner anchored?

The libel recites that, at the time of the collision, the Marion A. was lying "just south of the Red Buoy," which is fixed on the edge of the channel on the Portsmouth side. The answer admits and alleges that "the point at which said schooner was then anchored is about south by east of said buoy, and about midway between the cities of Norfolk and Portsmouth, to the southward of the United States custom-house at Norfolk." Without reciting and commenting upon the evidence of each witness who testified in the case on this point, I think I can safely say that their evidence on either side is substantially epitomized in the language I have quoted from the libel and answer. I shall take the position of the schooner at anchor to be that assigned to it by the answer, which was deliberately drawn and intelligently and deliberately sworn to by Captain Dawes. The only point left open to doubt by the allegation of the answer is as to the distance at which the schooner lay from the Red Buoy on the course of south by east. The schooner's testimony is that this distance was fifty yards, though Hubbard places it at one hundred and fifty yards. I shall assume that it was a hundred yards, and this distance would place it about due south of the custom-house. I have no better guide in ascertaining the po-

sition of the schooner from these data than the official chart of the harbor made by the officers of the United States coast survey, a copy of which I have before me.

The testimony of witnesses as to depth of water is always perplexingly inaccurate; and there is no safe guide but the charts. The official chart gives a channel north of the Red Buoy of more than three hundred yards in width, clear of wharves, slips, and docks. All these charts lay down three dotted lines: one representing the line of six feet depth of water on each side of the channel; another of twelve feet depth; and the third of eighteen feet depth. The channel of Norfolk harbor, north of the Red Buoy, between the two lines of eighteen feet depth, is about three hundred yards in width, and from twenty-five to forty-two feet in depth. The Red Buoy sits south of the channel on the Portsmouth side, and a little south of the line of twelve feet water on that side. I have drawn a red line from the Red Buoy on the chart on the course of south by east. This line intersects the line of twelve feet water at a distance of about 100 yards from the Red Buoy, and intersects the line of eighteen feet water at a distance of 300 yards from that buoy. If, therefore, the schooner was lying anywhere within a distance of 100 yards wide from the buoy on a south-by-east course, it was within the line of twelve feet water, and there was an open, free channel north of it nearly 400 yards and 12 to 42 feet deep. If the schooner was lying anywhere within 300 yards of the Red Buoy on this south-by-east course, it was within the line of eighteen feet water, and there was an open, free channel north of her of 300 yards in width and 18 to 42 feet in depth. The schooner was south of the line of twelve feet water, and outside of the principal main channel of navigation in the harbor. It would have been more prudent for it to have been farther south and on the flats, because steamers drawing less than twelve feet water could follow it and strike it where it was; but still it was not in the channel, and scarcely on the edge of the channel, properly so called, at the point at which it was actually lying. But this does not constitute a fault in the schooner. All that could possibly be claimed is, that it was an imprudence in view of the fact that steamers often run outside of the main channel in running short cuts to their points of destination. The schooner, therefore, was not legally in fault.

The next question is, whether the steamer had a right to run close to the south edge of the channel in a harbor where that edge is the usual anchoring ground of shipping, and on a dark morning, when the utmost caution was incumbent on the steamer, and when it was most especially her duty to avoid all risk and keep to the middle of the channel. The officers of the Florida account for her running in the direction of the schooner by referring to the position in which a Norwegian bark was then lying at anchor. I judge from what has been stated in evidence, though that was very uncertain and unreliable, that the Norwegian bark was lying southeast of the Red Buoy on the line of eighteen feet water. But even if she had been much farther north, and entirely out in the channel, there was room in a channel three hundred yards wide for the Florida to pass to the north of the bark. At all events the schooner cannot be held for the fault of the Norwegian bark. It was the duty of the harbor-master to require the bark to change her position; and both the harbor-master and the bark are blamable for the bark's position. But their fault did not relieve the steamer from the duty on such a night, and coming into a small harbor, to keep in the middle of the channel.

I feel called upon to make another remark. The Florida was moving into the harbor at a speed too great to check up and stop in the distance of about a hundred yards. It is very difficult for the officers of steamers to realize the fact that they have no legal right to run through a harbor at that speed. It is so seldom that harm occurs in doing so, and it is so customary with steamers to run at such speed, that habit passes with them for law, and they come to believe that such speed is legally allowable. The law of navigation for steamers moving in harbors is: that they must run at a speed under which they can check up within a much shorter space than a hundred yards. This is especially incumbent upon them when entering a harbor filled with vessels on a dark night. The Florida ought to have crept along feeling her way at the slowest speed. I make this as a general remark, and do not lay stress in this case, upon the speed at which the Florida was running. The steamer was in fault, but the fault consisted in leaving a channel three hundred yards wide and running along the edge of it, in or within the south line of twelve feet water. See The Granite State, 3 Wall. [70 U. S.] 310.

The decree must be against the steamer or its stipulators.

MERCER (SMITH v.). See Case No. 13,078.

MERCER (UNITED STATES v.). See Case No. 15,758.

MERCER, The ROBERT J. See Case No. 11,891.

Case No. 9,434.

The MERCHANT.

[Abb. Adm. 1; [1] 5 N. Y. Leg. Obs. 363.]

District Court, S. D. New York. May, 1847.

PLEADING IN ADMIRALTY—JOINDER OF CAUSES—WAGES—MONEYS ADVANCED—IN REM—IN PERSONAM—JOINT LIABILITY.

1. A claim for seamen's wages and a claim for moneys advanced to the use of the ship may be united in one action against the ship.

[1] [Reported by Abbott Brothers.]

2. A seaman who claims to recover both for wages and for moneys advanced to the ship's use, may join in a libel in rem with a co-libellant claiming wages only.

3. Where the vessel is liable to two libellants for wages, for which, under the practice of the court in respect to the consolidation of suits, they may be compelled to sue in common, they may join in one action in rem, not only in suing for the common demands, but also in respect to other claims which are peculiar to each.

4. The history of the distinction between proceedings in rem and in personam, reviewed.

[Cited in The Richard Busteed, Case No. 11,764; The City of Norwalk, 55 Fed. 111.]

5. Where both the vessel and the master or owner are conjointly liable, the personal remedy, and the remedy against the vessel, may be sought in one and the same action.

[Cited in The J. F. Warner, 22 Fed. 344.]

6. Rule 13 of the supreme court interdicts the blending of an action against the owner personally, with one against the vessel, for the recovery of wages.

7. A claim for wages, and for moneys advanced to the use of a vessel on the part of one libellant, cannot be joined, in an action in personam, with a separate claim for wages alone, on the part of another.

This was a joint libel filed by William Johnson and Benjamin Griffiths against the sloop Merchant, in rem, and also in personam, against her master, John Kenan, and her owner, Joshua Jones, to recover wages and for moneys paid to the use of the vessel. The libellant Griffiths, averred in the libel that he was employed on board the sloop, running between New York and Newburg, upon a contract for wages, at $30 per month; and that he served ten days, for which he claimed $10. The libellant Johnson, alleged that he was likewise employed on board the sloop at the same time; that no specific agreement was made with him for wages; that he served for twenty-one days, and that his services were worth $2.25 per day, and he accordingly claimed for them $47.25. He also showed that he had made advances of cash for the use and service of the vessel, amounting to $83.75, for which he claimed to recover. The libel prayed a decree against the vessel, and also against the master and against the owner.

The owner filed the following exceptions to the libel:—(1) That a demand for wages and a demand for moneys advanced to the use of the vessel, could not be joined in one libel; and that at least they could not be prosecuted in rem and in personam, in one action. (2) That a suit for wages could not be maintained against the vessel, master, and owner conjointly. (3) That the demands of the two libellants could not be joined in one action in personam against the respondents.

The cause now came before the court upon these exceptions.

Edwin Burr, in support of the exceptions.

Alanson Nash, opposed.

BETTS, District Judge. The strict rules of the common law in respect to the unity of the cause of action, or the community of interest or of responsibility of parties to actions, are not observed in the maritime courts. The practice in those courts is at least as liberal and comprehensive as that pursued in equity. In admiralty, the libel or petition is employed to present the case of the prosecutor upon which he desires the interposition of the court in his behalf. Such a case may be composed of wrongs to the person of the prosecutor or to his property, or of a breach of contract, or of omission to do what he is rightfully and equitably entitled to have performed. The libellant Johnson, can accordingly properly bring his single action in this court, for wages earned, and materials and supplies furnished the vessel, provided he establishes a case falling within the jurisdiction of the court; and in that respect his remedy would be the same whether he prosecuted the vessel in rem or the parties liable to him in personam. The admiralty adopts the rule of the civil law, respecting the cumulation of actions (1 Browne, Civ. Law, 446), to avoid multiplicity of suits. Griffiths has not a right concurrent with Johnson in the whole subject-matter in suit, but their demands are of the same kind, so far as wages are concerned, the libellants having both served at the same time on board this vessel, although not for equal periods.

From this view of the subject, it follows that had these libellants commenced separate actions against the vessel for their wages, the court, at the instance of the respondents, would have compelled a consolidation, as contemplated by the act of July 20, 1790 (1 Stat. 133, c. 29, § 6), which prescribes that in this class of cases, "all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel), shall be joined as complainants;" or, would have prohibited the recovery of costs in more than one suit; and as in such case the contestation of the claims of each libellant is separate, as much so as if those claims were prosecuted in distinct actions, there would be neither incongruity nor inconvenience in permitting the libellants to connect with their several claims of wages such other demands as each party might be allowed to charge upon the vessel; and accordingly, the actions being united for one purpose, there would be no just ground of exception that in other respects each embraced particulars which could not be of themselves the subjects of a joint suit. Assuming that Johnson has a lien on the vessel for wages and money advanced for her necessities, and Griffiths a lien in common with him for wages only, I think no exception lies to the joinder of both demands in one libel. For the vessel being deemed liable to both for the wages, which must be sued for in common, each party may fitly pursue against her in the same action such other demands as are peculiar to himself. It is not to be sup-

posed that congress intended by that enactment to save vessels and owners from multiplicity of actions for wages, by interfering with and inhibiting the right of each seaman, as it exists at law, to connect other demands with his individual suit for wages.

A greater difficulty is presented by the other aspect of the first exception; whether these different demands can be prosecuted in personam against the respondents by joint action. The admiralty had an established jurisdiction in personam over matters falling within its cognizance, long before a remedy was afforded in rem, other than upon express hypothecations. Browne supposes that suits were originally in rem on the instance side of the court. 2 Browne, Civ. Law, 396, note. The remedy in rem is undoubtedly the more useful and desirable one, but there are no traces of its exercise in the English admiralty until long after actions in personam had been of common use. Godolphin, in his Treatise on the Jurisdiction of the Admiralty, published in 1661, points out the method in which the jurisdiction was exercised, as derived from the Consolato del Mare. He says the proceedings were summary, by warrant of arrest, and caution for the appearance of the party arrested. Godol. Adm. Jur. 41. So, also, it manifestly appears in the stipulation between the law judges and judge in admiralty, of May 15, 1575 (Zouch, Adm. 120), that the arrangement of jurisdiction had relation to its exercise in the arrest of the party alone. Throughout the first thirty chapters of the Consolato del Mare, which have relation to the enforcement of maritime contracts, the proceedings of the consular courts and courts of appeal are by personal summons or citation of the parties sought to be charged, and by decrees against them personally; which, like our judgments at law, could be executed upon the property of the debtor (2 Consol. del Mare, par Boucher, 9, 33), and in the subsequent chapters, in which provision is made for the sale of vessels to satisfy what are now regarded as maritime liens, it is at best equivocal whether the sales were not made by force of executions on judgments or decrees first obtained in personal suits, and not by the direct condemnation of the vessels or merchandise. So Clarke, in his Admiralty Practice, does not, as Browne intimates, merely treat first of proceedings in personam, but he views the process against vessels and property by warrant of arrest or sequestration, as auxiliary only to the suit in personam, and employed to constrain the appearance of the real party to be charged (title 28, and Oughton's Notes), and this was clearly so by the civil law (Wood, Civ. Law, bk. 4, c. 3, § 2).

The method of initiating suits in the English admiralty by arrest of the vessel, is declared to be of ancient use (The Dundee, 1 Hagg. Adm. 124; 2 Chit. Prac. 536), but at what point of antiquity it became a remedy of the court, is not traceable from the published decisions or rules. Evidently it must have been posterior to the compilation of Clarke's Praxis in the reign of Elizabeth, and which was first published in 1679,—Brevoor v. The Fair American [Case No. 1,847],—because that form of action is not treated of by Clarke. Title 28 of his work has reference to proceedings against property to compel the appearance in personam of the respondent.

There is certainly no clear authority showing that actions in rem preceded those in personam, as the general means of exercising the jurisdiction of the court; far less is there any to prove that the latter class of actions derived their qualities from the processes or rules of pleading employed in the former. Each form of action is distinct and independent of the other in respect to the methods of procedure employed, and (with a few exceptions) in respect to jurisdiction over the subject-matter upon which they may act. Suits in rem and in personam are by no means convertible, and if in some instances they are concurrent, there are numerous cases in which one must be employed to the exclusion of the other. Willard v. Dorr [Case No. 17,679]; The Packet [Id. 10,654]; Hammond v. Essex Fire & Marine Ins. Co. [Id. 6,001]; The George [Id. 5,329]; The Grand Turk [Id. 5,683]; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; Drinkwater v. The Spartan [Case No. 4,085]. It therefore does not follow that because these libellants may, or even must join in an action for wages against a vessel, that the like rule applies when the prosecution is in personam alone. These observations are intended to meet that part of the argument which regards the proceedings in this case as two separate suits, each of which is to be upheld or discharged upon principles applicable to it if prosecuted as a sole action; and they are made for the purpose of limiting the operation of the decision to the present case as it stands upon the pleadings.

The practice in this district has always sanctioned a proceeding conjointly in rem and in personam in cases where the party was entitled to the public remedy. See the case of The Zenobia [Case No. 18,208], decided in this court in July, 1847. Betts, Adm. 20. Such it is believed is the common course of admiralty courts in the United States. Abb. Shipp. 783, and note. This avoids multiplicity of suits, and saves needless repetitions of proofs and discussions, because the same facts, and between the same parties, must be in contestation in each action. In the instance of seamen suing for wages, the same libel was allowed to pray the arrest and condemnation of the vessel, etc., etc., and process and a decree against the master and owner, to satisfy the wages in arrear. The like result is obtained in the English admiralty, by compelling the parties chargeable personally to come into the suit in rem, and give their absolute appearance. This subjects them and their sureties to satisfy the

decree of the court (The St. Johan, 1 Hagg. Adm. 334), and is equivalent to an arrest and decree in personam. In this case, accordingly, the proceeding in personam is not to be regarded as an independent action, subject to the rules which would govern it in that form, but as auxiliary and concomitant to the suit in rem for wages, which must then be conducted in the name of both parties, and may have also the advantage of a personal decree at the same time.

But it is argued that, in this point of view, the libellants had no authority to unite the owner and master with the vessel; rule 13 of the supreme court, declaring that, "in all suits for mariners' wages, the libellants may proceed against the ship, freight, and master, or against the owner and master alone in personam." Although the question of who may be responsible to a demand is one of general jurisprudence, yet the form and the arrangement of process by which the obligation is to be enforced, is matter of practice. And, according to the provisions of the act of congress of August 23, 1842, the supreme court is vested with authority to impose on inferior courts an absolute law in this respect (5 Stat. 518, § 6), and the court, under that power having proceeded to regulate this subject-matter, their regulation must be regarded complete and exclusive, inhibiting what it does not allow, as well as governing what is fixed by positive appointment. Gibbons v. Ogden, 1 Wheat. [14 U. S.] 1. The remedy, therefore, in admiralty, must be in conformity to the direction of the supreme court rules; and rule 13, must, I apprehend, be accepted as having determined this point, whether regarded as matter of practice or pleading, by designating the methods in which this remedy is to be pursued, and thus also excluding all others. At least, it limits the scope of actions in rem and personam conjointly, when prosecuted for the recovery of wages, to the vessel, freight, and master, deferring the remedy in personam to a separate suit, where the owner is made a party. It is difficult to perceive the policy which induced this change of practice, or why the owner is not as aptly connected with the vessel as the master, in a proceeding involving their common liability, particularly when that of the owner is primary and coupled with an interest, whilst that of the master is only incidental to his office. That this distinction of actions is, however, considerately made, is obvious from rules 12, 14–17, and I feel constrained to say, that suitors are by force of rule 13, now interdicted from blending an action against the owner personally with one against the vessel, for the recovery of wages. The second exception must, accordingly, be allowed in favor of the respondents.

The third exception is overruled. The two seamen can rightfully join in a prosecution for wages, and each is entitled to unite with his demand other claims in his behalf, being liens on the vessel. This exception is not extended to the joinder of the master and owner with the proceeding in rem. The exception, however, raises the general question whether the libellants can proceed jointly against the master and owner, in personam, for the demands put forth by the libel. Clearly, at common law, parties must show a common interest in the subject-matter of the suit, to be enabled to prosecute it in their joint names. It is not sufficient that their respective claims are of the same character or kind, upon contracts express or implied, liens or other liabilities; but it must furthermore appear that each plaintiff is entitled to a common share in the recovery. 1 Chit. Pl. 8. The same is the case in equity, and a demurrer will lie for multifariousness for joining parties who have distinct interests. Edw. Parties, 10; Story, Eq. Pl. § 279; Yeaton v. Lenox, 8 Pet. [33 U. S.] 123. The civil law does not seem to have laid down rules in relation merely to parties uniting in an action, although it did regulate the joinder of different causes of action in one suit; usually prohibiting the union of remedies which were dissimilar in kind (24 Poth. Pand. 368; Dig. lib. 50, tit. 17, art. 431; Wood, Civ. Law, 372), but permitting to be embraced, in one libel, demands arising from different sources, as from personal obligation, hypothecation, &c. Code, lib. 7, tit. 40. Nor do I find that the practice of ecclesiastical courts made provisions specifically, respecting omitting or bringing into suits a multiplicity of parties. 2 Chit. Gen. Prac. 481–489.

The principles and doctrines of the general law ought, accordingly, to be applied to proceedings in admiralty, ex contractu, so far as they govern methods of pleading. This is clearly so, as to the essential components of a libel, plea or exception; and the convenience and usefulness of conformity, in the structure of proceedings in the different courts, is a persuasive reason for adhering to the well-defined and understood course of other courts, in the pleadings in admiralty, and would induce the court to be readily guided by those rules, when not infringing any principle or object of the remedies obtaining here. In this view of the subject, I am inclined to think actions in personam in admiralty ex contractu et è diverso intuitu, must be governed by the rules applicable to them in other courts in respect to the competency of parties to unite in their prosecution; and that the present case is clearly one in which such joinder could not be allowed, if the suits had been against the respondents solely. In actions in tort, the rule is different. American Ins. Co. v. Johnson [Case No. 303]; The Amiable Nancy [Id. 331]; same case, 3 Wheat. [16 U. S.] 546.

I do not intend in this case, to decide that the crews of sea-going vessels must sever in actions for their wages earned on a common voyage; or that parties whose rights spring out of a common cause of action must do so; but shall leave these questions to be disposed

of as they may arise. But engagements for services on board river craft navigating between ports of this state, and for different periods, and at different wages, ought not to be distinguished in the modes of prosecution in this court against parties personally, from like suits in the courts of law. Questions have been raised and argued, upon the import and effect of the supreme court rules 12, 14–17; but, as they do not bear upon the points now decided further than has been already noticed, I shall forbear any remark upon them, other than to say that a remedy for supplies or materials furnished the vessel cannot be had against the master and owner, in connection with the vessel, but only against one of them. Rule 12.

The decision of the court upon the exceptions is: (1) That these libellants cannot maintain a joint action, in personam, solely upon the matter set forth in the libel. (2) That the libel is maintainable against the vessel in rem, in behalf of both parties, and that a decree may be taken for wages against both the vessel and master. (3) That no recovery or decree can be had in this form of the action against the owner. (4) That Johnson can have a decree for supplies, &c., against the vessel, and against either the master or owner at his election, but not against both.

Decree to be entered accordingly.

Case No. 9,435.

The MERCHANT.

ACOSTA et al. v. The MERCHANT.

[4 Adm. Rec. 544.]

District Court, S. D. Florida. Dec. 9, 1851.

SALVAGE—AMOUNT—UNITED STATES MAILS.

[A schooner laden with rice, and carrying the United States mails, went upon Pacific Reef, and became a total loss. Two small vessels, carrying 22 men, saved the mails, $900 worth of cargo, $7,760 in specie, and three hundred and fifty dollars worth of surveying instruments, and carried them 150 miles into port. It appeared that the specie and surveying instruments could have been landed by the schooner's boats on a barren island near by. *Held*, that the salvors should be allowed 40 per cent. on the cargo, 6 per cent. on the specie, and 15 per cent. on the surveyors' instruments; but there could be no allowance for the mails, as they could not be sold for salvage.]

[This was a libel in rem by Manuel Acosta and others against the cargo and materials of the schooner Merchant for salvage.]

Samuel J. Douglas, for libellants.

Wm. R. Hackley, for respondent.

MARVIN, District Judge. The principal facts in this case may be briefly stated as follows: The schooner Merchant, from Charleston, laden with rice, and having on board the Key West, Havana, and California mails, in the night of the 27th of November, ran ashore on that part of the Florida Reef known as the Pacific Reef, situated near Cape Florida, and about one hundred and fifty miles from this port, and, soon after striking, bilged, filled with water, and became a total loss. In the morning the smack I. A. Latham (Manuel Acosta, master), of the burthen of 63 tons, and carrying a crew of 7 men, and the sloop Texas (Wm. H. Bethel, master), of 97 tons and 15 men, both engaged in the business of wrecking, arrived at the wreck, and at the request of the master, C. W. Westendorff, took on board their vessels the mails, the passengers, their baggage, and the materials of the vessel, and so much of the cargo as could be got, and as was worth saving, and brought them to this port. On their arrival, they delivered the mails to the agent of the contractor, to be forwarded. The cargo and the materials have been sold, producing the sum of $955.87. The Merchant had also on board $7,760 in specie, and three boxes of surveying instruments belonging to the United States, and then in the care of Mr. Totten, a passenger of the coast survey, and valued at $350. The specie and surveying instruments were brought to this port by the libellants.

It is very evident, that the cargo and materials saved would have been wholly lost but for the services of the salvors. As to these, I think forty per cent. of the amount sales is a reasonable salvage to be allowed the libellants. It makes $382.34.

It is equally clear, that the mails, the specie, and the surveying instruments were in no considerable peril of loss; for Captain Westendorff could have removed these to the land, in his boats; and without doubt would have done so had not the assistance of the libellants been offered. But had he removed them to the shore, they would still have been one hundred and fifty miles from any port, or from any place where they could be used, or made available to any practical purpose,—They would have been on a barren island, and to have removed them to this or any other port would have required a vessel, and he had none at his command, nor could one be procured, but by waiting for the arrival of some wrecking vessel cruising on the coast. Under these circumstances, I think the libellants have rendered to the owners of this property a very substantial and real service, that ought to be reasonably rewarded. The facts and circumstances fully considered, I think six per cent. upon the specie, or $465.60, and fifteen per cent., or $52.50, upon the value of the boxes of instruments, will be a reasonable compensation for the service rendered. The aggregate of these sums is $900.44; and allowing the one-half thereof to the owners of the wrecking vessels, and dividing the residue among the men the share of each will be about fifteen dollars.

In making this decision, I have allowed nothing to the salvors for their services in bringing the United States mails to this port. Under the circumstances, this was a valuable

and important service; but it would be unequal and unjust to increase the amount of the salvage upon the cargo and materials and upon the specie in order to compensate the salvors for this service; for this would be in effect to take the money of the owners or underwriters of this property to pay a claim they are in no manner liable for. Although the property of the United States is no more exempt from the payment of salvage than that of an individual, and in like manner may, in general (with exceptions founded on public policy), be retained by the salvor, or sold by order of the court for the payment of salvage, yet the mails of the United States cannot be considered or treated in this regard as property or as liable to detention or sale. The mail bags may perhaps be considered as property, but not their contents; and both, upon principles of public policy, would be exempted from detention or sale, upon a claim of salvage. In the present case, I think justice demands, that a moderate and reasonable sum should be paid the libellants for their services in taking the mails from the wreck, and bringing them to this port. But this court has no means by which to make such compensation.

It is ordered, adjudged, and decreed: That the libellants have, recover and receive in full compensation for their services in saving the cargo and materials of the schooner Merchant as by them alleged forty per cent. ($382.34) upon the amount sales thereof; and that they recover and receive six per cent. ($465.60) for their services in bringing the specie to this port, and fifteen per cent. ($52.50) upon the value of the boxes of instruments for like services; and that, upon the payment thereof and their proper proportion of costs, the marshal restore said specie and boxes of instruments to the claimants, for and on account of whom it may concern. That the clerk, in taxing the costs in this case, charge each species of property with the wharfage, storage, or other charges properly belonging to it; and that he apportion the costs in this suit between the different claimants or species of property, according to their respective value or amounts, and charge each species with its proper amount thereof.

Case No. 9,436.

The MERCHANT.

[4 Blatchf. 105.] [1]

Circuit Court, S. D. New York. Sept. 25, 1857.

APPEAL—LIBEL DISMISSED—FOR WANT OF PROSECUTION—FINAL DECREE—REMEDY.

1. No appeal lies to this court from a decree of a district court, in admiralty, dismissing a libel in rem for want of prosecution.

[Followed in The Delaware, 33 Fed. 589.]

2. Such a decree is not final, or conclusive of the subject-matter of the litigation between the parties.

3. The remedy of the aggrieved party is to bring a fresh suit.

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

This was a libel of information, in rem, filed in the district court, by the United States, against the schooner Merchant and her cargo, to forfeit them, on the ground that the vessel was fitted out and equipped with the intent to engage in the slave trade. It was filed on the 21st of April, 1857, and the vessel and cargo were taken into the custody of the marshal, on the 23d of the same month. Vincent Beiro intervened, and claimed title to the cargo, and put in an answer to the libel. Thomas Carlin also intervened, claiming title to the vessel, and put in an answer. On the 12th of May, the proctor for the libellants obtained an order for leave to amend the libel. This amendment was filed on the 21st of the same month. The cause was placed on the calendar, and, at a stated term of the district court, held on the 5th of June, it was called in its order for hearing, by the proctors for the claimants. The proctor for the libellants declining to proceed in the cause, his default was entered, and the libel was dismissed. The proctor for the libellants, however, stipulating that he would proceed and try the cause on the next Wednesday, and that, in case of failure, a decree dismissing the libel might be entered, and the proctors for the claimants consenting, the cause was ordered to be restored to its place on the calendar. At a stated term of the court, held on the 18th of June, the cause was again regularly called on the calendar for hearing by the proctors for the claimants. The proctor for the libellants again declined to proceed, and moved a postponement, which motion was resisted. The court refused to postpone the cause, and an order was entered, agreeably to the terms of the previous order dismissing the libel for want of prosecution. [Case unreported.] Thereupon an appeal was taken to this court by the libellants. A motion was now made by the proctors for the claimants to dismiss the appeal for want of jurisdiction, upon the ground that the order or decree of the court below dismissing the libel, was not a final decree.

John McKeon, Dist. Atty., for libellants.
Charles Donohue, for claimants.

NELSON, Circuit Justice. By the 39th rule of the supreme court, in admiralty, it is provided, that if, in any admiralty suit, the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dis-

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

missed, with costs; and, by the 40th rule, that the court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which the decree may have been against the libellant for contumacy and default, and grant a rehearing, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms as the court may direct. The proceedings in the court below, in this case, on the refusal of the proctor for the libellants to prosecute his suit, were, as I understand them, taken, substantially, in accordance with the practice prescribed by the 39th rule, and are analogous to those in a common law court, where the plaintiff is non-prossed for not prosecuting a cause there, as required by the rules and practice of that court. The decree or judgment in such cases is not a final decree, and is not the subject of an appeal or writ of error, unless such a review is specially provided for by law. The remedy of the party, if he fails to procure the order of dismissal to be set aside, and the cause to be reinstated in court, is to bring a fresh suit. The order or decree of dismissal is not final, or conclusive of the subject-matter of the litigation between the parties.

In the case before me, if I should entertain the appeal and reverse the order of the court dismissing the libel, I could not remit the proceedings to the court below, and direct that court to proceed in the cause, as I possess no such power; and, if I should retain the cause, and undertake to hear it in this court, I should be usurping the jurisdiction of the district court, which has exclusive original cognizance in all such cases. It would be purely the exercise of original jurisdiction in a case in admiralty. I am satisfied, therefore, that I have no jurisdiction in the case, and that the appeal must be dismissed.

Case No. 9,437.

MERCHANT et al. v. LEWIS.

[1 Bond, 172.] [1]

Circuit Court, S. D. Ohio. Dec. Term, 1857.

PATENTS — INFRINGEMENT — COSTS — VERDICT — TRIPLE DAMAGES—DISCRETION OF COURT.

1. Under section 14 of the patent act of 1836 [5 Stat. 123], which provides substantially that where a verdict is rendered for an infringement of a patent right, it shall be competent for the court to render judgment for any sum not exceeding three times the amount of the verdict, as the circumstances of the case may require, with costs, the right of the plaintiff for costs follows from a verdict in his favor for any amount of damage, whether nominal or compensatory, and without any reference to the action of the court in adjudging an increase of damages.

2. The discretion given to the court by said section was clearly to meet the case of a willful and aggravated violation of a patent right, in which the jury had failed to do full justice to the plaintiffs.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

[This was an action by Merchant and Humphrey against James Lewis to recover damages for the infringement of letters patent granted to Zebulon and Austin Parker, Oct. 19, 1829.]

Lee & Fisher, for plaintiffs.
Corwin & Probasco, for defendant.

OPINION OF THE COURT. This is an action to recover damages for an infringement of the exclusive right of the plaintiffs to the improved water-wheel, patented by Zebulon and Austin Parker. Upon the trial, the jury returned a verdict against the defendant for five dollars; and judgment has been entered on the verdict, including full costs. The defendant has filed a motion for a retaxation, on the ground that a verdict in a patent case for nominal damages does not entitle the plaintiff to costs. The decision of the question presented on this motion depends wholly on the construction to be given to section 14 of the patent act of 1836 (5 Stat. 123), which provides in substance that where a verdict is rendered for an infringement of a patent right, it shall be competent for the court to render judgment for any sum not exceeding three times the amount of the verdict, as the circumstances of the case may require, with costs.

It is insisted by the counsel for the defendant, that under the section referred to, the plaintiffs can not recover costs, except in cases where the damages found by a jury have been trebled by the court. This would seem to be an exceedingly technical construction of the statute, not required by its phraseology, and obviously in conflict with its intention. The right of the plaintiff to costs follows from a verdict in his favor for any amount of damages, whether nominal or compensatory, and without any reference to the action of the court in adjudging an increase of damages. The discretion given to the court was clearly to meet the case of a willful and aggravated violation of a patent right, in which the jury had failed to do full justice to the plaintiff. In such a case costs are awarded; but there is nothing to negative the plaintiffs' right to recover them, if the court should refuse to exercise the discretion which the statute confers. A verdict for damages, whatever may be the amount, implies that the defendant has been a wrong-doer in the unauthorized use of the plaintiff's exclusive right under his patent; and such a verdict will carry costs. It is not a just inference, in a patent right case, that because nominal damages are found by the jury, the action is necessarily frivolous or vexatious. It happens, not unfrequently, that the owner of a patent is compelled, for the protection of his rights, to sue for an infringement, under circumstances in which he neither seeks to recover nor asserts a right to anything beyond mere nominal damages. This may be necessary for the establishment of his patent, and to prevent infringements. And, as by the legislation of

congress, the circuit courts of the United States have exclusive jurisdiction in patent cases, it would be a great hardship if he were subjected to the costs in thus asserting his legal rights.

It may also be remarked, in answer to the views urged by the defendant's counsel, that if sustainable it would result that costs against a defendant could not be recovered in any patent case where the verdict was less than five hundred dollars, unless the court, in its discretion, should treble the damages found by the jury. Such a construction would most injuriously affect the rights of many meritorious patentees, and would be in opposition to the spirit and design of the patent laws. The case referred to by counsel, Kneass v. Schuylkill Bank [Case No. 7,876], in which it was ruled that costs were not recoverable by the plaintiff in a patent case, unless the judgment amounted to five hundred dollars, arose under the patent act of 1793 [1 Stat. 318]. By section 5 of that act the rule of damages was three times the price for which the thing patented was usually sold or licensed; but there was no provision giving the plaintiff a right to costs. The court held that as the statute did not give costs, they could not be recovered unless the judgment was for five hundred dollars or upward. Then, by the provision of section 20 of the judiciary act of 1789 [1 Stat. 83], the plaintiff was entitled to full costs. The motion for a retaxation is therefore overruled.

[For other cases involving this patent, see note to Parker v. Hatfield. Case No. 10,736.]

MERCHANT (RUTTER v.). See Case No. 12,179.

Case No. 9,438.

MERCHANTS' & MANUFACTURERS' BANK v. STAFFORD NAT. BANK.

[44 Conn. 564.]

District Court, D. Connecticut. May, 1877.

BANKS AND BANKING—NEGLIGENCE IN COLLECTING DRAFT—LIABILITY OF BANK.

[A draft payable at sight was left with plaintiff bank for collection, which forwarded it to defendant bank with instructions to return without protest if not accepted or paid. Defendant promptly presented the draft, and the drawee said he would look up the matter. Defendant bank then mislaid the draft, and did nothing further for several weeks. Immediately after presentation of the draft the drawee wrote the drawers that it was paid; and his letter being shown to plaintiff bank, it thereupon paid to the drawers the amount of the draft. The drawee subsequently ascertained that he owed the drawer nothing, and the draft was not paid. *Held*, that defendant bank was guilty of negligence in not immediately notifying plaintiff as to the state of affairs, and was therefore liable for the amount of plaintiff's loss, it appearing that the drawers had no visible property from which the amount could be made by legal proceedings.]

At law.

SHIPMAN, District Judge. This is an action of assumpsit to recover damages for the alleged breach of contract by the defendants in not collecting a draft which was forwarded to them for collection and for non-compliance with their undertaking as collecting agents. The action was tried by the court, both parties having by written stipulation waived a trial by jury. The facts which were found to have been proved on the trial are as follows: Both parties to the suit are national banking associations. S. Folsom & Co., of Detroit, Michigan, endorsed and delivered for collection, on August 30th, 1876, to the plaintiffs, a bank in Detroit, said Folsom & Co.'s draft of that date for $500 upon Julius Converse, treasurer of the Mineral Springs Manuf'g Co., payable at sight to the order of the drawers, at the Stafford National Bank. On the same day the plaintiffs forwarded said draft to the defendant corporation, endorsed, "Pay R. S. Hicks, cashier, or order, for collection," and attached to the draft the following notice: "If not accepted or paid, return without protest." The draft was enclosed in a letter to the defendants' cashier, of which the following is the material portion: "I enclose for collection and remittance to the Merchants' Natl. Bank, N. Y., for our account. Return at once, if not paid. Yours truly, F. W. Hayes, Cashier. No protest. $500." The letter and draft were received by the defendants on September 1st or 2nd, who presented it for acceptance to the drawee prior to September 4th. He replied he would look up his account and inform the cashier in regard to payment. Mr. Converse, as treasurer, was also advised by the drawers by letter of Aug. 30th, that such a draft had been forwarded, and on Sept. 4th wrote them as follows: "The $500 draft has been received and paid. Don't draw any more. The balance that may be due on what you have brought, if any, we will remit for when we get your full account." Upon the receipt of this letter on the afternoon of Sept. 5th the drawers showed it to the plaintiffs, who, believing, from its contents that the draft had been duly paid to the defendants, paid the drawers $500, less $1.25 charges of collection. Mr. Converse was also president of the defendant corporation, which fact was known to the plaintiffs. After Sept. 4th Mr. Converse wrote S. Folsom & Co. making inquiries in regard to items of their account which were not understood. Not hearing from them, or not receiving satisfactory replies, he began to investigate the account, and ascertained that he had overpaid them $300, not including the $500 draft. When he commenced this investigation he did not know that the draft had not been paid by the defendants. Meanwhile the draft had been mislaid in the defendants' bank, and had escaped the attention of the cashier, who had no further conversation with Mr. Converse on the subject until Sept. 22nd. On that day Mr. Converse directed the cashier to return the draft unpaid, who accordingly on

September 22d wrote to the plaintiffs for the first time on the subject of the draft and returned it unpaid. The plaintiffs thereupon demanded repayment from S. Folsom & Co., which was refused. Folsom & Co. are solvent, and ordinarily pay their bills, but a judgment against them cannot be collected from any visible property without difficulty. If the defendants had written the plaintiffs on or prior to Sept. 4th that the draft had not then been paid, the defendants would not have paid Folsom & Co. The amount of the draft has never been paid to the defendants, and no part of the sum has ever been repaid to the plaintiffs.

The principles of law which I deem to be applicable to the case upon the foregoing facts, are as follows: The relation which the defendants sustained to the plaintiffs was that of an agent who has undertaken with his principal upon sufficient consideration to perform a certain duty. The general duty of an agent who receives for collection a bill of exchange is to use due diligence in presenting the same for acceptance, and in presenting it for payment, if it has been accepted, and to give the holders and other parties to the paper, by the next day's post, the notices of dishonor required by law in case acceptance or payment is refused, and to give to his principal any special notice which is required by the terms of the instructions to the agent, or of the contract which the agent has entered into with his principal. The agent is also required to protest, in case of non-acceptance, or non-payment, if protest is not forbidden, and to send the protest to the holder. Walker v. Bank of New York, 5 Seld. [9 N. Y.] 582; Hamilton v. Cunningham [Case No. 5,978]. The special instructions which were given in this case to the defendants, which instructions by the acceptance of the agency they undertook to observe in substance, were as follows: The draft was not to be protested, but was to be returned at once to the plaintiffs if not paid; if paid, the amount was to be remitted to a specified bank in the city of New York. It thus became the duty of the defendants to present the draft for acceptance and if acceptance was refused, or payment was not made (no days of grace being allowed in this state upon sight drafts) to return the draft at once, or to notify the plaintiffs of the delay in payment. The draft was received on Sept. 1st or 2nd. It was promptly presented for acceptance, but without any formal acceptance so far as the defendants were aware. No further communication was had with the drawer, and the draft was mislaid until Sept. 22nd, when for the first time any information was given to the plaintiffs. The defendants do not seem to have appreciated the duties which devolved upon them by reason of the agency. They were manifestly guilty of laches, and, it is not denied that a collecting agent may recover from his agent the loss which the former has sustained by reason of the laches of the latter. Commercial Bank v. Union Bank, 11 N. Y. 203.

The important question however in this case is as to the amount of damages which were sustained by the plaintiffs in consequence of the defendants' neglect. The agent by neglecting any part of his duty does not necessarily become responsible for the whole debt. The damages are not necessarily commensurate with the amount of the draft which has been remitted for collection. "A person acting on commission, who by his misconduct has brought loss upon his principal, is responsible to the precise extent of the loss produced by that misconduct." Hamilton v. Cunningham, supra; Van Wart v. Woolley, 3 Barn. & C. 439, Moody & M. 520. In this case the payment was made by the plaintiffs upon the strength of the drawee's letter of Sept. 4th, and I have been in some doubt, the payment to Folsom & Co. having been made in reliance upon the drawee's assertion that the draft had been paid, whether the defendants, although liable for the non-performance of their duty, were liable for the full amount which was paid to Folsom & Co. But the duty of the defendants was to return the draft at once if not paid, or inform the remitter of the delay in payment. If the defendants' cashier had discharged his duty, and had informed the plaintiffs of the non-payment, no injury would have accrued to the plaintiffs, who would have been seasonably advised of the mistake of the drawee.

Furthermore, if the defendants had promptly performed their duty, and obtained an answer to their demand of payment the draft would either have been paid on September 4th, for the drawee was apparently then ready to pay, or on the same day they would have notified the plaintiffs of non-payment. In either case no loss would have been sustained by the plaintiffs. Although Folsom & Co. are liable to the plaintiffs for the amount of money which they paid through mistake of fact, which amount was not actually due to Folsom & Co. from the drawee (Bank of Orleans v. Smith, 3 Hill, 560; Wingate v. Mechanics' Bank, 10 Pa. St. 104; East Haddam Bank v. Scovil, 12 Com. 303); yet the loss having actually occurred to the plaintiffs through the laches of the defendants, and the amount of that loss having been ascertained, the plaintiffs may look also to the defendants for satisfaction. Judgment should be entered in favor of the plaintiffs for $498.75, and interest from Sept. 5th, 1876.

Case No. 9,439.

MERCHANTS' & MANUFACTURERS' NAT. BANK v. WHEELER.

[13 Blatchf. 218;[1] 3 Cent. Law J. 13; 22 Int. Rev. Rec. 42.]

Circuit Court, S. D. New York. Dec. 21, 1875.

REMOVAL OF CAUSES—AT WHAT TERM—PLEADINGS NECESSARY.

1. Under section 3 of the act of March 3d, 1875 (18 Stat. 471), which requires the application to the state court for the removal of a cause into the circuit court of the United States, to be made "before or at the term at which said cause could be first tried," the term referred to is a term occurring after the passage of the act, and not a term before such passage.

[Approved in Crane v. Reeder, Case No. 3,356; Meyer v. Delaware R. Const. Co., 100 U. S. 473; Woolridge v. McKenna, 8 Fed. 666; Re Iowa & M. Const. Co., 10 Fed. 405.]

2. Where an action at law removed under said act is at issue when removed, no other or different pleadings are necessary than those in the state court.

[This was an action by the Merchants' & Manufacturers' National Bank against George M. Wheeler. Heard on motion to remand cause to the state court.]

Stillman K. Wightman, for plaintiffs.

Thomas M. Wheeler, for defendant.

JOHNSON, Circuit Judge. The defendant's first application to remove the cause seems to have been abandoned on account of defects supposed to exist in the papers presented to the state court. The subsequent application, which is to be regarded as made on the 27th of April, 1875, avoided the defects of the papers used on the prior application. The rule being now settled, that the application, if sufficient, by law is effectual to remove the cause, however it may be disposed of by the state court, the question now is whether the defendant was in time under the act of March 3d, 1875 (18 Stat. 470). The act was passed after the commencement of the March circuit, and the application was made during the succeeding circuit term, and before the actual trial of the cause. If, therefore, the statute means, by the phrase "before or at the term at which said cause could be first tried," a term occurring after the passage of the act, then, beyond question, the application was in time. That such is the meaning of the statute many considerations concur to prove. The act defines anew the jurisdiction of the circuit courts, making it substantially as extensive as the constitution permits, excepting cases where the supreme court has original jurisdiction. It then proceeds to declare, in substance, that every civil suit of which original jurisdiction might be taken by the circuit court, shall, if brought in a state court, be removable into the circuit court, whether then pending or thereafter brought. This is the grant of authority, and it defines the subjects on which it is to operate, as all suits, pending or to be brought. All are to be removable. What follows is merely detail as to the manner in which the power is to be exercised. It should receive a construction in harmony with the grant of power. By section 3, the party seeking a removal, is to apply "before or at the term at which said cause could be first tried." If this is taken to mean a term which occurred before the passage of the law, it to that extent renders nugatory the provision making all suits removable, and excludes from the privilege that large number of cases in which a term at which the cause could be tried had previously passed by. There is no reason for such a distinction, and the clause should be construed to relate to a term occurring after the act in question became a law. The question has been examined and decided in the same way by Judge Swing, of the Southern district of Ohio, in Andrews v. Garrett [Case No. 375].

I consider this cause as removed to this court according to law, and the motion to remand it should be denied.

A motion is also made to set aside, as irregular, a rule entered in the common rule book, on the defendant's motion, requiring the plaintiffs to file and serve a copy of the declaration, or be non-prossed. The cause was at issue in the state court, and a copy of the record there had been entered in the circuit court, as the statute requires, and then the statute goes on to prescribe, that, "the said copy being entered, as aforesaid, in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court." As the mode of pleading in this state is the same in the United States courts as in the state courts, in actions other than in equity or admiralty, by force of section 914 of the Revised Statutes, no other or different pleadings were necessary than those in the state court, and the rule entered was, therefore, irregular. Lewis v. Gould [Case No. 8,324].

These rules must, on the plaintiffs' motion, be set aside.

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

MERCHANTS', ETC., BANK (SANDY RIVER BANK v.). See Case No. 12,309.

MERCHANTS' BANK OF NEW ORLEANS v. UNITED STATES. See Case No. 3,097.

Case No. 9,440.

MERCHANT SERVICE.

[1 Curt. 509; 2 Liv. Law Mag. 427.]

[See Append. Fed. Cas.]

MERCHANTS' FIRE INS. CO. (HUCHBERGER v.). See Case No. 6,822.

Case No. 9,441.

In re MERCHANTS' INS. CO.

[3 Biss. 162; 6 N. B. R. 43; 4 Chi. Leg. News, 73; 20 Pittsb. Leg. J. 32.] [1]

District Court, N. D. Illinois. Dec., 1871.

BANKRUPTCY—ACT OF — STATE PROCEEDINGS IN INSOLVENCY—JURISDICTION EXCLUSIVE—DUTY IN INSOLVENCY—PAYMENTS THEREAFTER.

1. A fire insurance company is clearly within the scope and provisions of the bankrupt law [of 1867 (14 Stat. 517)].

2. The appointment by a state court of a receiver to take possession of the property and assets of the corporation is "a taking on legal process" within the meaning of the thirty-ninth section of the bankrupt act.

3. It is not a valid objection to the jurisdiction of this court that the proceedings in the state court were in accordance with a general statute of the state, and part of its organic law, and that the state court had first obtained jurisdiction of the parties and subject-matter. Such a construction would effectually defeat the operation of the bankrupt law.

[Cited in Re Safe-Deposit & Savings Inst., Case No. 12,211; Re New Amsterdam Fire Ins. Co., Id. 10,140.]

4. Nor is it a valid objection that the state statute under which the proceedings were instituted is not an insolvent law. If the fact of insolvency exists, and the corporation is within the provisions of the bankrupt law, this court has exclusive jurisdiction, and the fact that the state law does not purport to relieve the bankrupt from his debts, cannot be urged as a reason why the state court should hold the assets and administer the estate.

[Cited in Re Brinkman, Case No. 1,884.]

5. Though the proceedings in the state court may have been within its powers and jurisdiction, yet when the fact of bankruptcy intervenes the exclusive jurisdiction of this court attaches.

[Cited in Re Safe-Deposit & Savings Inst., Case No. 12,211; Re Green Pond R. Co., Id. 5,786; Re Hathorn, Id. 6,214.]

6. When the corporation found itself insolvent, it should have at once filed a voluntary petition in bankruptcy; and failure so to do, and acquiescence in the proceedings against it by the state court, is itself an act of bankruptcy.

7. The payment by the corporation, when actually insolvent, of the rent necessary to preserve a valuable lease, is an act of bankruptcy; and although such payment was judicious, and made in good faith, and such an act as would have been authorized by this court, these facts do not change the character of the act under the law.

In bankruptcy. The petitioning creditor in this case, the Singer Manufacturing Company, filed a petition in bankruptcy against the Merchants' Insurance Company, on an indebtedness upon a policy of insurance issued by the latter company, upon which loss was sustained on the 9th of October, 1871, and the chief act of bankruptcy alleged is that said insurance company, being insolvent, did on the 6th day of November, 1871, suffer its property to be taken on legal process, under certain proceedings instituted by the attorney general of Illinois, in the circuit court of Cook county, pursuant to the twenty-third section of the statute of that state approved March 11th, 1869, entitled, "An act to incorporate and govern fire and marine insurance companies, etc." The answer of the insurance company admitted the substantial facts alleged in the petition, and submitted to the court whether those facts constitute an act of bankruptcy within the meaning of the law.

Eldridge & Tourtellotte, for petitioner.
McCagg, Fuller & Culver, for respondent.

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

BLODGETT, District Judge. The respondent is a corporation, created under a special charter granted by the legislature of Illinois in 1861, and since 1863 up to about the 6th of November last, said company has been engaged in doing a fire and marine insurance business, pursuant to the powers granted in its act of incorporation, having its principal office in the city of Chicago. By reason of the losses sustained by said company from the great fire which occurred in this city on the 9th of October last, said company became insolvent, and on the 31st of October last the people of the state of Illinois, by the attorney general of the state, filed their bill of complaint in the circuit court of Cook county, pursuant to the 23d section of the general insurance law of this state, alleging in substance that said company had become insolvent and unable to pay its liabilities, and that its assets were insufficient to justify the continuance of said company in business, and praying that said corporation might be dissolved, and that a receiver be appointed to take charge of its assets; and on the 6th of November last the officers of said company, fearing that judgments might be obtained in certain suits then pending against the company, and the plaintiffs in such suits thereby obtain an undue preference over other creditors, consented to the appointment of a receiver by said court in accordance with said bill, and W. E. Doggett, Esq., was accordingly appointed such receiver, and the company has since delivered over to him all its assets and property. No charge of willful or intended fraud is brought against the corporation or its officers, it being conceded that its officers and managers are among the most upright and capable of our citizens, and that the present insolvency of the company results from circumstances beyond the control of those in charge of its affairs.

Upon these admitted facts we are called upon to adjudicate. There can be no doubt, or at least we have none, that this corporation is one of that class of corporations intended to be within the scope and provisions of the general bankrupt law. The 37th section declares that "the provisions of this act shall apply to all moneyed business or commercial corporations and joint stock com-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 20 Pittsb. Leg. J. 32, contains only a partial report.]

panies." The business of insurance, for the carrying on of which this company was incorporated and in which it has been engaged, is clearly included within the definitions given by the statute.

The object and intent of the general bankrupt law is to place the administration of the affairs of insolvent persons and corporations exclusively under the jurisdiction of the federal courts sitting as courts of bankruptcy; and the enactment of the general bankrupt law now in force suspended all actions and proceedings under state insolvent laws. Com. v. O'Hara [6 Phila. 402]; Perry v. Langley [Case No. 11,006]; Van Nostrand v. Carr [30 Md. 128]; Martin v. Berry [37 Cal. 208].

It also seems clear to us that the appointment of a receiver by the state court to take possession of the property and assets of the person, firm, or corporation, and apply the same to the payment of debts, is a "taking on legal process," within the meaning of the 8th clause of the 39th section of the bankrupt act. The receiver of a court of chancery is its executive officer, as much so, to all intents and purposes, as a sheriff of a court of law; and the goods or property in his hands are as much in the custody of the law as if levied upon under an execution or attachment. Indeed, the purpose for which the receiver in this case takes the property is the same as that of a sheriff in making his levy, except that the scope of the receiver's warrant is more comprehensive, he being required to pay all debts, while the sheriff only seeks the payment of the specific debt mentioned in his execution or attachment.

Although I am not aware that this particular point has ever before been raised in this court, it has often been decided elsewhere.

But it is objected that the proceedings in the state court here complained of being in accordance with a general statute of this state and part of the organic law by which the respondent exists, and being predicated mainly upon the reserved right of the state to protect its citizens against irresponsible insurance companies, and the state court having acquired jurisdiction of the parties and subject-matter, this court cannot now interfere as a bankrupt court and take charge of and administer the assets in question, although the insolvency of the respondent is fully conceded.

It seems enough to suggest, in answer to this position, that if correct, any state could effectually defeat the operation of any bankrupt law passed by congress by simply providing that any person or corporation, if deemed insolvent or incapable of doing business by a state officer, might, under the power of exercising and enforcing police regulations or enactments by the states, be wound up, and its assets administered upon, in the state courts, notwithstanding such person or corporation might be insolvent and guilty of all the acts of bankruptcy provided for in the general bankrupt law.

It is further urged that the proceeding in question does not come within the terms of the bankrupt act, because the state law under which it is instituted is not an insolvent law inasmuch as it does not purport to discharge the debtor from its liabilities; but we fail to perceive how the treatment the debtor may receive at the hands of the state court can avail to sustain that court's control over the assets. If the fact of insolvency exists and the person or corporation is within the provisions of the bankrupt law, the federal courts sitting in bankruptcy have exclusive jurisdiction of his property, and the fact that a state law does not purport or attempt to relieve the debtor from his debts cannot, it seems to us, be urged as a reason why the state court should hold the assets and administer them after proper proceedings in bankruptcy have been instituted in the federal courts.

We might further answer this objection by the suggestion that a discharge of an insurance company's liabilities under this state statute and proceedings in the state courts would be, in the nature of things, superfluous and unnecessary, for the reason that the main object of the proceeding is to forfeit the charter and franchises of the corporation, and why assume to discharge from further liability a debtor whose legal entity is to be dissolved? If its corporate existence is to be terminated it matters little what becomes of its unpaid balances.

It also seems clear to us that in so far as a state law attempts to administer on the effects of an insolvent debtor and distribute them among creditors, it is to all intents and purposes an insolvent law, although it may not authorize a discharge of the debtor from further liability on its debts.

We have no doubt that the proceeding in the state court to forfeit the charter and corporate franchises of this company is entirely valid and within the powers and jurisdiction of that court, perhaps exclusively so. The state having created the corporation may undoubtedly dissolve it in its own way, consistent with the terms of the grant.

The fallacy of the respondent's argument seems to us to consist in the assumption that because the state court had jurisdiction for the dissolution of the corporation, it can therefore hold jurisdiction under all circumstances for the distribution of the assets. If the fact of insolvency had not existed, and no act of bankruptcy had been committed, the state court would probably have had the right to administer the assets if once within its control, as an incident to the principal object to the proceeding which was the dissolution of the corporation. But, as before stated, when insolvency, or other facts, intervene so as to make the debtor a proper subject for the operation of the bankrupt act, the exclusive jurisdiction of the bankrupt court

attaches, and the state court and those acting under its mandate must surrender the control of the assets, whatever may be the final decree in regard to the continuance of the corporation. When the corporation found itself insolvent, or was certified to be insolvent by the state auditor, acting under the state law, and proceedings were instituted for the dissolution of the corporation and the administration of its assets, it was the duty of the corporation at once to voluntarily file its petition to be adjudged a bankrupt in the federal court, and its failure to do so, and its acquiescence in the proceedings by which its assets were placed under the control of the state court, is in itself an act of bankruptcy.

This is not a case of concurrent jurisdiction between the state and federal courts. In all cases where the state and federal courts have concurrent jurisdiction, the court which first obtains control of the parties and property by judicial proceedings will retain it, and the authorities cited by the counsel from the 8th Howard, and later cases, are full in point, but we conceive they do not apply to this case, inasmuch as this court has exclusive jurisdiction in cases of bankruptcy. In our view, then, the admitted facts show the respondent guilty of the act of bankruptcy charged in the petition, and nothing in the proceedings had before the state court tends to oust this court of its jurisdiction and authority to adjudicate the respondent a bankrupt.

The precise steps by which the officers of this court shall hereafter obtain possession of the assets of the bankrupt need not now be indicated, as the action of this court in that regard will be governed by circumstances as they may hereafter arise.

In thus announcing our conclusions, we do not consider that we are adopting any new rule, or making even a new application of an old one, as the pathway we are treading appears to us to be well beaten by precedents and authority. Nor should we have taken pains to so fully state our views but for the fact that the overwhelming calamity which befel this city on the 9th of October last, brought financial ruin upon a large number of insurance companies doing business here, and makes it seem desirable that a tolerably full exposition should be given of the law governing the rights and duties of insurers and insured.

It is also proper to add that the petition in this case charges a further act of bankruptcy —in that said insurance company, on or about the 31st day of October last, being then insolvent, paid one of its creditors in full, thereby giving such creditor a preference over other creditors. And it is admitted in the answer that after the company became insolvent a large sum of money fell due one Tuthill King for rent of the lot on which the company had erected a valuable building; and as this lease was deemed a valuable asset, and would be forfeited unless the rent was paid at maturity, the company paid the same, deeming that it was thereby subserving the best interests of its creditors.

We have no doubt but what the admitted facts applicable to this charge make out a technical act of bankruptcy. But no stress was laid upon it in the argument, as all parties seemed desirous of a decision upon the other charges.

The expenditure complained of seems to have been judicious and made in good faith, and this court would probably, on the facts stated, have authorized it, but this does not change the character of the act under the law.

It was undoubtedly a preference, and as such, a technical act of bankruptcy. An order of adjudication will be entered as prayed in the petition.

Suffering property to be taken under an order of the state court, appointing a receiver in an action instituted by the attorney general of the state to dissolve the corporation, is an act of bankruptcy. In re Washington Marine Ins. Co. [Case No. 17,246].

Case No. 9,442.

In re MERCHANTS' INS. CO.

[6 Biss. 252.] [1]

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

BANKRUPTCY—MEETING OF CREDITORS—NOTICE—ACTION OF—RULES OF PROCEEDING—ASSIGNEE'S ACCOUNTS—EXTRA ALLOWANCE.

1. A notice to creditors that a meeting would be held at a specified time and place for the purposes named in the 27th section of the bankrupt act [of 1867 (14 Stat. 529)], and that a final dividend would be declared, is a sufficient notice to authorize such meeting to make a final disposition of the estate.

2. Where the assignee's accounts and vouchers have been filed with the register, a reasonable time before such final meeting, the meeting may by vote properly dispense with the reading of them, and the exhibition of the vouchers, nor have individual creditors the right then to insist upon such reading or exhibition.

3. In the absence of specific provisions of law on any point, creditors' meetings are properly guided by the rules and usages of parliamentary bodies.

4. A creditors' meeting has no power over the accounts or fees of the assignee, but if the register submits them to such a meeting, their action will be regarded by the register and court, unless there exist grave reasons to the contrary.

5. The register has no authority to allow an extra compensation to the assignee, even after a vote by the creditors' meeting. The proper practice is to apply to the court for such extra allowance previous to the final meeting.

In bankruptcy.

W. H. Sisson, for objectors.

Bennett, Kretzinger & Veeder, for assignee.

BLODGETT, District Judge. At the request of W. H. Sisson and J. N. Witherell,

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

H. N. Hibbard, Esq., one of the registers of this court, to whom this case is referred, has certified to the court twelve questions touching the powers and duties of the register in the conduct of creditors' meetings. I do not propose to answer these questions seriatim, as they all practically relate to a few points of practice stated in different phases, and several of the questions seem to be purely speculative, and no direct or categorical answer is deemed necessary for a solution of the points raised in the case.

On the first of October last, an order of court was duly entered on the application of the assignee for a general meeting of the creditors of the bankrupt to be held before Mr. Hibbard, register, on the second day of November last, for the purposes named in the 27th and 28th sections of the bankrupt law. Due notice of the time, place and purpose of the meeting was given by the assignee, and the notice also stated that at said meeting a final dividend would be declared. The assignee reported to the meeting an account of his receipts and expenditures as such assignee, but on motion of Mr. Sisson, the meeting adjourned to the 24th of November, and the assignee was directed by the register to prepare and file in the register's office on or before the 16th of November, a full itemized account of his receipts and payments, for the purpose of being examined by the creditors. The assignee, in pursuance of said order, did, on the 16th of November, file said itemized account, with the register, verified by oath, and the vouchers pertaining thereto, and the same remained in the register's office until the day to which said meeting was adjourned, subject to the inspection of all persons interested. The adjourned meeting was held, pursuant to adjournment, on the 24th of November, but was not attended by a majority in number and amount of all the creditors who had proved their debts. At this meeting the itemized account of the assignee was produced and the items for assignee's services, amounting in the aggregate to the sum of $10,500, discussed by the creditors present, that being the only element of the assignee's account to which any exception seems to have been taken. After the matter had been fully discussed, the register, for the purpose of obtaining the sense of the creditors present, upon the charges of the assignee, submitted to the meeting a motion made by a creditor, to the effect that the accounts and charges of the assignee as presented be approved, to which action of the register in the submission of said motion to the meeting, Mr. Sisson and Mr. Witherell objected; but, notwithstanding their objections, the register put the motion to the meeting, and the same was passed by a large majority of the creditors present. Said Sisson then insisting that he had had no time to examine the assignee's account, the meeting was again adjourned until the 27th of November. On the 27th a further meeting was held, pursuant to adjournment, at which meeting the assignee commenced to read his itemized account, whereupon Mr. Sisson moved that the voucher for each item of said account should be produced and exhibited to the meeting by the assignee. It was then stated that the vouchers numbered over 8,500, which statement was conceded to be substantially true. Some of the creditors present then objected to Mr. Sisson's motion, on the ground that he had had ample time for the examination of the accounts and vouchers, and that one adjournment had been had expressly for the purpose of enabling him to examine said accounts, and that he had made such examination; and it was claimed that Mr. Sisson should point out or indicate the items of the account to which he objected. Mr. Sisson refusing to specify any particular item of the account as objectionable, and insisting on the reading of the account and vouchers in detail, a motion was made to dispense with the reading and approve the accounts of the assignee, including his charges for fees and expenses, which, although objected and excepted to by Mr. Sisson and Mr. Witherell, was put to the meeting by the register and almost unanimously adopted; after which proceedings the register audited and approved said assignee's account, except as to the charges for register's fees, the register having examined said account and vouchers and satisfied himself of its correctness.

To this action of the register in submitting to the meeting these various motions for approving the assignee's charges for fees and expenses, and dispensing with the reading of the accounts and vouchers, and approving the same against the objections of Mr. Sisson and Mr. Witherell, they except, and request the opinion of the court as to the regularity of these proceedings.

The order of court calling this meeting directed it to be held for the purposes of a final dividend. The notice of the assignee seems to have stated that the meeting would be held for the purposes named in section 27 of the bankrupt law, instead of stating that it would be held for the purposes named in sections 27 and 28; but it also stated that a final dividend would be declared, and as all creditors must be presumed to have known that this was not the first dividend meeting, it seems to me the business of making a final disposition of the affairs of the estate and declaring a final dividend was properly and legally before the meeting. One of the preliminaries to the making of such dividend, is the auditing of the assignee's account. The law and rules devolve the duty of passing and auditing the assignee's account upon the register, and the uniform practice by the register of this court has been to submit the assignee's accounts to the creditors' meeting for examination, discussion, explanation and approval before the same was audited, a practice which has always seemed to me eminently just and fair toward all parties interested. Perhaps

by the strict letter of the law the assignee's accounts need not be submitted to the creditors' meeting before auditing, but there can certainly be no harm in it, and I am not disposed to change the practice in that regard. The creditors are entitled, before the assignee's accounts are finally approved, to a full examination of the same, and there seems no occasion so appropriate as the duly called dividend meetings for such examination and discussion. In this case the account presented on the first assembly of the creditors pursuant to this call does not seem to have been in strict compliance with the rules, at least on objection being made an itemized account with all vouchers was ordered to be filed by the 16th of November in the register's office, and the meeting was adjourned until the 24th. The account and vouchers were filed within the time limited, and all creditors had opportunity to examine the same as fully as they chose for the eight days intervening before the adjourned meeting was held, and some creditors appear to have availed themselves of their privilege. The account was a very long one, involving the collection and disbursement of over $500,000, and the administration and winding up of the affairs of one of the largest insurance companies existing in this city at the time of the great fire. The vouchers were necessarily numerous.

The only items specifically objected to by any creditor were those charged by the assignee for his own compensation, and no one objected to these except Messrs. Sisson and Witherell. At the first meeting this item was discussed, and after discussion, a motion was made that the meeting approve the charge and the register took the vote of the creditors present or represented at the meeting on the question.

The meeting, also, on motion dispensed with the reading of the assignee's account and vouchers in detail, although Mr. Sisson and Mr. Witherell insisted upon such reading. I can see no irregularity in this. Neither the bankrupt law nor the rules under it, nor the usages of parliamentary bodies, by which creditors' meetings are properly guided, in the absence of specific provisions of law on any point, require that the entire body of creditors attending a meeting, shall sit and hear read the report and accounts of the assignee, unless they choose to do so, to gratify the whim or caprice of one or two creditors. If the majority of those present at the meeting see fit to dispense with the reading they can undoubtedly do so. Ample opportunity should be given all creditors to examine and object to the assignee's accounts, but that does not require that those who do not wish to make such examination, or have already made it to their own satisfaction, should sit through a creditors' meeting to hear those accounts read in detail.

In this case the only objection which took any specific form, or was even worthy of attention, was in regard to the items for assignee's fees and charges, and it was peculiarly appropriate that the register should take the views of the creditors present or represented as to those items. Not that he or the court was necessarily to be governed by the vote in finally passing the assignee's accounts. Yet the item being large and it being presumable that many of the creditors had information in regard to the nature and value of the assignee's services, their judgment on the question is certainly of weight, and the expression of a large majority should not, except for grave reasons, be overruled.

When there is a majority in value of the creditors of an estate present, the action of the meeting, or of a majority of such a meeting, should be as far as possible regarded in any matter resting in the discretion of the court or register, such as the allowing of extra compensation to the assignee. The passing of the general accounts of the assignee and settling his fees as allowed by law are, however, matters with which the creditors' meeting has nothing to do except so far as the register sees fit to submit them to the meeting for advice or information. Nor does it make any difference whether there is a majority in number or value of the creditors present or represented at such meeting. It is just as proper to take the sense of those present on any of these questions as if all were present. The meeting is a legal meeting, and what is done by those present is as binding as if all the creditors were present. Neither a minority nor majority can audit the assignee's accounts; that is the duty of the register.

The real grievance, if I properly understand these proceedings and objections, consists in the fact that the assignee charged $2,500 more than his legal fees, and the register, after said charge had been approved by the creditors present, approved the account including this item.

By the 27th and 28th sections of the bankrupt law, assignees besides being allowed certain specific fees may be allowed a reasonable compensation for their services in the discretion of the court. This allowance of extra compensation is no part of the duty of the creditors' meeting nor of the register, but is to be allowed by the court in the exercise of its judicial discretion in view of the nature of the duties performed by the assignee and the degree of compensation he has already received from the regular fees. But for the purpose of determining the propriety of such an allowance, it is eminently proper that the question of its fairness should be, if practicable, submitted to the creditors in some form. If it is charged into his general account which creditors have had an opportunity to examine, and no objections are made, or if submitted to a creditors' meeting and sanctioned by an almost unanimous vote of the creditors present, such action would have great weight with me in determining the propriety and amount of the allowance, and if the

meeting was largely attended I should consider the vote in favor of the allowance almost potential.

The certificate in this case shows that the register allowed and audited the assignee's entire claim after taking the vote of the meeting. In this I think he erred. The proper practice I think would be where an assignee claims extra allowance for him to apply to the court for such allowance previous to the final meeting, and the court, on hearing the application, can allow such amount as the facts justify, which would then be properly chargeable as an item in the assignee's account to be reported to the meeting and audited by the register.

The practice, however, in this district has heretofore been to submit the entire claim of the assignee to the creditors at the final meeting, and if approved by a majority, the register passed the account without submitting it to the court. I do not intend by what I have said to disturb any settlements of assignee's accounts which have been made and passed unchallenged, but only to indicate a practice for the future, and to say that in this case leave will be given the assignee to present his claim for extra allowance at any time before the dividend is paid.

Case No. 9,443.

MERCHANTS' INS. CO. v. McCARTNEY.

[1 Lowell, 447; [1] 12 Int. Rev. Rec. 122.]

Circuit Court, D. Massachusetts. May Term, 1870.

TAXES—ON INCOMES—BANK DIVIDENDS—ACCRUED BEFORE PASSAGE OF ACT—ASSESSED AS CAPITAL.

1. An insurance company being a stockholder in a bank received a dividend from the bank, three-tenths of which was made out of profits accumulated before the passage of the first act for collecting internal revenue, and seven-tenths from profits acquired afterwards. The bank more than five years before this case was tried had paid the revenue tax on the seven-tenths and denied a liability to taxation for the three-tenths, and it had never been enforced. *Held*, the three-tenths was capital and not liable to assessment as income under Act June 30, 1864, § 116, etc., 13 Stat. 281.

2. The seven-tenths having been once assessed to the bank could not be again assessed to the insurance company.

The plaintiffs owned stock in the Suffolk bank, and as such stockholders received $115,200 as their share of an extra dividend declared by the bank January 3, 1865; of which they carried the fifteen thousand, odd, to their surplus fund, and declared a dividend among their own stockholders of the remainder. Of the dividend declared by the bank, about three-tenths consisted of profits laid aside before the passage of the first internal revenue law, and of profits of sales of real estate bought before that time; and on the remaining seven-tenths the bank paid a tax of five per cent to the government, but denied their liability for the three-tenths, and it had never been exacted of them. The defendant [W. H. McCartney, collector] collected of the plaintiffs against their protest a tax of five per cent upon the whole sum so received by them, and the question presented by the agreed facts here was whether such tax was lawfully assessed.

S. Bartlett and F. W. Palfrey, for plaintiffs.
J. C. Ropes, Asst. Dist. Atty., for defendant.

LOWELL, District Judge. The revenue act under which this assessment was made is that of June 30, 1864, and especially sections 116–121, 13 Stat. 281, etc.

Section 120, p. 283, levies the duty on all dividends thereafter declared due as part of the earnings, income, or gains of any insurance company, and on all undistributed sum or sums made or added during the year to their surplus or contingent funds. In other words, it assesses the net annual income or gains of such corporations, whether they choose to divide them or to add them to their funds. And it provides in section 117 that in estimating the annual gains, profits, or income of any person there shall be deducted the income derived from dividends on shares in banks, &c., which shall have been assessed to and the tax paid by the corporations. And in section 121 that when any dividend is made which includes any part of the surplus or contingent fund of any bank, insurance company, &c., on which a duty has been paid, the amount of duty so paid on the fund may be deducted from the duty on the dividends.

The plaintiffs contend that no part of the dividend paid them by the bank was liable to assessment in their hands, because, as to the three-tenths, it was not income, and as to the seven-tenths it had already paid the tax.

As to the three-tenths it seems to me to have been a division of capital, a return to the plaintiffs in money of a part of the property which was already in their ownership as capital stock when the first tax act was passed. If the Suffolk bank had been wholly wound up, and had returned to its stockholders the exact value of their shares in money, having made no profits since the passage of the original act, this sum of money could not be taxed as income, gains, or profits; and so of a part. If the plaintiffs on receiving the money chose to divide it among their own stockholders, still it is not a dividend out of gains and profits, nor out of the surplus funds, because the surplus funds that are taxable, are those which are or have been made out of profits, since the passage of the act. This view appears to have been acquiesced in by the government, for they have neglected for some five years to enforce the opposite construction against the bank; and if

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

this money was capital in the hands of the bank it was still capital when it reached the stockholders. The tax is assessed on the bank for convenience, but is intended to be, in effect, a tax on the shareholders; and if the latter be not assessable for the income tax it cannot be levied on the corporation. Railroad Co. v. Jackson, 7 Wall. [74 U. S.] 262.

There is more difficulty in that part of the case which relates to the seven-tenths. The plaintiff corporation is bound to pay on its net "income earnings or gains," whether divided or added to its funds, and so the argument must apply equally to the sum divided and to that carried to the surplus fund, it being admitted that it was not needed to pay losses or expenses [in their own business; because it appears that the whole of it has been appropriated either to the dividend or the surplus fund. And this was assumed by both sides at the argument.][2] So the question simply is: Does such a dividend on which the tax has once been paid form part of the income of the plaintiffs in the sense of section 120? It is not exempted by the proviso of section 121, above cited, for that merely means that if a corporation has once paid the tax on its gains when turned over to the surplus fund it shall not pay again when it divides that fund.

It is equally clear that sections 116 and 117 do not refer to the incomes of corporations, because the mode of assessment, the exemptions of six hundred dollars rent of homestead, &c., and the increasing rate of tax on larger and larger incomes, are all incompatible with such a reference.

The real point seems to me to be whether in estimating the income of a corporation we are to take the analogy of section 117. For instance, in relation to the three-tenths which I have held to be capital, I have in fact followed the rule of section 117, though I did not refer to that section because it seemed to me the result was the same upon any fair meaning of the word income. Now supposing the question were whether interest on government bonds, or interest accrued but not actually received, &c., is to be included in the income of a corporation, might we properly refer to sections 116 and 117 to see what is income. After much reflection I am satisfied that we are bound to make such a reference, and to take those sections as our guide in ascertaining the meaning of income in the statute. The general intent of the legislature not to tax incomes twice is clear, and so is the injustice of such taxation; but my decision rests mainly on this: The intent of congress was to tax the income of the shareholders of the Suffolk bank by a tax levied directly upon the bank. The income of these plaintiffs has been so taxed. I am not ready to believe that it was intended that the same income should be again returned to the government for a new taxation, merely because it passed through another corporation before reaching the individual owners.

This conclusion I should reach, I think, without aid from section 117, and although that section contained no express exemption. But when I find that exemption it strengthens the argument because it shows what the law regards as taxable income. It was argued that this net dividend must be income because the statute of 1865 (13 Stat. 479) requires that such a dividend shall be returned as income. But the same law declares that the tax which has been paid on such a dividend shall be deducted from the tax that would otherwise be assessed on the shareholder's income. It was required to be returned because it ought to be counted in ascertaining the aggregate income, which as the law then stood, was assessable at a higher rate than five per cent if it exceeded five thousand dollars. That amendment was passed some two months after this tax was assessed, and if the argument be good that such dividends are income since that time because of the amendment, I see not why it does not hold equally good to take them out of the income account before that act was passed, or to take them out of the class of assessable income if they have been once assessed.

I do not base my judgment upon the ground that the plaintiff corporation is a mere agent or trustee for its own shareholders in receiving and paying out this dividend. I do not understand that to be so in fact or in law. But I do decide that the plaintiff corporation itself, as a shareholder in the Suffolk bank, is not bound to treat this dividend on which the income tax has been paid, as income liable to assessment again by the government, [and this] [2] whether it found it necessary to use the dividend in one way or another, [whether to pay taxes, expenses, or dividends. It is exempted from the income account. In accordance with the agreement of the parties, judgment is to be entered for the plaintiff for the full amount of $5,760 and interest and costs.][2]

[2] [From 12 Int. Rev. Rec. 122.]

MERCHANTS' INS. CO. (PEELE v.). See Case No. 10,905.

Case No. 9,444.

MERCHANTS' INS. CO. v. SELLER.

[1 Hunt, Mer. Mag. 521.]

District Court, D. Massachusetts. 1839.

SALVAGE—FRAUDULENT COMPACT WITH OFFICERS.

[Money received from salvors by the officers of a wrecked vessel while the salved property was in their care, though given in charity, may be recovered by the owners and insurers, the receipt of such gift being incompatible with their duties.]

[This was a libel in personam by the Merchants' Insurance Company of Boston and others against Asa Seller.]

[2] [From 12 Int. Rev. Rec. 122.]

Libel in behalf of the owners and insurers of the ship Bombay and cargo, against Asa Seller, the first mate of that ship, to recover a sum of money alleged to have been paid to him by the salvors of the vessel, which got on shore, and was carried into Key West in February, 1838. The libel charged that $1,000 was so paid to the captain, $300 to the first mate, and $200 to the second mate; that it was paid in pursuance of a corrupt understanding between the salvors and officers, and with a view to influence the testimony of the latter, and to inflame the salvage, &c. The captain paid the amount received by him, when demanded by the agent of the insurers. The second mate, being out of the country, was not served with process, and the suit proceeded against the first mate alone. He filed an answer, admitting the receipt of the money, but denying any fraud or agreement between him and the salvors, and alleging that the money was given him from motives of compassion, and in consideration of his unfortunate condition.

THE COURT gave judgment for the libelants, for the sum received by that officer, three hundred dollars and costs. The reception of the alleged sums of money from the salvors, by the officers of the wrecked ship, under the circumstances in which the property committed to their charge was placed, was holden by THE COURT to be altogether inexcusable. The transaction was pronounced to be of novel and exceptional character; that, with the aspect of charity and benignant consideration, it placed the officers of the ship in a position in reference to the claims of salvage, then in controversy, incompatible with their dutiful relations to the ship and cargo, and to owners and underwriters.

MERCHANTS' LOUISVILLE INS. CO. (WATERS v.). See Case No. 17,266.

MERCHANTS' MUT. LIFE INS. CO. v. The RICHMOND. See Case No. 12,795.

MERCHANTS' NAT. BANK v. CHICAGO. See Case No. 14,374.

MERCHANTS' NAT. BANK v. JEFFERSON COUNTY. See Case No. 15,472.

Case No. 9,445.

MERCHANTS' NAT. BANK v. LITTLE ROCK.

[5 Dill. 299.] [1]

Circuit Court, E. D. Arkansas. 1878.[2]

MUNICIPAL CORPORATIONS—LIABILITY ON BONDS—ILLEGAL SCRIP—VALID DEBTS.

The city of Little Rock, in payment of valid debts against the city, issued bonds in the similitude of bank-bills, in violation of statutes of the state, one of which prohibited the making or receiving of such paper. Afterwards the city called in and cancelled these illegal bonds, and issued in their place other bonds, which were unobjectionable in form: *Held*, that the city was liable on these latter bonds to holders thereof who had not participated in the issue of the illegal bonds, although they had notice of all the facts of the transaction.

At law.

Mr. McClure, for plaintiff.

Mr. Rose, for defendant.

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

DILLON, Circuit Judge (orally). This action is brought to recover on certain bonds of the city, numbered from 1 to 156, issued in 1874, under the power conferred by section 3294, Gantt's Dig. There is also a common count, based upon the same cause of action; and then another claim for an account known as the "ledger" account, which is in the nature of an acknowledgment of the liability of the city under the ordinance of October 30th, 1874.

It seems that the city, being indebted, and wanting to borrow money to pay such indebtedness and defray the necessary current expenses of the city government, in January of 1867, by the action of its council, resolved to borrow the sum of $100,000, specifying that $50,000 was for the establishment of schools, and $50,000 for other purposes.

Mr. Wassell, who was a member of the city council, testifies that at the time of the consideration of the question of the form in which the city could issue her obligations, this form of issuing the obligations of the city was deemed the most expedient—that is, to issue her obligations for money in the form of bonds. They could not, he said, issue money; they could, and did, issue bonds; and that they were advised by the city attorney that they had the power to do so.

The bonds which were issued were issued in denominations of $1, $2, $5, $10, $20, $50, and $100. The bonds were engraved with vignette, on colored paper, and in form and appearance very nearly resembling the ordinary greenback or bank-bill. The bonds in this form, purporting to be Little Rock city bonds, running for periods of from one to ten years, amounted, in the aggregate, to $100,000.

Here is the form of the bond: "Ten years after date, the city of Little Rock will pay five dollars to bearer, with interest at the rate of eight per cent per annum at maturity. Little Rock, Arkansas, July 22d, 1867." (Signed by the recorder and by the mayor.)

These bonds were paid out by the city for various classes of ordinary indebtedness. A portion of this money was expended under the direction of the city council—$3,500 to pay for the lot on which stands the present city hall, and $17,500 for the erection of the present city hall; $6,000 went to pay overdue coupons on bonds issued by the city,

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

[2] [Affirmed in 98 U. S. 308.]

under legislative authority, in aid of the Memphis and Little Rock Railroad Company; $4,000 to put up the Peabody schoolhouse; $6,000 was appropriated and went to pay the interest on those Memphis bonds; $3,600 to grade Markham street; $2,000 for culverts, and $5,000 and $2,000 for improvement of Ferry street; $2,000 to purchase cemetery grounds; $3,600 for the fire department; $8,000 for improving and extending the public landings; $2,000 and $4,000 for school sites; and from $1,500 to $1,700 per month was paid out on audited claims against the city for police services, salaries of city officers, gas, etc. It was paid out to persons who were creditors of the city, for property sold to it, or for materials furnished or labor performed for it.

The evidence shows—and it is undisputed—that when claims were allowed against the city by the council, a warrant was drawn on the treasurer of the city in the usual form, and when the warrant was presented to the treasurer what were called "Little Rock City Bonds," on bank-note paper, were paid out by the city on those warrants—the warrant being taken up and this paper given out in exchange for it.

The city received it for taxes, in the payment of licenses and other dues, and it passed in and out of the city treasury frequently—if not generally put out again, it was reissued to some extent.

The evidence further shows—and it is an undisputed fact—that this paper, for a long period, was a very considerable portion of the circulating medium of the city; it was taken in and paid out by the merchants, bankers, and others; and the Merchants' National Bank, of Little Rock, received a very large amount of it. Undoubtedly it is true that a considerable portion of the bonds or claims sued on were for money of this character, termed "city bonds" or "city money," which the plaintiffs had received in the course of their business as bankers. The present plaintiff was not connected originally with the issuing of this money by the city; it was not issued to advance any scheme of the plaintiff, nor for any consideration furnished by it, nor by its procurement; nor was the plaintiff in anywise connected with the inception of it.

Afterwards the city council passed an ordinance by which they invited the holders of this paper to bring it in for cancellation, agreeing to issue to them new obligations of the city for the amount of the principal of those city bonds and the accrued interest thereon. The evidence shows (it is undisputed) that under that authority the present holders surrendered to the city the sum of $31,000, including accrued interest of $354.22. They were cancelled and destroyed by the city; and in lieu of the amount of them then due, the city issued a like amount of bonds, to-wit, the bonds in this suit. The plaintiffs also had some other paper, which they surrendered in like manner, and which was cancelled by the city, which acknowledged its indebtedness for the amount by giving plaintiff credit therefor on its ledger; and this is what is known as the "ledger account." The plaintiff shows that the new bonds were given for the principal and interest of the overdue bonds on bank-note paper, and the amount credited on the ledger account is for like bonds, and for which new bonds were not issued.

The city of Little Rock defends against this action, and its main defence is: The emission of these bonds in this form—on bank-note paper—and for the purposes in view (as it appears on their face that they were issued and circulated as money), was in direct violation of the statutes of the state in that regard, and, therefore, that the bonds thus issued were illegal and void, and that the new bonds issued in lieu thereof were also illegal, void and without consideration, the issuing of the original bonds having been in violation of the statutory provision, and, therefore, not imposing any legal obligation against the city.

This defence makes it necessary to inquire into the legislation on this subject in this state. I will, however, state, in this connection, that the court finds that the issuing of city bonds on bank-note paper, engraved with vignettes, in the similitude of greenbacks or bank-bills, in the denominations of $1, $2, $5, $10, $20, $50, and $100 notes, in connection with the undisputed fact that they formed for a considerable period the local circulating medium of the city and community, in lieu of currency, establishes that such bonds were issued for the purpose of circulating as money, in violation of the statutes of the state in that regard. But it is quite another question, and one not necessary to be decided in this case, whether the statutes of the state in reference thereto, and the expositions thereof by the supreme court of the state, declare that the city would not be held responsible to the holders of such bonds issued in payment of legal claims duly passed upon. I think it is better to refer to the legislation upon this subject chronologically, rather than in the order in which it is embodied in Gantt's Digest (chapter 19, p. 256). It would appear from the acts, that the state of Arkansas has for a long time had a very pronounced and decisive policy against the issue, by persons or by private or public corporations, of paper designed to pass as a circulating medium; and no one can say but that, in the light of experience, it is a wise policy.

The first act of the legislature upon the subject appears in the Revised Statutes of Arkansas of 1838 (page 674). It is entitled "Private Notes." No title to this act is given, but the title may be seen in another act afterwards passed, which went into effect February 14th, 1838 (section 5 of the act entitled

"Change Tickets"; c. 24, p. 175, Rev. St.), and the title is in these words:

"Sec. 5. The act passed at this session of the general assembly, entitled 'An act to prevent the circulation of private notes in this state,' approved November 25th, 1837, shall take effect and be in force from and after the 1st day of March next."

This first act, entitled "Private Notes," was passed and approved November 25th, 1837, and went into effect on the 1st day of March, 1838; and it is an important consideration, in order to understand the legislative intention, that the act entitled "Change Tickets" was last passed, though first to go into effect.

The first act, in its 1st section, provides as follows: "No person or persons, unauthorized by law, shall intentionally create or put in circulation, as a circulating medium, any note, bill, bond, check, or ticket purporting that any money or bank-notes will be paid to the receiver, holder, or bearer, or that it will be received in payment of debts, or to be used as a currency or medium of trade in lieu of money."

The next section provides: "If any person or persons shall issue, put in circulation, sign, countersign, or endorse any such note, bill, bond, check, or ticket, he, she, or they so offending shall be indicted, and, being thereof convicted, shall be fined not less than $50 nor more than $300, and be imprisoned not exceeding twelve months."

Section 3 it is important to consider: "If any person or company vend, pass, receive, or offer in payment any such note, bill, bond, check, or ticket, he, she, or they so offending shall forfeit the sum of $50, to be recovered by action of debt, with costs, to the use of any person who will sue for the same before any justice of the peace of the county in which the party offending may be found.

Section 4: "The preceding section shall not affect any note issued by any bank authorized by law in the United States, except notes for less sums than $5."

Approved November 25th, 1837; in force March 1st, 1838.

Now, it will be observed that corporations, private or public, are not mentioned in this act. By the 1st section, the terms of prohibition are that no person or persons, unauthorized by law, shall issue or put in circulation this unauthorized currency. By section 21 of chapter 129 of the same Revised Statutes, it is provided that "when any subject matter, party, or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included;" and by section 24 of the same chapter it was further provided that, "for the purpose of construction, the Revised Statutes passed at the present session of the general assembly shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times. If any provisions of different statutes are repugnant to each other, that which shall have been last passed shall prevail, and so much of any prior provision as may be inconsistent with such last provision shall be deemed repealed thereby."

In a case some years after, the question arose in the supreme court of the state as to whether the word person, as used in the act approved November 25th, 1837, included corporations and municipal corporations; and the supreme court, in the case of Van Horne v. State, 5 Ark. 349, held that the word "person" did include corporations, public and private. If that is so, then we must hold this statute to read the same as though corporations had been expressly mentioned, for by construction the supreme court has incorporated the word "corporations" into the original statute; and when section 3 is read in the light of this construction, it provides not only if any person or persons, but also if any corporation or corporations, pass, receive, or offer in payment any of this illegal money, they are liable to a penalty, to be recovered by any person suing for it. And if this statute were without any modification, we have an interpretation by the supreme court of the state that corporations of all kinds, as well as private persons, are alike prohibited and liable to penalties; and not only to that effect, but the person who receives the money, or offers it in payment, is also made criminally subject to a penalty; so, while this statute provides against any person who shall put out a dangerous medium of circulation, if the law was still unmodified there would be some ground to claim, if it should be violated (and, unfortunately, all laws are violated), that the person who received and the person who attempted to offer it in payment were in pari delicto, for it is made criminal against him to issue it, it is equally made penal against you to receive it, and it is, therefore, equally in violation of the general purpose of the law, and there would be no right to recover under this act as it originally stood.

But before the session of the legislature closed, they passed another act (the act approved February 14th, 1838), which, in terms, refers to the subject matter of the previous act, and modified it by discriminating in favor of the person who holds the money in plain violation of the provisions of the law. [Rev. St. 1838, p. 175.] It reads (section 1): "The holder or owner of any change ticket, bill, or small note, issued for the purpose of change or otherwise, shall have the right to sue the drawer, issuer, or endorser of such change ticket, bill or bills, or small note or notes, before any justice of the peace in this state;" allowing him to recover the money, contrary to the prohibition of the prior act. We must conclude that subsequent consideration convinced the legislature that it was better not to punish the innocent receiver. Now, there can be no doubt, upon the original statutes, that the supreme court of the state, in

Van Horne v. State, was correct; nor is there any doubt that there is any less principle involved in holding municipal corporations issuing this scrip, equally with individuals, liable to the innocent party not procuring it to be issued.

There is another act in support of the view I have just stated—the act of December 17th, 1838 [Laws 1838, p. 13], entitled "An act to prohibit the issuing of small bills, notes, or change tickets." The 1st section provides: "That from and after the passage of this act, it shall not be lawful for any city, town, or corporation whatever, within the state of Arkansas, to issue small bills or notes, commonly denominated change tickets or shin-plasters, unless specially authorized by law."

Section 2 provides: "That all persons, officers of such city, town, or corporation, or others, whose names shall be affixed to any such bills, notes, change tickets, or shin-plasters, issued in violation of this act, shall be individually responsible for the same."

This act extends the liability to all persons, officers of any corporation or town, or others, whose names shall be affixed. Private corporations would be liable; and if any of its officers put his name to such bills or change tickets, it imposes a personal liability on him.

Section 3 provides: "That the holders of any such bill, note, or change ticket, or shinplaster, issued in violation of this act, may sue for and recover in gold or silver the amount for which they purport to be payable, from the individuals whose names shall be affixed thereto, before any justice of the peace."

This act did two things: At the time it was passed, the Van Horne Case, in which the supreme court of the state held that municipal corporations were included in the first act, had not been decided, and this act removed any doubt as to whether municipal corporations, with others, were embraced within the inhibitions of the original act; and, secondly, it gave an additional remedy against the officers of the municipal corporation, making them also personally liable to the holder; but it did not take away any right or remedy given to the holder by the former act. Since the legislature chose to pass this special act relating to municipal corporations, it may be said the supreme court erred in deciding that corporations were included in the original act. But as between the legislature and the supreme court, the latter is the proper and the best interpreter of the meaning of previous acts of the legislature; and, besides, this last act had been passed and in force three or four years before the case of Van Horne v. State was decided.

Subsequently, in the case of Jones v. City of Little Rock, 25 Ark. 301, the court decided that the parties seeking relief were not the proper parties to apply for it, and, in delivering the opinion of the court, it was held that there was no right to issue this paper, and in the course of the opinion it is said that if it was issued contrary to law the city would not be liable for it.

The latter statement was clearly dictum, and it is claimed that so much of the opinion in Van Horne v. State as holds the city is liable for such issues is dictum also. If this is so, one dictum neutralizes or equals the other.

I cannot say that these decisions are conclusive in settling this statute, but it is clear to my mind that, although this paper was issued in violation of law, the legislature did not intend that the innocent holders of such paper should be held liable to the penalties imposed on those who receive it by the terms of the first act.

Upon the principles of law applicable to the subject, we are of opinion:

1. That the form and appearance of the city bonds, on bank-note paper, engraved with vignettes, in the similitude of greenbacks or bank-bills, and of the denominations of $1, $2, $5, $10, $20, $50, and $100, in connection with the undisputed fact that they did form, for a considerable period, a local circulating medium, and were used by the city and the community in lieu of currency, establishes that the said bonds were issued for the purpose of circulating as money, and in violation of the statutes of the state in that regard.

2. It is quite another question, and one not necessary to be decided in this case, and which we do not decide, whether, under the statutes last referred to, in view of the exposition thereof by the supreme court of the state, the holder of such bonds, if in nowise concerned in their illegal issue, and if they represented or were issued for a valid and legal claim against the city, could not recover thereon against the city. Nor is it necessary to determine whether the act of December 14th, 1875, has the effect to validate city money, so called, of the character of the bonds issued by the defendant city, known as city bonds, on bank-note paper.

3. The immediate consideration of the bonds in suit was the surrender by the plaintiff to the defendant of an equal amount, including interest, of what are styled "city bonds on bank-note paper," all of which last-named bonds were overdue at the time of such surrender, and of date prior to July 13th, 1868, and which were held and owned by the plaintiff at the time of such surrender, and which had been originally issued to other persons than the plaintiff, in exchange for or payment of the ordinary warrants of the city—issued to divers persons upon valid claims against the city, audited and allowed by the city council. The city bonds on bank-note paper thus held by the plaintiff were, at the instance of the city, surrendered to it, and destroyed by it, and the bonds in suit issued therefor. Assuming, but not deciding, that if in the hands of the plaintiff the said city bonds on bank-note paper could not have been enforced in an action directly on said bonds against the city, the court is of opinion that the bonds in suit, issued by the defendant in lieu of said

bonds on bank-note paper (the last-named bonds having been originally issued under the circumstances above stated, for valid debts against the city to other creditors of the city than the plaintiff, and the plaintiff not having been connected with their issue), constitute a valid ground of action against the city, and the city is liable thereon to the plaintiff, although the said city bonds on bank-note paper were of such an appearance, and of such a form, as to be especially adapted to constitute a circulating medium, and were in fact used in and about the city as a local circulating medium in lieu of money.

4. There is also a claim against the city for the amount of certain city bonds, on bank-note paper, surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds surrendered by the plaintiff and destroyed by the city to the credit of the plaintiff on the ledger of the city. The same principles of law apply to this claim as to the claim on the new bonds.

5. Under the foregoing views there is no question of the statute of limitation in this case, although it is probable that, under the "call" made by the city in 1875, and the action taken thereunder, this defence would in no event be available to the city; but it is not necessary to rule the point.

The plaintiffs are entitled to judgment for the amount of the new bonds issued in lieu of the bonds surrendered, and the amount placed as the credit to the plaintiff on the ledger account of the city, which was introduced in evidence.

Judgment accordingly.

This judgment was affirmed in the supreme court. 98 U. S. 308. See subsequent opinion of state supreme court [unreported].

Case No. 9,446.

MERCHANTS' NAT. BANK v. NATIONAL BANK OF COMMERCE.

[7 Am. Law Rev. 572.]

Circuit Court, D. Massachusetts. April, 1873.

BILLS OF LADING — ACCEPTANCE—SURRENDER BY BANK—LIABILITY.

At law.

Before SHEPLEY, Circuit Judge, and a jury.

This was an action against the defendants for negligence on surrendering upon acceptance, instead of holding for payment, three bills of lading, two of them attached to two thirty-day drafts, drawn by James H. Mulford, of Memphis, upon Green & Travis, of Boston, and one to a sight draft, drawn by S. M. Anderson & Co., upon the same parties, in June, 1870.

The plaintiffs offered evidence to show the drafts were drawn against cotton sold by the drawers of the drafts, and shipped to Messrs. Green & Travis; that the drafts were discounted by the plaintiff bank, and the railroad receipts attached to the drafts; that the plaintiff bank forwarded the drafts, with bills of lading attached, to their correspondent bank in New York (the Metropolitan National Bank); and that the Metropolitan National Bank forwarded the same to the defendant bank for acceptance and payment; that the defendant bank presented the drafts to Green & Travis for acceptance, and upon acceptance, delivered to them the bills of lading; and that Messrs. Green & Travis failed soon after (June 29, 1870), leaving the drafts unpaid. The defendants claimed that the bills of lading were attached to the drafts to secure their acceptance, and not their payment; and that, in the absence of instructions to hold for payment, the defendants were authorized to surrender the bills of lading upon acceptance. They also offered evidence to show that there was an agreement between Green & Travis and the parties of whom they purchased the cotton (Mulford & Anderson) that the bills of lading should be surrendered upon acceptance, and claimed that the plaintiff bank were bound by this agreement. It appeared that there were no instructions given to the defendants either by the plaintiff bank or the Metropolitan National Bank of New York concerning the drafts in question; but the defendants proved that instructions were given to them to hold one bill of lading attached to a large draft in December, 1869, and that this was the only instruction given.

THE COURT ruled, that in the absence of instructions or consent expressed or implied by the plaintiff bank, the defendants were not authorized to surrender the bills of lading upon acceptance of the drafts by Green & Travis, but should have held them for payment; that the agreement of the vendors of the cotton and drawers of the drafts (Mulford & Anderson) that the bills of lading should be delivered up upon acceptance of the drafts would not be obligatory upon the plaintiff bank unless they were informed of it, and directed the jury to find upon and answer two questions: First, whether there was an agreement between Green & Travis and Mulford & Anderson that the bills of lading should be surrendered upon their acceptance; second, whether this was known to the plaintiff bank.

The jury found, under the instructions of the court, a general verdict for the plaintiff for the value of the cotton surrendered, and found also that there was an agreement with Green & Travis by Mulford & Anderson for the surrender of the bills of lading upon acceptance of the drafts, but that the agreement was not known to the plaintiff bank.

MERCHANTS' NAT. BANK v. PAPIN. See Case No. 12,239.

Case No. 9,447.

MERCHANTS' NAT. BANK v. VALLEY BANK.

[Cited in Keppel . Petersburg R. Co., Case No. 7,722. Nowhere reported; opinion not now accessible.]

MERCHANTS' NAT. BANK (WRIGHT v.). See Cases Nos. 18,084 and 18,085.

Case No. 9,448.

MERCHANTS' NAT. BANK OF BOSTON v. STATE NAT. BANK OF BOSTON.

[3 Cliff. 201.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1868.

PRACTICE IN CIVIL CASES—PRODUCTION OF BOOKS —AT LAW — IN EQUITY — SUBPOENA DUCES TECUM—NOTICE TO PRODUCE—EFFECT OF — WHEN PRODUCED.

1. The word "require" in section fifteen of the judiciary act [1 Stat. 82], when taken in connection with a subsequent clause, does not mean to include a power in the circuit courts to compel a compliance with an order to produce books or writings; but if the party against which the order is passed shall fail to comply, then it shall be lawful for the court to give judgment, if against the defendant, the same as in case of default, if against the plaintiff, the same as in case of nonsuit.

2. At common law parties were not competent witnesses, and they could not be compelled to attend, by writ of subpoena, or bring with them any writings pertinent to the issue, by the writ of subpoena duces tecum.

[Cited in Bischoffsheim v. Brown, 29 Fed. 343; Edison Electric Light Co. v. United States Electric Lighting Co., 44 Fed. 300; Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. 195.]

3. Notice to produce was at law the only method of a party desiring the production of papers by the other, unless he resorted to equity. Such notice, however, only laid the foundation for the production of secondary proof.

4. The conditions under which the power to require the production of writings, etc. should be exercised are: The motion must be in a case at law; the writings, etc. must appear to be in the possession of the party against whom the order is passed; it must appear that they contain evidence pertinent to the issue, and that the circumstances are such that the party might be compelled to produce them, as provided in the section referred to.

5. The order may be absolute or nisi.

6. Production before the trial is not perhaps contemplated by the provision, unless there is just ground to apprehend that the writings may be destroyed, or transferred to another, or removed out of the district, in which cases the order should be made without delay, and absolute.

7. In the case of incorporated banks having officers well known as the custodians of their books and papers, notice should be given for such officers to produce any document desired in the case.

Motion by plaintiffs that defendants be required to produce certain documents or writings in their possession.

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

Sidney Bartlett and J. G. Abbott, for plaintiffs.

B. R. Curtis, C. B. Goodrich, and B. F. Thomas, for defendants.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Power is conferred upon the circuit court, by the fifteenth section of the judiciary act, in the trial of actions at law, on motion of either party, and due notice thereof being given, to require the opposite party to produce any books or writings in his possession or power, which contain evidence pertinent to the issue in cases, and under circumstances where the party might be compelled to produce the same by the ordinary rules of proceeding in chancery. 1 Stat. 82.

Evidently the word "require," when taken in connection with the subsequent clause of the same section, does not include a power to compel a compliance with the order and direction of the court. On the contrary, the provision is, that if a plaintiff shall fail to comply with such order, it shall be lawful for the court, on motion, to give the like judgment for the defendant as in case of nonsuit, and if a defendant fail to comply with the order it shall be lawful for the court, on motion, to give judgment for the plaintiff, as in case of a default. Evidence is essential in the trial of actions at law; and the acts of congress, and the rules and usages of courts, provide the means for compelling the attendance of necessary witnesses for the purpose, and the production of books and writings material to the issue. Circuit courts, as well as all other federal courts, may issue any writ necessary for the exercise of jurisdiction, agreeably to the principles and usages of law, and of course they may issue the writ of subpoena, to compel the attendance of witnesses. They may also issue the writ of subpoena duces tecum, to compel the attendance of a witness, and also to require him to bring with him books and writings in his possession containing evidence material to the issue in a pending action. Parties were not competent witnesses at common law, and of course they could not be compelled to attend the trial, by the writ of subpoena, or to attend and bring with them any books or writings in their possession which were pertinent to the issue, or which might tend to elucidate the matter in controversy, by the writ of subpoena duces tecum. Notice to produce was the only remedy of a party in a suit at law, unless he resorted to equity, in case the other party to the record had in his possession books or writings containing evidence material in the trial. Such notice, however, never enabled the party to compel the production of such books or writings. All the effect it had was to lay the foundation for the introduction of parol or secondary proof of their contents, in case it appeared that the books and

writings described in the notice were in the possession of the party notified, and that he refused to produce them at the trial, as requested. Recent acts of congress make parties, where the suit is between individuals, competent witnesses, which in many cases affords a better and more certain remedy in relation to books and writings in possession of the opposite side, than notice to produce. Besides these common-law remedies to obtain such books and writings, when "pertinent to the issue," power is conferred upon the circuit and district courts of the United States to require a party, in the trial of actions at law, to produce books or writings in his possession or power, if it appears that they contain evidence pertinent to the issue, and the case and circumstances are such that he might be compelled to produce the same by the ordinary rules of proceedings in chancery suits. Undoubtedly the power conferred is a discretionary power, but it is one which should be firmly exercised in a case falling within the conditions specified in the provision, when it appears that there is just ground to apprehend that delay will defeat the action of the court, and that the party is unable to obtain the evidence by subpoena duces tecum, and that the case and circumstances are such that notice to produce is not a safe and adequate remedy. Unless the case is shown to be one within the conditions specified in the provision, the power "to require" or pass the order does not exist. Those conditions are that the motion must be in a case at law, and on due notice to the opposite party, and it must appear that the books or writings are in the possession or power of the other party, and that they contain evidence pertinent to the issue, and that the case and circumstances are such that the party might be compelled to produce the same, as therein provided. No doubt is entertained that the motion may be made, in a pending action at law, before the day of trial; but the requirement of the order of the court must perhaps be that the books and writings be produced at the trial of the action. Such an order may be absolute or nisi, as the circumstances may justify or require. Production before the trial is not perhaps contemplated by the words of the provision, nor is it in general necessary, as the penalty, in case of failure to comply with the order, is not arrest and imprisonment until the party comply, as for a contempt, but a judgment of nonsuit, or default, as the plaintiff or defendant is the offending party. Where the motion is accompanied by satisfactory proof that the case is one in all respects within the conditions of the provision, and it is also satisfactorily shown that there is just ground to apprehend that the books and writings may be destroyed or transferred to another, or removed out of the jurisdiction before the day of trial, the order should be made without delay, and be absolute. On the other hand, if there is no suggestion of fraudulent intent to suppress the documents, and the evidence to show that they contain any matter pertinent to the issue is not satisfactory, the order, if made at all, should be made nisi, or the application may be refused.

Danger that the evidence, if any, will be suppressed, or that the books and witnesses will be transferred, or that they will be removed out of the jurisdiction, is not suggested in this case, and the evidence to show that the case is one within the conditions of the provision is not entirely satisfactory. Were there no other objections to the granting of the motion, we should be constrained to deny it, but there is another even more decisive than those already suggested. Incorporated banks have officers for the transaction of their business, and some one or more of those officers, as provided by law, and the usages of such institutions, have the possession of the books and papers, and are known as the legal custodians of everything belonging to the corporation. Heretofore the commands of the subpoena duces tecum have been ample to obtain such evidence as that described in the motion, and the court is not satisfied that the same process will not have a like salutary effect in this case. Should it fail, it will then become the duty of the court, in case a proper application is made, to exercise all the power it possesses to afford an adequate remedy to the moving party in this case.

Motion denied.

Case No. 9,449.

MERCHANTS' NAT. BANK OF BOSTON v. STATE NAT. BANK OF BOSTON.

[3 Cliff. 205.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1868.[2]

TRIAL — NONSUIT — EVIDENCE INSUFFICIENT—INSTRUCTION—USAGE—CASHIER—CERTIFICATE OF CHECKS.

1. Judges of the circuit courts cannot direct a peremptory nonsuit, but the defendant, when the plaintiff's case is closed, may move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant a verdict, and that, as matter of law, their verdict should be for the defendant.

[Cited in McConnell v. Merrill, 53 Vt. 153.]

2. The motion must be made at the close of the plaintiff's case, or the trial must proceed.

3. The motion is not addressed to the discretion; it presents a question of law, and the ruling of the court is a subject of exception.

4. A power evidenced by a usage must be considered as defined and limited by that usage; and if it appeared that a usage existed among certain banks other than the defendant bank for the cashier to certify checks upon them, it is doubtful if it could be regarded as evidence that the cashier of the defendant bank had any such authority.

5. The motion by the defendant in this case, that the court instruct the jury that the evidence

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

[2] [Reversed in 10 Wall. (77 U. S.) 604.]

introduced by the plaintiff was not sufficient to warrant a verdict, was allowed, because it was *held* that the act of June 3, 1864 [13 Stat. 99], conferred no authority upon the cashier of the defendant bank to certify as good the checks described in the declaration.[2]

[Cited in Congress & E. Spring Co. v. Edgar, 99 U. S. 656.]

Assumpsit upon certain checks upon the defendant bank, and certified as good by the cashier thereof. At the close of the plaintiff's case the defendant moved that the court instruct the jury that the evidence introduced by the plaintiff was not sufficient to warrant a verdict.

Sidney Bartlett and J. G. Abbott, for plaintiff.

B. R. Curtis, C. B. Goodrich, and B. F. Thomas, for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Repeated decisions of the supreme court have established the rule that the judges of the circuit courts cannot direct a peremptory nonsuit when the plaintiff is present in court and claims the right to submit his case to the jury. But the defendant instead thereof, when the plaintiff's case is closed, may, if he sees fit, move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant a verdict in his favor, and that as matter of law their verdict should be for the defendant. Unless such a motion is made for the defendant at the close of the plaintiff's case, the trial must proceed, and the evidence must be submitted to the jury, under the instructions of the court. When made, the motion is not one addressed to the discretion of the court, but it presents a question of law, which it is the duty of the court to decide, and the ruling of the court, in granting or refusing the motion, is as much the subject of exceptions by the party aggrieved as any other ruling of the court in the course of the trial.

In considering the motion, the court proceeds upon the ground that all the facts stated by the plaintiff's witnesses are true; and the rule is, that the motion should be denied, unless the court is of the opinion, in view of the whole of the plaintiff's evidence, oral and written, and of every inference the law allows to be drawn from it, that the plaintiff has not made out a case which would warrant the jury to find a verdict in his favor. Evidently the plaintiff's case, when viewed in that light, presents a question of law for the court, and it is well settled by the highest authority that it is the duty of the court to give the instruction whenever it appears that the evidence is not legally sufficient to serve as a foundation for a verdict for the plaintiff. Scuchardt v. Allens, 1 Wall. [68 U. S.] 370; Parks v. Ross, 11 How. [52 U. S.] 362; Bliven v. New England Screw Co., 23 How. [64 U. S.] 433.

Guided by these views, the court has come to the conclusion that the prayer for instruction presented by the defendants must be granted. Considering that the case is one which will probably be removed into the supreme court for review, the court does not deem it necessary or expedient to enter into any extended discussion of the several questions involved in the motion.

Briefly expressed, the grounds of the decision of the court may be stated in the following propositions, in which both judges concur:—

1. That the act of congress of June 3, 1864, entitled "An act to provide a national currency," etc. conferred no authority upon the cashier of the defendant bank to certify, as good, the several checks described in the first eight counts of the declaration. 13 Stat. 99, §§ 8, 23.

2. That the power to certify the checks of third persons, in behalf of the corporation, is not inherent in the office of a cashier of a national bank, nor is the exercise of such a power within the scope of his usual and ordinary duties. U. S. v. City Bank of Columbus, 21 How. [62 U. S.] 56; Miner v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 71; Bank of U. S. v. Dunn, 6 Pet. [31 U. S.] 51; Fleckner v. U. S. Bank, 8 Wheat. [21 U. S.] 360; Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738; Mussey v. Eagle Bank, 9 Metc. [Mass.] 306; Kirk v. Bell, 16 Q. B. 290; 12 Eng. Law & Eq. 389; Hoyt v. Thompson, 1 Seld. [5 N. Y.] 320; Bank Com'rs v. Bank of Buffalo, 6 Paige, 497; 1 Hare & W. Lead. Cas. 460–472.

Recent cases decided in the courts of New York, referred to by the plaintiffs, do not affect the question, as they were founded upon either an admission in the pleadings, or an agreed statement of facts, admitting that the usage was that cashiers might certify checks, or on proof that such had been the practice of different banks. Whether the teller had authority from the bank to certify checks was not a question in the case of Willets v. Phoenix Bank, 2 Duer, 129, because the opinion of the court shows that the complaint averred, and the answer admitted, that the certifying the checks was the act of the defendant bank. Slight examination also of the case of Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 4 Duer, 219, will show that it contains nothing to support the theory that the cashier of the defendant bank had authority to certify as good the checks in question in this case. The statement of the court in that case was that the teller "had general authority to certify checks," but the exception to his acts was, that his general authority in that behalf was qualified by directions not to give such certificates, unless the customer had funds. Contrary to those instructions, the charge of the defendant bank was, that he colluded with a customer,

[2] [Reversed in 10 Wall. (77 U. S.) 604.]

and certified his checks, when the customer had no funds on deposit. The decision of the court was, that the bank was liable for the amount of the check, as it appeared beyond controversy that the plaintiff was a bona fide holder of the checks without notice. Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 14 N. Y. 623, 16 N. Y. 125.

Support to the theory of the plaintiffs cannot be drawn from the case of Claflin v. Farmers' & Citizens' Bank, 25 N. Y. 293, as the admitted fact in that case was, that the president who certified the checks had a general authority to that effect, but the checks as certified were held to be void, even in the hands of a bona fide holder, because they were checks drawn by himself. Checks on a bank marked "good," say the court in the case of Girard Bank v. Bank of Penn Tp., 39 Pa. St. 99, are to be regarded as evidences of deposit to the credit of the holder; but the authority of the president, cashier, or any other officer of the bank to make such a certificate was not made a question in the case, and was not decided by the court. By the true construction of the seventeenth article of the by-laws, it confers no such power upon the cashier of the bank, and there is no evidence in the case that the directors or the corporation ever authorized the acts of the cashier in making the certificates upon the checks under consideration. Proof of any such usage on the part of the defendant bank, or of any such antecedent practice by their cashier, is entirely wanting, and the evidence as to the usage of other banks fails altogether to show that the cashiers of the other banks in this city, or any one of them, are accustomed to certify checks as good either with or without funds in the bank.

Twenty-two of the cashiers of the national banks located and doing business in Boston were examined by the plaintiffs, and not one of them testified that he, as cashier of a bank organized under the act of congress, certified a check of a third person as good. None testified affirmatively in that respect, but one, if no more, testified that he never had given such a certificate. They all concur that as cashiers they borrow money for their respective banks whenever the bank is in want of money, and give the check of the bank for the amount, and sign it as cashier. Their testimony also is, that they buy and sell New York funds as the agents of their respective banks. Those selling give a draft on New York, signing it as cashier, and those buying give checks, or pay for the same in legal-tender notes or other national currency, or other current funds. The plaintiffs also proved that the cashier of the defendant bank prior to the 23d of February, 1867, borrowed large sums of money of the Second National Bank in Boston, on checks signed by him as cashier; and the cashier of the latter bank testified that he knew no one in the several transactions but the cashier who gave the checks. Giving full effect to testimony as to usage, it only proves that there is a usage among the banks in this city that the cashiers may borrow money of other banks than their own in the settlement of balances through the clearing-house, and may sign the checks given for the same in behalf of their respective banks, and that they may also buy and sell New York funds in the manner before explained. But the opinion of the court is, that the evidence introduced to show usage has no tendency to show that there is any usage among the banks in this city that the cashier of a national bank may certify checks as in this case. The better opinion is, that a power evidenced by usage must be considered as defined and limited by the usage. Strong doubts are entertained by the court, even if it appeared that such a usage prevailed among the other banks in the city, whether it could be regarded as evidence that the cashier of the defendant bank had any such authority, unless it appeared that the defendant bank had in some way directly or indirectly sanctioned the usage; but it is not necessary to decide that question at the present time. Be that as it may, it is nevertheless clear that usage cannot make a contract, or vary or enlarge one, as made by the parties. Evidence of usage is admissible to explain what is doubtful, but it is not admissible to contradict what is plain. Insurance Co. v. Wright, 1 Wall. [68 U. S.] 470; Bliven v. New England Screw Co., 23 How. [64 U. S.] 431; The Reeside, [Case No. 11,657]; Dickinson v. Gay, 7 Allen, 37; Dodd v. Farlow, 11 Allen, 428.

Viewed in any light, the court is of the opinion that there is no evidence of usage in this case which would warrant the jury in finding that the cashier of the defendant bank had any authority whatever to bind the bank by his certificates that the checks were good. The argument of the plaintiffs also is, that the certificates of the cashier import on their face that he was authorized to exercise that power in behalf of the bank. Stated in other words, the proposition is that the certificate affords a prima facie presumption of authority in the officer to make the certificate, but the court is of a different opinion, as the proposition, if admitted, would enable the cashier to exercise all the powers vested in the directors by the act of congress, to which reference has been made. Payments made, or money received over the counter of the bank by the cashier, are doubtless within that rule, and so perhaps are any other acts of the cashier, within the scope of his usual and ordinary duties. But the doctrine cannot be applied to the acts of the cashier outside of his usual and ordinary duties, without establishing a rule which will enable every cashier at will to absorb all the powers of the directors, and to render null the most important features of the eighth section of the act of congress providing for a national currency. Doubtless the decision of the court in the case of Bank of Vergennes v. Warren,

7 Hill, 91, was in fact founded on that distinction; but if it was the intention of the court to give it a wider application, it is clear that it is contrary to the decisions of the supreme court of the United States, and cannot be favored by this court.

The ninth count of the declaration is for goods sold and delivered by the plaintiff bank to the defendant bank; but the court decides that there is no evidence in the case which would warrant the jury in finding that the plaintiff bank ever sold the gold certificates and the coin, or either of the same, to the defendant bank or to the cashier thereof in their behalf, as alleged in that count.

Assuming that the propositions stated are correct, then it necessarily follows that the plaintiffs have no cause of action under the tenth and eleventh counts of the declaration. They have not introduced any evidence in the case which would warrant the jury in finding a verdict in their favor under those counts. Motion granted.

[NOTE. Pursuant to the instruction of the court, the jury found for the defendant. The plaintiff excepted, and carried the case by writ of error to the supreme court, where Justice Swayne reversed the decision of this court, and awarded a venire de novo; Justices Clifford and Davis dissenting. 10 Wall. (77 U. S.) 604.]

Case No. 9,450.

MERCHANTS' NAT. BANK OF CHICAGO v. MEARS et al.

[8 Biss. 158; 24 Int. Rev. Rec. 103; 5 Reporter, 426; 10 Chi. Leg. News, 180; 1 Thomp. Nat. Bank Cas. 353; 6 N. Y. Wkly. Dig. 46.] [1]

Circuit Court, N. D. Illinois. Feb., 1878.

NATIONAL BANKS—REAL ESTATE SECURITIES—BILL TO FORECLOSE MORTGAGE.

A national bank does not transcend its powers in taking from a customer as collateral security for a loan to him, the note and mortgage of a third party, together with certain personal securities; and if the borrower becomes insolvent, and the personal securities prove insufficient the bank can maintain a bill to foreclose the mortgage.

Bill of foreclosure.

Simeon Mears was a regular customer of the bank, frequently borrowing large sums of money. Sometime prior to 1875, he borrowed $5,000 on short time paper, and deposited as security, note of J. E. Warren for $4,740, secured by mortgage to E. Ashley Mears, the note being payable to E. Ashley Mears, and indorsed over by him to Simeon Mears. When the latter's note matured he could not pay it, and the bank took Warren's note. When that matured Warren was insolvent, and Simeon Mears, who had indorsed it, was called upon to pay as indorser of Warren's note. The bank all the while held other securities, and by selling these, Mears' debt was reduced to $2,887, on September 3, 1875, when he gave a new note for this sum, and the Warren note was treated as collateral for this.

Mattocks & Mason, for complainant.

E. A. Otis, for defendants.

BLODGETT, District Judge. This case was submitted to the court on final hearing upon the briefs of counsel and upon the proof taken before the master. It is a bill filed to foreclose a mortgage given by J. Esaias Warren and wife to E. Ashley Mears, by E. Ashley Mears assigned to Simeon Mears, and by Simeon Mears assigned to the complainant. The defendants to the bill are Simeon Mears and the mortgagor, and George B. Warren, who claims as a grantee of the mortgagor by a quit-claim deed made some month or so after the mortgage was made, but recorded prior to the mortgage. The quit-claim from J. Esaias Warren, the mortgagor, to George B. Warren, was put on record about a month prior to the recording of the mortgage, although the mortgage was made prior to the quit-claim deed, but the testimony of George B. Warren shows very clearly that he took title from J. Esaias Warren, mortgagor, merely as security, with the understanding that he took it subject to any liens which had been created upon the property.

There are two objections by these defendants to the foreclosure—first, on behalf of George B. Warren, that he is an innocent purchaser without notice, which I have said is sufficiently disposed of by his own testimony. [The second is, that this bank, the complainant in this case, being a national bank, acting under the national banking law, cannot make loans upon this class of security. The facts, about which there is to be no dispute, are, that Warren made his note, secured by a mortgage, to E. Ashley Mears; E. Ashley Mears assigned to his father, Simeon Mears, and Simeon Mears took it to the complainants in this case, the Merchants' National Bank of this city, and effected a loan, giving the note as collateral security for the loan. This was some time shortly after the note was made—within a few months. It was carried along until some time in the year 1875, when Mr. Mears paid up part of the loan, and the bank further reimbursed itself for the full loan, by the sale of other collaterals, and became the owner by sale, and an agreement between themselves and Mears, of the Warren note and mortgage as final security for the payment of the balance of twenty-seven or twenty-eight hundred dollars.] [2] It is objected, as I said before, that this transaction is ultra vires, that it is beyond the power of a national bank to make a loan upon real estate security, and a large array of authorities is cited in support of this proposition, and it is

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 5 Reporter, 426, and 6 N. Y. Wkly. Dig. 46, contain only partial reports.]

[2] [From 24 Int. Rev. Rec. 103.]

a proposition in regard to which I have no doubt, where it is invoked in a proper case; but here, I do not think the loan can be said to have been made upon real estate security. It was made upon a note to Mears, secured by collateral. The collateral was the Warren note—with such incidental security as the Warren note had.

I had occasion, about a year ago to go quite carefully into this question in a suit brought by the Northwestern National Bank against Loewenthal [unreported], where precisely this same question was raised and contested very vigorously. All the authorities were there considered that entered into this brief; and I held then, and on re-examination of my position at that time, I am contented with the view I then took of the case—that the transaction cannot be held to be within the limitations, either expressed or implied, of the national banking law. The seventh clause of section 5136 reads as follows: "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes, according to the provisions of this title." Rev. St. U. S.

It is claimed, and I think it has been amply held by various state courts, and indirectly by the United States court, that national banks can only loan money on personal security directly. Section 5137 provides that: "A national banking association may purchase, hold and convey real estate for the following purposes, and no others: * * * Second, Such as shall be mortgaged to it in good faith by way of security for debts previously contracted."

Here is the express power to take a mortgage on real estate for debts which have been previously contracted. You may not loan money on real estate security; but after the creditor has made default, or after the loan has been actually made, the bank may take real estate security, unless the transaction should be colorable for the purpose of evading the statute—making the loan first, and taking security so soon afterwards as to show it was part of the original understanding; but in a case such as is provided here, there is no doubt but what the bank, after having made a loan, if it becomes doubtful of the borrower's solvency or ability to give satisfactory personal security, may then take a mortgage on real estate, so that this case now before me is not affected by the clause which I have just read. It simply authorizes them to take security on real estate under certain circumstances.

The seventh clause which was just read, undoubtedly contemplates that the loans made by a national bank shall be made upon personal security. But was this anything but personal security? The bank had the note of Simeon Mears with a large amount of other collaterals, the whole transaction, in its inception, amounting to thirteen thousand dollars, and from time to time, Mr. Mears made payments, and other securities were applied which were held by the bank, until the indebtedness from thirteen thousand dollars was reduced to twenty-seven hundred dollars, and then by an arrangement between the parties, this was taken as final satisfaction or security for the twenty-seven hundred dollars balance.

I think that this cannot be held within the inhibiting clause, and I am most clear that the defense set up cannot avail. There will be a decree for the complainant for the amount found due, and it will be determined, of course, after the sale of the estate, whether there is any residue to go to the other parties in interest, after satisfying the lien of the bank.

Case No. 9,451.

MERCHANTS' NAT. BANK OF HASTINGS v. TRUAX.

[1 N. B. R. 545 (Quarto, 146);[1] 1 Am. Law T. Rep. Bankr. 73.]

District Court, D. Minnesota. April 30, 1868.

BANKRUPTCY—MORTGAGE—KNOWLEDGE OF INSOLVENCY—FRAUD ON CREDITORS.

A mortgage given when a debtor was insolvent is not valid, if the mortgagee had reasonable cause to believe that the debtor was insolvent, and that the mortgage was given in fraud of creditors; hence, the prayer of a petition asking that such mortgage be first paid off from the avails of the mortgaged property must be denied.

[Cited in Re Gay, Case No. 5,279; Re Wright, Id. 18,071; Re Randall, Id. 11,551; Re Kingsbury, Id. 7,816; Graham v. Stark, Id. 5,676; Re Wells, Id. 17,388; Re Bininger, Id. 1,420. Re Walton, Id. 17,130; Rison v. Knapp, Id. 11,861; Martin v. Toof, Id. 9,167; Singer v. Sloan, Id. 12,899.]

[Walter C. Cowles was declared a bankrupt upon the petition of S. G. Renick, president of the First National Bank of Hastings. Case No. 3,297. The Merchants' National Bank of Hastings now seek to establish a lien by way of chattel mortgage upon the bankrupt's assets.]

NELSON, District Judge. The Merchants' National Bank holding a mortgage upon a large amount of the personal property of Cowles, who was adjudicated a bankrupt December 21st, 1867, files a petition against Daniel W. Truax, the assignee, claiming a recognition of the lien, and asking that it be first paid off from the avails of the mortgaged property. The assignee, in his answer, alleges that the property was mortgaged to the bank to defraud the creditors of the debtor, and with the intent to give a preference, and that the petitioner having proved up the

[1] [Reprinted from 1 N. B. R. 545 (Quarto, 146), by permission.]

claim, secured by the mortgage, before the register, has released, abandoned, and discharged the property, taken as security therefor. The evidence reported shows the same state of facts to exist in regard to this transaction as was shown at the time Cowles was adjudged a bankrupt, and clearly establishes two propositions, which are conclusive of the petitioner's rights.

First. That Cowles was insolvent at the time he executed the mortgage. Insolvency, within the meaning of the bankrupt act, when applied to traders, means inability to pay debts in the ordinary course of business, as persons carrying on trade usually do. See Bouv. Law Dict. tit. "Insolvency"; [Buckingham v. McLean] 13 How. [54 U. S.] 151; 4 Cush. 128; 3 Gray, 594. The debtor, although totally unable to meet the ordinary current expenditures necessary to enable him to carry on his business, seems to have been blind to his condition; this, however, may have arisen from the fact that he regarded himself as not absolutely broken up, and hoped that he might retrieve his affairs, and eventually pay his debts, but his own belief as to his condition cannot disprove the fact, substantiated by the strongest testimony, of his insolvency.

Second. The mortgagee had reasonable cause to believe that Cowles was insolvent, and that the mortgage was in fraud of creditors. The testimony of Howes, the cashier, as well as that of Van Dyke, the president, is conclusive upon this point. Howes says: "Cowles told him at the time that the personal property mortgaged was subject to a lien; that judgment would go against him, and he should be subjected to great loss unless he should be able to get the money to release the property; $1,000 was paid then, and the balance, deducting stamps, &c., was credited to an account headed 'W. J. Van Dyke, special.' The balance was to be paid upon W. J. Van Dyke's check; it was to be paid by Cowles at Mr. Van Dyke's say so; and was not to be paid upon Mr. Cowles's checks. I think the credit was made to Van Dyke at my suggestion, inasmuch as the money was not to be paid except for the purpose of manufacturing the lumber, and to make our security available." The evident design on the part of the witness is apparent from this portion of his testimony. He wished to prevent, if possible, the creditors of Cowles from reaching the money. Van Dyke appears to have taken the same view of the case, and says he wished the money to be so placed that Cowles could tell his creditors that he had none. At this time Howes had reasonable cause to believe Cowles solvent. He says, "At the time the loan was made, I considered Cowles solvent,—that is, if his assets were well managed, that they were more than his liabilities."

It is unnecessary to consider this case further; it seems too plain to admit of doubt; allowing all the testimony offered by the petitioner, and rejecting that portion objected to by him, we are unable to grant the relief asked for. Prayer of petition denied.

[C. D. Tuttle, the holder of another chattel mortgage on the property, sought by petition to establish a lien thereon, which was also denied by the court. Case No. 14,277.]

Case No. 9,452.

MERCHANTS' NAT. BANK OF LOWELL v. LELAND et al.

[38 How. Pr. (1870) 31.]

Circuit Court, S. D. New York.

ACTION ON BOND TO STAY JUDGMENT PENDING MOTION FOR NEW TRIAL—MOTION TO STAY PROCEEDINGS—AUXILIARY EQUITY SUIT.

[A stay of proceedings on a judgment in a state court pending a motion for a new trial was granted upon defendants giving bond conditioned to pay the judgment if the motion were denied. The motion was denied, but defendant took an appeal therefrom, and the appellate court stayed proceedings pending the appeal. In the meantime plaintiff brought an action in a federal court upon the bond given in the state trial court, whereupon defendants moved the federal court to stay proceedings in this action until the disposition of the appeal. *Held*, that as the condition of the bond had in fact happened it was not clear that plaintiff should not be allowed to enforce it immediately, and, as an order staying proceedings would deprive him of that right without any opportunity of obtaining a review, such stay would only be granted upon condition that defendant should institute a plenary suit on the equity side of the court, auxiliary to the action at law, to restrain the prosecution thereof, so that a determination of the questions raised would become subject to review by appeal.]

Action on an undertaking, given by the defendants [Charles Leland and others] to the plaintiff, to stay proceedings pending a motion for a new trial; in an action wherein the plaintiff had recovered judgment against two of the defendants in a state court. The condition of the undertaking, was to pay the judgment if the motion for a new trial was denied. It was given pursuant to an order of the court, requiring it as a condition of granting a stay of proceedings on the judgment. The motion for a new trial having been denied, the defendants in that case appealed to the general term, and the court upon motion, and after a hearing, ordered a stay of proceedings on the judgment pending the appeal, provided the defendants gave a bond or undertaking of the same general character as required upon appeals from judgments. The defendants gave the undertaking required. The plaintiff having commenced this action and entered a rule that defendants plead, the defendants now moved to stay proceedings in this action pending the appeal in the state court.

Francis C. Barlow, for plaintiff.

Wm. G. Choate and John Fitch, for defendants.

BLATCHFORD, District Judge. The several stays of proceedings granted by the state

court by the orders of May 11, 1868, May 30, 1868, and Jan. 21, 1869, are, in effect, nothing more than stays of the collection by execution of the judgment recovered in the state court. If it were quite clear that the undertaking of May 29, 1868, was merely an additional security for the payment of the judgment, the mode of giving defendants in this suit relief by staying the plaintiff's proceedings herein, by an order made on a motion to that end, would be objectionable as concluding the plaintiff's rights, without his having any means of review. But I regard it as by no means certain, that the undertaking, given as it was, and as is stated on its face, for the purpose of obtaining a stay of execution on the judgment, until the motion for a new trial in the suit could be heard and decided, and in consideration of such stay and being an absolute undertaking to pay this amount directed to be paid by the judgment, if such motion for a new trial should be denied, is not one which the plaintiff in this suit was entitled to enforce, without regard to the appeal from the judgment. That question, and the question whether this court has any right to interpolate into the undertaking any other condition than the one expressed in it, or which to make it operative, namely: that the motion for a new trial should be denied or dismissed, ought in view of the fact that the motion for a new trial was denied and that the defendants in the judgment had the benefit of a stay in execution therein, while such motion was pending, to be raised and disposed of in a plenary suit. A suit brought on the equity side of this court by the defendants in the suit against the plaintiff therein, to restrain or regulate this suit and thereby prevent injustice, would not be an original suit, but would only be auxiliary and supplementary to and dependent on this suit and would be maintainable without reference to the citizenship or residence of the parties to it; and process in it could be served on the plaintiff in this suit out of this district. Dunn v. Clark, 8 Pet. [33 U. S.] 1; Clark v. Matthewson, 12 Pet. [37 U. S.] 169, 172; Freeman v. Howe, 24 How. [65 U. S.] 451, 460; St. Luke's Hospital v. Barclay [Case No. 12,241]; Logan v. Patrick, 5 Cranch [9 U. S.] 280; Dunlap v. Stetson [Case No. 4,164].

As the amount of the judgment obtained in this court and collection of which is sought to be restrained is $5,301.23, either party to such equity suit, could obtain the judgment of the highest court on the question involved. I think the proper disposition to be made of the present motion is to direct a stay of all proceedings in this suit, to collect on execution any judgment which the plaintiff may obtain herein, on condition that the defendants herein institute within thirty days herefrom such an equity suit as is above suggested.

I do not feel disposed to interfere with the right of the plaintiffs to proceed to obtain a judgment in this suit if they are entitled to one as against any legal defence which may be interposed, leaving the questions which were raised and discussed on the motion to be disposed of in the equity suit to be brought.

MERCHANTS' NAT. BANK OF ST. LOUIS v. SHAW. See Case No. 843.

Case No. 9,453.

MERCHANTS' NAT. BANK OF TOLEDO v. CUMMING.

[5 Reporter, 680; 17 Alb. Law J. 297; 345; 24 Int. Rev. Rec. 150; 3 Cin. Law Bul. 211.] [1]

Circuit Court, N. D. Ohio. April 8, 1878.[2]

TAXATION—NATIONAL BANK UNEQUALLY TAXED—RELIEF.

The capital stock of a national bank was assessed at its full value, while all other property was assessed at less than one half its full value: *Held*, that the capital stock was onerated with an undue proportion of the public taxes, and that the bank in its corporate capacity was entitled to a standing in court for relief.

Action by the Merchants' National Bank of Toledo against [William] Cumming, [treasurer of Lucas county and] collector of taxes, to restrain him from collecting a tax assessed for the year 1876 on the shares of stock of plaintiff's bank. The late Judge Emmons of the same circuit, before his death, granted a preliminary injunction.

Mr. Raney and Wager Swayne, for plaintiff.

Mr. Griswold and F. K. Hamlin, for respondent.

BAXTER, Circuit Judge. [There were several points presented and urged in the argument of this case on hearing which, in the view I have taken of it need not be discussed here suffice it to say that,] [3] from the pleadings and proofs, it very satisfactorily appears that complainant's capital stock was assessed for the year 1876 at its full value, while all other property was assessed at from thirty to forty per cent. only of its real value, and that, by reason of this unequal assessment, complainant's capital stock was in the hands of its shareholders onerated with an undue proportion of the public taxes. It is not important to inquire into the methods leading to such a result. Whether from inadvertence or design, the consequences are the same to the complainant. It is an injustice that contravenes the constitution of Ohio, as well as the provisions of the national banking law, and a wrong which the courts may, when their powers are properly invok-

[1] [Reprinted from 5 Reporter, 680, by permission. 17 Alb. Law J. 297, contains only a partial report.]

[2] [Affirmed in 101 U. S. 153.]

[3] [From 17 Alb. Law J. 345.]

ed, take cognizance of to redress. But the defendant insists that the wrong complained of is a wrong to complainant's shareholders, against whom the tax was assessed, and not against the complainant. This objection seemed, on first impression, to have been well taken, but further reflection induces the belief that it involves the rights of complainant as well as the rights of its corporators. Between the two there is an intimate connection; the legal entity—the corporation—is distinct from the shareholders, but the former is a trustee for the latter, and custodian of corporate funds; and if it shall pay the taxes so assessed, and assume to deduct the same from dividends declared, or to be hereafter declared in favor of its shareholders, it may, and the averment is that it will, subject itself to a multiplicity of suits with its own shareholders; whereas, if it refuses to pay these taxes, it will impair its credit, embarrass its business, and expose itself to vexatious and expensive suits, and entail upon itself irremediable injuries in resisting the illegal exactions made upon it. Hence, in view of the probable consequences, I have reached the conclusion that the complainant, in its corporate capacity, is entitled to a standing in this court, and to relief, and I shall, therefore, authorize a decree permitting complainant to pay to the defendant, or into the registry of the court, forty per cent. of the amount of the tax assessed against its shareholders, in accordance with its tender heretofore made, and, on this being done, an injunction be issued perpetually enjoining the collection thereof. The costs will be decreed against defendant, to be paid out of the money to be realized under decree hereinbefore authorized.

[The case was taken by the defendant, on appeal, to the supreme court, where the decree of the court below was affirmed, Mr. Chief Justice Waite dissenting. 101 U. S. 153.]

Case No. 9,454.

MERCHANTS' TRANSP. CO. v. The NEW YORK.

[N. Y. Times, Nov. 21, 1861.]

Circuit Court, S. D. New York. 1861.

COLLISION—WEIGHT OF EVIDENCE.

[A libel for the loss of a steamer sunk in collision with a schooner on a clear night in Long Island Sound will be dismissed where it appears that the vessels, properly manned and carrying proper lights, were aware of each other's presence in due season, and libelants could not establish by preponderating evidence that the schooner changed her course.]

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

[This was a libel in rem by the Merchants' Transportation Company against the schooner New York for collision. Libelants were owners of the steam propeller Charles Osgood, which was lost in collision with the schooner New York on Long Island Sound. There was a decree in the district court dismissing the libel. The libelants appeal.]

NELSON, Circuit Justice. On the evening of the 10th of November, 1858, the Osgood was proceeding on one of her usual trips through the Sound from the city of New York to Norwich, Conn., and the schooner on one of her regular trips in the opposite direction, from Boston to New York. The wind was about north northwest, with a breeze of some five or six knots the hour. The direction of the propeller was about east northeast, and that of the schooner about west by south. She was on her starboard tack, and had been from three miles east of New Haven. The night was clear, and no difficulty in seeing vessels at a considerable distance. Both vessels had lights and saw each other in time to have avoided the disaster. They came together in the middle of the Sound, northeast of Huntington's Light, the schooner striking the propeller, head on, on the larboard side, opposite the boiler, and about one-third of the way from the stern. The propeller filled and sunk in a few minutes, from the effects of the blow. On the part of the propeller, it is insisted that when she discovered the schooner, which was a mile or more ahead, she was a point in her weather-bow, and that if she had kept her course the collision could not have happened, but that, as she approached the propeller, and while at an angle of forty-five degrees on her line of sailing from the propeller, she suddenly changed her course, bearing away before the wind, until she struck her, as already stated. On the part of the schooner, it is claimed that she discovered the propeller a long distance ahead, half a point on her weather bow, and that, as the two vessels approached, the propeller attempted to pass across the bow of the schooner; that the helm of the latter was immediately ported, to luff into the wind and avoid a collision, but the two vessels were so close to each other it was impossible to prevent it. The court below found in favor of the view taken by the schooner, and dismissed the libel. It was sustained in the proofs by three witnesses on board this vessel, the master and two hands, one at the wheel and the other the look-out. The view of the propeller was sustained by two, the master and the man at the wheel. The look-out was not examined, but his absence was accounted for, he having gone to California.

It is quite clear, unless the propeller can maintain her position that the schooner suddenly changed her course by bearing away before the wind, and thus produced the disaster, that the ground of the libel fails, as no fault can be justly imputed to her. If she kept her course, which she had pursued from a point three miles east of New Haven, and which must have been seen on board the propeller for a mile or more before the

collision occurred, it was the duty of the latter to have adopted the proper movement to avoid her. The case turns upon this question of fact, did or did not the schooner change her course and thus produce the disaster? We think the weight of the proofs with the finding of the court below; at least upon the evidence, we cannot say that the libelants have established the affirmative so fully and satisfactorily as to justify us in charging this vessel with the loss. The case is one of great carelessness, or want of skill, on the one side or the other. The night was not dark, nor the wind very strong. Both vessels were near the middle of the Sound, which is several miles wide at the place of collision. They saw each other at a distance that afforded full time for any necessary movement to have prevented the meeting. Our surprise is nearly as great that it happened at all as if it had occurred in open day. Decree below affirmed.

Case No. 9,455.

MERCIER v. LACHENMEYER.

[28 Leg. Int. 325;[1] 8 Phila. 152; 3 Leg. Gaz. 316; 1 Leg. Gaz. Rep. 279; 4 Am. Law T. Rep. U. S. Cts. 226.]

Circuit Court, E. D. Pennsylvania. Oct. 2, 1871.

PRINCIPAL AND AGENT — SPECIAL AGENT — ACTS WITHIN SCOPE OF INSTRUCTIONS — SHIPPING — CHARTER-PARTY.

1. James T. Abbott & Co. were the agents employed by Otto Lachenmeyer to charter a vessel on behalf of John Lachenmeyer, with specific instructions as to the kind of vessel to be obtained, the ports of sailing and discharge, etc. They holding themselves out as agents of Lachenmeyer, chartered the vessel of John Mercier, the libellant, but altered the terms of the charter-party authorized by the respondents, who disavowed such new charter-party and notified the libellant of such disavowal. *Held*, that James T. Abbott & Co. were special agents, and only their acts within the scope of their instructions are binding upon their principal.

2. There being shown no act or declaration of the principal, from which an enlargement of this limited power of the agents can be presumed, the respondents cannot be charged with the obligation of a contract, to which they did not, by express authorization or legal implication, yield their assent.

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

McKENNAN, Circuit Judge. James T. Abbott & Co. were ship agents at St. Thomas, and were the correspondents of Edmund A. Souder & Co., of Philadelphia. Otto Lachenmeyer, one of the respondents, was in the employment of E. A. Souder & Co., and in conducting their correspondence with James T. Abbott & Co., authorized them to charter a vessel for his father, John Lachenmeyer, to carry lumber from St. Mary's, Georgia, to Montevideo, sending them a printed form of charter-party used in the business of E. A. Souder & Co., limiting the freight rates to be paid to $19 to $20 gold "flat," per M. feet, and, if absolutely necessary, to add a gratuity of $50 to the master, and with the privilege of ordering the vessel to a port on the Uraguay not above Paysander or to Rosario on the Parana, at $2 per M. feet additional freight. This order was renewed several times by Otto Lachenmeyer, modified only by an enlargement of the limit to $21 gold, and an optional change of the place of loading to Fernandina or Lachlisin's Mills. On the 23d of December, 1869, James T. Abbott & Co. chartered, at St. Thomas, the libellant's vessel, the St. George, and, in the name of Otto Lachenmeyer, entered into a charter-party with him, by which he was to receive $21 gold per M. freight, a percentage of 5 per cent. per M. and, if the destination of the vessel was changed to Rosario, Fray Rentos or Paysander, an additional freight piece of $2.50 per M. feet. In pursuance of this charter, the libellant immediately sailed to St. Mary's where he was notified that the respondents disavowed the charter-party, as having been made in violation of instructions to James T. Abbott & Co., and that lading would not be furnished on the footing of it. The libellant awaited at St. Mary's the expiration of his lay days and until the 9th of March following, refusing any other engagement of his vessel, and has filed his libel to recover the demurrage stipulated by the charter party, and the damages arising from its non-fulfilment by the respondents.

The libellant can recover only on the footing of the contract made with him by James T. Abbott & Co. If it substantially embodies the terms for which they were authorized by the respondents to stipulate, it is the respondent's contract, and the libellant had a right to call upon them to fulfil it. That an agent can bind his principal only within the extent of his authority, and that this must be ascertained, at their own peril, by those who deal with him, is an elementary principle of the law of agency. In its application, it is relaxed only where the principal, by his acts or declarations, or by a general substitution of the agent for himself in the transaction of the kind of business entrusted to him, authorizes the presumption that the agent is invested with unrestricted discretion as to the subject matter of the agency, or at least with power to bind his principal to the extent to which he assumes to act for him.

What then is the relation in which the parties stand to each other. It is plainly such as ordinarily results from the exercise of authority by one who is employed to perform a service for another, under special instructions and with limited powers. James T. Abbott & Co. were the agents employed to charter a vessel in behalf of John

[1] [Reprinted from 28 Leg. Int. 325, by permission.]

Lachenmeyer, with specific instructions as to the kind of vessel to be obtained, the ports of sailing and discharge, the price to be paid for freight and the amount of gratuity to the master. They were, therefore, special agents, and only their acts within the scope of their instructions are binding upon their principal. No act or declaration of the principal has been shown, from which an enlargement of this limited power of the agents can be presumed, and it is hardly necessary to add that no such effect is due to the fact, if it be a fact, that James T. Abbott & Co. were the exclusive shipping brokers of Edmund A. Souder & Co., at St. Thomas. The latter were the intermedium through whose connection with James T. Abbott & Co. the negotiation was conducted and their employment was effected, but certainly neither the nature nor extent of their relations can operate to charge the respondents with the obligation of a contract, to which they did not, by express authorization or legal implication, yield their assent. In point of fact, such an assumption is repelled by the charter-party itself, for upon its face James T. Abbott & Co. describe themselves as the agents of Otto Lachenmeyer, not of E. A. Souder & Co. There was no room for misconception by James T. Abbott & Co. They knew who their principal was. They represented themselves to libellant as acting for Otto Lachenmeyer, and thus the libellant was warned of the duty, and informed of the means, of ascertaining the nature and limitations of the contract which they were authorized to make with him. Nor was there any ambiguity in the instructions given to the agents. What may be the meaning of the term "flat," which has supplied a subject of such earnest discussion and animadversion by the counsel,—this much is clear: That $21 gold per M. feet and $50 currency to the master were authorized to be paid, and an additional $2 per M., if the port of discharge was changed by the charterer to the Uruguay or Parana. Now, instead of these rates, to which James T. Abbott & Co. were limited by their instructions, they stipulated for $21 gold, and 5 per cent. primage also in gold—which is a form of gratuity to the master—and $2.50, if the destination of the vessel was changed. Is such a contract, in the execution of which the agents did not observe their instructions, and provided for payments in excess of those to which they were limited, to be regarded as the engagement of their principal? Obviously not; and of this the libellant is chargeable with notice, because he dealt avowedly with representatives, and was bound, at his peril, to know that they kept within the line of their authority.

Although these considerations are decisive against the libellant, an additional objection is made to his recovery, which was not urged in the district court, and which, it is therefore argued, is not available to the respondents now, as the whole case is brought into this court and is heard de novo, and as no assignment of specific errors is required, all the questions arising upon the pleadings, and proofs are legitimate subjects of consideration. The objection now urged is distinctly presented by the answer of the original respondent, and seems to have led to the libellant's motion, which was ordered to stand as a supplemental libel against John Lachenmeyer. It has not been waived and may, therefore, be pressed at any stage of the controversy. As before stated, Otto Lachenmeyer was merely the organ of his father, John Lachenmeyer, in the correspondence in relation to the charter. He so declares himself in explicit terms, and his correspondents are asked to exert their offices only for the benefit and in the behalf of John Lachenmeyer. He did not propose that they should make any engagements for him. John Lachenmeyer was their principal, whom alone they had power to bind. But the charter-party was executed in the name of Otto Lachenmeyer as the charterer, and John Lachenmeyer is not a party to it. It is not then the contract of Otto Lachenmeyer, because it was unauthorized by him. Nor is it the contract of John Lachenmeyer, because he is not named in it and it does not purport to bind him. This is an awkward dilemma, either horn of which is fatal to the libellant.

The decree of the district court dismissing the libel is affirmed, with costs to be taxed against the libellant.

Case No. 9,456.

The MERCURY.

[Blatchf. Pr. Cas. 328.] [1]

District Court, S. D. New York. Feb. 28, 1863.

PRIZE—VIOLATION OF BLOCKADE—ENEMY PROPERTY.

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

In admiralty.

BETTS, District Judge. This vessel, with a cargo of spirits of turpentine, was captured as prize January 4, 1863, coming out of Charleston harbor, by the United States ship-of-war Quaker City. The cargo was sent to this port for adjudication, and regularly arrested here, by warrant of attachment, January 30 thereafter. The marshal duly returned the process February 17 thereafter. No one appearing on the return and proclamation to make defence, a judgment of default and condemnation was then duly entered, upon motion of the district attorney. No ship's papers were found on board of the vessel. The owner of the vessel, her mate, and one passenger were examined as wit-

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

nesses in preparatorio before the prize commissioners. The facts proved by the testimony are, that the vessel and her cargo of turpentine were both the entire property of the witness, the owner, who resided in Charleston, and avowed, on oath, his citizenship, and denied all allegiance to the United States government. He purchased the vessel and her cargo in Charleston immediately previous to her leaving port on this voyage. He knew of the blockade of the port. She had attempted to come out once unsuccessfully previous to her capture, and was captured in or near the harbor of Charleston as she came out of it on a voyage destined to Nassau, New Providence, and back to Charleston. A mail on board, which she was carrying to Nassau, was thrown overboard. The owner avers that she raised no flag because she had none on board, but that he would have carried a confederate flag had he possessed one, and would have resisted the seizure by force had he been armed. The mate testifies that the capture was made in Charleston harbor, January 4, between two and three o'clock in the morning. The vessel was on her arrest taken to Port Royal, and, under an appraisement and survey, by order of Admiral Dupont, was appropriated to the use of the United States naval service on that station, at the valuation of $200.

Let a decree be entered for the condemnation and forfeiture of the vessel and cargo to the libellants.

Case No. 9,457.

MERCY v. OHIO.

[5 Chi. Leg. News, 351.]

Circuit Court, N. D. Illinois. March 12, 1873.[1]

RAILROAD COMPANIES—TOWN BONDS—SPECIAL ACT—ELECTION—IRREGULARITY IN.

1. The bona fide holder, for value paid, of coupons payable to bearer, issued by a town organized under the township organization law of Illinois, by virtue of a special act of the legislature empowering such town to vote subscription to the capital stock of a railroad company, is not bound to prove that every prerequisite has been complied with, in order to maintain his action.

2. A mere irregularity in the form, for example, of an election, called to vote for or against such subscription, does not constitute a good defense to a suit upon the bonds or coupons in the hands of a bona fide holder.

3. The plaintiff in this case has established a prima facie case, by showing the law, the vote, the acceptance by the company, the issuing of the bonds, and a compliance with the conditions upon which the vote was taken, though as to this last it was perhaps not necessary for the plaintiff in a case like this to prove such compliance.

4. It is not material under the statute in question that the application for the election should be formally addressed to the town clerk. The application was in fact received by him, and he acted upon it by giving the requisite notices for the election.

5. That the ordinary judges of election, the supervisor, assessor and collector, presided and canvassed the votes, instead of a moderator, if a defect at all, is but an irregularity, which does not render the election void, nor invalidate these securities in the hands of an innocent purchaser.

6. *Held*, that it is to be presumed that the persons authorized to vote under the terms of this act were legal voters, and not mere inhabitants.

7. That the subscription in question was not made until after the constitution of 1870 took effect, is not such unreasonable delay as will constitute a valid defense against an innocent holder of the bonds; the new constitution expressly permitting such subscription to be made, where there has been a prior vote.

8. The conditions of the vote in this case construed, and *held* to have been complied with.

9. Where bonds are placed in the hands of a third person to deliver upon the happening of certain things, and he delivers them irregularly or prematurely or contrary to instructions, and the bonds pass into the hands of bona fide purchasers without notice, the loss, if any, must fall upon the party who has so placed them in the hands of the third person, and not upon the purchaser.

[This was an action of assumpsit by George O. Mercy against the town of Ohio.]

Geo. O. Ide, of Paddock & Ide, for plaintiff.
M. T. Peters, for defendant.

DRUMMOND, Circuit Judge. On the 28th of Feb'y, 1867, the legislature incorporated the Illinois Grand Trunk Railway with power to build, maintain, and use a railway from some point or points on the Mississippi river, either at Rock Island, Fulton, or any other intermediate point or points to Prophetstown, Mendota, Newark, and the village of Lisbon, Grintown, and Joliet to Chicago, or to any desirable point on the Indiana state line. The road was to be built on or near the established line of the old Illinois Grand Trunk Railway, as nearly as might be practicable, from Prophetstown to Joliet, running through the places aforesaid. On the 25th of March, 1869, the legislature amended this act, and declared that "any city, incorporated town or township, which may be situated on or near the route of the Illinois Grand Trunk Railway, west of the city of Mendota, by the way of Prophetstown to the Mississippi river, may become subscribers to the stock of said railway, and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereto attached, under such limitations and restrictions, and on such conditions as they may choose, and the directors of said company may approve—the proposition for said subscription having been first submitted to the inhabitants of such city, town or township, and approved by them." The amendment further provided that upon the application of ten voters, as aforesaid, specifying the amount to be subscribed and the conditions, it should be the duty of the clerk of the city, town or township, to call an election in the same manner that other elections for the city, town or township were called, for the purpose of determining whether the city, town or township would subscribe to the stock of the railway; and it provided that if

[1] [Affirmed in 18 Wall. (85 U. S.) 552.]

a majority of the voters should be for the subscription, then the corporate authorities of such city, town or township, and the supervisor and town clerk of such township should cause the subscription to be made, and upon its acceptance by the directors of the company, the bonds were to be issued in conformity with the vote, which bonds were to be of not less than one hundred dollars, and in no case to bear a higher rate of interest than ten per cent. Under these laws, bonds were issued by this town, and bore upon their face that they were issued under them, and they came into the hands of the plaintiff in good faith for value. Upon the coupons of these bonds this suit has been brought, and various objections have been made by the town to the recovery by the plaintiff in this case.

I suppose there can be no doubt that in a case like this it is necessary for the plaintiff to make out that the bonds were issued in pursuance of authority properly given to the town. This is claimed to be shown by the introduction of the law, and by showing that there was an application made, as required by the law, containing certain conditions; that there was a vote taken, and that the majority of the vote was in favor of the subscription; that it was accepted by the company, and the bonds issued in pursuance thereof, the conditions having been complied with. How far it is necessary for a bona fide holder of bonds or coupons issued in this way to establish in evidence before recovery, the conditions under which the bonds were to issue, is a question about which there has been a good deal of controversy in the courts—whether, in other words, it is incumbent on the bona fide holder of bonds or coupons to prove all the prerequisites, which the law required, prior to the issuing of the bonds. The courts have held uniformly in the construction of such laws, that it is not indispensable that every prerequisite should be shown, and they have further uniformly held that a mere irregularity in the form, for example, of an election, did not constitute a good defense to the suit for the bonds or coupons in the hands of the bona fide holder.

The first objection made is in relation to the authority, and my opinion is, that upon this question a prima facie case is made out when the plaintiff has shown what has been already stated—the law, the vote, the issuing of the bonds, the acceptance and compliance with the conditions upon which the vote was taken, though as to this last perhaps it was not necessary in such a case as this. One of the objections on the part of the town is, that there was no town election held. The facts are, that when the application was made by the number of voters required by the statute, and notice was given, the election seems to have been held by the ordinary judges of election, and not by the moderator, who ordinarily presides at mere town-meetings. The authorities of the town, or the persons whose advice was followed in this case, seem to have thought that it being an election, the judges of election, as in state and county elections, should receive the votes; and they accordingly did receive, canvass and announce them. The supreme court of this state has decided that, in the absence of all language in a statute designating the particular manner in which an act shall be done by a town, the presumption is, it is to be done by the town as a town, or a township. The only organization that this town of Ohio had, was the township organization under the statute. The supreme court having held, that under a statute such as this, it was the duty of the township to have proceeded in a regular town-meeting manner, perhaps it would have been proper that the moderator should have received and canvassed these votes, rather than the judges of election. I do not see, as to one objection that is made, that the application is addressed to any particular person. I do not think that is material. The object of the law was that there should be an application made, and that the clerk should give the notice. The application is shown, and the clerk did give the notice, and there is no question made but that the notice was such a notice, and for such time as the law required.

There is further objection made as to the votes that were taken. It does not appear that there was any one who was desirous to vote, whose vote was rejected, and the presumption would be, I think, that legal voters were meant by the language of the law.

Another objection taken under this head, is as to this being an election to subscribe stock to the Illinois Grand Trunk Railway Company, when the corporation was the Illinois Grand Trunk Railway. I do not think that is a substantial objection. The application is in proper form, describing the corporation as the Illinois Grand Trunk Railway, and the notice seems to be so, and the bonds that were issued seem to be in the same form.

But the principal objection taken under this head is that which has been already referred to—the fact that the judges received and canvassed the votes, instead of the moderator; and the question is, whether that is, as against this plaintiff, a vital objection—one going to the foundation of the authority, so far as he is concerned, warranting the town, as to him, in saying, that the bonds were unauthorized because of this defect. My opinion is, that it has not that right, that it is simply an irregularity, and does not render the election (even conceding the correctness of the position taken by the defense) absolutely void, and the bonds in the hands of an innocent holder a nullity. The main thing in this election was to determine whether there was a majority of the voters in favor of the subscription, upon the conditions named. There is no dispute but that there was such a majority; and the fact that certain persons named as judges, by common

consent, received the votes, and canvassed them, is nothing more than an irregularity, which might render the election voidable, but does not render it a nullity when suit is brought upon the bonds in the hands of an innocent holder.

Another objection taken on the part of the defense is, that the proposition of the town to subscribe for the stock, was not accepted by the company until October, 1870, after the adoption of the new constitution of the state. The election was held on the 21st day of August, 1869, and it is contended that this was an unreasonable delay, and that the town was not bound by an acceptance of the company made after so long a time, the constitution of 1870 having prohibited municipalities from making subscriptions to the capital stock of railroad companies or private corporations. But the new constitution also provided that the adoption of the section prohibiting subscriptions in the future should not be construed to affect the rights of any municipality to make a subscription where the same had been authorized under a law already in force by a vote of the people prior to the adoption of the constitution. The only question, therefore, would be (this being within the letter and spirit of that provision of the constitution) whether there was an unreasonable delay, and I do not think that as against an innocent holder, the court can assume that there was such delay as to render the bonds void in his hands.

The next objection is one about which I have had considerable difficulty, under the language of the amendment of March, 1869, declaring, in case there is a majority of the voters in favor of a subscription, that the corporate authorities of the said city, town or township, and the supervisor or town clerk of the said township, shall cause the subscription to be made, and upon its acceptance by the directors of the company shall cause bonds to be issued in conformity with the vote. The bonds, in point of fact, were in this instance issued by the supervisor of the town, and the clerk, and the question here is, whether that is within this clause of the amendment; and it may be a question who are the corporate authorities within the meaning of this law. Of course, the words "supervisor" and "town clerk" of a township, could not both apply to a city; "said city, town or township, and the supervisor and town clerk of said township"—because, as we know, ordinarily, a supervisor is not an officer of a city. There must, therefore, be some limitation of this language, the "supervisor and town clerk of such a township," and after some hesitation I have come to the conclusion that the supervisor and town clerk are, within the meaning of this law, the corporate authorities who had the right to act, to cause the subscription to be made, and the bonds to be issued; and I think that has been generally the construction given to language similar to this, as used in statutes. I find several cases where the supervisor and town clerk have issued the bonds under somewhat similar language to that which has been used here, and either no objection was made to the authority, or else it was overruled, if any was made. This is a question, I admit, not free from difficulty; but I have thought, in view of the decisions which have been made by the supreme court of the United States, in relation to bonds, with such recitals in the hands of bona fide holders for value, that the construction ought to be, in a matter of doubt like this, in favor of the holders of the bonds.

Another objection made is, that one of the conditions was not complied with—that the road was not completed, as required by the conditions of the vote. It seems to me that, as a matter of fact, that is hardly made out. But, on the contrary, I am inclined to think that the weight of the evidence shows that the road was completed within the fair meaning of the condition. One of the conditions was, that "the Grand Trunk Railway shall be completed, and the cars running thereon, for the purpose of carrying passengers and freight from Mendota through the town of Ohio." It can hardly be contended, I apprehend, that the whole of the road should be completed from the Mississippi to Chicago, or the state line, before the bonds could be issued within this condition, in view of the limitation made by the amendment itself to the towns that might subscribe, they being west of the city of Mendota.

Another objection made is, that these various conditions that were annexed to the application, and the notice of the vote, were not inserted in the bonds. The language is somewhat peculiar: "Said bonds to be issued and delivered only on this expressed condition, 'that the aforesaid Grand Trunk Railway,' etc., 'shall be completed.'" The construction sought to be given by the defense is, that these conditions should be "expressed" in the bonds—that is, inserted in the bonds, and it being conceded that they were not, that the issue was unauthorized and void. I hardly think that so rigid a construction as this ought to be given to this language. The word, to be sure, is "expressed." The language is not, however, "expressed in writing"—it is not that these conditions are to be inserted in the bonds. It would be a literal compliance with this language, if the conditions were expressed orally, when they were delivered. Anything may be expressed by word of mouth, as well as by writing, and as against an innocent holder, it seems to me that to sustain the objection would be a stringent construction of this language. The meaning of it was probably intended to be, simply, "upon the express condition," and it may be nothing but a mere clerical error, or an ungrammatical phrase. I am inclined to think, however, that had the intention been that the condition should be inserted in the bonds; and if that had been the meaning of the

signers to the application, that intention would have been stated a little differently.

There is nothing in another objection made that, by the terms of the election, no part of the principal and interest of the bonds or coupons was to become due until after five years from the issue. I do not think that a fair construction to be placed on the whole subject. On the contrary, I think the fair meaning would be, that coupons were intended to be payable before the principal of the bond was payable. The language of the amendment of March, 1869, was that bonds were to be issued, with coupons for interest attached. The language of the application is, that bonds might be issued, with interest payable at a particular time. One-fifth of the whole number were to be due in five years, and one-fifth in every succeeding year thereafter. Now I do not think it a reasonable construction of the law, the application, the notice, and the vote, to say that the interest of these bonds was not to be payable until after the expiration of five years. On the contrary, it is apparent to every one that bonds of that character never could have been negotiated at all, and that the whole enterprise would necessarily have been a failure. This is only referred to for the purpose of putting a construction upon acts performed, and an unreasonable construction should never be placed upon acts like these.

Another objection is, that the Grand Trunk Railway was not organized when the election of August, 1869, took place. I do not think that that would render the election absolutely void. The company was not required to do any act until the election took place, and until they were called upon to make an acceptance of the subscription. It might possibly be a question whether it ever would be organized, unless the subscriptions were made as authorized.

The ninth and tenth objections as to the issuing of coupons, and the completion of the road, I have already considered.

As to the delivery of the bonds, the facts seem to be that the bonds were issued, and placed in the hands of a third party, with instructions to deliver them under certain circumstances, and he delivered them, as he supposed, in compliance with the instructions. Now, there may be a very serious question whether, when bonds are delivered in such a way as this, to a third party, and are by that third party turned over, and come into the hands of an innocent holder for value, the party so placing them in the third party's hands, should not, in case of any irregularity in relation to the matter, or of non-compliance with instructions, suffer the consequences of such irregularity, or non-compliance with instructions, and it seems to me that under the evidence in this case, and what is stated in the bonds, and as against this plaintiff, the defendant must, if there has been any non-compliance with regulations or instructions, suffer the consequences.

This disposes of all the objections, and I think that the plaintiff is entitled to recover the amount of the coupons sued on, with interest from the time the coupons ought to have been paid. The principles which are here stated are, I think, fairly deducible from the numerous decisions of the supreme court of the United States, upon the subject of municipal bonds in the hands of bona fide holders for value.

[The case was taken by the defendant, on a writ of error, to the supreme court, where the judgment of the circuit court was affirmed. 18 Wall. (85 U. S.) 552.]

MEREDITH (BANK OF NORTH AMERICA v.). See Case No. 893.

MEREDITH (CHOATE v.). See Case No. 2,692.

MEREDITH (LEWIS v.). See Case No. 8,328.

MEREDITH (SPEIGLE v.). See Case No. 13,227.

MERIDEN BRITANNIA CO. (STRONG MANUF'G CO. v.). See Case No. 13,546.

Case No. 9,458.

In re MERKLE.

[5 Ben. 8.] [1]

District Court, E. D. New York. Feb., 1871.

BANKRUPTCY—VOLUNTARY SUBMISSION OF BANKRUPT TO ARREST—MOTION TO SET ASIDE BANKRUPTCY.

After involuntary proceedings in bankruptcy were commenced, the petitioning creditors commenced an action in a state court against the bankrupt and another, to recover a debt, composed in part of a note set forth as protested in the petition in bankruptcy. In that action, they obtained an order of arrest, but they gave instructions to the sheriff not to arrest the bankrupt or serve him with the summons. The bankrupt voluntarily surrendered himself to the sheriff, and gave bail, and then moved, before the return of the order to show cause, to set aside the bankruptcy proceedings. *Held*, that the bankrupt had not removed himself from the effect of the bankruptcy act [of 1867 (14 Stat. 517)], and that the motion must be denied.

[In the matter of George Merkle, an alleged bankrupt.]

BENEDICT, District Judge. This is a motion, on the part of an alleged bankrupt, made before the return of the order to show cause why he should not be adjudged a bankrupt, to set aside the proceedings against him, for the reason that, since the commencement of the proceedings, the petitioning creditors have caused him to be arrested and held to bail in an action, commenced in a state court, to recover a debt composed in part of the note set forth as protested in the petition.

Whatever force there might be in the position that the taking of the bankrupt upon an order of arrest amounts to a satisfac-

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

tion of the debt, is destroyed, in this case, by the fact disclosed, that although an action was commenced by the petitioners, in which the bankrupt and another person were joined as defendants, and an order to arrest both defendants was granted by the state court, specific instructions were given to the sheriff, not to arrest the bankrupt, nor to serve him with the summons in this action, and that the arrest of the bankrupt was made because he voluntarily surrendered himself to the sheriff, and voluntarily gave bail, in that action, without the knowledge or assent of the petitioners, who now disclaim the proceeding, as against the bankrupt, and offer to give their consent to cancel the bail bond, if any consent on their part be necessary.

A person proceeded against as a bankrupt, does not, by voluntarily placing himself under arrest, or in jail, or in any other place of confinement, remove himself from the effect of the bankruptcy act. The motion is denied.

Case No. 9,459.

The MERMAID.

[1 Brown's Adm. 51.] [1]

District Court, D. Michigan. Feb., 1859.

MARITIME LIENS—REPAIRS—LAW OF CANADA.

There being no lien by the local law for repairs furnished in Canada, no proceeding in rem can be maintained here to enforce the payment of such repairs.

This was a libel for repairs furnished to the schooner Mermaid, at the port of Amherstburg, in the province of Canada West. It was admitted, by stipulation, that the vessel was a Canadian bottom, owned in Canada; that there was no local statute of that province giving a lien to material-men, and that the contract for the repairs was also made at Amherstburg.

J. S. Newberry, for libellant.

D. B. Duffield, for claimant.

WILKINS, District Judge. By the constitution of the United States, its judicial power extends to "all cases of admiralty and maritime jurisdiction;" and it is contended, by the counsel for libellant, that this language embraces the general maritime law of continental Europe, unrestricted by the rulings of the English courts limiting admiralty jurisdiction to the ebb and flow of the tide; and that, by this general law, which, as part of the law of nations, is recognized in Canada, the fact of making the repairs of itself created a lien upon the vessel enforceable in this court. I cannot so rule. The Mermaid was a foreign vessel in the port of Detroit, and liable in this court for supplies furnished here, yet if no lien attached at her home port, where the contract was made and performed, none can be enforced here. The law of England covers her provinces, unless changed by provincial statutes; and there being no local law giving this lien, and no ebb and flow of the tide bringing the waters of the lakes within the jurisdiction of the admiralty, as interpreted by the English courts, there was no lien existing against the vessel. Libel dismissed.

NOTE. It will be observed that the Mermaid was a Canadian bottom, consequently the case presents the ordinary feature of repairs furnished in a home port, for which there was then confessedly no lien, under the decision in the case of the General Smith. Had the Mermaid been an American vessel, the question might have been one of greater difficulty. See The Avon [Case No. 680]; The Champion [Id. 2,583].

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

MERMAID, The (BRITISH CONSUL v.). See Case No. 1,897.

Case No. 9,460.

MERRIAM v. CLINCH.

[6 Blatchf. 5.] [1]

Circuit Court, S. D. New York. Dec. 14, 1867.

OFFICERS—COLLECTOR OF CUSTOMS—FEES—DEPUTY—ABSENCE—DEATH.

1. Under the 22d section of the act of March 2, 1799 (1 Stat. 644), where the deputy of a collector of the customs acts for the collector, in cases of occasional and necessary absence and of sickness, the collector still acts, but acts by the deputy, and is entitled to all the perquisites and emoluments of the office; but, where the collector is disabled or dies, the duties and authorities vested in him devolve on the deputy, and the perquisites and emoluments which accrue to the office of collector, after such disability or death, do not belong to the collector, or to his estate.

[Cited in Chadwick v. Earhart, 11 Or. 389, 4 Pac. 1181.]

2. No officer is entitled to the emoluments of an office for any longer period than the period during which he holds the office.

3. The provisions of the statutes of the United States on that subject, cited.

4. The right to the compensation attached to an office grows out of the discharge of the duties of such office, and its emoluments do not belong to a person who does not discharge its duties.

This was a final hearing, on pleadings and proofs, of a suit originally brought in a state court, and removed into this court by certiorari. Preston King, while holding the office of collector of customs for the district of the city of New York, died, on the 13th of November, 1865, at said city, intestate. The plaintiff [Ela N. Merriam] was appointed his administrator, on the 25th of November, 1865, by the surrogate of St. Lawrence county, New York. Mr. King became such collector on the 1st of September, 1865. On the 22d of September, 1865, Mr. King, by an instrument in writing executed by him, under his hand and official seal, appointed the defendant "special deputy collector of customs." The ma-

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

terial parts of that instrument were in these words: "District of the City of New York. To Charles P. Clinch. By virtue of the powers vested in me by the 22d section of the act of March 2d, 1799, chapter 28, and in pursuance of the treasury circular of February 1st, 1850, appended to the treasury circular of April 3d, 1842, I hereby constitute and appoint you special deputy collector of the customs, within this district, to act for me during my absence or sickness, and, in case of my disability or death, the duties and authorities vested in me as collector will, by law, devolve on you, my special deputy." From the time of the death of Mr. King until the 16th of May, 1866, the defendant acted as collector of customs for said district, under said appointment as special deputy. During that time, large sums of money accrued and became due and payable, for the salary of the collector of customs of said district, and for fines, penalties, and forfeitures. The plaintiff claimed that these sums pertained, as perquisites of office, to such collector, and came into the hands of the defendant in a fiduciary capacity, as the servant, agent, and special deputy of Mr. King. He averred that the defendant claimed to hold and retain such sums in his own right, and refused to account for them, or pay them over to the plaintiff. The prayer of the bill was, in substance, that the defendant pay over to the plaintiff all such moneys as had come into the hands of the defendant, as such servant, agent, and special deputy of Mr. King, as such collector, on account of the salary of the collector of said district, and on account of the share of fines, penalties, and forfeitures, and other perquisites of office, pertaining to said office, accruing or arising between November 13th, 1865, and May 16th, 1866. The defendant, prior to his said appointment as special deputy was appointed assistant collector of customs at the port of New York, under section 16 of the act of March 3, 1863 (12 Stat. 753), and, from the time of his said appointment as such assistant collector, until the 16th of May, 1866, he received and retained a salary as such assistant collector, at the rate fixed by law for that office, $5,000 per annum, and, in addition, he received and retained, from the 13th of November, 1865, to the 16th of May, 1866, the full salary allowed by law to the collector, and the share of fines, penalties, and forfeitures allowed by law to the collector.

E. G. Ryan and Charles G. Myers, for plaintiff.

Thomas Simons, Asst. Dist. Atty., and Nelson K. Wheeler, for defendant.

BLATCHFORD, District Judge. The question involved in this case arises under the 22d section of the act of March 2, 1799 (1 Stat. 644). That section provides, that "every collector, * * * in cases of occasional and necessary absence and of sickness, and not otherwise, may * * * exercise and perform" his "functions, powers, and duties, by deputy, duly constituted" under his hand and seal, "for whom, in the execution of his trust," he "shall be answerable;" and "that, in case of the disability or death of a collector, the duties and authorities vested in him shall devolve on his deputy, if any there be, at the time of such disability or death, for whose conduct the estate of such disabled or deceased collector shall be liable." The section provides for two classes of cases in which the collector is unable to discharge himself the duties of his office. The first class is where the collector is necessarily occasionally absent, or is sick. The second class is where the collector is disabled or dead. In the first class of cases, the collector does not cease to exercise or perform the functions, powers, or duties of his office. On the contrary, by the express language of the section, he continues to exercise and perform such functions, powers, and duties, but he exercises and performs them by his deputy. Such deputy must be duly constituted such deputy under the hand and seal of the collector, and the collector is made answerable for the execution, by such deputy, of his trust. In the second class of cases, that is, the disability or death of the collector, the duties and authorities vested in him devolve on his deputy, if there be one at the time of such disability or death, that is, on the deputy whom the section thus authorizes him to constitute; and the estate of such disabled or deceased collector is made liable for the conduct of such deputy. In the second class of cases, if there be a deputy, the collector does not continue to exercise and perform the functions, powers, and duties of the office by the deputy, but the duties and authorities before vested in the collector devolve on the deputy; and, in such second class of cases, if there be no deputy, then, by a provision in the same section, the duties and authorities before vested in the collector devolve on the naval officer of the same district, if any there be, and, if there be no naval officer, then on the surveyor of the port, if any there be, and, if there be none, then on the surveyor of the nearest port in the district. The section also provides, that the authorities of the person empowered to act in the stead of a disabled or dead collector shall continue until a successor to such collector shall be duly appointed and ready to enter upon the execution of his office If, under this section, there is no person empowered to act in the stead of the disabled or dead collector, then the duties and authorities before vested in the collector do not devolve on any one.

Now, where a deputy, constituted under this law, acts for the collector, in cases of occasional and necessary absence and of sickness, the collector still acts, but acts by the deputy, and is entitled to all the perquisites and emoluments of the office, as fully, while so acting by deputy, as if he did not so act by deputy. But, when the collector is dis-

abled or dies, then the duties and authorities vested in him devolve on the deputy thus constituted. The collector, in such case, whether he be disabled or dead, does not exercise or perform his functions, powers, and duties, by such deputy, nor does he act by such deputy, nor is he entitled to the perquisites and emoluments of the office, which he would have been entitled to, if he had not become disabled or had not died. The duties and authorities of the office devolve on such deputy, if there be one, and, if there be none, then on the other officers successively, who are designated in the section. The word "authorities" is broad enough to include the emoluments of the office. The "duties" of the office include the obligations which the officer owes to superior authority and to the public. The "authorities" of the office are the powers and prerogatives with which the office is clothed, connected with the discharge of his duties, including, not only such powers as are necessary to enable him to discharge his duties properly, but the right and the power to demand and receive the emoluments attached by law to the office.

These views accord with settled principles. The constitution of the United States (article 2, § 6) provides, that "in case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president." The provision, in this section of the constitution, that the powers and duties of the office of president shall devolve on the vice president, is identical, in legal effect, with the provision, in the 22d section of the act of 1799, that the authorities and duties vested in the collector shall devolve on his deputy. Three times, since the adoption of the constitution, the president has died, and, under the provision referred to, the powers and duties of the office of president have devolved upon the vice president. All branches of the government have, under such circumstances, recognized the vice president as holding the office of president, as authorized to assume its title, and as entitled to its emoluments. The vice president holds the office of president until a successor to the deceased president comes to assume the office, at the expiration of the term for which the deceased president and the vice president were elected. The deputy, under section 22 of the act of 1799, holds the office of collector, until a successor to the disabled or deceased collector is duly appointed, and ready to enter upon the execution of his office. It has never been supposed that, under the provision of the constitution, the vice president, in acting as president, acted as the servant, or agent, or locum tenens of the deceased president, or in any other capacity than as holding the office of president fully, for the time being, by virtue of express authority emanating from the United States. So, in the case of the collector, the deputy, in acting as collector, after the death of the collector, who constituted him such deputy, does not act as the servant or agent of the deceased collector, but holds the office of collector fully, for the time being, by virtue of express authority emanating from the United States. The fact that, in the one case, the constitution itself designates the person on whom the powers and duties of the office shall devolve, and that, in the other case, the collector is authorized, before his decease, to designate such person, makes no difference in the principle. The person so legally designated becomes, when he assumes the powers and duties so devolved upon him, the direct agent of the government, and not the agent or servant of any individual who may have designated him.

It is, also, a well established principle, that no officer is entitled to the emoluments of an office for any longer period than the period during which he holds the office. And the legislation of congress is to this effect. The purport of the statutory provisions on the subject of the compensation of public officers—Act March 3, 1839, § 3 (5 Stat. 349); Act Aug. 23, 1842, § 2 (5 Stat. 510); Act Aug. 26, 1842, § 12 (5 Stat. 525); Act Sept. 30, 1850, § 1 (9 Stat. 542, 543)—is, that no person is entitled to receive the emoluments of an office which he does not hold. Opinion of Attorney General Crittenden, 5 Op. Attys. Gen. 768.

In the present case, Mr. King, by his death, ceased to hold the office of collector; and not only so, but the duties and authorities before that time vested in him, then devolved on the defendant, because the defendant had, during the lifetime of Mr. King, been duly constituted by him his deputy, in accordance with the provisions of the 22d section of the act of 1799. The designation of the defendant as deputy, made by Mr. King, was made strictly in accordance with those provisions. The instrument refers to the section, and then states, that Mr. King constitutes and appoints the defendant special deputy collector of the customs, within the district of the city of New York, to act for him during his absence or sickness, and then adds, "and, in case of my disability or death, the duties and authorities vested in me as collector, will, by law, devolve on you, my special deputy."

I am unable to see any ground upon which the right of Mr. King to the emoluments of the office of collector, after his death, can rest. It is urged, that the provision of the section in question, which declares that the estate of the deceased collector shall be liable for the conduct of the deputy, gives to the estate of the deceased collector a title to the emoluments of the office, during its administration by the deputy. Indeed, the claim of the plaintiff seems to be put wholly on that provision; and the idea that the defendant, in administering the office, under his appointment as such deputy, acted as the servant or agent of Mr. King, and not as a direct agent of the government, can rest on nothing but that provision. But that provision cannot

have the effect claimed for it. Under that clause of the 22d section which relates to the absence and sickness of the collector, he is entitled to the emoluments of his office while he is so absent or sick, and yet he is expressly, by the section, made answerable for the execution of the trust of his deputy, during such absence or sickness. But he is entitled to such emoluments in that case, not because he is answerable for the acts of his deputy during such absence or sickness, but because he himself, by the very terms of the act, still execises and performs the functions, powers, and duties of the office, although he does so by deputy. Under that clause of the same section which relates to the disability and death of the collector, he is not entitled to the emoluments of the office, after he dies, although his estate is, by the section, expressly made liable for the conduct of the deputy whom he designates. The reason why he is not entitled to such emoluments in that case, is, because he ceases, by his death, to hold the office, and to exercise or perform its functions, powers, and duties. The liability of his estate for the conduct of the deputy, after his death, is a special liability, attached by law, as a condition. No person is bound to accept the office of collector, but, if he does, he takes it subject to the burdens which the law imposes on the holding of it. Nor, after he takes it, is he compelled to appoint a deputy, under section 22 of the act of 1799. The provision is permissive only. But, if he avails himself of it, and appoints a deputy, with the incidental advantage to himself of being able, under the section, to perform, by deputy, while occasionally and necessarily absent or sick, the duties of the office, and thus enjoy, while so absent or sick, its emoluments, he makes such appointment of a deputy subject to the condition imposed by the statute, that, on his own death, the duties and authorities of the office devolve on such deputy, and his own estate becomes liable, after his death, for the conduct of such deputy, while administering the office. Under the section, but one appointment of a deputy, for any purpose, can be in force at any one time. The same person, when designated, is to act in the cases of absence, sickness, disability, and death; and the collector, in availing himself of the privilege of performing the duties of his office, during his lifetime, while absent or sick, by such deputy, must take on himself all the liabilities which the designation of such deputy imposes. And there is nothing unreasonable in making the estate of the deceased collector liable for the conduct of the deputy, or in withholding from it, notwithstanding such liability, the emoluments of the office, during the term of such liability. The liability is imposed because the collector has the sole and unresrticted designation of the deputy. No superior officer of the government has any voice in approving or disapproving, confirming or rejecting, such appointment. Hence, the manifest propriety of holding the estate of the deceased collector liable for the conduct of the deputy after the death of the collector, so long as such deputy continues to act as the agent of the government, under a designation made by the deceased collector. But there would be no propriety in giving to the estate of the deceased collector the emoluments of the office during such period. The right to the compensation attached to an office grows out of the discharge of the duties of such office, and its emoluments do not belong to a person who does not discharge its duties. Conner v. City of New York, 1 Seld. [5 N. Y.] 296.

I do not think that the fact that the defendant has, with or without the assent of the government, continued to receive, during the period in question, the salary appertaining to the office of assistant collector of customs at the port of New York, has any bearing upon the question of the right of Mr. King's estate to the emoluments of the office of collector during that period.

In passing on the question involved, I only decide that Mr. King's estate is not entitled to those emoluments. I do not mean to decide that the defendant is entitled to retain them. Whether there is any thing in the fact that the defendant accepted the salary of assistant collector, that precludes him from claiming the emoluments of the office of collector during the same period; or whether there was such an incompatibility between his acting as collector and his being assistant collector, as to make it impossible for him to hold both offices, and to authorize the government to call upon him to elect which office he would hold, and whether he has, in fact, made such election in favor of the assistant collectorship; or whether, under the general rule and practice, that, where an officer holding one office is authorized to perform the duties of another, he may receive the emoluments of the office which he is thus temporarily filling, but cannot receive his own at the same time, the defendant may have the emoluments of the collectorship on relinquishing those of the assistant collectorship; or whether, if he would be otherwise entitled to the emoluments of the office of collector, he is not entitled to them because of his not having taken, on the death of Mr. King, the oath required by the 4th section of the act of June 1, 1789 (1 Stat. 23), or the oath required by the 20th section of the act of March 2, 1799 (5 Stat. 641); or whether, as to so much of such emoluments as consists of fines, penalties, and forfeitures, the naval officer of the district and the surveyor of the port, are, under section 91 of the same act (5 Stat. 697), entitled to what would have been Mr. King's share of the same if he had lived, on the ground that, within the meaning of that section, there was no collector in the district, until such a successor to Mr. King as the 22d section of that act speaks of, was duly appointed—are questions not involved in this case, and in regard to which I neither express nor intimate any opinion.

The bill must be dismissed, with costs.

Case No. 9,461.

MERRIAM et al. v. DRAKE.

[9 Blatchf. 336; 5 Fish. Pat. Cas. 259.] [1]

Circuit Court, N. D. New York. Jan. 16, 1872.

PATENTS — COMBINATION — EQUIVALENTS — SAME RESULT—WHIP SOCKETS.

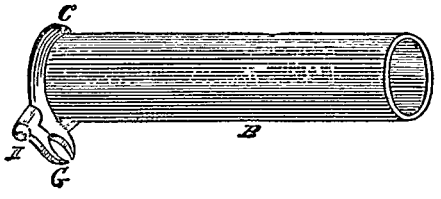
1. The claim of the reissued letters patent granted to John O. Merriam and Edwin Chamberlin, as assignees of Charles B. Morehouse, the inventor, July 12th, 1870, for an "improvement in whip-sockets," the original patent having been granted to said Morehouse February 6th, 1866, namely, "The whip-socket, B, having permanently attached thereto the stationary jaw or clamp, E, in combination with the detachable jaw or clamp, G, whereby the said whip-socket may be fastened to, and connected with, the dash-board rod of a carriage or other vehicle, substantially in the manner and by the means herein described and set forth," is a claim to a whip-socket having, at the top and bottom thereof, metal rings or flanges, for the purpose of giving support and strength, with a stationary jaw of a clamp permanently attached thereto, and a detachable jaw, to be applied to clasp the rod of the dash-board, the detachable jaw forming, in connection with its fellow, a mouth or double jaw, which can be slid off and upon the object to which it is to be fastened, and made tight thereon by the single screw which holds its outer end to its fellow.

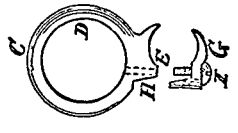
2. Such form of clamp allows the whip-socket to be made fast to the dash-board rod without perforating the leather thereof.

3. Such claim is not infringed by a whip-socket which has no rings or flanges, and has a substantially different clamp, requiring the perforation of the leather of the dash-board to admit of its application thereto.

[This was a proceeding by John O. Merriam and Edwin Chamberlin against Francis Drake to restrain certain infringements.]

[2][Final hearing on pleadings and proofs. Suit brought upon letters patent [No. 52,439]





for an "improvement in whip-sockets," granted to Charles B. Morehouse, February 6, 1866; assigned to complainants, and reissued to them July 12, 1870 [No. 4,071]. The invention is illustrated by the above engraving, in which the upper ring and clamp and the dash-board and rod are omitted. The description in the specification is as follows: "The nature of the said invention and improvement consists in the use of a whip-socket, having permanently attached thereto a suitably shaped extension or extensions, adapted to fit the dash-board rod of a carriage or other vehicle, in combination with one or more screw-caps, whereby said whip-socket may be securely fastened to the dash-board rod, substantially in the manner and for the purpose hereinafter more fully described and specified." It described the construction and operation of the invention as follows: "The whip-socket, B, may be made in any usual shape, and of any material desired, having at the top and bottom thereof metal rings or flanges, D, which are for the purpose of supporting and strengthening the whip-socket, B, and form part thereof. To these rings or flanges, D, are securely and permanently attached the stationary clamps, E. These clamps, E, should be of proper shape and size to conform to the dash-rod. The clamp, G, is made of malleable cast-iron, or other metal, and, in size and shape to correspond with the stationary clamp, E. The operation of the improved fastening is as follows: The whip-socket, B, is placed against the dash-board, A, the stationary clamps, E, fitting closely against the dash-board rod, K. The clamp, G, is then placed against the said dash-rod, K, opposite to the stationary clamp, E, and then, by means of a screw or screws, or other mechanical means, the said clamps are forced together, securely clamping, clasping, and grasping the dash-board rod, K, thereby securely holding and fastening the whip-socket, B, in its proper place and position, yet detachable at pleasure." The claim was in these words, as follows: "The whip-socket, B, having permanently attached thereto the stationary jaw or clamp, E, in combination with the detachable jaw or clamp, G, whereby the said whip-socket may be fastened to and connected with the dash-board rod of a carriage or other vehicle, substantially in the manner and by the means herein described and set forth."][2]

Esek Cowen, for complainants.
John B. Gale, for defendant.

WOODRUFF, Circuit Judge. It will be seen, from the description and claim of the patent, that the patentees do not claim that either of the parts which make up their improved whip-socket is new. The whip-socket itself may be made in any usual shape, and of any material desired, having, however, at the top and bottom thereof, metal rings or flanges, plainly indicating, as, also, the plaintiffs' proofs in regard to the previous state of the art show, that whip-sockets for sustaining the whip, and attached to the dash-board rod, were not new, but were precisely what the patentees claim to have improved. And there is no claim, obviously there could be none, that clamps were not well known and com-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 336, and the statement is from 5 Fish. Pat. Cas. 259.]

[2] [From 5 Fish Pat. Cas. 259.]

[2] [From 5 Fish. Pat. Cas. 259.]

mon devices for clasping and holding, permanently or temporarily, as the case might require, whatever might be placed between the two jaws thereof. Nor is the feature, that one jaw is permanent or fixed, and the other movable and detachable, claimed to be, in itself, novel. The manner in which parts of machinery are clamped by a double or single jaw; the well known clamping tools of the joiner, the cabinet-maker, the shoe-maker, and the blacksmith; the common device of a clamp connected with, and forming part of, various articles in domestic use, to fasten them to a table, or to a fixture, as, for example, the common reel, the needle cushion, and like articles found in the shops, and in the use of the seamstress or embroiderer—is familiar. Nor could the patentees claim the use of a clamp generally, as a means of attaching a whip-socket to a dash-board. That would be claiming, as an invention, the mere application of an old device to a new use, which, by itself alone, is not the subject of a patent.

In view of the state of the art, and of the want of any pretence, in the specification or claim, that either of the parts are new, the claim of the plaintiffs' patent must be construed to be for a whip-socket constructed substantially as described, that is to say, having, at the top and bottom thereof, metal rings or flanges, for the purpose of giving support and strength, with a stationary jaw of a clamp permanently attached thereto, and a detachable jaw, to be applied, by some mechanical means, so as to clasp the rod of the dash-board; and, as clamps are of various form and manner of application, the precise form and mode of attaching the detachable jaw in the plaintiffs' patent is carefully exhibited in the drawings, where it is exhibited as forming, in connection with its fellow, a mouth or double jaw, which, (like the clamp attached to a lady's pin and needle cushion) can be slid off and upon the object to which it is to be fastened, and made tight thereon by the single screw which holds its outer end to its fellow. It is a whip-socket having this combination, and the devices employed to adapt each part to its place and office in the combination, that is secured to the plaintiffs by their patent; and, each part being old, the plaintiffs could not, and do not, by their patent, close the door to any other combination of these old elements, or to any other mode of combining them which is not substantially like that employed by the plaintiffs.

The office, as well as the advantage, of the form of clamp specified by the plaintiffs as a part of their whip-socket, is shown by the evidence, as well as by the specification annexed to the original patent, of which the patent relied upon is a reissue. It was deemed important, that the whip-socket should be so constructed that it could be made fast to the dash-board rod without cutting, perforating, or injuring the leather which constitutes the dash-board. That was the chief feature in the patent. Other patents existed for fastening a whip-socket by means of a metallic clamp differing but little from the one used by the plaintiffs; but the application thereof to the dash-board rod involved the cutting or perforating of the leather to permit one jaw of the clamp to pass through, so as to embrace the rod, when the socket was in its proper position. Accordingly, the specification and drawings of the original patent, and of the reissue, describe, exhibit, and refer to a peculiar arrangement of the jaws of the clamp, so that, at one end, they are held together and tightened by the clamp-screw, and, at the other end, are open, to be slid sidewise upon the rod, before the screw is made tight; and they may be removed in like manner, without disfiguring the leather of the dash-board.

I do not suggest that such a whip-socket, made up of these several parts arranged and adapted to each other in the manner described, was not a patentable device. Its peculiar arrangement of the parts, and their adaptation to the purpose in view, probably made it something more than a putting of an old device to a new use; but the patent stands upon rather narrow ground. It does not cover every possible mode of clamping a whip-socket to a dash-board, but, at most, only a mode which is substantially the same.

The defendant does not use or sell such a whip-socket as is described or referred to in the plaintiffs' specification, nor one that is at all like it. His socket consists of two parts hinged upon each other, so as to open and close at the top and bottom alternately, as the whip shall be inserted or withdrawn. It has no rings or flanges at the top or bottom, nor elsewhere thereon. Indeed, rings or flanges could not be placed thereon at all, without destroying its chief and peculiar characteristic, namely, the opening thereof at the top, to receive the whip, and the closing thereof around the whip when it is thrust to the bottom, and opening, in turn, when the whip is withdrawn. The defendant does not, therefore, use the plaintiffs' rings, nor any equivalent device, for either would be impracticable. The rings in the plaintiffs' whip-socket serve a double purpose. They strengthen the socket, and are its sole support, and are the base of the clamps, by an extension thereon forming the permanent jaws. The whip-socket used or sold by the defendant has not, and cannot have, any such rings. It is made of sufficient strength to render them unnecessary for either strength or support. It will not avail the plaintiffs to say, that, by making the defendant's socket of a form, or thickness, or strength sufficient to render the rings unnecessary, the defendant does employ an equivalent. Not so. He dispenses with the plaintiffs' device altogether. He has no need to use it, and is unable to use it. He has contrived another mode of giving strength

and support, and has provided, in such other mode, for attaching it to the clasp which he employs to secure it to the dash-board. It is not true, that a device is necessarily equivalent to another, merely because it effects the same result. The whole field of invention is cultivated with a view to devise other and new modes of effecting results that are known and common. The defendant does not use or sell a whip-socket having a clamp substantially like that which is described in the plaintiffs' patent. True, he fastens the whip-socket to the dash-board rod. That is the result attained by both. But, as already, in substance, suggested, the plaintiffs have not secured to themselves a monopoly of the result, but only of the special means of accomplishing it, in the combination constituting the whip-socket described, and such other means as are, in the combination, equivalent thereto. To one side of the body of the defendant's whip-socket are permanently attached projections, with outward curved faces, fitting the side of the dash-board rod, and, on the outer side of the rod, a strap of metal, also curved, is applied to the rod, and, by a screw at each end, passing to the projections first named, this strap is drawn down upon the rod and clasps it, drawing the inner projections on the socket firmly against the rod. This part of the defendant's whip-socket is not like that of the plaintiffs in form, nor in mechanical structure, nor in mode of operation, nor in its result, except only that it does fasten the whip-socket to the rod. It requires that the leather of the dash-board be cut or perforated, to allow of its application. It cannot be slipped upon the rod sidewise, and so removed at pleasure. It cannot be moved from one position to another, slid up or down, without new perforations of the leather, with each change of position, thus disfiguring the dash-board. In short, the defendant's whip-socket, with its adaptation to use, is a different organization, and constitutes no infringement of the plaintiffs' patent.

The bill of complaint must be dismissed, with costs.

MERRIAM (KITTLE v.). See Case No. 7,857.

MERRIAM (UNITED STATES v.). See Case No. 15,759.

Case No. 9,462.

MERRIAM et al. v. VAN NEST et al.

[3 Ban. & A. 209; [1] 13 O. G. 597.]

Circuit Court, S. D. New York. Feb., 1878.

PATENTS—WHIP-SOCKETS—EQUIVALENTS.

1. The complainant's patent, for a combination, with whip sockets, of the particular means described for attaching them to carriages—the device used being a clamp, one arm of which is formed of projections on the side of the socket, and the other of a lever of the third order, both curved to fit the dash-rail of a carriage, and so constructed that it will fasten to the rail without reaching round it, and is worked by a screw and nut; is not infringed by the use of a socket, with a clamp extending around the rail made up of projections from the socket, a bar to go behind the dash-rail, and two screws with nuts, one on each side of the rail.

2. It is not infringed by the use of a socket with a clamp extending around the rail, made up of projections from the socket, a bar to go behind the rail, and a bar hinged to a projection at one side of the rail.

[This was a bill by John O. Merriam and others against Abraham R. Van Nest and others, for the infringement of a patent, No. 43,858, originally granted to Charles B. Morehouse, August 16, 1864.]

Josiah P. Fitch, for complainants.

Charles J. Hunt, for defendants.

WHEELER, District Judge. This cause has been heard on pleadings, proofs and argument. The plaintiffs own reissued patent, No. 5,713, dated December 30th, 1873, which they allege the defendants infringe. The defendants, among other defences, deny any infringement.

The invention is of an attachment to whip-sockets for fastening them to carriages. Not of whip-sockets, nor of the attachment of them to carriages, for those things were long before known, but of the combination, with whip-sockets, of the particular means described for attaching them to carriages. This is all that is claimed of the patent, and all the patent the invention would bear.

The device used is a clamp, one arm of which is formed of projections on the side of the socket, and the other of a lever of the third order, both curved to fit the dash rail of a carriage; and it will fasten to the rail without reaching round it, and is worked by a screw and nut.

The defendants have sockets, with two different attachments, for fastening them to carriages. Each consists of a clamp, and so far in name their methods are like the plaintiffs'. But each of their clamps is quite different from the plaintiffs'. One is made up of projections from the socket, a bar to go behind the dash-rail, and two screws, with nuts, one each side of the rail. The other, of like projections, and bar to go behind the rail, with the bar hinged to a projection at one side of the rail, and worked by a nut and screw at the other side of the rail. Both extend around the rail.

If the patent had been for the result of attaching a whip-socket to a carriage by the means described, it might be said that the defendants accomplished a result of which the plaintiffs had a monopoly by means mechanically equivalent to the plaintiffs, and that they thereby infringed. But here the whole field of attaching sockets to carriages was left open, except as to the use of the means de-

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

scribed, and the monopoly of the use of those could not be infringed by the use of others not the same.

From the comparison of the two methods of the defendants with those of the plaintiffs, they do not appear to be the same. They may be equivalents in accomplishing a result, but not in methods of accomplishing it, so there does not appear to be any infringement.

This result makes the consideration of the other defences set up wholly unnecessary for the purposes of the suit. Let a decree be entered dismissing the bill of complaint, with costs.

Case No. 9,463.

In re MERRICK.

[7 N. B. R. (1873) 459.] [1]

District Court, E. D. Michigan.

BANKRUPTCY—PROOF OF DEBTS—REGISTER—COMMISSIONER—DISCRETION TO REFUSE—RECEIPT AND FILING.

1. As the law now stands, proof of debts in bankruptcy may be taken by a register or by a commissioner in all cases, whether of a resident or non-resident creditor, or whether such commissioner holds his office in the same town with the register or not. The only limitation being that it shall be taken before a register or commissioner of the same judicial district in which the creditor resides or in which the proceedings are pending.

2. The court has no discretion to refuse to receive and file a proof of debt which appears on its face to have been taken by a proper officer and to be correct in form and in substance.

3. The receipt and filing of proof of debt alone confers jurisdiction over the claim on the court, and then only does its revising power over such proof, mentioned in the act of 1868 [15 Stat. 228], commence. The receiving and filing of a proof of debt concludes nothing, and the power still remains in the court to revise and correct, or reject such proof altogether.

[In the matter of W. B. Merrick, a bankrupt.]

By Hovey K. Clarke, Register:

I, the above named register, hereby certify that in the course of proceedings before me in the above bankruptcy, on the 12th day of November instant, Mr. O. Kirchner presented to me to be filed as proof of debt against the above bankrupt's estate, an affidavit drawn up by himself, and sworn to on the same day before Ervin Parmer, "United States commissioner, Eastern district of Michigan." Observing the date of the jurat, I inquired where the claimant then was, to which Mr. Kirchner replied that he did not know. I then inquired why he had not been produced before me to prove his claim, remarking that the paper offered appeared to be an "affidavit" and not a deposition. To this no reply was given, except to concede that it was an affidavit, drawn by Mr. Kirchner, and that he had a right to insist on its being filed. I declined to take it and he withdrew. On the 14th of November Mr. Kirchner again appeared and "tendered" the paper to be filed, the theory of a "tender" seeming to be, that in this case the paper offered so fully satisfied the law in every particular that the register had no discretion whatever; that his duty had become clerical only, namely, to file the paper and thus admit the claim of Edmund Cole as satisfactorily proved. I am unable to concur in this view of the powers and duties of registers in taking proof of debts. I have not been furnished with a statement of the principle of law by which this view of my duty is supposed to be supported, unless a reference to Shephard's Case [Case No. 12,753], may be regarded as conveying by inference such statement. I do not see anything in the case to which I am referred, that has any bearing on the question before me, except that United States circuit court commissioners are authorized to take depositions to prove debts in bankruptcy within the district where the case is pending. This was a disputed point before the amendment to the bankrupt act of July 27, 1868, Hall, J., in Shephard's Case [supra], holding that the commissioners had such power; and Busteed, J., in Re Haley [Case No. 5,918], holding that they had not. But the act of 1868 gives this power with sufficient clearness, so that I do not see how any question can be raised upon it. I have always hitherto been able when certifying for the determination by the district judge questions which arise on my own powers and duties, to state with some definiteness the point to be decided. If in this certificate I shall not be able to state the case as it is regarded by Mr. Kirchner, who demands the filing of the proof of debt in this case, my inability is not the result of any indifference on my part to the duty I am called to perform. Each of my interviews with him was ended so abruptly, that no proper opportunity was afforded me to state my views of his demand. The last interview was closed by his positive assertion that there was no question in the case. Under these circumstances I am obliged to discuss every question which seems to me pertinent, or may be so regarded by the district judge, in the determination of the propriety of the demand that the paper shall be filed as proof of debt due to Edmund Cole.

I. The duties of a register to whom a cause in bankruptcy is referred, in taking and filing proof of debt, are not only judicial and clerical, but they are also supervisory. The first meeting of creditors for the proof of debts and the choice of an assignee is called a "court of bankruptcy" (section 11), which the register is to hold and in which he is to preside (sec. 4). It cannot be doubted, I think, that the powers given to "the court" by the act as to the proof of debts are by the general order of reference (from No. 4) conferred upon the register, subject of course, to the transfer to the district judge for determination of any issue of law or fact which may arise in the proof of debts. What general powers could be committed to him by the

[1] [Reprinted by permission.]

order of reference if these are not? The provision of section twenty-two, that the deposition must be satisfactory to the officer taking it, and, as if to provide for the case of a proof taken before a commissioner, the provisions which authorize the requiring of "further pertinent evidence either for or against the admission of claims," and the provisions of section twenty-three, authorizing the postponement of a proof of claim, where "doubts are entertained concerning its validity,"—the exercise of which power must be conceded to the register, for proofs of debts in the first instance can be presented nowhere else but to him—and the act of 1868, under which commissioners within the district of the register in charge of the case derive their power to take deposition in bankruptcy, and which expressly subjects all such proofs to the revision of the register, all seem to me to be irreconcilable with the proposition that the register's powers over a proof of debt, taken before a commissioner, in a cause referred to him, is confined to the merely clerical function of filing it. I regard his powers, and consequently his duties, as of a much more responsible character than this; and they are of a character which every real creditor has an interest in their faithful and intelligent performance. If the register's duties were judicial only he might rest his action upon the theory, that as every creditor is a party to every proffered claim, any other creditor adverse to the claimant may appear and raise any question touching the validity of the claim, and so long as no question was presented to him by a party he was not called to the exercise of any duty concerning such proffered claim; but this would be practically impossible, and hence the importance to every creditor of the supervisory power expressly vested with registers by the act of 1868. Every creditor is interested in the maintenance of this power in its fullest efficiency in the hands of the register, and it ought not be in the power of any creditor, or party claiming to be such, to evade or defy it. If I have in this statement correctly apprehended the powers of the register in taking proof of debts, I think he has a right to be informed, and that it is his duty to know why a creditor claiming to have a debt against a bankrupt's estate, instead of attending before the register, specially charged with the powers of the court in taking proofs, and submitting to the examination which the act contemplates, goes before a commissioner of his own selection, having his office in the same building with the register, and thus without any apparent reason evades the scrutiny which the register might exercise; and if the claimant refuse to answer, I think it my duty to decline to take the proof until some reason is given for what appears to be an evasion of the order of reference. I do not think that the power to take depositions in bankruptcy was conferred upon commissioners for any such purpose. It was designed for the relief of creditors who are at inconvenient distances from the register—a privilege which it would be well if it were possible to extend. The passage of the act of 1868 had a very beneficial effect in this respect; but I cannot think it was the purpose of the act to allow this convenience to be converted into a means of transferring some of the most important duties of the register to commissioners having their offices in the same place, and, stripping the register of all his supervisory powers, leave to him the merely clerical duty of filing proofs taken before commissioners.

II. Proofs of debts are to be established as provided by section twenty-two of the act, by depositions, not affidavits, taken before a register or commissioner. The provisions of the act on this subject are peculiar. Among them is this: "That no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true." Appear to whom? Of course to the officer taking it. That it must be "satisfactory" to him the act very plainly requires. I do not see how it can be supposed that an affidavit drawn by the attorney of the affiant, and merely sworn to before the officer authorized to take a deposition, is a compliance with this provision of the act. The distinction between a deposition and an affidavit ought to be well understood, for notwithstanding the words are sometimes inaccurately used, and an "affiant" is often called a "deponent," (see Burrill, Law Dict. p. 366, "Depositions,") yet, strictly, in a deposition the statements are reduced to writing by the officer taking it, or by a disinterested person under his direction, and thus he becomes officially cognizant of what the deposition contains, as he certainly ought to be, if it is required that it shall be satisfactory to him. On the contrary, an affidavit is an ex parte statement drawn by the attorney of the party interested in it, of the contents of which the officer who administers the oath is not expected to have any knowledge, and in a very large proportion of cases he has no knowledge of such contents whatever. To infer from the jurat to an affidavit that the officer administering the oath had examined the affidavit, or had made himself in any way acquainted with its contents, or knew even that the affiant was acquainted with and understood its contents, would be contradicting an experience nearly universal. In the few cases, in all, however, not amounting to half a dozen, where this practice has been attempted before, of presenting as proofs of debts affidavits drawn by attorneys and sworn to before commissioners, which, having declined to receive, when the claimants subsequently appeared before me to prove their claims, I have found in almost every instance that the proof had not been read to the claimant by the commissioner and that in some instances only what the attorneys supposed to be the substance of it had been stated to the affiant before he swore to it. I am

persuaded that the framers of the bankrupt act never intended that the very important matter of proving debts in bankruptcy should be committed to such loose methods of procedure; and I am very sure that the interests of all creditors demand that facilities for the examination of creditors when proving their claims should rather be rendered more effective than that a practice should be tolerated which will reduce proofs of debts in bankruptcy to a mere formality. I regard it as worthy of careful attention by the court and its officers to prevent any such result. All creditors have an interest in such a construction of the act, and in the establishment of such a practice under it as shall afford the fullest opportunity for the scrutiny of all claims which are offered for proof; and under the law as it stands, this can be done nowhere so conveniently and effectively as by the register to whom the cause is referred. These views as to the nature and examination in proofs of debts which the bankrupt act contemplates, I think, are fully supported by several reported cases to which I refer. In re Haley [Case No. 5,918]; In re Strauss [Id. 13,532]; In re Elder [Id. 4,326].

III. In considering the question as one of practice, which it is desirable should be such as will enable creditors to secure all the rights to which they are entitled, with the least inconvenience and expense to them, it may be remarked that a practice which will add to the fees which must be paid to the officer who takes a deposition, an attorney fee for drawing it, does not deserve encouragement; for even if, in such a case as this, the oath is administered by the commissioner, without charge, it is scarcely possible that any attorney would rate his services so low as to be satisfied with the fee which the law allows to its officers for the whole service of taking and filing a deposition to prove a debt. Beside, it is the policy of the law that all the expenses of realizing and distributing a bankrupt's assets, including the fees for proving claims, shall be a charge upon the fund, and are entitled to priority of payment before any dividend. To call in professional assistance, in any but a few peculiar cases, to aid in proving claims in bankruptcy is wholly unnecessary. So the profession generally understand it; and if there be any who do not, the public should know it, that they may not be subjected to any useless expense to secure their due proportion of the bankrupt's assets. All which, together with the proof of debt offered, is respectfully submitted.

LONGYEAR, District Judge. By section 22 of the bankrupt act it was provided, "that all proofs of debts against the estate of the bankrupt, by or on behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or on behalf of non-resident creditors, before any register in bankruptcy in the judicial district where such creditors, or either of them reside, or before any commissioner of the circuit court authorized to administer oaths in any district." A difference of construction by the courts having arisen as to the power of a commissioner, under that provision, to take proof of debts, where the creditor resided within the district where proceedings were pending, congress by section three of the act of July 27, 1868 (15 Stat. 228) enacted that "such commissioners may take proof of debts in bankruptcy in all cases, subject to the revision of such proofs by the court according to the provisions of said act." So that as the law now stands proof of debts in bankruptcy may be taken by a register or by a commissioner in all cases, whether of a resident or non-resident creditor, or whether such commissioner holds his office in the same town or in the same building in which a register holds his office, the only limitation being that it shall be taken before a register or commissioner of the same judicial district in which the creditor resides, or in which the proceedings are pending. The law never did require, neither does it seem to have been contemplated, that such proofs should be taken before the register to whom the bankruptcy has been referred; to the exclusion of all others.

In this state of the law, I cannot see that the court has any discretion to refuse to receive and file a proof of debt which appears on its face to have been taken by a proper officer, and to be correct in form and in substance. By the receipt and filing of proof of debt, and by it alone, the court obtains jurisdiction of the claim and of the creditor presenting it; and then, and then only, does the revisory power of the court over such proof mentioned in the act of 1868 commence. The receiving and filing of proof of debt concludes nothing. True, unless otherwise ordered, it entitles the creditor to be placed on the list of creditors, vote for assignee, and receive dividends. But the court may otherwise order; and, under its revisory powers, may postpone the same, as provided in section twenty-three; and, as provided in section twenty-two, summon the creditor and other persons before it, and examine them in regard to the claim itself, and may reject the claim altogether, or in part only; and do all other things in regard to it which the act authorizes to be done. In this case the creditor is a resident of this district, and the commissioner before whom the proof was taken is a commissioner of this district. It appears, therefore, that the proof was taken before a proper officer. The proof is also strictly correct in form and in substance. It is objected, however, by the register, that it is an affidavit merely, and not a deposition. I cannot see the force of this objection, the proof being, as it is, in the exact form prescribed (form No. 4). It is also objected that it appears to have been written by the creditor's attorney, and not by the commissioner. The rules and regulations

for taking depositions of witnesses to be used as evidence in the courts usually require that the depositions shall be written by the officer taking it, by some disinterested person in his presence, or by the witness. There is, however, no such requirement in this case. Neither is it of so much importance, in view of the fact that what the creditor must swear to is clearly and explicitly pointed out in the act, section twenty-two, and the exact form in which he shall do it is prescribed (form No. 4). It is a practice, however, not to be commended. It is far preferable, and more in accordance with the spirit of the act, that the officer, with the act and the form before him, should examine the creditor on oath touching the matters specified, and himself reduce the deposition to writing or fill up the printed blank, if such is used. But I am not prepared to decide that unless this is done the proof should be rejected, especially where no attendant or resulting objectionable circumstances or facts are made to appear. If a creditor sees fit to go to the unnecessary expense of employing an attorney to draw up his proof of claim, in an ordinary case, instead of having the officer to do it whose duty it is, I do not know that the court ought to complain; but the court will see to it that the estate is not damaged by an allowance for any such unnecessary service.

The argument of the learned register against recognizing the power of commissioners doing business in the same town, or, as in this case, in the same building as the register in charge, is of much force. But, in my view of the matter, it goes rather to the policy and justness of the law than to the validity, or to the power and duty of the court to set it at naught by construction. It is, no doubt, the wiser policy for creditors, in all cases where they can do so conveniently, to make their proof before the register in charge, because he is thereby afforded an opportunity of putting such questions to them, and making such explanations to them as to their rights and liabilities as he may see fit, and the creditor may then be saved the trouble of being afterward summoned before the court to submit to an examination in regard to his claim. But all the court can do is to commend that course to creditors as the wiser policy.

It follows, from what has been said, that the proof of debt of Edmund Cole must be received and filed.

Case No. 9,464.

MERRICK v. BERNARD.

[1 Wash. C. C. 479.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—KNOWLEDGE—SALE THROUGH SUPER-CARGO—PRIVATE DEBT.

1. If a party knows that A is an agent for several shippers, who had separate interests in the cargo, he cannot take the property of the principal to pay his debt; although he would be perfectly justified in paying over the money, for the use of the principal, to the agent.

2. A consignee, who receives merchandise from the super-cargo for sale, and who knows that the super-cargo is the agent of others, contracts a debt with such shipper for the proceeds of his portion of the cargo; and the super-cargo has no right to appropriate the same to the payment of his private debt.

This action was brought, to recover the amount of sales of certain goods of the plaintiff, which were put into possession of the defendant, a merchant of Bordeaux, by Randell the agent of the plaintiff, and super-cargo of the Ploughboy. It appeared by the evidence of Randell, that the Ploughboy was the property of Jones & Clark, of Philadelphia, who put on board the principal part of the cargo; but the plaintiff, with some other merchants, also shipped separate cargoes for Bordeaux, consigned to Randell, the super-cargo, who received his separate instructions from each shipper. The plaintiff's instructions rather limited the general authority of the super-cargo, but it did not appear that they were communicated to the defendant. On arriving at Bordeaux, Randell placed the business in the hands of the defendant, to whom the whole cargo was delivered; and a freight list, which did not distinguish otherwise than by numbers, the separate interest of the shippers. But the defendant was distinctly informed, that such separate interests did exist, and to what extent. Some time after the sales had begun, but before the whole was completed, Randell drafted a plan for a voyage, for the ship, with a cargo from Bordeaux to Guadaloupe, and thence back to Bordeaux, with a cargo of colonial produce; and having received considerable advances from the defendant, to enable him to place funds in England, for the use of Jones & Clark, he stipulated with the defendant, to return to Bordeaux, to the defendant's address; and to secure the defendant, he gave him a general invoice of the whole cargo, to enable him to insure. He took in a cargo at Guadaloupe, and returned to Bordeaux; but before he got into the town, having heard that the government during his absence had laid such high duties on colonial produce imported otherwise than in French bottoms, as to render the voyage a losing one; he wrote to the defendant to know how this fact was, and suggesting the propriety of his going to Amsterdam, or elsewhere, to sell the cargo, promising to allow the defendant the same commissions, as if he had sold it. The defendant wrote him, that he was misinformed as to the new law; that he would be admitted to an entry, if he was furnished with all proper certificates and documents. He went up, and delivered the cargo to the defendant, with a freight list, from which, or from other papers, the separate interests of the shippers were distin-

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

guished. About this time, the defendant received information of certain bills, drawn on him by Jones & Clark, payable in Amsterdam; and finding that the part of the cargo belonging to Jones & Clark, would, in consequence of the new duties, not form a sufficient fund to enable him to take up those bills, he hesitated about accepting them. To induce him to do so, Randell agreed to place in his hands the whole cargo; observing, that he could draw upon Jones & Clark to reimburse the other shippers. This was agreed to. The whole cargo was so appropriated; the bills were drawn on Jones & Clark, who refused to pay them. The defendant being found in Philadelphia, this action, for money had and received was brought to recover the full amount of the plaintiff's part of the cargo, deducting therefrom the old, and not the new duties; which, it was contended, ought not to be charged to the plaintiff, as it was by the defendant's misinformation to Randell, that he went up to Bordeaux.

Duponceau and Dallas, for defendant, contended; first, that Randell, from his general power as agent, had a right to make this appropriation of the plaintiff's funds, and to reimburse him by bills on Jones & Clark, for the payment of which the defendant was not answerable; that if this was his general power, the defendant was not to be affected by any private limitations of it, from particular instructions; unless such communication was communicated to the defendant. That though a factor cannot pledge the goods of his principal, for a debt of his own, whether with or without notice (6 East, 17), yet he may sell, if bona fide, and without notice (4 Burrows, 2051). That the power of a foreign agent is more extensive than a domestic one. Bull. N. P. 130. That it was not sufficient, that the defendant should have notice of the separate interests of the shippers; but that he should have had notice, that the agent had limited powers. Randell might have received from the defendant, the amount of the plaintiff's interest, and then have lent or given it to defendant, if he pleased; in which case, he alone would be answerable. 2d. As to the extra duties; Randell was bound by a contract, which was certainly within the scope of his authority, to go to Bordeaux, that the defendant might not lose the security for his advances, or the commissions; and that the increase of duties did not discharge him from this obligation; if he did wrong, he alone is liable. Cases cited, Abbot, 78; 3 Bos. & P. 490.

On the plaintiff's side was cited, 6 East, 17; 3 Term. R. 757; 2 Strange, 1178, as to the powers of factors.

Ingersoll & Gibson, for plaintiff.

THE COURT informed the plaintiff's counsel, when about to reply, that they wished him to confine his observations to the facts in the cause; since, upon the law of the case, it was impossible there could be two opinions. If the defendant knew, that Randell acted as agent for the several shippers, and that they had several interests in the cargo; then the defendant, by the sale of the plaintiff's part of the cargo, contracted a debt with him, though he would have been fully justified in paying the money to the agent, unless prohibited to do so by the principal. But this very power in the principal, to forbid that payment, proves that there subsisted a contract also between the defendant and the principal. If this be the case, the question is, has this debt been legally discharged? That it has been paid either to the plaintiff or to Randell, is not pretended; but has the defendant, by any act of Randell, been exonerated from the payment? This brings us to the question, what acts the agent could do, to discharge the defendant within the general scope of his authority; for if that was restrained by any private instructions, it does not appear that such instructions were communicated to the defendant. He had a power to sell the plaintiff's property to the defendant, or to authorize him to sell it, and he might have received payment in money or in bills, and possibly in other ways. But most clearly he had no right to permit the defendant to retain the money, to satisfy the debt due from the agent himself, or from any third person, with notice to defendant of the plaintiff's interest. If the defendant had paid the money to the agent, he, the agent, might, without such notice, have paid the money again to the defendant, to enable him to take up the bills of Jones & Clark; because, in that case, having once received the money, and mixed it with the general mass of his own money, there could be no means to identify it, as belonging to the plaintiff; and in that case, the agent alone would have been responsible. See Salk. 160. But suppose, when the defendant paid the money, in the supposed case, he had received it back, with perfect knowledge that it belonged to the plaintiff; the payment and repayment being merely an operation to enable the agent to convert the plaintiff's money to the use of Jones & Clark, there would have been mala fides in the transaction; and the defendant, receiving the money as the money of the plaintiff, would be answerable to him for it; no matter how the transaction was sanctioned by the agent, the defendant could not say, that he had discharged the debt once due to the plaintiff. The whole question then is, whether this transaction was bona fide or not: and whether so or not, must depend on the question, whether the defendant knew that Randell was the agent of distinct shippers, and that the cargo thus assigned over to him, for the payment of the bills, was the property of different persons. If he did know these facts, the cause is clearly with the plaintiff.

Upon the second point, the facts appearing to be as stated by the defendant's counsel, that Randell was bound, by an agreement with the defendant, to return from Guadaloupe to Bordeaux; the counsel for the plain-

tiff, upon an intimation from the court, of their opinion on that point, gave up the claim of difference between the old and new duties.

Verdict for plaintiff.

MERRICK COUNTY (UNION PAC. R. CO. v.). See Case No. 14,383.

Case No. 9,465.

In re MERRIFIELD.

[3 N. B. R. 98 (Quarto, 25).] [1]

District Court, S. D. New York. June 14, 1869.

BANKRUPTCY—ASSIGNEE—RENT—VERBAL LEASE—POSSESSION SURRENDERED.

Bankrupt held his store on a verbal lease, terminating May 1, 1869, for sixteen hundred dollars per annum and taxes. On December 26, 1868, he surrendered his stock of goods to the register, and delivered to him the key of his store. The register turned the same over to the assignee, March 2, 1869, and on the 25th of March the goods therein were sold by the assignee's order. On the 1st of February, the landlord executed another lease to a stove company. Toward the end of April applications were made to the assignee for the key, and he immediately delivered it up. The store had been unoccupied by the assignee after the 1st of April, and he was ignorant of the owner and of the second lease. The landlord claimed rent from December 26, 1868, to February 1, 1869, and the stove company claimed rent at the rate of two thousand dollars per annum from February 1, 1869, to May 1, 1869. *Held*, the assignee should only pay rent at the rate of sixteen hundred dollars per annum to April 1, 1869.

[Cited in Ex parte Faxon, Case No. 4,704; Re Dunham, Id. 4,145; Re Ten Eyck, Id. 13,829; Re Hufnagel, Id. 6,837; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. 267.]

The bankrupt [Truman Merrifield] filed his petition December 26th, 1868, at which time he had a stock of goods at No. 230 Water street, which premises he occupied under a verbal lease from B. Stephens and others from May 1st, 1868, to May 1st, 1869, at a rent of sixteen hundred dollars a year, and the taxes on the property. Upon filing his petition, the bankrupt surrendered his property to the register, John Fitch, and delivered to him the key of said store, and the register thereupon placed a man in charge of the property. After the appointment of an assignee on the 27th day of February, 1869, the person in charge of the stock of goods, by direction of the register, delivered the key to the assignee (March 2d, 1869), who sent the same to an auctioneer, with directions to take possession of and sell the said stock of goods. The said auctioneer immediately proceeded to take an inventory of stock, and the same was sold on the 25th day of March, 1869, and the goods immediately afterwards were removed. The possession of the premises could have been delivered to anybody who required the same on or at any time after the 1st of April; but it was not until the last week in April that application was made to the assignee for the keys of the place, when they were immediately delivered. The store had been unoccupied by the assignee since the 1st of April. The assignee was not, at the time of his appointment, nor until the end of April, aware who was the landlord of the building, or entitled to the rent. The owners of the building made a written lease, on the 1st of February, to the Barstow Stove Company, to rent the said premises, No. 230 Water street, to them at the rate of two thousand dollars a year, of which arrangement the assignee had no knowledge, and no application was made by the Barstow Stove Company to him for the possession of the said premises until the last week of April, when they were immediately delivered. The owners, B. Stephens and others, claim to be paid by the assignee the rent of said premises, from the 26th day of December, 1868, to the 1st of February, 1869, at the rate of sixteen hundred dollars a year, amounting to one hundred and fifty-five dollars and fifty-five cents. The Barstow Stove Company claim to be paid by the assignee the full rent of the said premises for the three months of February, March, and April, at the rate of two thousand dollars a year, or five hundred dollars.

It is hereby stipulated and agreed that the foregoing statement of facts may be submitted to the court for its decision as to the liability of the assignee to pay the rents claimed.

E. M. Willett, for claimants.

C. W. Bangs, for John Sedgwick, assignee, etc.

BLATCHFORD, District Judge. I think that the assignee ought to pay rent for the store from December 26th, 1868, to April 1st, 1869, at the rate of sixteen hundred dollars per annum, and for no other period, at any rate.

[1] [Reprinted by permission.]

MERRIL (SOHIER v.). See Case No. 13,158.

Case No. 9,466.

In re MERRILL.

[9 Ben. 165; 16 N. B. R. 35; 24 Pittsb. Leg. J. 205.] [1]

District Court, D. Vermont. May 24, 1877.

BANKRUPTCY—PROOF OF DEBT—EVIDENCE—WITNESS—INTEREST.

1. Where a creditor offered himself as a witness before the register to prove the contract under which he alleged right to prove a claim against the bankrupt's estate, the bankrupt being then dead: *Held*, that such witness could not be excluded on the ground of interest, under the Revised Statutes.

2. The proof of debt is a proceeding in rem and not an action against the bankrupt or his

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 24 Pittsb. Leg. J. 205, contains only a partial report.]

guardian, if he be alive, or against his executor or administrator, if he be dead.

By JOHN L. EDWARDS, Register:

[Memorandum:—At the second and third meeting of creditors on the 16th day of April, A. D. 1877, Reed R. Wheeler, of Burton, in said district, proved his claims against said estate for over three thousand dollars. The assignee objected to the allowance of this proof, whereupon an order was made by the register that the parties interested therein appear before him at his office in Newport, in said district, on the 12th day of May, A. D. 1877, at 10 o'clock a. m., for the purpose of hearing such questions as might arise in relation to the modification or expunging of said proof. In pursuance of said order the parties appeared with their counsel before the undersigned register, at the time and place set for said hearing. Inasmuch as the creditor had neglected to prove his claim before the second and third meeting of creditors, well knowing that the claim was disputable and would be contested by the assignee, and inasmuch as the settlement of the estate would be delayed on account of the adjustment of said proof through the neglect of the creditor in not seasonably proving his claim, so that its adjustment could have been had in the due course of settling the estate, the register ordered that the said Reed R. Wheeler deposit with the register the sum of forty dollars, to be applied in extinguishment of the costs of the assignee at such hearing so far as the same might become necessary. No objection was made to this order. The subject matter of the creditor's proof consists of a long account which, up to December 1, 1871, consisted mainly of commissions on the sale of emery wheels which the bankrupt [E. C. Merrill] manufactured, and which it was conceded the said Reed R. Wheeler sold on commission up to that time as traveling agent of the bankrupt. Said Wheeler claimed that, in October, 1872, he made a contract with the bankrupt by which he was to have wages for his services in making sales, at as high a price as said Merrill was paying any other of his employees, or as much as said Wheeler could make at his trade, which was that of a blacksmith, and that said services under the contract were to commence December 1, 1871, dating back from October, 1872, to December 1, 1871. Said Wheeler continued his services, either on a commission or under a contract for wages up to the filing of the petition in bankruptcy, and after December 1, 1871, charged his services at one thousand dollars per year above expenses. The assignee claimed that said Wheeler worked on commission all the time, and denied that said Wheeler made any contract with the bankrupt in October, 1872, or at any other time to work for wages. The petition in this case was filed on the 22d day of December, 1873, and said bankrupt deceased in February, 1874. Said Wheeler offered himself as a witness to prove said contract, which he claimed he made with the bankrupt in October, 1872. To his admissibility as a witness for this purpose the assignee objected. And the register ruled that said Wheeler was not an admissible witness for that purpose on account of the decease of said bankrupt with whom the contract was claimed to have been made. Counsel for said Wheeler desired that this question might be submitted to the district court for their opinion thereon. I therefore certify the same to the district court for decision thereon.] [2]

WHEELER, District Judge. Upon the question concerning the competency of the creditor as a witness in his favor, certified by the register, the law of the forum must as a matter of course govern. In these proceedings the courts of the United States constitute the forum and consequently the laws of the United States must control in this respect. By those laws no witness can be excluded on account of interest except in actions by or against executors, administrators or guardians in which judgments may be rendered for or against them. Rev. St. § 858. By the laws of the state, where one party to a contract or cause of action in issue and on trial is dead the other is excluded as a witness. According to the state law this creditor would be excluded. Such exclusion however would be on account of interest of the witness, and contrary to the law of the United States, unless the case would fall within the exception contained in the proviso to the statute on this subject.

The proof of a debt against an estate in bankruptcy is not a proceeding against a bankrupt, nor his guardian if he have one when alive, nor against his executor or administrator when he is dead, but is a proceeding in rem solely and affects the estate only. It is not an action against either an executor or administrator for or against whom any judgment can be rendered in it, and is not within the exceptions in the law of the United States.

The law of the United States prohibits the exclusion of this witness on account of his interest; and as it would seem, the law of the state, which but for this prohibition would exclude him, is not in force in this proceeding. For these reasons, in the opinion of this court the decision of the register excluding the witness is erroneous.

[2] [From 16 N. B. R. 35.]

Case No. 9,467.

In re MERRILL et al.

[12 Blatchf. 221; 13 N. B. R. 91; 1 N. Y. Wkly. Dig. 364.] [1]

Circuit Court, N. D. New York. June 16, 1874.

PARTNERSHIP—SPECIAL PARTNER—CONTRIBUTION—CASH—GOODS.

L. and three other persons undertook to form a limited partnership under the provisions of the statute of New York (1 Rev. St. p. 764, § 2) which provides that such partnerships may consist of general partners, and "of one or more persons who shall contribute, in actual cash payments, a specific sum, as capital, to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership, beyond the fund so contributed by him or them to the capital." The articles of copartnership provided that L. should contribute to the common stock $1,000 in cash, and, in addition, "the entire inventory on hand, of the effects and property belonging to him, lately owned and used by A. and said L., supposed to be about $8,000." The certificate filed under the statute stated that L., the special partner, had contributed to the common stock "$1,000 in cash and about $8,000 of effects and property, the exact amount of which is yet to be ascertained," and to it was annexed an affidavit of one of the general partners, that L. had actually contributed the sum of $1,000 in cash to the common stock of the firm, and had paid in the same in good faith: *Held*, that the partnership was not a limited one, and that L. was a general partner.

[Cited in Lineweaver v. Slagle, 64 Md. 483, 2 Atl. 695; Manhattan Co. v. Laimbeer, 108 N. Y. 602, 15 N. E. 712.]

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

Charles B. Sedgwick, for creditors.
Francis Kernan, for debtors.

WOODRUFF, Circuit Judge. The firm of Merrill, Wilder & Co. were charged by a creditor with having committed acts of bankruptcy, and, in the petition, it was averred, thet the firm was composed of William G. Merrill, David Wilder, Villars Merrill, Junior, and George J. Letchworth, all general partners therein. The application for a decree adjudging them bankrupts was resisted by Letchworth, only on the ground that he was not, and had never been, a general partner, but was only a special partner in the firm, and that the copartnership was a limited copartnership, formed under the provisions of the statutes of the state of New York, wherein he was in no wise liable for the debts of the firm otherwise or beyond the capital he had contributed to the common stock. The district court held him to be a general partner, and adjudged all the partners bankrupt, and that adjudication Letchworth seeks to review and reverse in this court. His petition of review states the facts upon which the adjudication proceeded, and, as the allegations of the petition are not denied, they are to be deemed admitted for the purposes of the review.

The only facts which I deem it material to notice, and upon which the petition will be disposed of, are that the parties attempted to form a limited partnership in which Letchworth should share in the profits of the business to be carried on, and have the immunities which the statutes authorizing such copartnerships allow, and yet not contribute, nor be bound to contribute, his share of the capital in cash. They entered into articles of copartnership containing numerous details touching the business to be carried on, stipulating that each of the four partners should share equally in the profits and losses of the business. The consideration for which Letchworth was to be thus admitted to membership in the firm, and permitted to share the profits, was, that he should contribute to the common stock one thousand dollars in cash, and, in addition thereto, "the entire inventory on hand, of the effects and property belonging to him, lately owned and used by M. Alden, deceased, and said Letchworth, supposed to be about eight thousand dollars." To carry their purpose into effect they signed and filed, as required by the statute, a "certificate of limited partnership," (so entitled,) in which, among other proper particulars, it was certified, that "the said William G. Merrill, David Wilder, and Villars Merrill, Jr., shall be the general partners, and the said George Letchworth shall be a special partner, and has contributed to the common stock one thousand dollars in cash, and about eight thousand dollars of effects and property, the exact amount of which is yet to be ascertained." To the certificate was annexed the affidavit of William G. Merrill, that Letchworth "has actually contributed the sum of one thousand dollars in cash, to the common stock of the said firm, and has paid in the same in good faith."

The statute under which the parties attempted to establish a limited partnership (1 Rev. St. N. Y. p. 764, § 2) provides, that such partnerships may consist of general partners, responsible as general partners now are by law, and "of one or more persons who shall contribute in actual cash payments, a specific sum, as capital, to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership, beyond the fund so contributed by him or them to the capital." It then requires that the certificate to be filed shall, among other things, state "the amount of capital which each special partner shall have contributed to the common stock," and that there shall be filed with the certificate an affidavit "stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash."

It is quite certain, that the copartnership

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 1 N. Y. Wkly. Dig. 364, contains only a partial report.]

which these parties attempted to establish was not such as this statute provides for. They doubtless acted with most entire fairness and integrity. They no doubt supposed that what they did sufficiently satisfied the reason and intent of the statute, so long as, in their published notice, they informed the world that the capital contributed by Letchworth to the common stock was not actually paid in cash, but consisted in part of property, the amount of which was not yet ascertained. But this was not in compliance with the statute, and neither they nor the court are to entertain the inquiry, whether a statute authorizing just such a partnership as they entered into, and securing to Letchworth immunity for the debts of the firm, would not be a better statute than the legislature have seen fit to enact. In general, all who share the profits of the business of a copartnership are liable to its creditors for all of its debts. The statute permits the formation of a copartnership in which, as to one or more of the members, there shall be an exemption from liability beyond the fund "contributed by him or them to the capital." The express condition of that immunity is, that that fund be contributed in actual cash payments. The expression "fund so contributed," which fund is made the limit of the liability of special partners, imports, contributed "in cash." It was, of course, competent for the legislature to have authorized such partnership, and to have permitted the special partner to contribute property or goods at a just valuation, but they have not done so. So, it was competent to have permitted a contribution of part cash and part goods or other property, but, for reasons concerning which we are hardly at liberty to speculate, this was not done. We are bound by the statute, and the parties cannot claim under the statute, which derogates from the general rule of law, without showing a strict compliance with the statute. They cannot be permitted to say that it was just as well for the firm and for its creditors to have a contribution of goods at their fair value as to have cash. The legislature saw fit to require that he who contributed capital to be employed in the joint business, to be the basis or consideration of his participation in the profits, should, in order to the limitation of his liability for debts, pay all of that contribution in money, before the partnership should be deemed formed; that that money should be under the exclusive control of the general partners; that they should be at liberty to invest or employ it as in their discretion they saw fit, for the benefit of the firm and its creditors; and that no one should be permitted to share profits on the basis of a contribution of goods or property, and yet be entitled to limit his liability for debts. It is unnecessary to vindicate the statute, and yet it is pertinent to inquire—can a person be permitted, under such a statute, to put in one hundred dollars cash, and a stock of goods estimated at fifty thousand dollars, be permitted to share profits on the basis of a contribution of $50,100, to capital, and yet be not liable for the debts?

I am decidedly of opinion that the parties failed to establish a limited partnership, and that they were always general partners. I may add, further, that an express provision of the statute, that the certificate filed shall state "the amount of capital which each special partner shall have contributed to the common stock," was not satisfied by a certificate that Letchworth had contributed "$1,000 in cash and about $8,000 of effects and property, the exact amount of which is yet to be ascertained."

For these reasons the decision of the district court was correct. Whether the other ground of the decision was so or not it is unnecessary to inquire.

The adjudication is affirmed, with costs.

MERRILL (AIREY v.). See Case No. 115.

Case No. 9,468.

MERRILL v. AREY.

[2 Ware, 215.] [1]

District Court, D. Maine. March, 1859.[2] [3]

SHIPPING—CHARTER PARTY—DANGERS OF THE SEA—FIRE—INDEMNITY.

1. Where by the terms of a charter-party the hirers of a vessel covenanted to return her on the expiration of the service in like good condition as when she sailed, ordinary wear and the dangers of the seas excepted, the risk of a loss by fire is on them.

2. "Dangers of the seas" include only those which accrue from the action of the elements, and such as are incident to that cause, rather than all that arise on the sea. An accidental fire is not one of the peculiar dangers of the sea.

3. In all contracts, both for service performed, and for dangers assumed by the way of bottomry or insurance, the maritime law gives full indemnity, but no more.

[Cited in Isaksson v. Williams, 26 Fed. 644.]

In admiralty.

Mr. Merrill, for libellants.

Shepley & Dana, for respondents.

WARE, District Judge. This is a libel on a charter-party. The libellants, being the owners of the schooner William Henry, of the burthen of 130 tons, on the 17th of February, 1853, let her to the respondents, by the charter-party, for two or three voyages, at the option of the hirers, from Frankfort to the Chesapeake Bay, or any other Southern

[1] [Reported by George F. Emery, Esq.]

[2] [Affirmed in Case No. 115.]

[3] This case, though appearing by the manuscript to have been decided in 1859, was determined in 1854, and the decree of the district court was affirmed by the circuit court at September term, 1854.

port or ports, for the monthly charter of $150. By the terms of the contract, the hirers were to victual, man, and sail the vessel, at their own charge, and to return her at the expiration of the service, to the owners, in the like good condition as when they took her, ordinary wearing and the dangers of the seas only excepted. She soon after took in a cargo of ice and sailed from the Penobscot on the first of March, for Pensacola. According to the testimony of the respondents the vessel was found to leak some, but not badly, soon after getting to sea, but about ten or eleven days after sailing the leak increased, either from an injury to the vessel from striking some heavy, floating body in the water, or from the increased violence of the sea. In the condition in which the schooner then was, the master did not think it safe to prosecute the voyage to Pensacola, and he bore away and put into Norfolk for repairs. He then made a protest, and called a survey of the vessel. It was found that the ice had been considerably wasted by the influx of sea water, and the cargo had shifted, and the surveyors advised to unload her and sell her cargo, in order to a more full examination of her hull. This was accordingly done, and on an examination some trifling repairs were made, at an expense of something over twenty dollars. The outward cargo for Pensacola having been sold, the voyage was abandoned. After remaining at Norfolk about ten days, the master sailed for Baltimore, with a light, southerly wind, and fair weather, passed Point Comfort about dark, and though varying his course from time to time, in order to keep in the deep water of the channel, struck on the Tangier shoals about midnight. After lying there through one tide, about a mile and a half from the shore, and attempting without success to get the vessel off, the master, with the crew, left in the boat early in the afternoon, and went ashore. They returned in the course of the afternoon and took some articles from the vessel and left her for the night, towards the close of the afternoon. The next morning the schooner was discovered to be on fire, and when the master and crew arrived in the boat, she was burned from stern to midship. Some of the sails and rigging were saved, but the hull of the vessel was entirely destroyed. The schooner was insured for $1500, and valued in the policy at $3000. The insurance has been paid.

A large amount of testimony has been taken relative to the conduct of the master before the vessel arrived at Norfolk, to the transactions there, to the master's conduct after leaving Norfolk in going up to the Chesapeake, and his leaving the vessel after she struck on the shoal, from all which the counsel for the libellants infers, that there was gross negligence, if not criminal misconduct, on the part of the master, while the counsel for the respondent contends that no fault is justly imputable to him, but that throughout the whole he acted with reasonable discretion and prudence, and that the loss of the vessel was a pure misfortune for which the hirers are no way responsible.

In the view which I have taken of the case, I have not thought it necessary to enter into a minute examination of this testimony. By the general principle of the law of hiring of things, the hirer is bound to take the same care for the preservation of the thing that a prudent man takes of his own property of a like nature, under like circumstances. Story, Bailm. §§ 398–400. It is a contract of mutual interest. The hirer is benefited by the use of the thing, and the lender by the hire or rent paid. The hirer is not liable, as a common carrier, for a loss by every sort of accident, except by the act of God, neither is he bound for that extreme care and diligence, that one is, who has the use of a thing by a gratuitous loan and the whole benefit of the contract is on one side, and the burthen on the other. But he is responsible not only for his own diligence, but for that of his servants, to whom the thing is entrusted. If this, therefore, had been an ordinary contract of hiring, and to be governed by the common principles of the law applying to this contract, the inquiry into the conduct of the master and crew would become very material. But the liabilities of the hirer may be varied or enlarged by the terms of the contract; and the agreement by which this vessel was hired, was special. She was hired by a charter-party, by which the hirers covenanted to return her on the expiration of the service, to the owners, in like good condition as when she sailed, ordinary wear and the dangers of the seas excepted. Stranding on the shoals is indeed one of the dangers of the sea, but the stranding was not the proximate cause of the loss. In the actual state of the weather, it is, I think, sufficiently apparent from the evidence, that the vessel might have been got off and saved without great difficulty or expense, if she had not been burnt. It may be said that the stranding led to the burning, and was thus the first, and in one sense the efficient cause of the loss. But even this would not have been the case if the master and crew had remained on board; and after all the explanations that have been given, I cannot perceive that the abandonment of the vessel was imperiously called for. It is said, indeed, that there were some indications of a storm, and if one had arisen the vessel must have been destroyed, and the lives of the crew put in jeopardy. But the peril should be imminent and serious that will justify a master in abandoning his vessel. Lying as they did, within a mile and a half of the land, the master might well have remained in the vessel till the danger was more pressing. Without, however, dwelling on these circumstances, the risk of a loss by fire, in my opinion, by the terms of the con-

tract, the hirers took on themselves. Dangers of the seas is somewhat of an equivocal expression. It may, without any violation of its natural import, be interpreted to mean, dangers that arise upon the sea, which would include every hazard and danger, from the beginning to the end of the voyage, of whatever kind; or with equal propriety, it may mean only those which arise directly and exclusively from that element, of which that is the efficient cause. Sometimes it is taken in one sense and sometimes in the other. In insurance cases, where the import of this phrase is as often considered as in any other, perhaps oftener, its meaning is not exactly settled. And there may be a difference between the force given to it in this, and other maritime contracts, such as bills of lading and charter-parties; and I am not aware, if this is the case, that it is exactly discriminated. In most cases, the owners of the ship have the possession by their own masters and mariners, for whose conduct they are more or less responsible. But in the present, the charterers had the possession. They equipped her with their own master and men, and had the entire direction of her motions. The exceptions were introduced into the charter-party in their favor. It would, therefore, be natural, and in conformity with the common rule of law, if its meaning were doubtful or ambiguous, to interpret it against them, and in favor of the other party. I think, also, it would be most in harmony with the general inclination of American courts, to interpret this phrase as including only dangers that arise from the action of the elements and the dangers incident to that cause, rather than to include all that arise on the sea. The exception now commonly introduced into insurance policies of loss by fire, shows a doubt, at least among those most conversant with maritime affairs, whether this would come within the common phrase, dangers of the sea. An accidental fire is not certainly one of the peculiar dangers of that element. It may arise on land as well as at sea. Besides, an accidental fire always implies some degree of fault or carelessness among those whose duty it is to prevent it. On the whole, in this case, I do not think that a loss by fire ought to be included in the dangers of the seas, and more especially as the charterers had the possession. This decision is, I think, justified by the principles of law,[4] and is consonant to the decision of the courts.

If it be held that the charterers are liable on this contract, the question arises, for what sum they are liable, whether for the whole value of the vessel, or for such part as is not covered by the insurance. Though this question was not raised in the argument, it is not seen how it is to be avoided, and it is not of easy solution. The schooner was insured for $1500, and this has been paid. Insurance is essentially a contract of indemnity. Where nothing is exposed to loss, it is a mere wager, and it is a well-established principle that this is simply void, and as a consequence, the property at risk, even when valued, may be always a subject of inquiry; though if anything is at risk, the court will incline in favor of the assured. Alsop v. Commercial Ins. Co. [Case No. 262]. In this case, the vessel was at risk, and was of greater value than was assured by the insurers, and as by the terms of the policy, a loss by fire was included, they could make no defence. But on this contract, can the owners recover the full value of the vessel? If they can, so far as the insurance goes, they recover a double indemnity. And this is against the clear policy of the maritime law. But the counsel for the libellants says they recover as trustees for the insurers. What claim have the insurers to this sum since a loss by fire was one which they expressly took on themselves? It seems to me that their mouth is closed. Their own contract, their own words, must raise an insuperable obstacle to their recovery in any form of action, or against any parties. If the owners recover in this action the full value of the ship, in every view which I can take of the case, they will be twice paid to the amount of the insurance. In all contracts, both for service performed, and for dangers assumed by the way of bottomry or insurance, the maritime law scrupulously gives what is due to full indemnity. But it gives no more. It does not permit owners to make a profit out of a common calamity. On the best consideration of the subject, which I have been able to give, I think the owners in this action can recover the whole of value of the schooner above the amount insured, and no more. There were a number of depositions taken as to the value of the vessel. There was a wide and singular discrepancy in the testimony, varying in the estimate of her value from $1000 to $3500. In such a conflict, the court is thrown on its own opinion, to be made up from circumstances about which there is no controversy, and as this case will by appeal be carried to another tribunal, any errors I may commit may be corrected. She was of the burthen

[4] The Roman law contains salutary admonitions on this subject. Every fire in a building, if it could be traced to no other cause, was presumed to arise from the negligence or fault of the inhabitants. Plerumque incendia culpa fiunt inhabitantium. Dig. 1, 15, 3, § 1; Dig. 18, 6, 11. And by the Aquilian law, those from whose fault it arose, or whose duty it was to prevent its spreading and ravages, were answerable for the consequences. Dig. 9, 2, 27, §§ 5, 9. The French have adopted this principle from the Roman law, and carried it out with much more efficiency than has been done either by the law of England or this country. 11 Toullier, No. 155 et suivant, in an examination of engagements that are formed without convention, has, with his usual learning and ability, given the history and present state of the French law on this subject, and particularly in No. 179, in vindication of the severity of the law.

of 130 tons, and about seventeen years old, and I have come to the conclusion that she was worth about $2000. The libellants also claim charter for her to the time when she was lost, amounting to $115. This is allowed. Some, also, of the rigging was saved. After all allowances are made, the decree will be that the libellants receive $698, and costs of suits.

[The respondents appealed to the circuit court, where the decree of the court below was affirmed, and it was also decided that, as there was no appeal by the libellant, he could not claim greater damages in this court than those allowed in the district court. Case No. 115.]

Case No. 9,469.

MERRILL v. DAWSON et al.

[Hempst. 563.] [1]

Circuit Court, D. Arkansas. Oct. 12, 1846.[2]

DEPOSITION—NOTICE TO TAKE—BY WHOM TAKEN—EX PARTE—COURTS—JUDICIAL NOTICE OF LAWS—MORTGAGES—CHATTEL—RECORD—NOTICE OF LIEN—BILL OF SALE—FORECLOSURE.

1. Where the name of a defendant is omitted in the caption of a deposition, but appears in the commission and proceedings, such deposition should not be excluded.

2. Notice to take depositions is sufficient, if served by delivering a copy to the party, or leaving such copy at his dwelling-house or usual place of abode with a free white person, a member of, or resident in the family.

3. If a witness resides more than one hundred miles from the place of trial, his deposition may be taken under the 30th section of the judicial act of 1789 (1 Stat. 88) without notice. But the requisites of that act must be observed strictly.

4. The residence of the witness and distance from the place of trial, are facts proper for the inquiry of the officer taking the deposition, and his certificate of those facts is competent evidence and sufficient to authorize the deposition to be read.

[See Banks v. Miller, Case No. 963.]

5. The probate court of Mississippi being a court of record, and possessing a seal, the judge thereof is the judge of a county court, within the meaning of the above act, and as such, authorized to take a deposition under it.

6. Notice of the time and place of taking depositions is necessary under a joint commission; but when the opposite party, after notice, fails or refuses to join, and the commission issues ex parte, notice is not necessary.

7. On an ex parte commission, the party suing it out is at liberty to put as few of the interrogatories as he thinks proper; except that he must put the last general interrogatory.

8. The courts of the United States will judicially take notice of the laws of the several states in the same manner as of the laws of the United States.

9. Until the act of the 20th February, 1838 (Rev. St. p. 578), and which took effect on the 19th March, 1839, there was no law requiring mortgages of personal property to be recorded; yet mortgagees, before that time, under laws in force, were permitted to have such mortgages recorded if they deemed it expedient.

10. Such recording was legal, but not per se operating as constructive notice to creditors and purchasers, although it tended to give publicity to the mortgage as well as repel fraud.

11. The statute of frauds (Ter. Dig. 266) cited and explained.

12. Notice of a lien or incumbrance on property, binds the purchaser when received before the actual payment of the purchase-money, and arrests all further steps towards the completion of the purchase, and if persisted in, is held to be in fraud of the equitable incumbrance.

13. A purchaser, to be protected, must deny notice before the actual payment of the purchase-money, and this essential averment cannot be supplied by intendment.

14. Where the existence of a mortgage was known and talked of in a neighborhood, and publicly proclaimed at a sale of such mortgaged property, under execution against the mortgagor; *held*, to be sufficient actual notice to purchasers at the sale, to hold them responsible.

15. Actual notice proved by facts and circumstances.

16. A bill of sale absolute on its face, and the vendor still retaining the possession of the property sold, has been held to be per se fraudulent as to creditors and subsequent purchasers of the vendor; such possession being inconsistent with the deed.

[Cited in Hempstead v. Johnston, 18 Ark. 123.]

17. Possession of slaves by the mortgagor, either before or after forfeiture, is neither fraudulent, nor a badge of fraud requiring explanation; such possession being consistent with the deed.

18. Declarations by a grantor impeaching a deed he has made, are incompetent evidence.

19. The practice in mortgage cases is by interlocutory decree to allow until the next term to redeem; and if the debt is not then paid or tendered, by final decree, to foreclose and bar the equity of redemption, and direct a sale if proper to be had.

20. An absolute foreclosure, in many cases, may be decreed without sale. It is a matter of sound discretion.

[This was a bill in equity by Ayres P. Merrill against James L. Dawson, William Dawson, James Smith, Samuel C. Roane, Samuel Taylor, Nathaniel H. Fish, Garland Hardwick, Absalom Fowler, Noah H. Badgett and Sophia M. Baylor, to foreclose a mortgage of certain negroes executed to secure the plaintiff.]

S. H. Hempstead, for complainant.

I. It is too well established at this day to be controverted, that a mortgage is a chattel interest. The object of the transaction in its original construction, is to create a security and that only. The mortgagor is equitably the sole owner until foreclosure, and has an estate of inheritance which may be devised, granted, or sold. 1 Atk. 603; 12 Ves. 334; 2 Ball & B. 402. The property in equity is regarded as only charged by the mortgage, and in no way passed, modified, altered, or affected, and the mortgagee, after foreclosure, acquires a new estate. 1 Pow. Mortg. 112a; Radcliffe v. Warrington, 12 Ves. 334; 4 Kent, Comm. 135, 142, 159; 1 Hil. Abr. 276; Clark v. Beach, 6 Conn. 142; Wilson v. Troup, 7 Johns. Ch. 38; 1 Schoales & L. 380; 1 Pow.

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

[2] [Affirmed in 11 How (52 U. S.) 375.]

Mortg. 187b, 188a, and note P; Bogart v. Perry, 1 Johns. Ch. 55; Doug. 630-632; Jackson v. Willard, 4 Johns. 42; Jackson v. Bronson, 19 Johns. 325; Runyan v. Mersereau, 11 Johns. 534. The foreclosure operates as a new sale and purchase, and creates an estate in the mortgagee when there was none before. 3 Pow. Mortg. 1022, note B; Hill v. Price, 1 Dickens, 344; 2 Burrows, 978. And so mortgaged property cannot be sold on execution against the mortgagee, before possession acquired on foreclosure of the equity of redemption, although the debt be due, and the estate of the mortgagee has become, technically speaking, absolute at law. Huntington v. Smith, 4 Conn. 235; Blanchard v. Colburn, 16 Mass. 345; Jackson v. Dubois, 4 Johns. 216; Hitchcock v. Harrington, 6 Johns. 290; Collins v. Torry, 7 Johns. 278; Fish v. Fish, 1 Conn. 559. And it is on the same principle that a mortgagee in possession is accountable to the mortgagor for rents and profits. 1 Pow. Mortg. 171; 2 Mass. 435. And the former must account for the hire of mortgaged slaves while in possession. 1 Bibb, 195; 3 Bibb, 18; 6 B. Mon. 122. The principle, then, is clear, and sustained by the authority of all respectable courts, that the debt is the principal and the mortgage the incident; and as it is a rule in equity that what is once a mortgage is always a mortgage, (2 Story, Eq. Jur. 287; 1 Vern. 8; 1 Eden, 59; 7 Ves. 273; 7 Johns. Ch. 43; 1 Pow. Mortg. 116a,) it would seem to follow irresistibly that the mere fact of forfeiture could not change the relative situation of the parties so as to divest one of an estate and vest it in another, and that so long as the right of redemption exists, there is no change at all, and the mortgage, whether before or after forfeiture, remains a mere security for a debt. The object of the mortgage in this case was to indemnify Merrill, on account of his indorsement for the accommodation of Dawson, of the two notes mentioned in the bill, amounting to twelve thousand five hundred and seventy-eight dollars and twenty-two cents, and which were subsequently discounted at the Planters' Bank of Mississippi, at Natchez, for the exclusive benefit of Dawson, and the proceeds paid to him. Merrill was, in fact, security, and as such was obliged to take up these notes on the 4th of March, 1842; and at that point of time his right to proceed on the mortgage accrued. He was, then, actually damaged, and the condition of the mortgage was broken. The formal wording of the mortgage provides for the payment of the notes to Merrill, but that is quite immaterial, since the object is to ascertain the true nature of the transaction between the parties; and it was as I have stated it. Flagg v. Mann [Case No. 4,847]; 2 Story, Eq. Jur. 287; 1 P. Wms. 270; 1 Ves. Jr. 406. It has been well said, that courts of equity do not regard the forms of instruments, but look to the intention and give to the acts of parties such construction as that intention justifies and requires. Barron v. Paxton, 5 Johns. 258; Reed v. Jewett, 5 Greenl. 96.

In all cases of indemnity it would seem to be a clear proposition, that actual damage must alone invoke redress, and so are adjudged cases. 1 Saund. 116, note 1; Douglass v. Clark, 14 Johns. 177; Aberdeen v. Blackmar, 6 Hill, 324; Churchill v. Hunt, 3 Denio, 321; Gilbert v. Wiman, 1 Comst. [1 N. Y.] 550. There was no default for which the mortgage could be foreclosed until the 4th of March, 1842, and he asserted his rights in the proper tribunal within six months afterwards, and in shorter time than non-residents usually allow themselves to seek a remedy in our courts. Looking to the true nature of the transaction, it is apparent that he could not foreclose before payment; because, otherwise, he might at any moment have possessed himself of the mortgaged property or the value, without paying a farthing, or being injured to the extent of a penny, in opposition to the clear intention of the parties, and against the well-established principles of equity. Marsh v. Lawrence, 4 Cow. 461. On the 4th of March, 1842, then Merrill was obliged to take up those notes by payment; on that day he became the legal holder of them; on that day his right to seek indemnity from the mortgaged property became perfect, and not until then. This is a point of some consequence, because it entirely destroys the chief ground of defence of the defendants, if ground that can be called, which is unsustained by authority and condemned by reason, namely, that the mortgagor retaining the possession of the slaves rendered the transaction fraudulent. In point of fact, so far from the mortgagor's having remained in possession after forfeiture, the very reverse is true, because he was dispossessed of the slaves in 1841 by the levy and sale under which the appellant claims; so that whether such possession would or would not be fraudulent, must be a purely speculative inquiry, not strictly applicable to the facts of the present case. But, as a matter of curiosity, let us see how the question stands on the score of authority.

Now I assert the general rule in the American and English courts to be, that the possession of personal property by the mortgagor, either before or after default or forfeiture, is not fraudulent, the possession being consistent with the deed. And that doctrine has been established by the supreme court of the United States in the cases of Hamilton v. Russell, 1 Cranch [5 U. S.] 309; U. S. v. Hooe, 3 Cranch [7 U. S.] 75; Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 449. And by Judge Story in Wheeler v. Sumner [Case No. 17,501]; De Wolf v. Harris [Id. 4,221]. And in the following cases, decided in the state courts, namely, Head v. Ward, 1 J. J. Marsh. 280; Hundley v. Webb, 3 J. J. Marsh. 645; Maples v. Maples, 1 Rice, Eq. 300; Callen v. Thompson, 3 Yerg. 475; Sommerville v. Horton, 4 Yerg. 551; Bruce v.

Smith, 3 Har. & J. 499; Hambleton v. Hayward, 4 Har. & J. 443; McGowen v. Hoy, 5 Litt. [Ky.] 239; Haven v. Low, 2 N. H. 15; Ash v. Savage, 5 N. H. 547; Barron v. Paxton, 5 Johns. 258; Beals v. Guernsey, 8 Johns. 446; Craig v. Ward, 9 Johns. 197; Marsh v. Lawrence, 4 Cow. 461; Weller v. Wayland, 17 Johns. 102; Smith v. Acker, 23 Wend. 653; Planters' & Merchants' Bank v. Willis, 5 Ala. 780. In the English courts, in Stone v. Grubham, 2 Bulst. 225; Cadogan v. Kennett, Cowp. 432; Edwards v. Harben, 2 Term R. 587; Jarman v. Woolloton, 3 Term R. 618, 620; Eastwood v. Brown, 1 Ryan & M. 312; Reed v. Wilmott, 5 Moore & P. 564; 7 Bing. 583; Latimer v. Batson, 7 Dowl. & R. 110; 4 Barn. & C. 653; Martin v. Podger, 2 W. Bl. 701; 3 Barn. & Ald. 507; Lady Arundell v. Phipps, 10 Ves. 145. The same principles will be found in elementary treatises of high character, namely, Rob. Frauds, 550; Long, Sales, 71–76; 2 Kent, Comm. 518; 1 Pow. Mortg. 155; 2 Pow. Mortg. 646; Shep. Touch. 65. In Lady Lambert's Case, referred to in Shep. Touch. 65, it was determined that a mortgage or other conditional sale being good at the commencement, without a transfer of possession to the mortgagee or vendee, it will in law continue so, notwithstanding the retention of possession by the mortgagor or vendor, after forfeiture. In fact, to hold that possession by a mortgagor would even be prima facie evidence of fraud, would be an outrage on the common sense of society. Head v. Ward, 1 J. J. Marsh. 280. Jurists of this age content themselves with combating fraud, in fact, when discovered; and do not feel warranted in assuming its existence, either at law or equity, without conclusive proof. Not stopping at the explicit declaration that fraud shall never be presumed, they have thought it just to go further and say, that where an act does not necessarily import fraud, and may have been more probably done through a good than a bad motive, the presumption of innocence must prevail. Gregg v. Sayre, 8 Pet. [33 U. S.] 244; Fleming v. Slocum, 18 Johns. 405; 1 Story, Eq. Jur. 199.

An attentive examination of the cases with regard to the possession of property by the vendor, even after an absolute sale, and where such possession is not consistent with the nature or terms of the deed, will show that the weight of authority is in favor of this proposition, namely, that such possession as to creditors and purchasers, without notice, is only prima facie fraudulent, and may be explained, and is not, per se, fraudulent, admitting no explanation. But when we come to the consideration of mortgages, where, by the very nature and terms of such instruments, the possession of the mortgagor, both before and after default, is consistent with the deed itself, how is it possible for any one who has shaken from his robes the dust of the black letter tomes of past ages, to maintain before an enlightened court that such possession is either fraudulent or a badge of fraud; and what court, at this day, would have the courage to sanction such a doctrine?

It is worthy of observation that cases upon mortgages of chattels, where continuance of possession by the mortgagor occurs, do not turn upon any distinction between possession before or after forfeiture, but upon general principles, and thus completely refuting the idea, if such a fallacy requires refutation, that possession is unobjectionable before, but fraudulent after default. It is believed that there is no respectable case predicated upon any such distinction, and which, indeed, would be in disregard of the universal maxim —"Once a mortgage, always a mortgage." The decisions are the reverse. Bucklin v. Thompson, 1 J. J. Marsh. 223; Head v. Ward, Id. 281; McGowen v. Hoy, 5 Litt. [Ky.] 239. In considering mortgages of chattels, it must not be forgotten that prominent distinctions exist between a pledge or mortgage of goods which are consumed in the use, and a mortgage of slaves, which partake more of the nature of realty, and are so regarded in the Southern states, for many purposes not material to be here enumerated. They are a peculiar species of property, and on account of their value and capability of commanding ready money on sudden emergencies, are oftener subjects of mortgage than any other species of property denominated personal. And general practice as to slaves has so familiarized possession by the mortgagor that it is justly regarded as one of the conditions and incidents of the contract, whether the mortgage is recorded or not; and delivery of possession would be out of the common course. Maples v. Maples, Rice, Eq. 300; Fishburne v. Kunhardt, 2 Speer, 564. In the case last cited Frost, J., said: "The presumption of fraud from possession by a mortgagor after condition broken would be arbitrary, because contrary to almost universal experience." And in Maples v. Maples, above cited, which involved a mortgage of slaves, Chancellor Johnson said: "Permitting the mortgagor to remain in possession of the mortgaged property, although there is no covenant to that effect, is too common here to excite suspicion." And in the same case, on appeal, Chief Justice Dunkin held that possession by the mortgagor after forfeiture was neither fraudulent nor a badge of fraud requiring explanation. Indeed, in South Carolina, that doctrine has been so repeatedly adjudged as to have become a permanent landmark in her jurisprudence, as will be seen by the following cases, in addition to those cited, and to which particular attention is invited, especially as they relate to mortgages of slaves, and are, therefore, directly in point. Gist v. Pressley, 2 Hill, Eq. 325; Bank v. Gourdin, 1 Speer, Eq. 439, 458; Smith v. Henry, 1 Hill [S. C.] 23. On this question we are obliged to go to slave states for authority, because in non-slaveholding

ones sales and mortgages of slaves do not occur, and consequently no such cases arise. In the case of U. S. v. Hooe, 3 Cranch [7 U. S.] 73, above cited, Chief Justice Marshall says: "The difference is a marked one between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. If in the latter case the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor until the creditor becomes entitled to his money, and either chooses, or is compelled to exert, his right." Barron v. Paxton, 5 Johns. 258.

It may not be inappropriate to observe, that in New York there is an express legislative act declaring that bills of sale, and mortgages of goods and chattels, shall be presumed to be fraudulent, when possession continues in the vendor or mortgagor, unless the person claiming under such sale or mortgage shall show the absence of an intent to defraud and the good faith of the transaction. 2 Kent, Comm. 528; Stoddard v. Butler, 20 Wend. 548; Butler v. Van Wyck, 1 Hill, 442. Hence decisions made after that statute, based upon or influenced by it, would not furnish a safe guide as to the general question here discussed, out of New York, that being among the few states where such a statute exists. And yet, even there, it has been repeatedly held, and has now become settled doctrine, that such possession is only primâ facie evidence of fraud, and that almost any excuse is sufficient to destroy that presumption, and show the good faith of the transaction. Smith v. Acker, 23 Wend. 653; Fuller v. Acker, 1 Hill, 473; Butler v. Van Wyck, Id. 438, 447. "Perhaps," says Cowen, J., delivering the opinion of the majority of the court, in the last case, "it is necessary for the vendee or mortgagee, claiming in the face of a continued possession in his vendor or mortgagor to give evidence, slight at least, that the consideration was a true debt. Beyond this the verdict of the jury must be received as final. The convenience of the vendor or mortgagor, the declared purpose of enabling him to pay debts, even the comfort of his family, in retaining household furniture, according to their rank in life; in short, motives of humanity, and almost of mere courtesy, may, I think, on the authority of Smith v. Acker, 23 Wend. 653, be given in evidence to the jury, who may, if they please, allow them as legitimate excuses." And in Stoddard v. Butler, 20 Wend. 548, Senator Verplanck held this language: "Thus it happened here and in England, that, whilst the courts and the books laid down the rule broadly, and often applied it strictly, that 'unless possession accompanies and follows the deed, it is fraudulent and void,'—in the words of Justice Butler, Edwards v. Harben, 2 Term R. 587, adopted and incorporated in our own statute; yet first case after case, and then class after class, of exceptions was exempted from the rule, until with us there were no less than twenty-four distinct grounds of exemption; such as the kind of sale, purchase under execution or distress for rent, necessity, convenience, the custom of trade, the distance or situation of place, the relation of parties, motives of humanity or of friendship, and special circumstances of various kinds, more or less accurately defined, all enumerated by Judge Cowen. 3 Cow. 190."

At an early period of English jurisprudence, fraud was arbitrarily inferred from acts susceptible of a satisfactory explanation. But when the extension of commerce rendered the frequent transmission of property necessary, and created a corresponding demand for securities of various kinds, the harsh rules of a darker age yielded to a wiser policy, more compatible with the actual condition of mankind, and the usual course of human affairs. Twyne's Case, 3 Coke, 80, is a leading one on the subject of fraudulent sales of personal property. It was decided in the forty-fourth year of the reign of Elizabeth, in the court of star-chamber,—a tribunal which, becoming odious in consequence of its usurpations was abolished in the sixteenth year of the reign of Charles I.; and, as Lord Clarendon informs us, "to the general joy of the whole nation." The case derives no weight from adventitious circumstances, such as the dignity and authority of the tribunal, or the eminence and integrity of the judges; but it must be supported, if at all, on the intrinsic justice of its doctrines. Now, when we recollect that the proceeding was a criminal information on the part of the crown, and remember, too, the historical fact, that the tribunal itself was an instrument of tyranny in the hands of the sovereign, we shall not wonder that the information was sustained by "the whole court of star-chamber," and Twyne himself branded as a criminal. It is sufficient to observe that the resolutions in that case would hardly be adopted to their full extent in modern times, although it cannot be denied that there were such marks and signs of an intent to defraud creditors as might create suspicion and demand explanation, and might probably authorize fraud to be inferred as a question of law, without the intervention of a jury, if that course of practice could be tolerated at all. (1) The gift was general and absolute, without exception of apparel, or any thing of necessity. (2) The donor continued in possession and used them as his own, and by reason thereof traded and trafficked with others, and defrauded and deceived them. (3) It was made in secret. (4) It was made pending the writ. (5) There was a secret trust between the parties, for the donor possessed all and used them as his proper goods, notwithstanding the gift was absolute and unconditional. (6) The deed stated that the gift was made honestly, truly, and bonâ fide. These were the principal, and by no means slight, badges of

fraud in that celebrated case; and yet a court at this day would not feel warranted in holding such a transaction fraudulent per se as the court of star-chamber did, but would allow a party to explain it if in his power. To hold that retention of possession is per se fraudulent, is to establish an artificial rule not founded in truth nor upheld by the principles of justice. It is to destroy an important element of trade and commerce, and take us back to the primitive ages, where the transactions between men were few and simple, and where ignorance of writing and the absence of records, rendered actual delivery the more necessary as an indication of title. It is to crush the energies of the debtor by depriving him, in many cases, of the means of extricating himself from embarrassment without absolute ruin. Harshness to debtors has yielded to an enlarged and liberal philanthropy. Imprisonment for debt, the relic of a barbarous age, is fast disappearing everywhere. The debtor cannot be put in chains and sold to foreigners, nor can his body be cut in pieces; both of which were allowed by the laws of the twelve tables of Rome. Cooper's Justinian, 658. In place of such cruelty certain property, necessary for his sustenance and comfort, is, in most if not all of the states, preserved to him against the rapacity of the creditor, and the exemption of homesteads is now becoming a very general policy in our country. In the strongest cases in favor of the proposition that possession must accompany the deed in absolute sales, as Twyne's Case, 3 Coke, 80; Stone v. Grubham, 2 Bulst. 225; Cadogan v. Kennett, Cowp. 432; and Edwards v. Harben, 2 Term R. 594, it is expressly conceded, that if the conveyance is conditional, or if, by the terms or nature of the instrument or deed, possession is consistent therewith, such possession is not only not per se fraudulent, but not even a badge of fraud, requiring any explanation at all. The weight and respectability of authority undoubtedly is, that possession by the vendor, even after an absolute sale, and where such possession is incompatible with the deed, is only primâ facie evidence of fraud, and subject to explanation, and is not per se fraudulent. Kidd v. Rawlinson, 2 Bos. & P. 59; Lady Arundell v. Phipps, 10 Ves. 145; Beals v. Guernsey, 8 Johns. 452. And the same doctrine has been established by the supreme court of Arkansas in the cases of Cocke v. Chapman, 2 Eng. [7 Ark.] 200; Field v. Simco, Id. 275, and cases there cited; Costar v. Davies, 3 Eng. [8 Ark.] 218.

There is a principle connected with this question of possession which deserves consideration. The only reason why absolute sales of chattels, where there was no transfer of possession, were declared fraudulent and void, was on the supposition that there was a secret trust between the parties, and that the retention of possession was calculated to deceive those with whom the vendor might subsequently deal. As expressed by Justice Burnet (1 Atk. 163), "Possession can be no otherwise a badge of fraud than as it is calculated to deceive creditors; as to the possession of goods, I have no way of coming to the knowledge of the owner but by seeing who is in possession of them." Such a sale is held fraudulent and void as to creditors and purchasers, although good between the parties themselves. Whenever the rule is enforced it is for the benefit of creditors and purchasers, and they are the only persons who can avail themselves of it. Twyne's Case, 3 Coke, 80; Long, Sales, 67. Now where a creditor or purchaser has notice of a bona fide sale for a valuable consideration, he cannot say or pretend that he has been deceived, deluded, or defrauded, although the vendor retains possession, uses the property as his own, and such possession is inconsistent with the deed or contract. With such knowledge, to allow the second to overreach the first purchaser would be to sanction a fraud. In such a case the retention of possession would be of no consequence, and could not be available for any purpose. This doctrine is sustained by the case of Sanger v. Eastwood, 19 Wend. 514, where it was held that a purchaser of personal property, with notice of the existence of a mortgage covering it, cannot avail himself of the facts, that the mortgage was unaccompanied by delivery of possession, and that it had not been filed for record. And from other cases the rule is deducible, that if a creditor has knowledge of a sale, the mere retention of possession is a matter of no consequence. Steel v. Brown, 1 Taunt. 381; Sturtevant v. Ballard, 9 Johns. 337; Barron v. Paxton, 5 Johns. 258; Ryall v. Rolle, 1 Atk. 165; Bissell v. Hopkins, 3 Cow. 166. It is said that there is no clause in this mortgage, authorizing the mortgagor to retain possession, and that that is a badge of fraud. It is sufficient to reply that it was not necessary; because, first, the transaction was of such a nature that the mortgagee was not entitled to the possession of the slaves until he paid the notes; and, second, the effect of the mortgage is the same as if it contained such a clause, for this right in the mortgagor is incidental to a mortgage, and implied by law without such clause.

"There is usually in English mortgages," says Kent, "a clause inserted in the mortgage that until default in payment the mortgagor shall retain possession. This was a very ancient practice, as early as the time of James I., and if there be no such express agreement in the deed, it is the general understanding of the parties, and at this day almost the universal practice, founded on a presumed or tacit assent." 4 Kent, Comm. 148; 5 Johns. 258; 2 Hill, Eq. 328. In mortgages of slaves, very general practice has familiarized possession by the mortgagor, as one of the conditions and incidents of the contract. It is too common and universal to excite suspicion. Fishburne v. Kunhardt, 2 Speer, 564; Bank v. Gourdin, 1 Speer, Eq. 439, 458;

Maples v. Maples, Rice, Eq. 300. The general custom in Arkansas, as proved by witnesses, accords with this doctrine, and it is just and reasonable, and a different one could not be tolerated as to slaves. But even if it were necessary to show any circumstances in this case by way of explanation of possession, the record contains an abundance of reason to justify it. 1. The nature of the transaction between Dawson and Merrill, which was only to secure Merrill from loss and damage, in consequence of the indorsement of these notes, and not in fact allowing Merrill the right of possession at all; until he was damnified by the payment of the notes, which was not until the 4th of March, 1842, and then the negroes had been sold. 2. That at the time Dawson made the mortgage, Nov. 25, 1837, he was a wealthy and solvent man, with a large property, and able or supposed to be able to pay all his debts, and who did not become embarrassed until long afterwards. 3. The mortgage was made in Natchez, Mississippi; the negroes were upon Dawson's plantation, in Jefferson county, Arkansas, and the mortgage was placed upon record, thus showing that it was not a secret transaction. 4. Merrill was then, and ever has been, a non-resident of this state, within the saving in the statute of limitations, even if it could be pretended that any statute applied. This is no stale demand; nor is it pretended that Merrill slept upon his rights, for after he paid the notes, he immediately commenced proceedings to subject the mortgaged property. 5. The whole testimony shows, and Dawson's answer under oath admits, that the mortgage was made bona fide and for a valuable consideration, and to secure Merrill; and the conduct of the latter proves the fact. In addition to this, the defendants had actual, if not constructive, notice, as will presently appear, and they purchased in their own wrong. 6. Last of all, the possession of Dawson, while he did have possession, was consistent with the deed of mortgage, and in fact Merrill was not entitled to possession at all until March 4, 1842. That there was at any time, any actual fraud in the transaction, has not been proved. There is no circumstance or fact which would justify even a suspicion of fraud as to Merrill. The idea that they colluded with each other to defraud a subsequent creditor, to defraud a person who was not a creditor of Dawson until long afterwards, is absurd. As to subsequent acts and declarations of Dawson, referred to by some of the defendants in their answers, suffice it to say, they are not proved, and if they were proved, they could not affect Merrill in the slightest degree, he being wholly unconnected with them. That there was any fraud in fact is a naked assumption, without the slightest evidence to sustain it.

II. It is insisted by the defendants, that this mortgage was not legally acknowledged, and that it was not in fact properly or legally recorded, although the recorder certified under his hand and official seal, on the original mortgage, that it was duly recorded in book B, page 174, on the 29th of December, 1837, and hence that it does not act as constructive notice. It is true that the record does not show on what day it was recorded, but that is not material, nor can the certificate of the registering office be contradicted, as we shall presently perceive. This was such an instrument as the law authorized to be recorded. The law in force in 1837 required the recorder to record all deeds and conveyances which were presented to him for that purpose. Ter. Dig. 454. It does not limit such deeds and conveyances to real property; personal chattels would therefore be embraced. It does not require any particular mode of acknowledgment or authentication, or indeed any at all. Act 1804; Ter. Dig. 454. The same act, under the title "Mortgages," (section 1, Ter. Dig. 433,) requires every mortgagee of real or personal estate, when the mortgage is satisfied, at the request of the mortgagor, to "enter satisfaction upon the margin of the record of such mortgage recorded in said recorder's office." The second section prescribes a penalty for failure to do so. The fifth section of same act gives the same remedy upon a "mortgage of personal property" as upon real estate. Ter. Dig. 434. These provisions show conclusively that mortgages of personal property were authorized to be recorded, (Hodgson v. Butts, 3 Cranch [7 U. S.] 140; 1 Pet. Cond. R. 476; McKeen v. Delaney's Lessee, 5 Cranch [9 U. S.] 22; 2 Pet. Cond. R. 179,) whether such recording would operate as constructive notice or not. The mortgage was made in the state of Mississippi, and was properly acknowledged before the judge of the probate court of Adams county, an officer competent to take the acknowledgment of deeds in that state. How. & H. Dig. p. 368, § 99; Talbot v. Simpson [Case No. 13,730]. A judge of probates in Mississippi is a judge of a county court, within the meaning of the act of congress of 1789. The recorder acts ministerially and not judicially in the matter of recording deeds. Elliott v. Piersol, 1 Pet. [26 U. S.] 341; 2 Bin. 40; Dawson v. Thruston, 2 Hen. & M. 135. When a deed, therefore, is presented to the recorder for record, he ought to admit it, and has no authority to reject it. Id. The recording of a deed is evidence that it was legally proved and admitted to record (Talbot v. Simpson [supra]), and the certificate of the registering officer cannot be impeached or controlled by producing the record and showing a variance (Ames v. Phelps, 18 Pick. 314), or traversing such certificate. Rex v. Hopper, 3 Price, 495. If after a deed is left for record with the clerk to be recorded, he delivers it to the grantor without recording it, this is a breach of official duty for which the clerk would be liable to creditors for any injury they might sustain, but would not render the deed void or impair the rights of the grantee. Bank of

Kentucky v. Haggin, 1 A. K. Marsh. 307; Avent v. Read, 2 Stew. [Ala.] 488. Hence if a deed after it is received by the clerk remains unrecorded through no fault of the grantee, until after an attachment of the land embraced in the deed, the attachment shall not prejudice the grantee. Franklin v. Cannon, 1 Root, 500; Hartmyer v. Gates, Id. 61; Judd v. Woodruff, 2 Root, 298. The same principle is substantially decided in McGregor v. Hall, 3 Stew. & P. 397.

The principle upon which these cases rest is, that the officer is presumed to discharge his duty, and that if he omits to do so, the grantee or mortgagee shall not be prejudiced —shall not lose his rights, which would indeed be against the dictates of justice. It is not required of him "that he should stand by and see that the clerk does his duty." Beekman v. Frost, 18 Johns. 563, 1 Johns. Ch. 300. In the case of King v. Hopper, 3 Price, 495, it was expressly held, that the lodging of a deed in the officer's hands is an enrolment. "And indeed," says Richards, B., "the affairs of mankind would be in a dreadful condition if it were not so, for when the deed is once lodged, the party interested in it loses all dominion and control over it, and it is from that moment left entirely with the officer. If an actual and complete enrolment were necessary, this deed had not been enrolled on the 22d nor on the 24th of July; but the cases all decide that that is not necessary, and that the instant a deed is lodged in the office, from that instant it must be considered as enrolled, and the practice accords with that rule." The same principle was explicitly asserted in Garrick v. Williams, 3 Taunt. 544. In McDonald v. Leach, Kirb. 72, it was held, that where a deed is received for record, this entry made upon it by the register and the deed lodged in the office, is equivalent to actual registration. 2 Hil. Abr. p. 432, § 87; McConnell v. Brown, Litt. Sel. Cas. 462. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument in law is considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. Marbury v. Madison, 1 Cranch [5 U. S.] 147; 1 Pet. Cond. R. 273, 274. The receiving of an instrument, marking it filed by the clerk, and signing such indorsement officially, is a sufficient recording to protect the rights of the grantee from subsequent incumbrances. See cases above cited. Nor is it necessary that the date of recording should be put upon the record. If the recording of the deed with the acknowledgment is prior to the opposing title, it is sufficient. Galusha v. Sinclear, 3 Vt. 394; Morey v. McGuire, 4 Vt. 327; Wickes v. Caulk, 5 Har. & J. 36; Rex v. Hopper, 3 Price, 495.

It has been held that registry acts are remedial, and ought to be liberally and beneficially construed. Jackson v. Town, 4 Cow. 599; James v. Morey, 2 Cow. 247; Jackson v. Bowen, 7 Cow. 13; 2 Pow. Mortg. 624a. Hence a memorial of registry containing the substance of a covenant in a lease, without expressly setting it forth, has been held to be a good registration. McAlpine v. Swift, 1 Ball & B. 285. In Latouche v. Dunsany, 1 Schoales & L. 157, Lord Redesdale said that if registration was to be considered notice, it must be notice whether the deed be duly registered or not. A clerk may record a deed made by an agent without inquiring into the validity or fact of agency. 3 A. K. Marsh. 92. The registry of a deed executed by several, but acknowledged by one only, is good and sufficient. Shaw v. Poor, 6 Pick. 86. A clerical error or mistake does not vitiate the registry of a deed. As where a term assigned was of sixty-one years, and was stated in the enrolment to be sixty-two years; or, as where the consideration was 250 pounds and was enrolled 280 pounds; or, as where the name of the trustee was enrolled "Seden," when it was spelt "Soden" in the deed, and where the assignment was stated to be Seden, habendum to Corrie; in these cases the enrolment was held good. Ince v. Everard, 6 Term R. 545; Wyatt v. Barwell, 19 Ves. 435; 2 Pow. Mortg. 621, note. Where lands lie in several counties, it is sufficient to record the deed in any one of them. Scott v. Leather, 3 Yeates, 184; Duffield v. Brindley, 1 Rawle, 91. Deeds were enrolled at the common law for safe custody. 1 Salk. 389. The enrolment of a deed under the statute 27 Hen. VIII. c. 16, is a record, and, therefore, is not traversable. Rex v. Hopper, 3 Price, 495. The indorsement of the registry of a deed on the deed itself is sufficient evidence of enrolment. Pyne v. Dor, 1 Term R. 55. The production of a deed with the memorial indorsed, is sufficient proof of the enrolment. Compton v. Chandless, 4 Esp. 18; Bull. N. P. 229; Kinnersley v. Orpe, 1 Doug. 56. The date of enrolment indorsed by the clerk of enrolments on the deed, is conclusive evidence of the date and fact of enrolment. Rex v. Hopper, 3 Price, 495; 1 Saund. Pl. & Ev. 425; and there can be no averment or proof against it.

The object of every registry act is to afford publicity, and if a deed was in reality recorded, before a subsequent incumbrance accrued, it would be strange if the subsequent incumbrancer could say, that although the deed was on record, yet it afforded no notice, because the precise day of placing it there did not appear from the record. That would be to say, that the registry is utterly void, unless the date of it appears from the record, which would entirely destroy the beneficial construction which has ever been placed on registry acts, and would be at war with the first principles of justice as well as adjudged cases. Under the registry act of 27 Hen. VIII., a party might be permitted to give evidence of the day of an enrolment having been actually made, because it was not the usage to insert on the record the particular day.

Rex v. Hopper, 3 Price, 495; 1 Exch. 403. It has, as I think, been demonstrated (1) that the mortgage from Dawson to Merrill was lodged and filed for record December 29, 1837, and was from that day, in contemplation of law, enrolled, so as to protect the rights of the mortgagee; (2) that no evidence is admissible or can be received to impeach or contradict the certificate of the recorder indorsed on the mortgage. But if such evidence can be received, then I contend (3) that the mortgage was actually recorded, and that it is immaterial whether the manual labor of transcribing it was performed by the clerk in person, by Dawson, or any other amanuensis, provided the clerk adopted and sanctioned the act, which he did, as is manifest from his certificate, and which certificate is not to be controverted by parol proof, for that would be to set up inferior in the place of the higher evidence.

In England, registration is not of itself notice, and a mortgagee or purchaser is not bound to search the register; but if he does, he will be deemed to have actual notice of all incumbrances on the register, within the period of his search, (2 Pow. Mortg. 631a, note; Wiseman v. Westland, 1 Younge & J. 117; Bushell v. Bushell, 1 Schoales & L. 103; Latouche v. Dunsany, Id. 157,) thus showing it may be made the medium of actual notice. But in this country registry is constructive notice to all the world. Johnson v. Stagg, 2 Johns. 510; Frost v. Beekman, 1 Johns. Ch. 299; Peters v. Goodrich, 3 Conn. 146; Grant v. Bissett, 1 Caines, Cas. 112; Parkist v. Alexander, 1 Johns. Ch. 398; St. Andrews' Church v. Tompkins, 7 Johns. Ch. 14. Where a person claims to be a purchaser without notice, he is bound to deny, fully and in the most precise terms, every circumstance and fact from which notice might be inferred (Jerrard v. Saunders, 2 Ves. Jr. 454; Frost v. Beekman, 1 Johns. Ch. 303); and this he must do, although notice is not charged in the bill. 3 P. Wms. 244, note; Bodmin v. Vandenbendy, 1 Vern. 179; Murray v. Ballou, 1 Johns. Ch. 573, and cases there cited; Murray v. Finster, 2 Johns. Ch. 155; Galatian v. Erwin, 1 Hopk. Ch. 55, 56; Carr v. Callaghan, 3 Litt. [Ky.] 365. "If a purchaser wishes to rest his claim on the fact of being an innocent bona fide purchaser, he must deny notice, even though it be not charged, and he must deny it positively, not evasively; he must even deny fully and in the most precise terms every circumstance from which notice may be inferred." Per Chancellor Kent, in Denning v. Smith, 3 Johns. Ch. 345; Pillow v. Shannon, 3 Yerg. 511. Every case on the registry acts has been determined on the ground that those acts do not affect the great fundamental principles of equity; but that every purchaser claiming under a registered deed, with notice of a prior incumbrance or purchase, is subject to any equity which such prior incumbrance or purchase may create. Chandos v. Brownlow, 2 Ridg. App. 428, vide 3 Sudg. Vend. p. 307, and notes b and 1, and authorities there cited; 1 Story, Eq. Jur. 385; Cotton v. Hart, 1 A. K. Marsh. 58. So, too, in Portwood v. Outton's Adm'r, 3 B. Mon. 253, it is said, that a mortgage of land without seal or scroll was not a recordable instrument within the statute, so as to make the record constructive notice, yet that it was good against a subsequent purchaser with notice of its existence.

III. But, supposing there was no constructive notice arising from the registry of the mortgage, the defendants had actual notice. It is a just and salutary rule, calculated to preserve good faith and protect the rights of individuals, that whatever is sufficient to put a party upon inquiry is good actual notice. Johnson v. Bloodgood, 1 Johns. Cas. 53; Sterry v. Arden, Id. 267; 1 Story, Eq. Jur. 389; Ferrars v. Cherry, 2 Vern. 384; Smith v. Low, 1 Atk. 490; Taylor v. Stibbert, 2 Ves. Jr. 437; Daniels v. Davison, 16 Ves. 250; Newman v. Kent, 1 Mer. 240; Green v. Slayter, 4 Johns. Ch. 46; Peters v. Goodrich, 3 Conn. 146; Ward v. Fox, Hughes [Ky.] 431; Johnston v. Gwathmey, 4 Litt. [Ky.] 317; Roberts v. Stanton, 2 Munf. 129; Pitney v. Leonard, 1 Paige, 462; Burkart v. Bucher, 2 Bin. 466; Newl. Cont. 54; Sugd. Vend. 498. In a great variety of cases it must necessarily be a matter of considerable difficulty to decide what circumstances are sufficient to put a party upon inquiry. Such, certainly, however, as to facts, as that a reasonable mind could not hesitate to deem sufficient to call for further inquiry, and to put a party upon his diligence, is good actual notice. 1 Story, Eq. Jur. 389; Nantz v. McPherson, 7 T. B. Mon. 599; Jackson v. Sharp, 9 Johns. 166; Jackson v. Burgott, 10 Johns. 460; Dunham v. Dey, 15 Johns. 567; 2 Pow. Mortg. 561. Examples of actual and implied notice, sufficient in equity. In Fry v. Porter, 1 Mod. 300, Hale, C. B., speaking of the point of notice, said: "Here are several circumstances that seem to show there might be notice, and a public voice in the house, or an accidental intimation, &c., may possibly be sufficient notice." Butcher v. Stapely, 1 Vern. 364; 2 Pow. Mortg. 561. A verbal communication to a purchaser before he receives a conveyance, that A. B. has a claim to the land, is a sufficient notice to charge the purchaser with A. B.'s equity. Currens v. Hart, Hardin, 37. Lis pendens is sufficient notice. Green v. Slayter, 4 Johns. Ch. 38. A violent presumption of notice or proof of facts which imply it is sufficient. Cunningham v. Buckingham, 1 Ohio, 265; 2 Hil. Abr. p. 458, § 246. Where a grantor notified his grantee in writing, that the title of the land was in another as collateral security, to pay certain notes, this was held a sufficient notice to the purchaser, although nothing was said of date, amount, or time of payment. Dunham v. Dey, 15 Johns. 567. H. went as an agent for the defendant to purchase a lot of B., who refused to sell, and told him he had already conveyed the lot to

G., one of the lessors of the plaintiff. "Here, then," says the court, "was a direct and positive notice to the agent of the defendant," equivalent to a notice to his principal. Jackson v. Sharp, 9 Johns. 168. Notice of a prior incumbrance may be presumed from inadequacy of price. 2 Pow. Mortg. 578a, note. On the principle, that whatever puts a party on inquiry is good notice in equity, it is observable that if a person be apprised that the legal estate is in a third person at the time he purchases, he will be bound to take notice of the trusts with which the legal estate is clothed. 2 Freem. p. 137, pl. 171; 2 Pow. Mortg. 578, note. While H. was in negotiation for the purchase of a lot, he was informed that G. claimed the lot and had title, and was cautioned against purchasing, but he made the purchase and took a quitclaim deed. Kent, C. J., held that this was actual notice beyond all controversy, and that the purchase was subject to G.'s prior right. Jackson v. Burgott, 10 Johns. 460. A subsequent purchaser admitted in his answer that before the execution of the deed to him, he had heard that the grantor had made some provision for his daughters, out of property in Greenwich street, and there was no evidence in the case that the grantor owned any other property in that street, except the lots included in the settlement. Chancellor Kent held this purchaser chargeable with constructive notice, or notice in law of this settlement, "because he had information sufficient to put him on inquiry." Sterry v. Arden, 1 Johns. Ch. 267. Where a sheriff stated and declared to all bidders, at the time of the sale, that the property offered was subject to a mortgage, this was deemed sufficient actual notice to charge a purchaser at the sale with such mortgage. Muse v. Letterman, 13 Serg. & R. 168; Lindle v. Neville, Id. 227.

Notice sometimes resolves itself into matter of fact, and sometimes into matter of law; each case, to a great extent, depends upon its own circumstances as to notice. 1 Story, Eq. Jur. 387–389; Com. Dig. "Chancery," 4, c. 2. If a man purchases land, and is informed of the existence of a lease, this is sufficient to put him on inquiry, and is therefore good notice; or if he is informed that the estate is in the possession of tenants, he is bound to inquire into the claims of those tenants, and is affected with notice of all the facts as to their estates, and is bound by the leases they hold. Taylor v. Stibbert, 2 Ves. Jr. 437; Hiern v. Mill, 13 Ves. 118; Hall v. Smith, 14 Ves. 426; 1 Story. Eq. Jur. 389, note 3 and authorities therein cited; St. Andrew's Church v. Tompkins, 7 Johns. Ch. 16. The recital in a deed is notice; thus the recital of a letter of attorney, by which a deed was made, is notice to the purchaser of the existence of such a power. Jackson v. Neely, 10 Johns. 374; Cuyler v. Bradt, 2 Caines, Cas. 326; 2 Pow. Mortg. 620a; 1 Story, Eq. Jur. 389; Hall v. Smith, 14 Ves. 426. Evidence that a tenant cut wood on the land is constructive notice to the demandant, that the former held a deed of the land. Kendall v. Lawrence, 22 Pick. 540. So possession of land is notice to a purchaser, and he must inquire of the title of the occupant. Knox v. Thompson, 1 Litt. [Ky.] 352; Fitzhugh v. Croghan, 2 J. J. Marsh. 434; 4 T. B. Mon. 196; 2 J. J. Marsh. 180; Brown v. Anderson, 1 T. B. Mon. 201. The deposit of title deeds as a security for money, constitutes an equitable mortgage; and a person, knowing such deposit, cannot take a mortgage or purchase to the prejudice of the equitable incumbrance so created. 1 Story, Eq. Jur. 383, 384. Notice may be either actual and positive, or constructive, or. implied. Id. 387. And the fact of notice may be inferred from circumstances as well as proved by direct evidence. 4 Mass. 637. "Any circumstance," says the court in Knox v. Thompson, 1 Litt. [Ky.] 353, "that puts another on the search, is sufficient to convict him of notice." Nothing can destroy the effect of actual notice. 2 Pow. Mortg. 617, note, 572a. It is also a rule, that where there is notice of a deed the purchaser is bound by the effect and consequence of it, whatever opinion he may entertain as to its validity. Thus in the case of Ferrars v. Cherry, 2 Vern. 384, it was held, that the defendant purchased with notice of the settlement, but he contended that the settlement did not recite or contain any notice that it was made pursuant to articles entered into before the marriage, and that the settlement was therefore voluntary, and fraudulent as to him; but the court said "he ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary or made pursuant to an agreement before marriage; and, having notice of the deed, must at his peril purchase, and be bound by the effect and consequences of the deed." 2 Pow. Mortg. 572, 573. So in Brackett v. Wait, 6 Vt. 424, it was expressly held, that where a person has notice of a prior unrecorded deed, he is not protected from the effect of such notice by any erroneous opinions as to its validity, and must purchase at his peril.

There is another point connected with notice, which seems to me entitled to great weight, and it is this: By the English registry acts, recording is not constructive notice; but, if the records are searched, that is actual notice to a purchaser of all incumbrances within the period of his search. 2 Pow. Mortg. 631b, note. In this country the unauthorized registry of a deed would not amount to constructive notice. In all the cases upon this class of deeds in the American courts, the principle has not been carried further than that they are not constructive notice; but it has not been determined, that, when such deeds are actually recorded in a register office, that a search for and examination of the deed so recorded, would not be actual notice, or a circumstance from which notice would be presumed. On every principle of reason it would seem that the actual fact of examining a record, in an office where incumbrances are pre-

served, although the deed was not authorized to be recorded at all, would, at least, be equivalent to a verbal communication of an incumbrance, and would have the advantage of furnishing more precise and certain information, —such, at least, as would be sufficient to put a prudent man upon inquiry, which is all that is necessary to constitute actual notice. In Morrison v. Trudeau, 1 Mart. [N. S.] 384, it was held that a deed unduly registered, either from want of valid acknowledgment, or otherwise, will, notwithstanding, operate as notice to third persons. I understand the court to declare that such a record may constitute medium of actual notice, as, for example, by examination or means of a like character. So in the British courts judgments on record are not of themselves notice, and yet if it can be proved that a party searched the records of the court, it will be enough to bind him with notice of all judgments entered, though he might have overlooked them. 2 Pow. Mortg. 597, and notes. But it is unnecessary to pursue the point for the proof of actual notice, independent of this circumstance, is clear and conclusive, leaving no doubt on the mind as to the knowledge of the defendants of the existence of the mortgage at the time of their purchase. It was proclaimed at the sale,—the record book, where the mortgage was recorded, was lying open near at hand and all persons referred to it, and some of the defendants made search. Proof could not be more conclusive.

IV. Notice of a lien or incumbrance on property, binds the purchaser, if received by him at any time before the execution of the conveyance and payment of the purchase-money, and arrests all further proceedings towards the completion of the purchase; and, if persisted in, it is held to be done in fraud of the equitable incumbrance. 2 Pow. Mortg. 617; 2 Fonbl. Eq. bk. 2, c. 6, § 2, note I; Id. § 3, note M; Id. bk. 3, c. 3, § 1, note B; Taylor v. Stibbert, 2 Ves. Jr. 441; Jewett v. Palmer, 7 Johns. Ch. 68; Blair v. Owles, 1 Munf. 38; Le Neve v. Le Neve, 3 Atk. 654; Story v. Lord Windsor, Id. 304; 1 Paige, 208–284; Frost v. Beekman, 1 Johns. Ch. 301. In Wormley v. Wormley, 8 Wheat. [21 U. S.] 449, it is said by Story, J., to be a settled rule in equity, that a purchaser without notice to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase-money. Mead v. Orrery, 3 Atk. 238. And in Jewett v. Palmer, 7 Johns. Ch. 68, above cited, Chancellor Kent said: "A plea of a purchase for a valuable consideration without notice, must be with the money actually paid; or else, according to Lord Hardwicke, you are not hurt. The averment must be, not only that the purchaser had not notice at or before the time of the execution of the deeds, but that the purchase-money was paid before notice. There must not only be a denial of notice before the purchase, but a denial of notice before payment of the money. Harrison v. Southcote, 1 Atk. 538; Story v. Lord Windsor, 2 Atk. 630. Even if the purchase-money be secured to be paid, yet, if it be not in fact paid before notice, the plea of a purchase, for a valuable consideration, will be overruled. Hardingham v. Nicholls, 3 Atk. 304." Now Roane and Taylor, in their answers, show that they had notice before the sale; they do not deny notice. Fish denies notice generally; Fowler states that he did not receive actual notice until after the negroes came to his possession. In none of these answers is there any denial, or any thing equivalent to it, that the purchase-money was actually paid when the notice was received. This is absolutely necessary, as shown by the above cases. It must be positively averred in the answer, and cannot be inferred or supplied by intendment; and without it the plea of a purchase for a valuable consideration without notice, must be overruled. It is to be observed also, that Roane, Taylor, and Fish, do not show themselves to be bonâ fide purchasers for a valuable consideration at all. They do not specify the judgment under which they purchased,—do not show, or exhibit, or refer to, or produce a judgment and execution,—which they were bound to do, to bring themselves within the character of purchasers.

The rule is, that an unregistered mortgage has preference over a subsequent docketed judgment. But if the property mortgaged be sold by the sheriff, prior to the registry of the mortgage, a bonâ fide purchaser at the sheriff's sale, without notice, will be protected against the mortgagee, if he has actually paid the consideration, and shows a conveyance, good in form, by the recording of which he obtains priority as a purchaser. Jackson v. Terry, 13 Johns. 472. In fact a sheriff's deed, in the absence of statutory provisions, cannot be received in evidence at all, unless the judgment and execution are produced, for the purchaser claims under the judgment and execution, which is the only authority for the sheriff to sell. Bowen v. Bell, 20 Johns. 338; Weyand v. Tipton, 5 Serg. & R. 332; Dunn v. Meriwether, 1 A. K. Marsh. 158; Cox v. Nelson, 1 T. B. Mon. 94; Hinman v. Pope, 1 Gilman, 136. Nor do those persons show any deed from the sheriff, and in these particulars have failed to show themselves purchasers. But be this as it may, the defendants, Roane, Taylor, Fish, Fowler, and Badgett, had actual notice. Badgett, in addition to having notice himself, purchased from Fowler, who had notice. The purchasers of these negroes could acquire no better right than Dawson himself had to them. The officer only professed to sell the right and interest of Dawson, whatever it might be, as his deposition amply proves. The defendants who purchased stand in Dawson's shoes,—the sale, if valid, was a judicial assignment or transfer of Dawson's interest, subject, undoubtedly, to all subsisting prior incumbrances, and to the rights of third persons. To that sale the rule of caveat emptor most strongly applies. Merrill was neither party nor privy to the judgment under which

the negroes were sold, and of course his rights were not affected by any proceeding under it. If A. is in the possession of a slave, and it is sold as his property, but in fact belongs to B., may not the owner reclaim his property; and is it any defence for the purchaser to say that he purchased without notice, that B. was the true owner? A court of justice would inform him that he bought at his peril, and could acquire no greater right than A. had to the property. This principle, necessary to preserve the sacred rights of property, rests upon a foundation, unconnected with the doctrine of notice of another's right. It rests upon the great principle applicable to all sales of personal property, whether by the agreement of parties or by the authority of law under judicial process, that the purchaser must look to the title and buy at his peril,—that the maxim caveat emptor must govern. Ashe v. Livingston, 2 Bay, 85; Long, Sales, 164; Clute v. Robison, 2 Johns. 595; 2 Pow. Mortg. 589a.

VI. Roane, Taylor, Fowler, Fish, and Badgett, are liable personally for the value of the slaves, in case they do not surrender them. Blair v. Owles, 1 Munf. 38; Hughes v. Graves, 1 Litt. [Ky.] 317. They were appraised at the sale by three respectable and disinterested persons, under oath, according to the appraisement law, and that must necessarily constitute the criterion of value. The testimony proves that they were very likely negroes. The parol testimony very satisfactorily proves that they were not valued beyond what they were worth. I insist upon that criterion of value, for it is the only one to which we can rightfully resort.

VII. It is perfectly manifest from the pleadings and proofs in the cause, that the negroes will be insufficient to discharge the mortgage debt, and that it is, therefore, necessary to apply the hire thereto, which hire is claimed of the defendants by the complainant, in his bill. The defendants are personally accountable for the reasonable hire of the slaves, at least from the time of the service of process upon them, which is equivalent to a demand. Graves v. Sayre, 5 B. Mon. 390; 7 Dana, 227; 2 B. Mon. 159. As to other cases relative to hire, vide Reed v. Lansdale, Hardin, 6; 3 Bibb, 18; 6 T. B. Mon. 122; 7 T. B. Mon. 544; 4 T. B. Mon. 347; Mims v. Mims, 3 J. J. Marsh. 108. In detinue the institution of suit is a sufficient demand to entitle the plaintiff to the hire of slaves by way of damages from that time. Tunstall v. McClelland, 1 Bibb, 186; Cole's Adm'r v. Cole, 4 Bibb, 340; Jones v. Henry, 3 Litt. [Ky.] 49; Carroll v. Pathkiller, 3 Port. [Ala.] 279. And so in this case, the hire must be computed at least from the service of the writ of subpoena on the defendants.

A. Fowler argued the case for himself and other defendants fully and elaborately, on the principal grounds (1) that as the possession of the slaves did not accompany and follow the mortgage, but remained continuously in the possession of the mortgagor, the mortgage was, therefore, fraudulent and void as to creditors and purchasers; (2) that it was not properly acknowledged or recorded, and that the defendants had no constructive notice, and no sufficient actual notice of its existence, and that they were innocent and bona fide purchasers, for a valuable consideration, without notice; (3) that the mortgage was fraudulent in fact, and was designed and intended to protect Dawson's property from creditors, and that the suit was prosecuted for Dawson's benefit. These points and others were argued with great ability by Mr. Fowler, but the reporter having no notes of it, or of the authorities cited and relied on, is unable to insert them here, which he would otherwise do with great pleasure. On the 18th of July, 1846, the defendants filed exceptions to depositions taken by complainant.

JOHNSON, District Judge. The first exception points to the omission of the name of James L. Dawson, as one of the defendants, in the caption of the depositions of Trapnall, Dorris, Walker, White, Bogy, and Hammett; but his name appears as a defendant in the order of the court appointing commissioners, in the notices served on the defendants, in the caption of the interrogatories which were filed and attached to, and issued with, the commission, in the commission which issued under the authority of this court, and in the oath of the commissioners to execute the same. The commissioner states, in the caption of the depositions, that they were taken in pursuance of said commission and interrogatories, in each of which the names of all the defendants are fully stated. Under these circumstances, it cannot, in my judgment, be said, that the depositions do not appear to be taken in this case, and this exception is overruled. [Keene v. Meade] 3 Pet. [28 U. S.] 6.

The second exception is, that notice of filing interrogatories, and the time and place of taking such depositions, was not given to Roane, Badgett, Taylor, and Fowler. The notice was served on Taylor, Roane, and Fowler, by delivering to each of them a true copy of the notice, and on Badgett and Fish, by leaving a true copy of the notice with a white member of the family, and on Dawson and Baylor by delivering a true copy to their counsel, they not being residents of this district. This, in my opinion, is a good service of the notice. By the 13th rule of practice for the courts of equity of the United States, the service of a subpoena may be made by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person who is a member or resident in the family. If this be a sufficient service of a subpoena to notify the defendant of the suit, it ought to be con-

sidered sufficient service of a notice in any subsequent proceeding in the cause. This exception is also overruled. The third exception is in these words: "Only a part of the interrogatories of said complainant were propounded to and answered by, each of said witnesses." Not having arrived at any satisfactory conclusion upon this exception, in the absence of the presiding judge, a decision upon it will be deferred to the next term of this court. The fourth exception is, "that the deposition of Henry D. Mandeville, taken at Natchez, on the 8th of March, 1845, was taken without any sufficient notice having been served on said defendants, of the time and place of taking the same." The answer to this exception is, that where the deposition is taken according to the acts of congress, at a greater distance from the place of trial than one hundred miles, no notice is required. By the certificate of the magistrate before whom the deposition was taken, it appears that the witness lives more than one hundred miles from this place. That his certificate is competent evidence of the fact, is established by the adjudication of the supreme court, in the case of the Patapsco Ins. Co. v. Southgate, 9 Pet. [34 U. S.] 617. The court say: It was sufficiently shown, at least prima facie, that the witness lived at a greater distance than one hundred miles from the place of trial. This is a fact proper for the inquiry of the officer who took the deposition, and he has certified that such is the residence of the witness. In the case of Bell v. Morrison, 1 Pet. [26 U. S.] 356, it is decided that the certificate of the magistrate is good evidence of the facts therein stated, so as to entitle the deposition to be read to the jury. This exception is overruled.

The fifth exception is to the competency of the evidence contained in the deposition of Mandeville. The decision of this exception will be reserved to the final hearing.

The sixth exception is to the authority of the magistrate, before whom Mandeville's deposition was taken. It was taken before Thomas Fletcher, "judge of the probate court, within and for the county of Adams, and state of Mississippi"; and the inquiry is, whether he is authorized by the acts of congress to take depositions. By the thirtieth section of the judiciary act of 1789 [1 Stat. 80], depositions de bene esse may be taken before any judge of a county court of any of the United States. Is Thomas Fletcher a judge of a county court of any of the United States? In order to decide this question, we must look into the laws of the state of Mississippi. That this court is bound to take notice of the laws of Mississippi, is clearly settled by the supreme court of the United States, in the case of Owings v. Hull, 9 Pet. [34 U. S.] 625. The court there held that the laws of all the states in the Union are to be judicially taken notice of, in the same manner as the laws of the United States are to be taken notice of by the circuit courts of the United States. Looking, then, into the laws of Mississippi, we find a court of probate established in each county of the state, with jurisdiction in all matters testamentary, and of administration, and of orphans' business; in the allotment of dower, in cases of idiocy and lunacy, and of persons non compos mentis; see section eighteen of the fourth article of the constitution, and the acts of the legislature of 1833, law 444. By the fourth section of the act it is provided, that the court of probate in each county shall provide a seal for said court, thereby constituting it a court of record. The question then is, Is this a county court? It is a court of record established in each county in the state, and styled "the probate court of the county of ———." I am clearly of opinion that it is such a county court as is contemplated by the act of congress, and that depositions may be taken before the judge thereof. The deposition of Mandeville is a deposition taken de bene esse, and may be read on the final hearing, unless the defendant shall show that the witness has removed within the reach of a subpoena after the deposition was taken, and that fact was known to the party, according to the decision of the supreme court in the case of the Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 617; Russell v. Ashley [Case No. 12,150]. This exception is therefore overruled.

On the 3d day of June, 1847, the following opinion was given on the exceptions to depositions previously filed:

JOHNSON, District Judge. At the last term the defendant's second exception to the plaintiff's depositions was overruled. The attention of the court is again called to that exception, as not having been fully considered. The notice of the time and place of taking the depositions, is insisted to be insufficient. I am, however, of opinion that no notice was necessary. It was an ex parte commission, in which the defendants, after being duly notified, failed to join, by filing cross interrogatories. In taking depositions under a commission, notice of the time and place of executing the commission is requisite, where the commission is a joint one. But when it is not joint, but ex parte, notice is not required. See 1 Smith, Ch. Prac. 364; 1 Newl. Ch. Prac. 262.

Upon the defendant's third exception, no opinion was expressed at the last term. It is as follows: "Only a part of the interrogatories of said complainant were propounded to, and answered by each of said witnesses, &c., they should be therefore suppressed." I am now satisfied that this exception is not well taken. The commission for taking these depositions, is not a joint, but an ex parte, commission in which the defendants failed to join; and it is only in cases of a joint commission that it becomes necessary that all the interrogatories should be propounded. Where the commission is ex parte,

the party refusing or failing to join it, would not be permitted to put any interrogatory to the witness, although he might be present at the examination. In such a case it is not incumbent on the person taking the deposition to cause all his interrogatories to be propounded to the witness. He is at liberty to put as many or as few of them as he thinks proper, with the exception of the last interrogatory, which must be put. This is the settled practice in the high court of chancery in England. See Newl. Ch. Prac. 267. Exception overruled.

On the 23d of August, 1847, the cause came on for hearing, and the court delivered the following opinion:

JOHNSON, District Judge. This is a bill in chancery, filed by Merrill, for the foreclosure of a mortgage of sundry slaves, executed to him by the defendant, James L. Dawson; and from the bill, answers, and evidence in the cause, the material facts appear to be as follows: That on the 11th of April, 1837, one N. L. Williams made his promissory note to the defendant Dawson, for the sum of $11,428.22, payable two years after date, and negotiable at the Planters' Bank of Mississippi at Natchez; and on the 1st June, 1837, said Williams executed to said Dawson a like promissory note for the sum of $1,150, payable twelve months after date; and said Dawson, being desirous of raising money on said notes, obtained from the complainant his indorsement upon said notes, as additional security thereto, and to secure and indemnify him against his liability thus assumed, as the surety of Dawson; the said Dawson, on the 25th of November, 1837, executed to said Merrill a mortgage upon sundry slaves therein named and described, the condition of which said mortgage was, that "if the said Dawson shall pay to said Merrill the sum of $12,578.22 (the amount of said two promissory notes), on the day the said notes shall become due, then the said indenture to be void." That on the 29th day of December, 1837, the said mortgage was recorded in the recorder's office in Jefferson county in this state, without acknowledgment or proof of its execution, except before a judge of the state of Mississippi. That the slaves named and described by the said mortgage were in the said county of Jefferson, on the plantation of Dawson, where he resided; and so remained in his possession until the 11th day of October, 1841, when all of them, except those claimed by the defendant, Sophia M. Baylor, were sold by the sheriff of Jefferson county, upon judgments and executions against the said Dawson; at which sale the defendants purchased, and received possession of a part thereof. That on the 28th day of November, 1837, the said Dawson presented said notes to said Planters' Bank, and by the discount thereof obtained the money to become due by said notes; that when the said notes became due and payable, neither the said Dawson nor the said Williams ever paid any part thereof, but suffered them to remain wholly unpaid until the 4th day of March, 1842, when the complainant, as the indorser thereof, paid the full amount of principal and interest due by said notes. Dawson, in his answer, admits all the material allegations in the complainant's bill. The defendant, Sophia M. Baylor, claims the following slaves, embraced in the mortgage, namely, Dick, Beverly, Lucas, Porter, and William, as her own property at the time the mortgage was executed by Dawson, who admits, in his answer, that he had only conditionally bought them of her, which condition he was unable to perform, so as to get a title to said slaves. From an examination of the evidence in the cause, I am satisfied that these five slaves were the property of Mrs. Sophia M. Baylor, and that Dawson had no right to mortgage or otherwise dispose of them. The bill, therefore, as to the defendant Baylor, will be dismissed. The remaining defendants allege, in their answers, the mortgage set up by Merrill, the complainant, is as to them fraudulent and void, not having been made upon a good and valuable consideration, and bona fide, but with the intent to defraud the creditors and purchasers of Dawson; that it never was legally recorded; that the possession of the slaves did not accompany and follow the mortgage, but remained and continued with Dawson, the mortgagor, after the mortgage is alleged to have been made, and never were in the possession of Merrill, and is therefore fraudulent and void.

The exceptions to the mortgage I will proceed to consider; and, first, as to the registry or recording of the mortgage. Previous to the enactment of the Revised Statutes of this state, which took effect and went into operation by the governor's proclamation of the 19th March, 1839, there existed no law or statute requiring mortgages of personal property, made on consideration deemed good or valuable in law, to be recorded. The statute concerning conveyances (Steel & M. Dig. 131) relates solely to deeds, conveyances, bonds, and other obligations for lands, tenements, and hereditaments, and contains no provision whatever relating to deeds, conveyances, or mortgages of personal property. The Statute of Frauds (Id. 267) contains the following provisions: "And moreover, if any conveyance be of goods, chattels, and be not on consideration deemed good or valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged or proved by the witnesses in the office of the clerk of the superior court of this territory, the clerks of the circuit courts, or before any justice of the peace or other competent authority within the county wherein one of the parties lives, within three months after the

execution thereof, or unless possession shall really and bona fide accompany the gift or conveyance; and in like manner, where any goods or chattels shall have been pretended to have been loaned to any person with whom, or, claiming under him, in whose possession (they) shall have remained for the space of five years without demand made and pursued by due process of law. on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of any use of property, by way of condition, reversion, remainder, or otherwise, in goods and chattels, the possession whereof shall have remained in another, as aforesaid, the same shall be taken as to creditors and purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation, or limitation, or use of property were declared by will or deed in writing, proved and recorded as aforesaid, and even then the creditors or purchasers may show actual fraud; and on such fraud being established, every such gift, contract, sale, loan, or possession shall be set aside in favor of such creditors or purchasers; and the provisions of this section shall also be extended to subsequent creditors after such pretended gift, sale, contract, loan, or conveyance." The second section of this act expressly provides, that "this act shall not extend to any estate or interest in any lands, tenements, or hereditaments, goods or chattels, which shall be upon good or valuable consideration, and bonâ fide and lawfully conveyed as aforesaid, nor to any person or persons who may be subsequent purchasers for bonâ fide considerations without notice." It is manifest, then, that the Statute of Frauds (which is only declarations of the common law), does not extend to the mortgage in this case, nor embrace it in any of its provisions, provided it was made upon a valuable consideration and bonâ fide; and if it were not, then it is inoperative and void, independent of the statute. But although mortgagees of personal property were not required to have their mortgages recorded, yet they were allowed and permitted to have them recorded if they deemed it expedient. This I infer from the following provisions, under the heads in the above digest of "Recorder" and "Mortgages." The first section under the head "Recorder" provides that there shall be an office of recorder in each and every district or county, which shall be called and styled "the recorder's office;" and the recorder shall duly attend the service of the same, and provide well bound books, wherein he shall record all deeds and conveyances which shall be brought to him for that purpose, according to the true intent and meaning of this act. The first section under the head of "Mortgages" provides, that every mortgagee of any real or personal estate in this district (territory), having received full satisfaction and payment of all sum or sums of money as are really due him by such mortgage, shall, at the request of the mortgagor, enter satisfaction upon the margin of the record of such mortgage recorded in the said recorder's office, which shall for ever after discharge, defeat, and release the same. From these provisions, it can hardly admit of doubt, that mortgagees were entitled to have their mortgages recorded in the recorder's office; for unless they were recorded, how is it possible that the entry of satisfaction could be made upon the margin of the record of such mortgage? The statutes are silent as to the acknowledgment or proof of the execution of the mortgage before it shall be admitted to record, but expressly requires the recorder to record all deeds and conveyances which shall be brought to him for that purpose; neither do the statutes declare that the registry of a deed or mortgage of personal estate shall operate as notice to creditors or purchasers; and in the absence of such a provision, I do not feel warranted in giving to it such a construction. The mortgage, then, in the present case, was properly admitted to record in the recorder's office, in Jefferson county, without requiring acknowledgment or proof of its execution. The acknowledgment before the judge in Mississippi being unauthorized by law, is to be considered as null and void. It stands, then, as a mortgage legally recorded, notwithstanding the registry thereof does not operate as constructive notice to creditors and purchasers.

The next inquiry is, Whether the defendants had notice of the mortgage before they became purchasers? They claim to be bona fide purchasers at the sheriff's sale, without notice of the complainant's mortgage or lien upon the property. Notice of a lien or incumbrance upon property binds the purchaser, if received by him at any time before the execution of the conveyance and payment of the purchase-money, and arrests all further proceedings towards the completion of the purchase; and if persisted in, is held to be done in fraud of the equitable incumbrance. 2 Pow. Mortg. 619; Frost v. Beekman, 1 Johns. Ch. 301. In the case of Wormly v. Wormly, 8 Wheat. [21 U. S.] 449, it was said by Judge Story to be a settled rule in equity, that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase-money; and in Jewett v. Palmer, 7 Johns. Ch. 68, Chancellor Kent said: "A plea of purchase for a valuable consideration without notice, must be with the money actually paid; or else, according to Lord Hardwicke, you are not hurt." The averment must not only be that the purchaser had not notice at or before the time of the execution of the deeds, but that the purchase-money was paid before notice. There must not only be a denial of notice before the

purchase, but a denial of notice before payment of the money. Even if the purchase-money be secured to be paid, yet if it be not in fact paid before notice, the plea of a purchaser for valuable consideration will be overruled. Hardingham v. Nicholls, 3 Atk. 304. There is not in the answers of the defendants, or either of them, any denial or any thing equivalent to it, that the purchase-money was actually paid before they had notice of the mortgage. This averment is essential, and cannot be supplied by intendment in order to make the plea available. The defendants, then, have not placed themselves in the attitude to call for proof on the part of the complainant, that they really and in fact had notice. But admitting their denial of notice to be full and complete, the evidence in the cause conclusively establishes the fact that they and each of them had actual notice of the mortgage before they made the purchase. The defendants Roane and Taylor admit that they saw the record of the mortgage in the recorder's office, before they purchased, but believed it to be fraudulent and made merely for effect. The defendant Fish says, in his answer, "this respondent thinks there was no general notoriety on the subject of this mortgage, as he never heard it spoken of but once before he purchased one of said negroes, and then it was said to be fraudulent by the persons speaking of it."

These admissions are amply sufficient to charge these defendants with notice of the mortgage. But by adverting to the depositions taken in this case, it will be seen that actual notice of the mortgage is conclusively proved against each of the defendants before the sale was made by the sheriff. Martin W. Dorris, in his deposition, says, "I believe that F. W. Trapnall proclaimed the existence of said complainant's incumbrance, and forbid the sale; and that Samuel C. Roane, Samuel Taylor, N. H. Fish, and Col. Fowler, were present in hearing of such proclamation; and that he heard Samuel Taylor say since the said sale that he was aware of the existence of said mortgage." Robert W. Walker in his deposition, says, "I know that said record book B. was lying open at page 174, in the clerk's office of said county, on the morning of said sale, subject to inspection, and that Absalom Fowler, in person, examined said record book, and inspected said deed of mortgage. I believe that it was generally known and spoken of at the sale by those present, that the complainant Merrill had a mortgage on the negroes." Drew White says, that he, as deputy sheriff, sold the negroes in contest, and that when said sale was about to commence, he proclaimed, in the presence and hearing of said Roane, Taylor, Fowler, and Fish, that said negroes would be sold subject to all incumbrances, without reference to any particular incumbrance. He further states, that F. W. Trapnall did forbid the sale of said negroes on behalf, he thought, of William Dawson. Ignace Bogy states, that "at the time said slaves of Dawson were sold by the sheriff of Jefferson county, I heard F. W. Trapnall, Esq., in an audible voice, forbid the sale of them, at the time when they were offered for sale, at the instance of some person whose name I do not now recollect; and said defendants, Roane, Taylor, Fish, Badgett, and Fowler, were present at the time, but as I did not have their ears, I cannot say that they also heard him." John J. Hammett, sheriff of Jefferson county, who made the sale, states, "that it was generally understood and spoken of by those present at said sale of said negroes, that said complainant Merrill had a mortgage upon them. I believe said Trapnall did, on behalf of one William Dawson, forbid publicly, the sale of said negroes. I believe that said defendants were all present at that time; and that when about to commence the sale of said negroes, I, as sheriff as aforesaid, proclaimed publicly and audibly, in the hearing of all present, and notified all persons that I offered said negroes for sale subject to all incumbrances, and that I would convey to the purchasers of said negroes the interest and title of said Dawson only; and that there were some three or four mortgages recorded in the clerk's office upon said negroes, to which mortgages I referred all persons present, and requested them to go into the clerk's office and examine for themselves before purchasing; and I believe that said defendants Roane, Taylor, Fowler, Fish, and Badgett were all present and heard such proclamation." Frederick W. Trapnall states: "I was present at the sale of the negroes of J. L. Dawson, at the October term of the circuit court of Jefferson county, in 1841, and at the request of Dawson at the time the sale was about to take place, I proclaimed in a loud voice that the negroes then offered for sale by the sheriff were embraced in a deed of mortgage, made by him to A. P. Merrill, which was then of record in Jefferson county, which was then unsatisfied, and I therefore forbid the sale. My impression is, that Absalom Fowler, Samuel C. Roane, Samuel Taylor, Nathaniel H. Fish, and Noah H. Badgett, defendants in this suit, were present on that occasion, and were within hearing of my voice. Badgett was standing by me at the time, and heard my proclamation; a good deal of conversation took place upon the subject. The sheriff then proclaimed that the negroes had been appraised, and would be sold subject to it."

The evidence just recited is, in my judgment, amply sufficient to charge the defendants with actual notice of the mortgage under which the complainant claims; the proof is too clear, direct, and positive, to admit of any reasonable doubt.

The remaining inquiry is, Whether the mortgage in this case was made upon a good and valuable consideration, and bona fide, or with the design and intention of defrauding the creditors and purchasers of Dawson. The main ground relied upon by the defendants'

counsel is, that the possession of the slaves did not accompany and follow the mortgage, but was retained by the mortgagor, and this circumstance is insisted to be conclusive and untraversable evidence of fraud; but that, if not conclusive evidence, at least a strong badge of fraud, sufficient, in this case, to render the mortgage inoperative and void against the defendants. A bill of sale absolute upon its face, made by a person who still continues in possession of the property, has been held both in England and in this country, by the highest tribunals, to be, per se, fraudulent as to the creditors and subsequent purchasers of the person so retaining possession. This doctrine received the sanction of the supreme court of the United States in the case of Hamilton v. Russell, 1 Cranch [5 U. S.] 309. The fact of possession not accompanying such a bill of sale, is considered conclusive evidence of a fraudulent intent, and as to creditors and purchasers the bill of sale is, in a judgment of law, fraudulent and void; but the continuance of possession by a mortgagor is not considered as having the same conclusive and vitiating effect upon the mortgage. There is an essential difference between the effect of a possession retained by the maker of an absolute bill of sale, and the possession retained by the maker of a mortgage. The object of the one is to pass the absolute right of property, and the object of the other is to give a security defeasible upon a particular contingency; the possession in the former case is utterly incompatible with the deed; whereas, in the latter case, there exists no such incompatibility. Whilst, therefore, the possession in the former case may be correctly said to form the conclusive and untraversable evidence of fraudulent intent, and under the deed, per se, fraudulent, such cannot be admitted to be the effect of the possession in the latter case. Possession by the mortgagor before forfeiture cannot be construed to be fraudulent, because it is consistent with the title, that not vesting until forfeiture. Nor can the continuation of the possession, after a breach of the condition, of itself, unconnected with any other circumstance of lapse of time, or the conduct of the mortgagee, be considered as a strong badge of fraud. The deed is still a mortgage; the right of the mortgagee is still contingent and collateral, and the possession of the mortgagor is not necessarily inconsistent with the title.

The utmost extent to which the authority of the decision can be carried, is that the tribunal, whose province it is to decide the facts, may infer a fraudulent intent, from the fact of possession remaining in the mortgagor. But this inference may be dispelled by the proof of other facts showing the transaction to be fair and bona fide. McGowan v. Hoy, 5 Litt. (Ky.) 240, and the authorities there cited; Head v. Ward, 1 J. J. Marsh. 280. See the case of U. S. v. Hooe, 3 Cranch [7 U. S.] 73; also, Wheeler v. Sumner [Case No. 17,501]; D'Wolf v. Harris, [Id. 4,221]; Maples v. Maples, Rice, Eq. 300; Fishburne v. Kunhardt, 2 Speer, 564; Gist v. Pressley, 2 Hill, Eq. 318; 2 N. H. 15, 547; Smith v. Acker, 23 Wend. 653.

Are there any other marks or badges of fraud in the present case? From all the facts and circumstances connected with the mortgage, independent of the declaration of Dawson after he made the mortgage (and they are clearly incompetent evidence), I have seen nothing from which an inference of fraud and collusion can be deduced. The execution of the mortgage by Dawson, and his indorsement of the two promissory notes, is established by Dorris and Hammett, who prove his handwriting; and the indorsement of the notes by Merrill, is proved by the cashier and teller of the Planters' Bank. The discount of the notes, and the payment of the money to Dawson by the Planters' Bank, and the payment to the bank of the notes by Merrill, on the 4th March, 1842, is established by the testimony of the same witnesses. The mortgage itself was actually recorded in the recorder's office in Jefferson county, on the 29th December, 1837. These facts clearly prove that the mortgage was made upon a good and valuable consideration, and bona fide, and not with the design or intent to defraud creditors and purchasers. Where this appears from the evidence in the cause, the inference of fraud, if any, arising from the mortgagor's possession is dispelled, and not calculated to cast a shade upon the mortgage. The defendants in their answers aver, that from the declaration of Dawson stating that the mortgage was merely nominal, and made only for effect to shield his property, they regarded the mortgage as fraudulent and void. No principle of the law of evidence is better settled than that the declarations of the grantor impeaching a deed he has made, are incompetent, and cannot be received for that purpose.

The conclusion to which I have arrived from a consideration of all the circumstances of the case is, that the mortgage was made upon a valuable consideration and bona fide, is free from the taint of fraud and collusion, and that the complainant is entitled to the relief he seeks.

The inquiry here arises as to the decree which ought now to be made. In the case of Downing v. Palmateer, 1 T. B. Mon. 66, the court of appeals of Kentucky states the practice in the following terms: "The practice of the courts of equity on this subject is simple, and ought not to be departed from. Whatsoever controversies may arise about the validity of a mortgage, its forfeiture and its payment, in whole or in part, is decided upon at its first hearing, and the courts ascertain what is due, and by interlocutory decree declare that unless this sum is paid, or tendered by a particular time, the mortgage shall be foreclosed, and a sale decreed, if a sale is proper to be had. The time so given

ought to expire in term time, and is sometimes, under extraordinary circumstances, lengthened by the chancellor. If, when that time expires, payment is moved with such costs as the chancellor shall adjudge, the mortgage is released, and there is an end to the controversy. "If a tender and refusal is relied on, the money is brought into court, with such costs as shall be allowed, and the party is thus permitted to redeem. If, on the contrary, neither payment nor tender is relied on (in all of which matters the court ought to adjudge), the court may decree an absolute foreclosure in many cases without sale; but if a sale is prayed for, and deemed expedient, the chancellor decrees it accordingly, and appoints his commissioners to execute it."

The principle and practice above laid down I deem to be correct, and they will be acted upon in the present case.

Decree: This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, namely: That the bill as to the defendant, Sophia M. Baylor, be, and the same is hereby dismissed with her costs to be paid by her (to) the said complainant. And it is further ordered and decreed, that unless the sum of eighteen thousand nine hundred and thirty-four dollars shall be paid or tendered to the said complainant, or his solicitor, by the remaining defendants, or any or either of them, on or before the first day of next term of this court, they, the said defendants, are from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged property in the bill mentioned, and a sale of said mortgaged property decreed, if a sale thereof shall be deemed expedient by this court. And the question of hire of the mortgaged property, of costs, and all other questions in the cause not now decided, are reserved to the further decree of this court.

William Dawson, James Smith, and Garland Hardwick, having disclaimed, the bill was dismissed as to them.

On the 15th of May, 1848, the cause came on for further and final hearing, and THE COURT pronounced the following final decree:

This day come the parties by their respective solicitors, and this cause coming on for a further and final decree in the premises, it doth satisfactorily appear to the court here, from the pleadings and proofs herein, that the indenture of mortgage mentioned in the bill was made in good faith, for a good and valuable consideration, on the 25th of November, 1837, by the said James L. Dawson, one of said defendants, to and with the said Ayres P. Merrill, the complainant, for the purpose of securing the payment by the said Dawson of the two promissory notes particularly mentioned in the said mortgage and bill of complaint, namely, one for eleven thousand four hundred and twenty-eight dollars and twenty-two cents, dated 1st of April, 1837, and due two years after the date thereof; the other for eleven hundred and fifty dollars, dated 1st of June, 1837, due twelve months after the date thereof, drawn by N. L. Williams, and payable to the order of the said James L. Dawson at the Planters' Bank of Mississippi at Natchez, and indorsed by said James L. Dawson, and also by the said Ayres P. Merrill, as security for said Dawson, to enable the said Dawson to obtain the discount thereof at the said Planters' Bank, as alleged in the bill; and which said mortgage was also made, and intended to be made, to indemnify and save the said Merrill harmless in regard to his indorsement of said notes. That on the 28th of November, 1837, said bank discounted said notes for the sole and exclusive use and benefit of him, the said Dawson, and placed the proceeds to his credit on the books of the bank, and subsequent to that time paid said proceeds to him or order, and that said bank thus became the bona fide holder of said notes for a valuable consideration; that when said notes respectively became due and payable, the said N. L. Williams, as well as the said Dawson, wholly failed to pay the same to said Planters' Bank, nor did any other person pay the same for them, nor any part thereof; and therefore the notes were duly protested for non-payment. And on the 4th day of March, in the year 1842, the said Ayres P. Merrill, by reason of the premises and as last indorser, was obliged to pay and did pay the sums of money in said promissory notes specified, together with interests, costs, &c., up to that time, amounting in the aggregate to fifteen thousand five hundred and ninety-three dollars and sixty-one cents, to the said Planters' Bank of Mississippi at Natchez, and then took up the same, and became, and from thenceforward continued to be, the legal holder and owner of said notes; and that being such legal holder and owner thereof, by virtue of the payment aforesaid, he did, on the 7th day of September, 1842, commence this his suit, to avail himself of the provisions of said mortgage, and to foreclose the same. That at the making of said indenture of mortgage, the said James L. Dawson was possessed, as of his own absolute property, of certain negro slaves specified in said mortgage and bill of complaint, and then upon his plantation in the county of Jefferson and state of Arkansas, of the names and then of the ages respectively next mentioned, namely, negro man named Jim, sometimes called "Old Jim," forty years old; Governor, twenty-two years old; Sandy, twenty-one years old; Connell, twenty years old; Tom, nineteen years old; negro woman named Phoebe, seventeen years old; Catharine, eighteen years old; Maria, sixteen years old; Mary, fifteen years old, and Eliza, eighteen years old; negro boy named Ransom, twelve years old, and Jim, sometimes called "Young Jim,"

eleven years old; all of whom were likely and valuable slaves, and continued in the possession of the said James L. Dawson until the 11th of October, 1841, and were and are hereby declared subject to the mortgage debt mentioned in the pleadings. That a male infant child of said Phoebe, named Jackson; that another male infant child of said Phoebe, named Beverly; that an infant boy of said Mary, named Henry; and that an infant girl of said Maria, named Frances, born since the making of said mortgage, as well as such other of the issue of such mortgaged slaves, not herein specially named, as may have been born since the making of said mortgage, ought to be, and hereby are declared to be, subject to the operation of said mortgage, and are to be sold towards discharging the said mortgage debt. That on the 11th of October, 1841, the said negro slaves, men, women, and children (excepting Beverly, born since), having been first valued according to law by three appraisers, sworn for that purpose, were sold as the property of said James L. Dawson, under execution, at the court house door of Jefferson county, and which sale, if valid at all, was, in the opinion of the court, subject to said mortgage and to the rights of said Merrill, under and by virtue of the same; and that on that occasion the said Samuel Taylor purchased and obtained possession of Old Jim, Catharine, and Ransom; that at the same time Samuel C. Roane purchased and obtained possession of Sandy, Connell, and Young Jim; that at the same time the defendant Fish purchased and obtained possession of Governor; that at the same time the defendant, Absalom Fowler, purchased and obtained possession of Tom, Mary and her infant boy named Henry, Maria and her infant girl named Frances, Phoebe and her infant boy named Jackson, and said negro woman named Eliza. That about a week after said sale, the defendant, Noah H. Badgett, purchased of said Fowler the said negro woman Phoebe and her infant boy named Jackson, and also the said negro woman Eliza; and that said Phoebe, since her acquisition by the said Badgett, has given birth to a male infant boy named Beverly. That if any notice was necessary, the said defendants respectively, as it satisfactorily appears to the court from the pleadings, circumstances, and proofs herein, had sufficient actual notice of the existence of said mortgage, before and at said sale, to render their purchases respectively subject to it.

That upon the proof in this cause, the court is of opinion, and doth find the said negro slaves respectively to be of the following value, namely, Old Jim, five hundred dollars; Governor, eight hundred and fifty dollars; Sandy, eight hundred dollars; Connell, eight hundred dollars; Tom, eight hundred dollars; Phoebe and her said child Jackson, one thousand dollars; Beverly, another child of said Phoebe, fifty dollars; Catharine, eight hundred dollars; Mary and her said child Henry, seven hundred and fifty dollars; Maria and her said child Frances, nine hundred dollars; Eliza, seven hundred dollars; Ransom, eight hundred dollars; Young Jim, six hundred dollars. That subpoenas in this case were served on the said Fowler on the 10th, on said Badgett on the 12th, on said Roane on the 14th, on said Taylor on the 14th, and on the said Fish on the 15th day of September, 1842; and the court here being well satisfied that said negro slaves are insufficient to discharge said mortgage debt, and that the hire thereof, according to the rate as proved by the depositions in this cause, ought to be applied towards the extinguishment of said interest and principal, such hire to be estimated from the time of the service of the subpoena on said defendants respectively, up to this time.

That from the proofs in the cause, the court is of opinion, and doth find the value of the hire of the following negro slaves in the possession of Absalom Fowler: for Mary, seventy dollars; for Tom, one hundred dollars; for Maria, seventy dollars per annum; and for which the said Fowler is declared accountable, at the rates aforesaid, to be computed against him from the 10th day of September, 1842, when the subpoena was served upon him, and which makes an aggregate amount of thirteen hundred and fifty-eight dollars, and for which said amount decree ought to be rendered in favor of the complainant. That the court is also of opinion, and doth find the value of the hire of Phoebe, in the possession of the said Noah H. Badgett, to be seventy dollars per annum, which being computed from the 12th day of September, 1842, the time when the subpoena was served upon him, amounts to three hundred and ninety-six dollars, which is chargeable against said Badgett, and for which a decree ought to be rendered in favor of the complainant. That S. H. Hempstead, Esq., the solicitor of the said complainant, produced and read in open court a certain memorandum or agreement in writing, executed in duplicate by and between the said Ayres P. Merrill, acting in that behalf through S. H. Hempstead, his attorney in fact, of the one part, and Samuel Taylor and Nathaniel H. Fish, two of said defendants, of the other, dated the 10th day of December, 1847; and also a certain other memorandum or agreement in writing, also executed in duplicate, by and between the said Ayres P. Merrill, acting in that behalf through S. H. Hempstead, his attorney in fact, of the one part, and Samuel C. Roane, one of said defendants, of the other, dated the 22d day of April, 1848; whereby it manifestly appears that the said Samuel Taylor, Nathaniel H. Fish, and Samuel C. Roane, acknowledging the right of said complainant to subject the said slaves so purchased by them respectively to the said mortgage, and to recover reasonable hire therefor, and also with a view to end any further litigation, as far as they are concerned, adjusted and compromised with said complainant, and in such adjustment, said Samuel Taylor, not delivering

the said slaves purchased by him, accounts for the same as follows: Old Jim at five hundred dollars, Ransom at eight hundred dollars, and Catharine at eight hundred dollars, amounting in the aggregate to twenty-one hundred dollars, and which is the appraised as well as the real value thereof, and for the hire thereof nine hundred dollars; making an aggregate of three thousand dollars. That said Nathaniel H. Fish, not surrendering Governor, accounts for him at eight hundred and fifty dollars, the appraised as well as the real value of him, and for his hire three hundred dollars, making together eleven hundred and fifty dollars. That said Samuel C. Roane, not delivering Sandy, accounts for him at eight hundred dollars, the appraised as well as the full value, and for the hire of the slaves purchased by him as aforesaid six hundred dollars, making together fourteen hundred dollars; that he elects to surrender to the complainant Connell, who is to be received at eight hundred dollars, the appraised as well as the full value thereof, and Young Jim at six hundred dollars, the appraised as well as the full value thereof, making for the two fourteen hundred dollars; and which two last-mentioned slaves are hereby decreed to the complainant, by consent of parties and to carry out said agreement, making altogether the sum of six thousand and nine hundred and forty-nine dollars, to be applied towards the extinguishment of said mortgage; and with which the said James L. Dawson is to be credited on said mortgage debt, as of the day of the rendition of this decree. The court here being satisfied, that by said compromise the said defendant Dawson obtains as large if not a larger credit on said mortgage debt than if said negroes were sold; and there is nothing in controversy, as far as said Taylor, Fish, and Roane are concerned, except costs. That the court here from the pleading and proofs in the cause, is of opinion, and doth find the indebtedness of the said defendant Dawson, up to this time, upon said mortgage, to be twenty-one thousand and three hundred and twenty-eight dollars for principal and interest, and deducting therefrom the said credit of six thousand and nine hundred and forty-nine dollars, that the balance justly (due) and owing by the said defendant Dawson to the said Ayres P. Merrill, and in arrear at this time upon said mortgage, and secured thereby, is fourteen thousand three hundred and sixty-nine dollars ($14,369).

It is therefore ordered and adjudged and decreed, that the said James L. Dawson do pay to the said Ayres P. Merrill the said balance of fourteen thousand three hundred and sixty-nine dollars, which includes principal and interest, and is the sum now justly due upon said mortgage, after allowing the credit aforesaid. That the said James L. Dawson, Absalom Fowler, and Noah H. Badgett be, and they are hereby absolutely barred and foreclosed from all equity of redemption in and to all or any of the slaves specified in the said mortgage, or to the issue thereof born since the making of said mortgage; and it is further ordered, adjudged, and decreed, that Samuel A. White be, and he is hereby, appointed a commissioner in this case, and to whom the said Absalom Fowler and Noah H. Badgett, without any unnecessary delay, and upon request being made by him, are required to surrender and deliver said slaves so purchased and possessed by them respectively as aforesaid; that is to say, that the said Absalom Fowler be, and he is hereby, required to surrender to such commissioner said slaves, Tom, Mary, and her child Henry, and Maria and her child Frances, aforesaid, and the issue thereof, if any, by whatever name known or distinguished, and born since he acquired them; and that said Noah H. Badgett also be, and he is hereby required to surrender to such commissioner said slaves Eliza and Phoebe, and her two children named Jackson and Beverly, and such other of her issue, if any, by whatever names known, born since he acquired her; and the said commissioner may, if it is necessary, sue out a writ of assistance to obtain the possession of said slaves, or any of them. And it is further ordered, adjudged, and decreed, that in case the said Absalom Fowler and Noah H. Badgett, or either of them, should be unable to deliver, or should fail or refuse to deliver, the slaves so purchased by them as aforesaid, upon the request of said commissioner, then and in that event it is further ordered, adjudged, and decreed, that for Tom, Mary and her child Henry, and Maria and her child Frances, or any one of them which the said Absalom Fowler is unable, or should fail or refuse to deliver, he shall be held accountable and liable, and shall pay to the said complainant, Ayres P. Merrill, the value thereof, as fixed and ascertained in a previous part of this decree, and to which reference is now made for the value thereof respectively, and for the collection thereof a special execution may issue, as at law; and for said negro Eliza and negro woman Phoebe and her said children, Jackson and Beverly, or any of them which the said Noah H. Badgett is either unable or should fail or refuse to deliver up to such commissioner, he shall in like manner be held accountable and liable to said complainant, Ayres P. Merrill, for the value thereof respectively, as fixed and ascertained in a previous part of this decree, and to which reference is now made respectively, and for the collection of which a special execution may issue, as at law; but before any such execution can be taken out in either case, the said commissioner must file in the office of the clerk of this court an affidavit stating such inability, failure, or refusal to deliver on request, and then said execution may issue against the proper persons upon the application of the complainant or his solicitor, and which shall be executed by the marshal as executions in ordinary cases; and whatever moneys may be made thereon shall be applied towards the extinguishment of the balance of

said mortgage debt; and it is further ordered, adjudged, and decreed, that if the said commissioner shall obtain the possession of all or any of said slaves, or the issue thereof aforesaid, either by voluntary delivery to him, or by his own exertions, or by a writ of assistance, he shall sell the same at the front steps of the state house in the city of Little Rock, at public auction, for cash in hand, on some convenient day to be fixed by him, first giving at least thirty days' notice of the time and place of sale, by publication in the "Arkansas Banner," and advertisements posted up at three public places in the city of Little Rock; and that said commissioner be, and he is hereby empowered to make proper bills of sale to the purchaser or purchasers, and that, after paying the expenses of sale, he pay to the said complainant or his solicitor the proceeds of such sale, and which proceeds must be applied towards the extinguishment of said mortgage debt; or if the complainant should purchase the negroes, or any part of them, at such sale, the amount bid by him must be allowed as a credit on said mortgage debt; and that a copy of this decree be furnished by the clerk to said commissioner, and that he make a full report of his proceedings to the next term of this court; and it is further ordered and decreed, that the said Absalom Fowler do pay to the said complainant the said sum of thirteen hundred and fifty-eight dollars, it being the hire of said slaves, Tom, Mary, and Maria, according to the rates and computed hire mentioned in the introductory part of this decree, and for which sum an execution may issue as at law, upon the application of the complainant or his solicitor, and the amount, when collected, is to be placed as a credit upon the said mortgage debt; and it is further ordered and decreed, that the said Noah H. Badgett do pay to the said complainant the said sum of three hundred and ninety-six dollars, being the hire of the said slave Phoebe, according to the rate and computed hire mentioned in the introductory part of this decree; for said sum execution may issue, as in the last-mentioned case, and the amount collected shall be placed in like manner upon said mortgage debt; and it is further ordered and decreed, that the costs of this suit be taxed by the clerk against the said defendants Taylor, Roane, Fowler, Fish, and Badgett, the proportion of one-fifth part thereof to each one of them, and that they respectively pay said costs in that proportion; but the costs of the defendants, James L. Dawson, Baylor, Smith, Hardwick, and William Dawson, are excepted out of the costs as above ordered to be paid. The costs occasioned by these defendants must be paid by the complainant. Whereupon the said defendants, Absalom Fowler and Noah H. Badgett, come and pray an appeal from a decree rendered herein to the next term of the supreme court of the United States; and thereupon, the court being fully advised in the premises, is of opinion that said prayer ought to be, and the same is hereby granted. And thereupon, it is further considered and ordered by the court, that, upon the said defendants Fowler and Badgett, or either one, giving security according to law for the prosecution of said appeal to effect, and to answer all damages and cost, if they fail to make their plea good in the said supreme court; that the appeal hereby granted is to operate as to both or either who may give the required security, against said complaint as a supersedeas.

Appeal bond was given by Fowler, a transcript taken, and the case removed into the supreme court [where the judgment below was affirmed. 11 How. (52 U. S.) 375].

MERRILL (JONES v.). See Case No. 7,481.

MERRILL (ORR v.). See Case No. 10,591.

MERRILL (PETTY v.). See Cases Nos. 11,049-11,051.

Case No. 9,470.

MERRILL v. PORTLAND.

[4 Cliff. 138.] [1]

Circuit Court, D. Maine. Sept. Term, 1870.

NEGLIGENCE—HIGHWAYS—DUTY TO KEEP IN REPAIR—WOODEN AWNING—CONDITIONS TO RECOVERY—INJURY—PROXIMATE CAUSE.

1. Towns are required, by the statute of this state, to keep their highways in such repair as to be safe for travel, either by day or night.

2. Compensation may be recovered, in this state, from any town bound by law to keep their highways in repair, for an injury received by any person travelling on such road or way, in the exercise of ordinary care, provided it be shown that the town had reasonable notice of the defect.

3. A wooden awning was well and strongly built, projecting from a shop or building over a sidewalk; at one end was attached to the awning, in a safe manner, a board, used as a signboard. As the plaintiff was passing under the signboard, the awning was struck by the carriage of a teamster, who was driving in the street, and who had approached near to the side where the awning was. The board fell and injured the plaintiff. *Held*, that the town was not liable, because the court could not determine whether the bodily injury was received through a defect or want of repair of a way or not.

4. The construction given to a state statute by the highest court of the state in which the statute is enacted is obligatory upon this court when seeking the construction of that statute.

[Cited in Lookout Mountain R. Co. v. Houston, 44 Fed. 450.]

5. Under the laws of Maine, certain conditions are annexed to the right to recover from a town for injuries received in consequence of a defective highway, which are as follows:—(1) The highway must be one the town is bound to keep in repair. (2) It must have been defective at the time of the accident. (3) The plaintiff must have been injured as alleged in the declaration. (4) The town must have had reasonable notice of the defect prior to the injury. (5) The plaintiff must have been in the exercise of ordinary care at the time of receiving the

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

injury. (6) The injury must have been occasioned solely by the defect, and not by any want of ordinary care on the part of the plaintiff.

6. The question whether the way was out of repair, or defective, or not, is one of fact for the jury, and that having been submitted to them under instructions to which no exception was taken, the court was not inclined to question the finding or set the verdict aside on the ground that that was an improper finding.

7. It was manifest that the jury found the awning to be a defect; therefore, the question for the court was whether the plaintiff received the injury by reason of such defect, under the existing statute of this state, conferring the right of action in such cases.

8. Travellers may receive injuries while travelling upon defective highways, and such as are not occasioned by the defects or their own negligence, and still the town required to keep the same way in repair, not be liable for the injury.

9. An injury may be produced by the united effect of a want of repair in a road, and some other cause, and the injured party not be entitled to recover from those whose duty it was to keep the way in repair.

10. If an obstruction be left in a street by a responsible party, still, if the town, by its own neglect, allow the obstruction to remain until it is chargeable with notice, the town, &c., is liable to a person injured by reason of the existence of such obstruction.

Trespass on the case [by Mary W. Merrill] to recover damages for personal injury, alleged to have been received by reason of a defective highway, in Portland. The alleged defect was an awning projecting from the front of a store, over the sidewalk. This awning was struck by a team, with a high rack projecting over the wheels, and a board was thereby knocked off the awning, which, falling on the plaintiff, passing under the awning, caused the injury. Verdict for plaintiff. Motion for new trial.

Geo. F. Talbot and A. Merrill, for plaintiff.
J. W. Symonds, City Sol., for defendants.

Before CLIFFORD, Circuit Justice, and FOX, District Judge.

CLIFFORD, Circuit Justice. Travellers have a right to travel by night, as well as by day, and towns are required by law, in this state, to keep their highways, townways, and streets in such repair that they shall be safe and convenient for that purpose. Compensation for any bodily injury received by a traveller, through any defect or want of repair in any highway, townway, or street, may be recovered of the town, bound by law to keep the same in repair; provided it appears that the town had reasonable notice of the defect or want of repair, and that the plaintiff was, at the time, in the exercise of ordinary care. Rev. St. Me. 227. Severe bodily injuries were received by the plaintiff, on the 16th of August, 1866, while walking up Congress street in this city, by the falling of a wooden awning attached to the front of the store, numbered 366, occupied at the time by Walker & Son, doing business as fruit dealers and confectioners. When the accident occurred, the plaintiff was on the sidewalk on the southeasterly side of the street, and the evidence showed to the satisfaction of the court and jury that she was in the exercise of ordinary care. Although the awning was constructed of wood, still the evidence showed that the frame was well and strongly built, of sound timbers, supported by four rafters, attached to a joist, spiked securely to the front of the building, and by three iron rods or braces, secured to the building above the frame of the awning by screws, and connected with the front of the frame which supported the awning, by screw bolts running through the plate of the awning frame. Damages were claimed by the plaintiff of the defendants upon the ground that the awning, as constructed, rendered the street defective, and, being unable to adjust the controversy with the proper authorities, she brought an action of trespass on the case, against the defendants, in the circuit court for this district. Service was duly made, and the defendants appeared and pleaded the general issue, and, upon that issue, the parties at the last term went to trial, and under the instructions of the court, the district judge presiding, the jury returned a verdict for the plaintiff, assessing the damages in the sum of $5,000. Dissatisfied with the verdict, the defendants filed a motion to set it aside, and for a new trial, upon the following grounds: (1) Because the verdict is against the evidence and the weight of the evidence. (2) Because the verdict is against law. (3) Because it is manifestly against the instructions of the presiding justice.

Since that time the several questions involved in the motion have been very fully and ably argued, and the court is now prepared to dispose of the case. Certain conditions are annexed to a right of action for such an injury, which are created by the statute conferring the right, either in express terms, or by the construction given it by the state courts, which is as obligatory in this court as the text of the statute. Leffingwell v. Warren, 2 Black [67 U. S.] 603. They are as follows,—and they must all concur, before it can be held, that the defendant town is liable (Nichols v. Brunswick [Case No. 10,238]: (1) That the highway was one that the inhabitants of the town were bound to keep in repair. (2) That it was defective and out of repair at the time of the accident. (3) That the plaintiff was injured as alleged in the declaration. (4) That the town had reasonable notice of the defect, prior to the injury. (5) That the plaintiff was in the exercise of ordinary care at the time the accident and injury occurred. (6) That the injury was occasioned solely through the defect or want of repair in the way, whether highway, townway, or street, and not from any negligence or want of ordinary care on the part of the injured party.

Two of those conditions,—the second and

sixth,—it is contended by the defendants, did not occur in the case, and that the jury were not justified in so finding, either from the evidence introduced in the case or by the instructions of the court. On the contrary, they insist that the street was not defective or out of repair at the time of the accident, and that the injury was not occasioned, either wholly or in part, by any defect or want of repair in the street; but wholly by the negligence and carelessness of a third party, for whose acts they are not in any respect responsible. They do not impute any negligence or want of ordinary care to the plaintiff; but they insist that the injury was occasioned by the negligent and careless act of a teamster who was passing up Congress street at the same time, travelling with his wagon, drawn by three or more horses, somewhat faster than the plaintiff. The wagon had a high rack, wider than the distance between the wheels, and projecting over the sides of the same, such as teamsters use to transport empty barrels from their place of manufacture in country towns to this market. Although the travelled part of the street is forty feet wide, the teamster had turned his horses to the south-easterly side of the same, and as the team approached the place where the accident occurred, the wagon wheels on that side were moving in the gutter near the curb-stone, and, as he rode along, the top of the rack on that side, struck the westerly corner of the awning, just as the plaintiff passed under it, knocking off the end board of the awning, used also as a sign by the occupants of the store; and the board so torn from its fastenings, fell upon the head of the plaintiff, knocking her down and bruising her badly, and injuring the nerves of the eyes so severely, that she has become entirely blind, without any prospect that she will ever recover her sight. Evidence was also introduced, showing that the awning was built some two months before the accident, and that it remained there some two years and a half, when, a large mass of snow having accumulated upon the covering, it was broken down by the weight. Unless the witnesses misstate, the awning was constructed of good materials, and it was securely attached to the front of the store. Before the accident, the end board which was knocked off by the teamster in the manner described, was once taken down, that the occupant of the store might have his name or the name of his firm painted on it; but the testimony shows that it was subsequently replaced, and apparently in a safe manner, and so continued to the time the accident happened. Much testimony was introduced on the question whether the awning, as constructed, was of the height and width as required by the city ordinance. On the part of the plaintiff, it was insisted that it was not of the required height, and that it was also defective, inasmuch as it extended into the street, three or four inches beyond the curb-stone. Both of these propositions, if fact, were controverted by the defendants, and they introduced testimony to establish the opposite theory; but the question whether the street was defective or out of repair, in every aspect of it, was one of fact for the jury, and inasmuch as the same was submitted to their consideration, under instructions to which no exceptions were taken, the court is not inclined to assume that in that respect there was any error in the action of the jury. Doubts are entertained by the district judge, whether he would have found in accordance with the verdict if the question had been submitted to his determination; but in view of the fact that there was considerable evidence in support of the finding of the jury, he fully concurs in the conclusion that the verdict should not on that ground be set aside.

Negligence cannot be imputed to the plaintiff; but it is clear to a demonstration that the teamster was both negligent and rash, and that if he could be identified he would be liable to make compensation to the plaintiff for the injuries she received by the fall ing of the board. Suggestions of that kind, however, are of little or no avail, as the evidence furnishes no ground to hope that he can be found, and, if discovered, it may be found that he is wholly irresponsible. Judging from the evidence as reported, the only person who saw him drive his wagon, or the rack on the same, against the awning, was the police officer, who testifies that he, the teamster, first collided with the wagon of the witness, which was standing on the same side of the street, opposite the store next below the one to which the awning was attached; that he saw the rack when it first struck the awning; that he hallooed to him to be careful, that he would break down the awning; that he gave no heed to the warning, and that, as his team advanced, the corner of the rack struck the end board of the awning, and it fell on the head of the plaintiff in this case.

Evidently, the jury found that the awning constituted a defect in the street, and, in view of that finding, the only question in the case is, whether they were also justified in finding that the injury was received by the plaintiff through that defect, within the meaning of the statute of the state upon which the action is founded. By that statute it is provided that if any person receives any bodily injury . . . through any defect or want of repair, or sufficient railing in any highway, townway, causeway, or bridge, he may recover for the same, in a special action on the case, of the county, town, or persons obliged by law to repair the same, if such county, town, or persons had reasonable notice of the defect or want of repair. Rev. St. Me. 227.

Viewed in this light, as the case must be, it is manifest that the rights of the parties

depend upon the true meaning of the phrase in that statute,—"receives any bodily injury through any defect or want of repair," and it is evident that the parties by their counsel have taken the same view of their rights, as is evidenced by their elaborate briefs and very able arguments presented orally to the court.

Bodily injury of a very serious and permanent character, beyond all doubt, was received by the plaintiff, without any fault on her part, by the falling of the board; but the question is, whether she received the injury through the defect or want of repair in the street, within the meaning of that statute. Except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. Such was the provision of the judiciary act, and it has remained in force to the present time without modification or repeal. 1 Stat. 92. "Infinite mischief would ensue," said Marshall, C. J., "should this court observe a different rule in construing the statutes of a state, from that established by the judicial authority of the state." M'Keen v. Delancy, 5 Cranch [9 U. S.] 22. In cases depending on the statutes of a state, the federal courts adopt the construction given to the statute by the highest court of the state, where that construction is settled and can be ascertained. Polk's Lessee v. Wendell, 9 Cranch [13 U. S.] 98; Emendorf v. Taylor, 10 Wheat. [23 U. S.] 157. Justice to the citizens of the several states required this to be done, and the natural import of the words in the act of congress includes the laws in relation to evidence and rights conferred by statute, as well as the laws in relation to property. Vance v. Campbell, 1 Black [66 U. S.] 430; Wright v. Bales, 2 Black [67 U. S.] 535; Loring v. Marsh [Case No. 8,514]. Other authorities of like import might be cited; but it is sufficient to say that the construction given to a state statute by the highest judicial tribunal of the state, is regarded as a part of the statute, and is as obligatory in the federal courts as the text. Leffingwell v. Warren, 2 Black [67 U. S.] 599. Governed by those authorities, it becomes the duty of the court here to follow the state decisions, as ascertaining the true intent and meaning of the provision under consideration. "Persons may be injured," said Shepley, C. J., in Moore v. Inhabitants of Abbot, 32 Me. 46, "while travelling on the highway, without being blameworthy and without the fault of those who are required to make the ways safe and convenient, and in such cases the risk is their own."

Persons may also suffer injury while travelling upon the highway which is not safe and convenient, and the injury may not be occasioned by the want of repair, or by their own want of care to avoid it, and in such a case, the same learned judge said, it would be quite clear they could not recover damages of those who were in fault by neglecting to keep the way safe and convenient. Several other propositions were also laid down in that case, which it becomes important to notice, as they are directly applicable to this case; for example, that an injury may also be occasioned by the united effect of a defect in the way, and some other cause, and in that case the court say that the party injured cannot recover of those whose duty it was to keep the way in repair; because he does not prove that the injury was occasioned through or by reason of such want of repair, and, as applied to the case then before the court, no doubt is entertained that the principle laid down is correct. He should prove, in order to recover, that the injury was occasioned entirely through the defect or want of repair, for the statute was not intended to impose upon towns the burden of making compensation for injuries not occasioned by their own neglect of duty. Travellers are bound to exercise ordinary care, and if they do not and their negligence or want of ordinary care contributes to the injury, the injured party cannot recover of the county or town bound to keep the same in repair, as it cannot be held, in that state of the case, that the injury was occasioned entirely by the defect or want of repair in the way where the injury occurred, as it is certain that the negligence or want of ordinary care of the plaintiff contributed to the result.

Cases may often arise, also, where the way is defective and the proof of injury clear, and yet it may appear that the act of a responsible third party either caused the injury by forcing the injured party upon the obstruction, or contributing to it, as in this case, and in that state of the evidence it is equally clear that the county or town, though bound by law to keep the way safe and convenient, is not liable to the injured party under that statute, as in that state of the case it cannot be determined that the bodily injury was received solely through the defect or want of repair in the way. Expressions are certainly found in that opinion which leave it to be inferred that the exemption of towns from liability under that statute, would be extended to cases where the contributory act was the direct consequence of some natural cause, as where the horse of the traveller, though of good temper and well trained, is caused to shy by lightning, or by the rays of the moon suddenly falling on the pathway, through the opening clouds, or other similar incidents occurring in the experience of every one accustomed to travel by night. Certainly, towns are not responsible because the horse of the traveller suddenly becomes frightened and starts aside. The question of the liability of towns, &c., where, under such circumstances, the traveller is thrown over a bank or into a stream for the want of a sufficient railing, is a very different one from

the question before the court, where it appears that the end board of the awning, which fell upon the head of the plaintiff, was forced from its fastenings by the negligent and rash act of a legally responsible party. Later decisions of the state court hold that the town is not liable, even where the horse of the traveller, though well trained, is caused to shy by the noise created by the diving of a muskrat into the water of a stream at the moment the horse is crossing the bridge, and where the traveller was thrown from his carriage and injured, from the want of a sufficient railing. Such cases, and others of a like kind, as where the horse is frightened by the cry of a child in an adjacent house, or the shriek of an insane person, or the sudden start of a hare or flight of a bird, present a question of construction which, if res integra, would deserve far more consideration than the one in this case, as the incidents adverted to are such as every person meets who is accustomed to travel in the night; but the court does not find it necessary to examine any such question, as the case before the court is unquestionably controlled by the rule of construction actually laid down in the leading case decided by the state court, which has ever since been followed without doubt or hesitation, as giving the true construction and meaning of that wise and humane enactment. Bigelow v. Reed, 51 Me. 329; Coombs v. Topsham, 38 Me. 204; Anderson v. Bath, 42 Me. 348.

Suppose the general rule to be as it is assumed by the court, still it is contended that the cases Springer v. Bowdoinham, 7 Me. 445, and Frost v. Portland, 11 Me. 271, admit of an exception to the general rule, and that the case before the court properly falls within that exception; but the court is of a different opinion. Undoubtedly towns in certain cases are liable, under those decisions, for an injury received by a traveller, by means of an obstruction placed or left in a highway, townway, or street by a responsible third party, where the obstruction has been allowed to remain in the highway, townway, or street, until the town is chargeable with notice, but in such cases, the county or town is liable to the injured party, because of their negligence in suffering it to remain, and not on account of the act of the third party in placing or leaving it in the travelled part of the way. They are bound to repair any such way, as well as to open and make it, and by suffering the obstruction to remain after they have notice of its existence, they become chargeable, because the way is defective and out of repair. Such cases however, afford no support to the claims of the plaintiff, as they rest entirely upon different ground. Kidder v. Dunstable, 7 Gray, 104. Reference need only be made to such portions of the instructions of the court as relate to the question under discussion. They were as follows: "That if the jury find that the awning as constructed was a defect in the street, and that the travelled part of the same, outside of the sidewalk, was safe and convenient, so that the teamster with his team could have passed over any part of it without difficulty, and that he reined his team into the gutter, and so drove along as to strike the awning with the corner of his rack, and thereby forced off the end board of the same, so that it fell upon the plaintiff, causing the injury for which the suit is brought, and that the board would not otherwise have fallen, the defendnats are not liable, because, when an injury is occasioned by the united effect of a defect in the highway and any other cause, the town or city is not liable." Both parties agreed in the correctness of that instruction, and inasmuch as it is substantially in accordance with the rule laid down in the leading case upon that subject as decided by the supreme court of the state, it was the obvious duty of the jury to have followed it, and if they had done so, their verdict must have been for the defendants. Any remarks to apply the instruction to the evidence as reported is quite unnecessary, as the proper application is as obvious as anything can be in judicial investigations.

Verdict set aside, and a new trial granted.

Case No. 9,471.

MERRILL et al. v. RINKER.

[Baldw. 528.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1832.

PERSONAL PROPERTY—BAILMENT—TITLE—ACTION TO RECOVER—WITNESS—PARTNERS—IN WHOSE NAME ACTION TO BE BROUGHT.

1. A receives goods from B and C, on an agreement that A should take them for sale from place to place, to pay the invoice price for such as were sold, to return those unsold and be credited with the amount at the prices charged, A to receive the surplus of what was sold over the invoice price. *Held*, that such agreement is not fraudulent in law, if not so in fact.

2. The goods were put up in New York, and brought to this state for sale, where they were attached by the creditors of A, for debts due before the agreement. A returns to New York, returns the invoices and abandons the goods to B and C, who rescinded the contract. *Held*, that A was a competent witness in an action for taking the goods.

3. B and C could recover in trover for taking them, if the contract was not fraudulent.

4. A and M were partners when the goods were invoiced, before the contract, M sold his interest in the partnership effects to B. *Held*, that A and B could sustain the action.

5. Reputed ownership in A, under such a contract, does not justify a creditor of A in taking the goods, unless under the statutes of bankruptcy.

[Cited in Blackwell v. Walker, 5 Fed. 422.]

6. Possession of goods by any other than the real owner, is neither fraudulent or a badge of

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

fraud, if the want of possession is fairly accounted for, and there is no fraud in fact.

[Cited in Almy v. Wilbur, Case No. 256.]

[Cited in Stevens v. Works, 81 Ind. 451.]

This was an action of trover, brought against the sheriff of Lehigh county, under the following circumstances: Thomas W. Viles was an insolvent debtor, who had been discharged under the insolvent law of New York in 1828. Merrill & Minikin were merchants in New York, to whom Viles applied for goods to trade on, which they agreed to furnish him on these terms; an invoice of the goods delivered was to be made out, Viles to sell them at the invoice price, and not less, he was to receive the overplus for his trouble, to return what he did not sell and be credited for them, and to pay the invoice price for what he sold. Under this agreement goods were laid off, and were packing, from the 25th February till the 5th March, 1830, amounting by the invoice to 1328 dollars, and delivered to a wagoner employed by Viles, who took them to Easton in this state, where they were attached by his New York creditors, Viles immediately returned to New York, delivered back the invoice to Merrill, and abandoned the concern; Merrill accepted the invoice, and rescinded the contract; the goods were afterwards taken to Allentown, where they were sold by the defendant, on process by the creditors of Viles, who indemnified him. On the 5th of March, 1830, Minikin sold out his interest in the firm of Merrill & Minikin, to Foster, one of the plaintiffs. Merrill & Foster were the only partners in the firm, the business was carried on in the name of E. Merrill, agent. Viles received the invoice on the 6th of March, made out in the name of Minikin & Co., dated 25th of February, Merrill struck out this date and inserted 6th of March, he also struck out Minikin & Co., and put in E. Merrill, agent; thus altered it was delivered to Viles. The invoice was copied from the books of the plaintiffs, where it was entered, the invoice in the book and copy was headed, "Merchandise, consigned to J. W. Viles by Merrill & Co.," and altered as above. Minikin & Co. had previously had similar transactions with Viles, who settled for them on the terms above stated, and was credited with the goods returned unsold. The plaintiff's agent demanded the goods from the defendant before sale, who refused to deliver them, saying he was indemnified. The debts of Viles, for which the goods were sold, were due before his discharge.

At the trial, Viles was offered as a witness by the plaintiffs, to which Mr. Wharton and Sergeant objected on the ground of interest, inasmuch as he is liable to the plaintiffs for the value of the goods, an agent may be admitted from the necessity of the case, but here there is no agency.

BY THE COURT: The jury must decide whether Viles is an agent, factor, or purchaser of the goods, as between plaintiff and defendant. But as the plaintiff has rescinded the contract, and accepted a re-delivery of the invoice, with an abandonment of the goods by Viles, he cannot consider Viles as a purchaser, nor can he look to him for the goods as his agent, where they have been taken from him by process which he could not resist; so that he has no interest in the suit. The bringing the suit, is an affirmance of Viles's being a consignee, in which capacity he is answerable only for negligence, or a violation of the terms of the consignment, neither of which is in evidence. 2 H. Bl. 590, 591. The objection was overruled, but the plaintiffs did not call the witness till they produced a release to him from plaintiffs.

T. Bradford and J. R. Ingersoll, for plaintiffs.

The transaction was a fair and real one, made bona fide, without any intention to give Viles a false credit, or injure his creditors, the effect of which was to make Viles the special agent, factor or consignee, with power to sell at prices limited, and with a right to return the goods unsold to the plaintiff. He was not a purchaser of any goods remaining unsold, nor was he a debtor to the plaintiffs except for what he did sell; the seizure by the sheriff prevented a sale or re-delivery according to the terms of the consignment, so that the property of the goods remained in the plaintiffs. It was competent to them and Viles to rescind the agreement, by which the rescission related to the delivery of the goods. Salte v. Field, 5 Term R. 211, 213. Viles having no interest in the goods, unless they sold for more than the invoice price, was not a partner of the plaintiffs, his only claim was in the nature of a commission, or compensation for his services in selling: he had no interest till a sale. Miller v. Bartlet, 15 Serg. & R. 137; there was therefore nothing to be taken on an attachment against the property of Viles. No property passed by the delivery, till the contract was consummated by complying with the conditions, though it had not been rescinded or a partial payment refunded. Marston v. Baldwin, 17 Mass. 606, 610. If the interest in the profits is merely in payment of services, it makes no partnership (Dry v. Boswell, 1 Camp. 330; s. p., Wish v. Small, Id. 331, cited); so if a broker is employed to sell and is to receive all that the article sells for beyond a certain sum fixed by the plaintiffs (Benjamin v. Porteus, 2 H. Bl. 590, 591; s. p., 15 Serg. & R. 119). Viles could not have sold these goods to pay his old debts, neither could he have pawned them; such acts by a factor would not charge the property, so as to divest the right of plaintiffs. Martini v. Coles, 1 Maule & S. 140. The assignment by Minikin to Foster of his stock in the firm, gave the latter a joint interest in the goods, so as to authorize this suit in the names of Merrill & Foster. They had

a right of stoppage in transitu, Viles was their bailee, whose possession was theirs, which is sufficient to maintain trover against any one who takes them out of his hands (Thorp v. Burling, 11 Johns. 285; 1 Maule & S. 140; 16 Johns. 74; 1 Johns. 472, etc.), there was a conversion here, no demand was necessary, but if necessary a demand by an agent is sufficient, (3 East, 381). By the terms of the contract, the plaintiffs retained their right to the goods, which were bailed to be sold on special conditions, limiting the price, stipulating for their return at all events if not sold; it was a special consignment in the nature of a conditional sale, by which the general property remained in the plaintiffs, subject to the right of selling at the invoice prices. Though this was not in the ordinary course of factorage transactions, yet it was so in its incidents, and the relative position and rights of the plaintiff and Viles; third persons were in no worse condition than if it had been an ordinary consignment, as the only peculiarity in it was the mode in which Viles was to account for the goods intrusted to him.

The turning question is on the good faith and fairness of the course of dealing between the parties; though the jury should find it to have been fraudulent, collusive, or a mere colour to cover an absolute sale to injure creditors or purchasers, or to give Viles a false credit, there is nothing in the transaction to make it so, as matter of law. Cases of reputed ownership merely, without any badge of fraud, arise only under the English statutes of bankruptcy. Though there was a delivery to Viles, it was conditional, so that any violation of the terms by Viles would rescind the contract from the time of delivery; the same effect would be produced if any third person should take a tortious possession of them, thus preventing Viles from selling pursuant to the condition. The plaintiff therefore had, at the time of the conversion, such property and present right of possession, as is sufficient to maintain this action. 1 Johns. 472; 15 East, 609. Here the property was unchanged, the specific goods entered in the invoice, were the same which were taken by defendant, and the right of property remained in plaintiffs. 2 Ves. Sr. 582, 585; 1 Atk. 232; 3 P. Wms. 185; 2 Esp. 578, 579.

T. I. Wharton and Mr. Sergeant, for defendant.

1. The transaction between the plaintiffs was in substance a sale on credit, but disguised so as to give it the appearance of a consignment or agency. Viles had the uncontrolled possession, with power to sell, not as a bailee, but as the owner of the goods, it was not a case of factorage, as Viles was liable for the invoice price as soon as he sold. Where property is delivered to another to be returned specifically, it is a bailment, but if an equivalent in kind, or any other may be returned, it is a sale. Jones, Bailm. 102; Story, Bailm. 193; 7 Cow. 752; 4 Cow. 752; 19 Johns. 44; 2 Kent, Comm. 464; 1 Rand. (Va.) 3. The option of re-delivery or paying the value, distinguishes a loan or bailment from a sale. 2 Wheat. Selw. 1052. Though the statute 21 Jac. 1, does not extend to a factor, yet if goods are in the hands of a retail dealer, to be sold or returned, they pass to his assignees as a case of reputed ownership. 2 Camp. 83; Bull, N. P. 42; 2 East, 117, 125. Where goods were sold to be paid for in thirty days, or warehouse rent to be paid, the property was absolute in vendee, though there had been no delivery, 1 Camp. 513. Here was an actual delivery and removal of the goods out of the control of the vendor, Viles was in full possession as owner, with assent of plaintiffs, this is evidence of property till the plaintiffs make out the property to be in them clear of all doubt. 5 Serg. & R. 275. Plaintiffs could not reclaim the property or countermand the authority to sell, Viles pays all charges and expenses, and has no lien on the goods; these circumstances divest the case of every feature of one of factorage or agency, nor is it a case where the plaintiffs had any right of stoppage in transitu. The delivery was complete, Viles's power over the goods absolute, and there was no insolvency between the sale and their reaching their destination. So that the right of stoppage did not exist. Rop. Vend. 189; Abb. 374; Holt, 498; 2 Wheat. Selw. 1052; 2 East, 125.

2. Viles was a partner by having a right to the profits (Gow, 15, 19); third persons had a right to so consider him (17 Ves. 404; Rosc. 89; 19 Ves. 461), and to seize the goods in his possession.

3. To support trover the plaintiff must have actual possession, or such property in the goods as gives him the right of present possession, absolute or qualified. 1 Chit. Pl. 150; 2 Wheat. Selw. 1050, 1051, 1057. A landlord cannot have trover for goods leased during the term (7 Term R. 9, 11; s. p., Corfield v. Coryell [Case No. 3,230]) because he has not a present right of property; otherwise, if the lease is void, as if made to a feme covert (15 East, 607). Here the plaintiffs had neither property, possession or a present right of possession.

BALDWIN, Circuit Justice (charging jury). Whether by the contract between the plaintiffs and Viles, there was a sale or a special consignment to the latter, of the goods in controversy, depends mainly on the intention of the parties. If the contract, as testified by the witnesses, and entered on the books of the plaintiffs, contains their whole agreement, as truly understood and intended by both parties, it is no sale in law or fact, on the other hand, if the real object was a sale, under the cover of a former consignment, then it was a sale and not a consignment, however it may have been entered on the books, or stated to the witnesses. This is

a matter of fact for your consideration, should you find the transaction to be a consignment, you will inquire whether it was fairly and honestly made, with no other object than has been stated or shown in evidence, or is evident from its nature; or whether it was done to enable Mr. Viles to defraud his creditors, to give him a false credit, or hold him out in false colours on the credit of the goods. Should you think that the goods were delivered for either of such purposes, it was fraudulent as to creditors and third persons, whether it was a sale or consignment, and your verdict ought to be for the defendant. Should you think that the contract was made fairly and honestly, as a special consignment, to enable Viles to support himself and family, your verdict will depend on whether it is fraudulent in law, though not in fact. Fraud in law, is the commission of an act prohibited by the words or policy of the law, or where certain acts are deemed full evidence of fraud and fraudulent in themselves, though not so intended; cases of reputed ownership do not come within this rule, they arise only under the positive provisions of a bankrupt law, by which a person in possession at the commission of an act of bankruptcy, of goods with the consent of the true owner, is declared to be the reputed owner, and the goods pass to his assignees, in the same manner as if he was the real owner. In cases not within the statutes of bankruptcy, there must be something more than merely reputed ownership in the person in possession of goods, to effect the right of the real owner; something inconsistent with the nature of the transaction, the dealings between the parties, or some badge or evidence of fraud, intended or tending to injure others. 9 Johns. 201.

As a general rule, the possession of personal property is evidence of ownership, but if from the nature of the case, possession is necessarily in one person, and the ownership in another, it is neither fraudulent in itself, nor a badge of fraud; a possession for a special purpose, by a person for the use, by the orders, or in the transaction of the business of another in its usual course, does not make the property liable to an execution or attachment for the debt of the holder. Such a possession is not within the principles of the statutes, or common law, for the suppression of fraud; if the contract is fair and honest, the possession consistent with its nature, terms and intention of the parties, then as the want of possession by the real owner, is fairly accounted for, his rights cannot be affected by a third person. After an absolute sale of goods, possession by the vendor is prima facie evidence of fraud, which must be rebutted; if the sale is conditional, the retention of possession by the vendor, till the condition is complied with, is no evidence of fraud. Goods consigned to a factor, an agent, or delivered for a special purpose, cannot be taken from the true owner; if the conduct of the parties is consistent with their contract, and that in its terms is fair and honest, no fraud is imputable, its form is immaterial, whether it is in the shape of a consignment, a conditional sale, or partakes of the character of both, according to the true intention of the parties. Vide 9. Johns. 337, 338, and cases cited, 5 Serg. & R. 278. In this case the contract was a special one, giving Viles power to sell at invoice prices, but binding him to return the goods if not sold; as between him and the plaintiffs, this did not vest the property in him by the delivery, he was their agent while the goods were in his possession, and when he sold them was their trustee for their invoiced price. Before a sale, the creditors of Viles had no more right to seize the goods, than if they had been in the warehouse of a factor or commission merchant; from the nature of the contract Viles must have the possession and control, and while he was acting pursuant to the contract in good faith, his creditors had no right to take the goods. Any reputed ownership from possession, and selling the goods as his own, would not justify their seizure for an antecedent debt; though a person who, trusting to the visible ownership, had given him a credit, might set off his debt against a claim by the plaintiffs for the goods purchased. 7 Term R. 359, 361. As a question of law therefore our opinion is, that the agreement between Viles and the plaintiffs, was not fraudulent in itself as against the law; you will decide whether it was fraudulent in fact or intention; if you negative fraud, then the contract is valid in law, either as a consignment, or a conditional sale. It has been contended that Viles was a partner, and the goods liable to seizure for his debt; but even admitting that the contract created a partnership, a creditor of an individual partner has no right to sell the partnership property; he can sell only what belongs to the debtor partner, after paying the debts due by the firm, and his own debt to the firm. An execution, an attachment, or act of bankruptcy, may dissolve the partnership, but gives no authority to force a sale of the joint stock, before the share of the debtor partner is ascertained; what belongs to the creditors, or the solvent partners of the firm, cannot be appropriated to pay the private debt of a partner.

It is objected to the plaintiffs' right of recovery, that they have no joint interest in the goods, or possession in law or fact, sufficient to sustain an action of trover. If you are satisfied that in point of fact, Minikin had transferred his interest in the partnership effects to Foster, before the commencement of this suit, then in point of law the plaintiffs have a joint interest in the goods.

Whether the plaintiffs have such possession or right of possession as will sustain

this suit, depends on your opinion on the question of fraud in fact; if you think the contract was colourable, intended as a cover for fraudulent purposes, the action must fail. But if you think the contract was in good faith, made for the purposes stated, the conduct of the parties consistent therewith, without any intention to defraud third persons; then, as no rule of law or policy is violated, the plaintiffs had the right of possession, against any person who converted the goods to his own use, while the contract was in the course of execution, according to the true intention of the parties; they have the legal possession, and may recover in trover the value of the goods, with interest from the conversion.

Verdict and judgment for the plaintiffs.

MERRILL (SUFFOLK BANK v.). See Cases Nos. 13,591 and 13,592.

MERRILL (WATERMAN v.). See Case No. 17,258.

Case No. 9,472.

MERRILL v. YEOMANS et al.

[1 Ban. & A. 47; Holmes, 331; 5 O. G. 268.] [1]

Circuit Court, D. Massachusetts. Feb. 13, 1874.[2]

PATENTS—CLAIM—PRODUCT—PROCESS—HYDROCARBON OIL.

1. A patentee may claim broadly a new product, however made, or he may claim the new product, when made by a described process, or he may claim the process, but he cannot embrace both the process and the product in the same claim.

[Cited in Milligan & Higgins Glue Co. v. Upton, Case No. 9,607; Durand v. Schulze, 10 C. C. A. 819, 61 Fed. 821.]

2. A claim for "the above described new manufacture of deodorized heavy hydrocarbon oils, suitable for lubricating and other purposes, free from the characteristic odors of hydrocarbon oils and having a slight smell like fatty oil, from heavy hydrocarbon oils, by treating them substantially as hereinafter described," is a claim for a heavy hydrocarbon oil, having the characteristics described in the patent, and produced by treating the oils in the manner described in the patent, and is not infringed by a similar oil produced by a different process.

[Cited in Badische Anilin & Soda Fabrik v. Hamilton Manuf'g Co., Case No. 721; Cone v. Morgan Envelope Co., Id. 3,096.]

3. A patent for a deodorized heavy hydrocarbon oil, made from heavy hydrocarbon oils (from which the lighter oils and mechanical impurities have been previously separated by distillation), by distilling from them, under atmospheric pressure, the volatile matters from which the objectionable odors arise, is not infringed by a hydrocarbon oil of the same characteristics, obtained directly from the crude petroleum by distillation in vacuo, in such a manner as to leave the heavy hydrocarbon oil as the distillate, free from the odorous bodies.

[Bill in equity [by Joshua Merrill against David M. Yeomans and others] for an injunction to restrain alleged infringement of letters-patent [No. 90,284] for improved manufacture of deodorized heavy hydrocarbon oils, granted the complainant May 18, 1869; and for an account. The principal question in the case was as to the construction of the first claim of the patent, which was as follows: "I claim the above-described new manufacture of deodorized heavy hydrocarbon oils, suitable for lubricating and other purposes, free from the characteristic odors of hydrocarbon oils, and having a slight smell like fatty oil, from heavy hydrocarbons, by treating them substantially as hereinbefore described."] [3]

B. R. Curtis, Chauncey Smith, and Walter Curtis, for complainant.

Causten Browne, William Bakewell, and Jabez S. Holmes, for defendants.

SHEPLEY, Circuit Judge. The invention of the complainant relates to the manufacture, from heavy hydrocarbon oils possessing the characteristic odors of such oils, by a process of treatment described in the specification in his patent, of deodorized heavy hydrocarbon oils, free from such characteristic odors, and having only a slight smell like fatty oil, and suitable for lubricating and other purposes.

The most important and intricate questions presented at the hearing of the case relate to the construction of the first claim in the patent. Considered in the broader view which courts take of the construction of claims, by considering them in connection with the specification, and the discovery and invention therein described, the question presented is: What is really the subject of the complainant's patent? Is it for a new article of manufacture, or for a new process of manufacturing? Is it, in the words of the statute, "for a new and useful art," or for "a new and useful manufacture?" It is contended on the part of the complainant that the patent secures to Merrill his product, and products substantially the equivalent of his, by whatever process produced. The defendants, on the other hand, contend that the patent is only for a process. Another construction, which we shall have occasion to consider hereafter, may be adverted to here, that the patent is for the described product of a specially described process. The questions of construction of the claims are attended with more difficulty, from the fact that the patentee, in stating his invention and specifying his process and making his formal claim, uses the word "manufacture" in its two different meanings, signifying, respectively, the operation of making, and the thing made.

To arrive at the true construction of the claim, we must first understand the nature and properties of "the heavy hydrocarbon

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Ban. & A. 47, and the statement is from Holmes, 331.]

[2] [Affirmed in 94 U. S. 568.]

[3] [From Holmes, 331.]

oils," which are the subject of the described treatment, next the described treatment, process, or art, and finally, "the deodorized heavy hydrocarbon oils," the described product of the treatment. This renders necessary a hasty glance at the history and state of the art prior to the invention of the complainant.

These oils are called "hydrocarbons" because they are composed of hydrogen and carbon, and do not, like most animal and vegetable oils, contain oxygen. They are the product of distillation of bituminous coals and shales, and of natural asphaltum or bitumen. The principal source of supply at the present time, however, is from the petroleum-wells, the product of which is used either in its natural state or as converted into a variety of articles by the process of distillation. By distillation a great variety of products can be obtained by the same process from coal, coal-tar, asphaltum, and petroleum. The distillation of petroleum was at first practised only for the purpose of refining it by separating it from foreign matters, and separating from it some of the combined carbon, too large a proportion of carbon causing it to generate too much smoke, and rendering it unfit for use in lamps as an illuminating-oil. It soon became known that, in distillation, petroleum separated into hydrocarbons of different gravities. Ordinary distillation separated the substance from fixed bodies held in solution or suspension in it, and separated the more volatile bodies from those of less volatility. By destructive distillation of petroleum, the character of the substances was changed in like manner as gas is produced by the destructive distillation of coal.

In the process of distillation, petroleum separates into hydrocarbon fluids of different gravities. The lightest fluids come over and are condensed first, and they increase in gravity as the distillation proceeds. The lighter oils come over more readily and with less heat. The heavier oils require a higher degree of heat to vaporize them. During the process of distillation, by changing from time to time the receiving-vessel into which the distillate runs from the condenser, the distillate is separated into the various products having different gravities. This is termed "fractional distillation." By continually changing the receiver from time to time, fluids of any desired gravity may be obtained, from the highest to the lowest which petroleum will yield under treatment. An arbitrary division of the products is made in practice, according to the commercial uses of the products. All the fluid which first runs from the still, until it falls to a gravity of about 60° Baumé, is classed as benzole or naphtha. All in the next grade, between 60° and about 38° or 40° Baumé, is known as "burning-oil," or "refined oil," and more popularly known as "kerosene-oil," and is used principally for illuminating purposes. All the distillate below 38° or 40° Baumé is known as paraffine-oil, or lubricating-oil; and this is the product of distillation which Merrill refers to in his specification as "heavy hydrocarbon oil." The language of the specification is: "My invention relates to the heavy hydrocarbon oils, which have heretofore been produced by distilling crude petroleum, or the crude oils obtained from the distillation of bituminous coals, bituminous shales, bituminous schists, asphaltum, and other substances producing hydrocarbon oils, by distillation. * * * These oils are well known to the trade, and distinguished from the lighter burning-oils and naphthas by the term 'heavy oils,' their specific gravity varying greatly between the asphaltum oils and paraffine oils."

These heavy hydrocarbon oils thus produced had a persistent disagreeable smell, which made them offensive and undesirable for use in close, warm rooms, as in woollen manufactories. "Attempts had been made to remove the smell by filtration, but with partial success." It had been the practice to treat such oils with acids and alkalies for the purpose of removing the peculiar offensive odor. This resulted in improving the character of the odor, but without wholly removing the persistent disagreeable smell. For several years before the date of Merrill's invention the progress of improved modes of treatment of paraffine oils had been so great that heavy hydrocarbon oils for lubricating uses had been produced and sold in large quantities, substantially, although not entirely, free from the peculiar odor of petroleum distillates.

William Atwood, a witness on the part of the complainant, who has been connected with this manufacture from its inception to this day, and who is probably as familiar with the history of the art and the properties of the different hydrocarbons as any manufacturing chemist in this country, testifies in relation to the lubricating-oils manufactured prior to the date of the Merrill invention by the Portland Kerosene-Oil Company, and known, in the evidence in this record, as the "Portland Oils." His testimony is, in substance, that the Portland oil compared with the oil manufactured by the Downer Company under Merrill's patent, is "as good as a lubricating-oil, but not for mixing with other oils, where it is desired that its own peculiar smell shall not appear. * * * There still remained the odor of the volatile oils, which were always present. It was certainly desirable to remove any odor arising from any source." He also describes the odor of the Merrill oil as "a different odor" from the odor of the Portland oil, "being less tenacious: or, in other words, one can be completely covered up with a smaller amount of any other odor than the other."

As the Portland oils, and those substantially like them, sold by the Downer Company, before the date of Merrill's invention, were the best of the heavy hydrocarbons sold as lubricating-oils at that time, it is sufficient to re-

fer to them as showing the state of the art at that time without more particularly adverting to the Maysville and other oils, which, also, had been previously manufactured and sold, and which the witnesses have particularly described. It is also contended in behalf of the defendants that the "Neutral Topaz Oil," like that sold by the defendants, had been manufactured by Dr. Tweddle, of Pittsburg, before the date of Merrill's invention. I do not find, after careful comparison of the testimony in the case, sufficient evidence to satisfy me that such was the fact. On the contrary, I am satisfied that Merrill was the first and original inventor of the process described by him, and I therefore pass to the consideration of the second step in the inquiry as appertaining to his process, and the product of his process, and the invention claimed and secured by his patent. The first step in this inquiry has been to ascertain what was the material to be operated upon. This we have found to be a heavy hydrocarbon oil, the product of distillation, objectionable for use as a lubricator by reason of those offensive odors peculiar to petroleum distillates. These offensive odors were due to the presence of the more volatile oils. The heavy hydrocarbon oils were generally sold as lubricators, to be mixed by the purchasers with sperm-oil or other fatty oils. They were also mixed with such oils by the manufacturers and dealers, and the mixed oils sold to the consumers for lubricators. Before the introduction of the Merrill oil, although the producers of the heavy hydrocarbon lubricators had succeeded in so far freeing them from the volatile compounds and the lighter and thinner oils, as to put on the market and sell in very large quantities an article satisfactory to the consumers in relation to its lubricating qualities, and substantially free from the peculiar offensive odors, yet this result was attained by a sacrifice of quantity to quality in the manufacture, and was only proximately the desired result, for there still remained some of the odor of the volatile oils. This peculiar odor was so persistent, that, when mixed with other oils, in whatever proportions, it was the predominant odor, and pervaded the whole mass.

The next step to be taken in the path of inventive art, as applied to the manufacture of paraffine or lubricating oils, was to eliminate the peculiar characteristic odor of the petroleum distillates, and also to increase the proportion of deodorized heavy hydrocarbon oil produced from a given quantity of crude oils. This brings us to the second step of the inquiry, Merrill's process.

After stating that his "invention relates to the heavy hydrocarbon oils which have been heretofore produced by distilling crude petroleum, or the crude oils obtained from the distillation of bituminous coals, bituminous shales, bituminous schists, asphaltum, and other substances producing hydrocarbon oils by distillation;" and, after adverting to the various modes of treatment, by acids and alkalies, and by filtration, which had been resorted to, with only partial success, to remove the persistent disagreeable odor peculiar to these distillates, he describes his process as follows: "To make heavy hydrocarbon oils free from the characteristic unpleasant odors of heavy hydrocarbon oils, I take the heavy oils which have been separated from the lighter oils and from mechanical impurities by distillation, and after chilling and expressing the solid paraffine, when such operation is necessary, place them in a still, heated by a fire underneath, and slowly and gradually raise the temperature, until from ten to thirty per cent. of the contents of the still are distilled over, when the still is cooled down and the remaining contents removed. The matters which go over to the condenser have a very foul, offensive, and disgusting odor, but the oil remaining in the still, if the operation has been properly conducted, is free from the characteristic offensive odor of hydrocarbon oils, and has no smell except a slight odor similar to fatty oils. It can be mixed, in all proportions, with sperm, lard, fish oils, and vegetable oils, and is so neutral in its character, that it takes the odor of the oil that it is mixed with."

He then goes on to describe, as a separate and distinct invention, the introduction of superheated steam within the still, whereby he claims the process will be facilitated, and oil of lighter color produced. This is the subject of the second claim in the patent. As no question arises in this case out of any alleged infringement of the claim relating to this portion of the alleged invention, no further reference will be made to it. After describing his apparatus, and the mode of using it for the introduction of superheated steam within the still, he continues: "I do not wish to confine my invention to its use in combination with the fire, because I can accomplish the same result by fire-heat alone applied to the still, or by any known mode of heating the still which will heat the oil sufficiently to distil over the portions of the oil necessary to be removed."

This, then, is his process: Taking the heavy hydrocarbon oils, the product of distillation, from which the lighter oils and mechanical impurities have been separated by distillation (and the paraffine, when necessary, also separated by the process of chilling and expressing), he distils from them the volatile matters from which the objectionable odors arise, and at the same time prevents new formations of such matters by keeping the temperature of the oil in the still below that at which these matters form by decomposition of the oil. After distilling off from twenty to thirty per cent., as the case may be, of volatile matters, the oil is left to cool in the still, and is then drawn off into tanks, for sale and use.

The product of Merrill's process is well and aptly described in the words of the specifica-

tion as a heavy hydrocarbon oil, "so completely divested of its fetid and pungent odors, having only a slight smell like a fatty oil, and so oily as to be greatly improved and increased in value as a lubricating-oil, or for any purposes for which it may be used, either alone or mixed with other oils."

Having determined the scope of Merrill's invention, we are better able to determine what is within the scope of his claim. The first claim in his patent is as follows: "I claim the above-described new manufacture of deodorized heavy hydrocarbon oils, suitable for lubricating and other purposes, free from the characteristic odors of hydrocarbon oils, and having a slight smell like fatty oil, from heavy hydrocarbon oils, by treating them substantially as hereinbefore described." If we were to omit from this claim the last seven words—"by treating them substantially as hereinbefore described"—there would be little doubt that the claim was broadly for a new article of manufacture, without limitation as to the mode by which it might be produced. It is claimed that the use of this last phrase in the claim, in connection with the words in the first part of the claim, render the claim, when properly construed, a claim for the described process alone. Substantially, the argument is, that "a manufacture" of oils, by "treating them substantially as hereinbefore described," is a claim for the described process rather than for the product.

A patentee who has invented a new process in the arts, whereby an article of manufacture is produced, new in kind and not before known, may separately claim and patent both the art and the manufacture. He cannot properly combine them in one claim. Differing in that respect from the English law, which allows a patent for "any manner of new manufactures" (a term which includes process and product), our law distinguishes between a patent for an art and a patent for a manufacture. "No doubt," says Mr. Justice Clifford, in Goodyear v. Providence Rubber Co. [Case No. 5,583], "can be entertained that a new product or manufacture, and a new process or method of producing the new article, are the proper subjects of separate and distinct claims in an original patent." Sometimes an old process produces a new product. If the thing produced be new, in and of itself, it is patentable as a new manufacture. If it be capable of being produced by various different processes, as for instance, by hand by the use of hand-tools, or by automatic or other machines, yet, when the product is independent of the process, the patent is infringed by the unlicensed manufacture of the new product by any mode of manufacture, the process of manufacture being wholly unimportant.

In other instances, however, not only does a new process produce a new product, but the process is inseparable from the product, and inheres in it after it is made, so that, upon inspection of the product, it is manifest that the process must have been employed. Whenever we see the new manufacture "vulcanite," we know this product was made by the process of subjecting a plastic compound of rubber and sulphur to heat, whereby the chemical change was effected which characterizes the vulcanite.

It is competent, therefore, for a patentee, under the appropriate and fitting conditions appertaining to his invention, to claim broadly the new product, however made, or to claim the new product when made by a described process. This, it appears to us, is what Merrill has claimed—a heavy hydrocarbon oil having the characteristics described in the patent, and produced by treating the oils in the manner described in the patent. He made his claim as if he believed that his oil could only be made by his process; and, if such was his belief, the evidence has not fully demonstrated to our satisfaction that he was not justified in that belief. The construction we have given to the claim is the only one which appears to us to be admissible, and the only one consistent with the language used by the patentee, and one which, most effectually, probably, secures to him the product of his invention. The thing patented and covered by the first claim in the patent, is, consequently, a heavy hydrocarbon oil, produced from heavy hydrocarbon oils, themselves the product of distillation, and having the offensive odors peculiar to petroleum distillates; such patented heavy hydrocarbon oil being so far deodorized as to be free from the characteristic odors of heavy hydrocarbon oils, and having a slight smell like fatty oil, suitable for lubricating and other purposes, and the product or result of the treatment described in the patent.

The defendants are charged with an infringement of this first claim in the letters patent No. 90,284, to Joshua Merrill, the complainant, dated May 18th, 1869. The evidence of infringement rests in the proof that the defendants have purchased, used, and sold in the market, quantities of heavy hydrocarbon oils, known as "Neutral Topaz Oils," being the product of a manufacture by Herbert W. C. Tweddle, of Pittsburg, according to the process described in his patent No. 99,975, dated February 15, 1870. This neutral topaz oil is abundantly proved to possess many characteristic properties in common with those peculiar to Merrill's oil, and which distinguished Merrill's oil from the lubricating paraffine-oils which had preceded it. The two oils have substantially the same density and odor, the same amount of lubricating quality, the same freedom from the offensive odors of petroleum distillates. In both, the boiling-point was from one hundred and fifty to two hundred degrees higher temperature than the boiling-point of the best of the other hydrocarbon heavy oils. Whatever presumption of fact might arise, in the absence of other proof to the contrary, that the processes must be substantially the same, because the results are so similar, we are not left in doubt, in this

case, as to the process of making the "Neutral Topaz Oil." It is clear that the process is essentially different from that described in Merrill's patent. The very essence of Merrill's invention was the elimination of offensive odors existing in distillates, the product of a destructive distillation. It was a deodorizing process, consisting in the removal, by distillation, of the light offensive oils produced in the oil by previous distillations, leaving a sweet residuum in the still. This product was a deodorized oil, an oil disinfected, an oil described by him as "completely divested of its fetid and pungent odors." Tweddle does not make his oil from a distillate made offensive by the presence of the products of distillation, but directly from crude petroleum. His process is not a deodorizing or disinfecting process to remove the odorous bodies that had been formed by or existed after distillation. It is designed to so conduct the distillation as to leave the distillate of crude petroleum free from those odorous bodies. Tweddle's has been well described as a process of prevention, while Merrill's is one of cure. In the two processes, Merrill's deodorized oil is a residuum left in the still; Tweddle's neutral topaz oil is a distillate which passes over and is condensed, and falls into the receiver. Tweddle's process is conducted in vacuo; Merrill's under atmospheric pressure. Other differences are apparent, upon examination of the different processes, as described in the respective patents, and as described by the expert witnesses. Sufficient has already been said to show that the differences in the two processes are so radical, that Tweddle's neutral topaz oil cannot, with justice, be claimed to be a deodorized heavy hydrocarbon oil manufactured from heavy hydrocarbon oils, by treating them substantially as described in Merrill's patent. Therefore the use and sale of it by the defendants was not an infringement of the first claim in the Merrill patent. Bill dismissed.

[NOTE. The case was taken on appeal, by the complainant, to the supreme court, where the judgment of the circuit court was affirmed; Mr. Justice Clifford dissenting. 94 U. S. 568.]

Case No. 9,473.

The MERRIMAC.

[1 Ben. 201.] [1]

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

SALVAGE—TROOPS TRANSPORTED—CONTRACT WITH GOVERNMENT—PASSENGERS.

1. Where a regiment of soldiers of the United States was being transported from New Orleans to New York upon a steamer, under a contract between the owners of the steamer and the government, and the vessel, having sprung a leak, was saved from sinking by the labor of the troops for four days and three nights in bailing the vessel, working under the command of the officers of the regiment, and continuing their labor after the vessel was brought so near shore that she might have been beached or the men landed in boats, and until, by the help of another steamer which came to her assistance, she was brought to the Mississippi bar and was thus saved from a total loss, *held*, that the relation of the troops to the ship was not that of passengers, and that they could recover salvage compensation for their services.

[Cited in White v. McDonough, Case No. 17,552.]

2. Even if they had been passengers belonging to the ship by virtue of a passenger contract, the court might well award them salvage by reason of the services performed by them after the vessel was in sight of the beach and they could have escaped from her.

[Cited in The F. I. Merryman, 27 Fed. 314.]

[This was a proceeding by Joseph Forbes against the Merrimac. It was pleaded by the defendants that the libelants should have made themselves parties to another suit pending in the Eastern district of Louisiana by Charles Morgan and others, claiming salvage against the Merrimac. The case came up upon exceptions to the article of the defendants' answer setting up this defence. The exception was allowed and leave given to reform answer. Case No. 4,927.]

This suit was brought to enforce a claim for salvage preferred by a large number of persons formerly comprising a colored regiment of the United States army. The facts were as follows: The steamer Merrimac left the port of New Orleans in the month of November, 1865, bound to this port, laden with cotton and troops. On the morning of Saturday, the 11th, she sprung a leak, which increased to such a degree as to compel her to put back to New Orleans, then some two hundred miles distant. The water soon choked the pumps, and the crew commenced to bail, notwithstanding which the leak gained rapidly and by two o'clock on Sunday morning had fully extinguished the fires, and the engine stopped. Up to this time the effort to keep the vessel afloat had been confined to bailing from the engine room, which had been done at first by the crew, who had been gradually relieved by the men of the regiment, whom the commanding officer had called up, until the labor had passed entirely into the hands of the soldiers. The water, however, continued to gain, and was some seven feet in the hold at this time. The master of the steamer, who appears to have been a competent man, and whose conduct does him credit, then informed the major commanding that the work of bailing must be made a regular thing by the regiment, whereupon the major issued orders to organize the regiment into two reliefs of five companies each, to work two hours on and two hours off. This was done, and in this manner, under the immediate direction of its officers and under military discipline, the bailing, by hand, by buckets and tubs from places in the engineers' room, and by barrels hoisted by a whip from two hatches, was continued by the regiment without intermission and with such success that the water was kept nearly at a stand-

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

still. The crew of the vessel were for the most part engaged in emptying the barrels and in the navigation of the vessel, she being then under sail, but poorly equipped for that purpose, and unable to hold her course upon a wind. On Sunday night a sail appeared in sight, when guns were fired and rockets sent up, in hopes to bring her to their assistance, but without avail. On Monday evening a light was made, which proved to be the Timbalier light, some forty-five miles west of the Mississippi bar. The weather was then fair, and the steamer came to anchor in ten fathoms of water, with the beach in plain sight. Soon after the lights of a vessel were seen and signals of distress were again made, which brought to their aid the steamer Morgan. From this steamer the true position of the Merrimac was learned and more buckets procured, and at the request of the master, the Morgan lay by her during the night, and next morning took her in tow, and towed her to the bar, on which she at once grounded at four p. m., Tuesday. Up to this hour the bailing had been continued by the men of the regiment, directed by its officers, without cessation, night or day. The labor had been severe and exhausting; some of the officers were without sleep for three nights; the water gave out, and was only supplied by a shower of rain which fell. No regular meals were served, and the men would drop asleep as soon as relieved, and were often with difficulty roused again by their officers, who went around for the purpose twenty minutes before each relief was to be put to work. When the vessel anchored off the Timbalier light her position was unknown to the master; but the beach was in plain sight, and while at anchor the water was smooth, so that the steamer could have been beached and the men could have been landed in the boats. No effort was made to abandon her, but, on the contrary, the major stationed guards at the boats to prevent any resort to them for that purpose by any one, and his men were kept bailing, the regiment working with the regularity of a machine; and, so far as the leak was concerned, effectually supplying the place of the engine which had been stopped by the water, only ceasing when the steamer reached a place of safety on the bar, within reach of the steam pumps, whence she was towed to her dock.

Emerson & Goodrich, W. R. Beebe, and E. C. Benedict, for libellants, cited the following authorities: 2 Pars. Mar. Law, 601, 602; Newman v. Walters, 3 Bos. & P. 612, and cases cited; The Great Eastern, 11 Law T. (N. S.) 516; The Joseph Harvey, 1 C. Rob. Adm. 307.

Spencer, Hoes & Metcalf and C. A. Rapallo, for claimants cited the following additional authorities: 2 Conk. Adm. pp. 345, 348; Abb. Shipp. (6th Am. Ed.) p. 669; The Neptune, 1 Hagg. Adm. 236; The Branston, 2 Hagg. Adm. 3; The Two Friends, 1 C. Rob. Adm. 285; The Salacia, 2 Hagg. Adm. 263; The Hope, 3 Hagg. Adm. 423; Bond v. The Cora [Case No. 1,620]; The Vrede, 1 Lush. 322.

BENEDICT, District Judge. It cannot be disputed that this valuable steamer, with her cargo, was in a position of very great peril, from which it was rescued by severe and exhausting labor performed by the libellants. But while the service is admitted, it is contended that the case is not one where salvage can be awarded. The main objection of many which have been ably presented by the claimants, is that the persons who performed the service in question were passengers, and that the service consisted of ordinary physical labor, within the line of the duty, which, as passengers, they owed to the ship. To this objection it is answered by the other side that the circumstances attending the rendition of the service were extraordinary, and the labor performed was not such as is included in a passenger's duty, and, further, that the libellants were not passengers within the meaning of the rules regarding salvage. The fact that a large steamer leaking as this one was, with from seven to ten feet of water in her hold, was kept afloat for the space of four days and three nights by the process of hand bailing, is undoubtedly an extraordinary occurrence, made possible in this case only by the circumstance that this large number of men were kept constantly at work and with great efficiency by the powerful aid of military discipline, judiciously but firmly applied by the officers of the regiment; but it may admit of doubt whether the circumstances were such as to change the character of the service and take it out of the category of ordinary labor, which it is said may be required of a passenger belonging to a ship which is in danger.

The determination of this question is unnecessary in the present case, inasmuch as I am of the opinion that the libellants did not sustain that relation to this steamer which is designated by the word "passenger" in the rules applied to salvage demands. The reason of the rule in question indicates the class of persons to which it relates. Passengers are not allowed salvage reward for ordinary labor performed by them in saving their ship, because such labor is made the duty of the passenger by the pre-existing contract under which he connected himself with the ship. 3 Kent, Comm. 314. Manifestly such a duty, the liability to which and the extent of which must vary according to the voyage, the character and outfit of the vessel, the competency of her master, and many other like circumstances peculiar to each case, can only arise out of a voluntary agreement. The duty rests in contract. It is a "covenanted allegiance:" the pre-existing covenant spoken of by Lord Stowell. The Neptune, 1 Hagg. Adm. 236. This being so, I am unable to see how the libellants are to be considered

as within the rule. They made no contract with the ship, had no power of selection of the ship, or the voyage even. They paid no passage money and incurred no liability for any. They acquired no right of action against the ship in case of failure to transport them. They were not fed or furnished by the ship, and had no interest whatever in being transported in her, but were men simply compelled by the orders of their superior officers to go on board this vessel at a certain time, to leave again whenever ordered by their officers. The government, it is true, had contracted with the ship for the transportation of this body of troops from New Orleans to New York, and to pay for their transportation, but privity of contract between the men and the ship, which would make ordinary labor for the ship in distress a duty, is wanting. That the position of these men on board was not considered by the master to be that of ordinary passengers is apparent from the fact in evidence that the master issued no orders to them, and did not undertake to direct their labors, but applied to the commanding officer of the regiment to issue his orders and to keep them to the work under his direction. This view is also confirmed by the circumstance which, although not recollected by the master, is proved by Major Bumstead, the commanding officer, whose appearance and mode of giving his evidence add weight to his statement, that when the master first spoke to him of the likelihood of being compelled to call upon him for men to assist in bailing, he said that the men, of course, should be paid. But it is said that the men were not the crew or the cargo, and, therefore, must have been passengers. This does not follow. A man may personally be on board a ship and be neither master, crew, nor cargo, and yet not sustain the legal relation of passenger, as was held by Dr. Lushington in the case of The Hanna, 15 Law T. (N. S.) p. 334. My conclusion, therefore, is that the service performed by the libellants cannot be held to have been performed by them in the line of any duty as being passengers. Having thus disposed of the main question, it is only necessary to say that the other objections raised by the claimants, have been heretofore passed on by the court. The fact that they were soldiers and in peculiar relations to the government, is no defence, as many cases in the books will show. That they saved their own lives with the ship does not bar them from reward, nor is it good ground of objection that they did only what was their bounden duty as men. It is, indeed, the bounden duty of every man to labor when he can to save the lives and property of his fellow man. And it is to encourage the performance of this duty that the maritime law, out of considerations of public policy, awards compensation for its performance. Performance of a duty imposed by contract is not rewarded, but services rendered in pursuance of the dictates of humanity, and prompted by a desire to perform the obligations which attach to every man, these are the very services which, when they result in the saving of property, are rewarded by a court of admiralty. Again, it is said, that the services involved no risk, enterprise, or disinterestedness, and that these are necessary characteristics of every salvage service. The rule is stated too broadly. The Clifton, 3 Hagg. Adm. 121; The Enterprise, Ship. Gaz. 1854; The Black, Ship. Gaz. 1854; The Purissima Concepcion, 3 W. Rob. Adm. 184. And besides, this service was not wholly wanting in these characteristics. The labor here performed might well involve risk to health, and certainly the mode of its performance under the circumstances, displayed much patience, willingness, and subordination.

The case presents another feature which is entitled to notice here. It appears in evidence here, that when the steamer reached the place where she anchored, the beach was in plain sight. The weather was then fine, and the sea soon became smooth. The steamer could then have been beached, or the troops landed in the boats; instead of which, guards were stationed at the boats by the major commanding, to prevent any one from attempting to resort to them, and the men were kept at the exhausting labor all that night and during the next day, and until the steamer was safely grounded on the Mississippi bar. This labor, performed after the steamer came to anchor, was for the sole purpose of saving the ship and cargo. Had the bailing been stopped, the steamer would have sunk and been lost, although the lives of those on board would have been saved. And this labor was willingly performed by men who were already worn with labor, want of sleep, and proper food, and who had the physical power to control the ship as well as their own actions. This feature of the case might justify an award to the libellants, even if they had been passengers belonging to the ship by virtue of a passenger contract; but I do not rest my decision upon this ground, but upon the ground that the libellants were not passengers, within the meaning of the rule which denies compensation to passengers, and are consequently entitled to a proper reward for the labor they performed, and I deem the considerations of public policy, upon which the whole doctrine of salvage rests, to be fully applicable to the present case, and to require that the good order, patience, and willingness with which this large body of men—soldiers as they were, with arms and the power to provide as they pleased for their own safety—labored constantly to keep the ship afloat, should be recognized in a court of admiralty. There remains to determine the amount proper to be awarded. Upon this question, as the case is peculiar, not only in some of the circumstances attending the service, but in the number of persons claiming to be rewarded, and as

no argument upon this point is submitted in behalf of the claimants, I desire before determining it to hear the views of counsel.

On hearing counsel, the court fixed the amount of salvage at two months' pay for each officer and man, according to the rate received by them in the military service. There were three hundred and fifty-one persons who appeared as libellants in the suit. The vessel was valued at two hundred and fifty thousand dollars, and the amount of salvage decreed was twenty thousand five hundred and thirteen dollars. No appeal was taken from the decree.

Case No. 9,474.

The MERRIMAC.

[1 Ben. 490.] [1]

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

SEAMEN'S WAGES—FORFEITURE—DESERTION—FORM OF OATH—CHINAMAN.

1. Where a sailor deserted from a vessel, before the voyage for which he was shipped was completed, and never afterwards made any attempt to return to his duty: *Held*, that he had forfeited his wages then due, irrespective of the statute of July 20, 1790 [1 Stat. 131].

2. The libellant, a Chinaman, was offered as a witness in his own behalf, and was sworn in the usual way. Objection was made, on behalf of the claimants, that the oath thus taken was not binding upon him. The court directed the claimants to examine him on that point. He stated that he did not know the name of the book that he was sworn on, but that, if he should say anything that was not true, the court would punish him, and after he was dead he should "go down there," making an emphatic gesture downward with his hand: *Held*, that a witness must be sworn in such a way as was binding on his conscience.

3. The libellant might be examined on the oath which he had taken.

This was a libel by William A. Corning against the bark Merrimac, and David Marshall her master, to recover wages, and the value of clothes alleged by the libellant to have been left on board of the vessel, to the amount of $404. The defence set up was desertion. The libellant testified, that he was sick in Havana, and left the vessel, taking his clothes with him, and that he went to the hospital, and, after being there some days, was put again on board of the vessel, and, after being on board of her a day or two, again left her, and did not return to her. He alleged ill treatment on board as the cause of this second leaving; but as to this his evidence was contradicted. He afterwards made his way to New York, and, finding the bark there, filed his libel. On the trial of the cause, the libellant offered himself as a witness, and was sworn in the usual way. The claimant objected to this, on the ground that the libellant was a Chinaman, and that the ordinary oath upon the Bible was not binding upon him. The court directed the claimants to examine him on this point. The libellant, on examination, said, that he was a Chinaman, but had left China when he was fifteen years old; that he did not know the name of the book upon which he was sworn; that if he should tell anything that was not true, the court would punish him; and, on being asked if anything would happen to him after he was dead, if he did not tell the truth, he answered that he would "go down there," making an emphatic gesture downward with his hand. The court ruled that a witness must be sworn in such a way as was binding upon his conscience, and that the libellant, on this testimony of his, might be examined. The libellant was then examined. The claimants put in evidence a deposition which he had given de bene esse, contradicting in some respects the evidence which he had given on the stand.

A. Nash, for libellant.
Benedict & Benedict, for claimants.

BLATCHFORD, District Judge. This is a libel by a seaman to recover his wages and the value of certain clothing and other personal property. The libellant shipped at Boston, as cook and steward, on the 3d of January, 1866, at $35 a month, for a voyage from Boston to Havana, and thence where the master might direct, and finally to a port of discharge in the United States, the voyage not to exceed six calendar months. He signed the proper shipping articles, containing the above particulars, at Boston. He joined the vessel on the day he shipped. She left Boston January 12th, and arrived at Havana February 2d, and left Havana again on the 1st of March. The libellant went to Havana in the vessel, discharging his duties, but he did not leave Havana in the vessel. The defence set up in the answer is, that the libellant deserted from the vessel at Havana, and thereby forfeited all his wages. This defence is, I think, proved. The clear weight of the evidence is, that the libellant left the vessel and her service at Havana on the 26th of February, not only without leave and against his duty, but with an intent not again to return to his duty. Cloutman v. Tunison [Case No. 2,907]. He never afterwards made any attempt to return to his duty. I place my decision on this ground, irrespective of the statutory forfeiture of wages insisted on under the fifth section of the act of July 20, 1790, in connection with the entries in the log book. The libellant, in fact, deserted twice; once on the 11th of February, and once on the 26th. But one desertion, the second one, is set up in the answer, and, whatever circumstances attended the first desertion, as involving the question whether or not the illness of the libellant furnished a sufficient excuse for his leaving the vessel on the first occasion, his second leaving was a plain desertion, unrelieved by any mitigating circumstances. It was not induced by any ill treatment on the part of the master and officers. The evidence of the libellant himself is whol-

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

ly unreliable. There are so many material contradictions between his testimony given orally at the trial, and his deposition taken de bene esse before the trial, as to show that he is entirely unworthy of credit.

As to the clothing and other articles which the libellant left on board of the vessel when he deserted, there is nothing shown to charge the vessel with liability for them, and there is no sufficient evidence that the master ever had any of them.

The libel must be dismissed.

Case No. 9,475.

The MERRIMAC.

[Blatchf. Pr. Cas. 563.] [1]

District Court, S. D. New York. Oct., 1863.

PRIZE—VIOLATION OF BLOCKADE—ENEMY PROPERTY.

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

In admiralty.

BETTS, District Judge. This vessel and cargo were captured, July 24, 1863, at sea, on the Atlantic Ocean, in latitude 33° 59′ 30″ north, and longtitude 76° 55′ west off Wilmington North Carolina, by the United States gunboat Iroquois, and were sent into this port for adjudication. They were libelled in this court, as prize, under such arrest, July 28th, thereafter, and the warrant and monition on the process were duly served on the vessel and cargo on the same day. No person appearing thereupon, due proclamation was made in open court, and a decree of default was rendered against the prize property, and all persons interested therein. The papers of the vessel and the proof taken in preparatorio were submitted to the court, and judgment and condemnation against the prize was prayed by the United States attorney. A register of the vessel was recorded, in the name of the Confederate States, at the Wilmington custom-house, in North Carolina, to Richard Bradley, of that place, as owner, July 21, 1863. A shipping agreement with the master and crew, signed, without date, a manifest, a clearance of the vessel and cargo from Wilmington, North Carolina, to St. George's, Bermuda, and several bills of lading of the same direction, signed in July, 1863, were produced with the papers from the vessel. The cargo was cotton, spirits of turpentine, and tobacco.

This, upon the vouchers in writing, is palpably a case of the seizure of enemy property, in flagrante delicto of traffic, in an enemy vessel, at sea. No citation of legal authority is requisite to show its confiscability. The deposition in preparatorio taken from the master of the vessel is in full harmony with the paper documents. He swears that he is a resident of North Carolina, and owes allegiance to that state, and not to the United States; that the vessel was captured sailing under the Confederate flag; that she was built in England, and was owned and sailed by a stock company in Wilmington; that he knew that the port of Wilmington was under blockade before he sailed from it, and saw the blockade squadron lying outside; that the cargo, he supposes, was the growth and manufacture of the Southern states; and that there was a consignee in Bermuda for the vessel and cargo. No comments need be added to this fullness of inculpatory evidence.

A decree is rendered condemning the vessel and cargo to forfeiture.

[The merchant steamer Eagle rendered valuable assistance in delaying and capturing the Merrimac. The master of the Eagle interposed a claim on her behalf that she should be entitled to share as one of the captors. It was decided that no such right existed. Case No. 9,476. The case was again heard upon the commissions and allowances claimed by the prize commissioners. Id. 9,477.]

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

Case No. 9,476.

The MERRIMAC.

[Blatchf. Pr. Cas. 584; [1] 6 Leg. & Ins. Rep. 59.]

District Court, S. D. New York. Jan., 1864.

PRIZE—ARMED VESSEL ASSISTING—TO WHOM PRIZE BELONGS—DISTRIBUTION.

1. The proceeds of property captured as prize of war belong exclusively to the government, and can be distributed or allotted only according to direct and positive authority of law.

2. Under the acts of March 25, 1862, and July 17, 1862 (12 Stat. 375, § 4, and Id. 607, § 6), an armed merchant vessel, not in the service of, and having no commission from, the United States, although she is present at the capture of a prize and co-operates therein, is not entitled to share in the proceeds.

In admiralty.

BETTS, District Judge. The Merrimac was captured at sea by the United States vessel of war Iroquois, and was condemned in this court as lawful prize. [Case No. 9,475.] The merchant steamer Eagle interfered actively, and probably serviceably, in intercepting and delaying the prize in her endeavor to evade a blockade port of the enemy, and escape from the Iroquois while in chase of her. On the reference to the prize commissioners, under the decree of condemnation, to report the proper distribution of the prize proceeds among the capturing vessels, the master of the steamer Eagle interposed a claim on her behalf that she should be decreed entitled to share, as one of the captors, in that distribution, but stated that his ship had no commission from the government. That application was opposed on the part of the Iroquois, on the ground that the Iroquois was the only .public ship of the United States present or within signal distance at the time

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

of the capture, and the prize commissioners so reported the fact to be; and furthermore reported, that the capture was made by the Iroquois, and that the armed merchant steamer Eagle was present at the capture, and co-operated therein.

Under the laws of the United States, the proceeds of property captured as prize of war belong exclusively to the government, and can be distributed or allotted only according to direct and positive authority of law. Act March 25, 1862 (12 Stat. 375, § 4); Act July 17, 1862 (12 Stat. 607, § 6). The statute law names the public ships and armed vessels in the service of the United States as exclusively entitled to share in the distribution of prize money. The power of the courts under our laws is, accordingly, limited to that special method of allowance. It is the fundamental doctrine of all governments that the title to prize property vests in the nation, although the modes of exercising or enjoying that dominion may be widely various. The Elsebe, 5 C. Rob. Adm. 173.

The rule as to sharing in prize captures is of broader range under the English law than under the American. The prize is there regarded as belonging, in a larger sense, to the admiralty or to the crown, as representing the right of the admiralty, and the distribution of its proceeds, as subject to the instructions of the admiralty or the crown, and as not depending entirely on statutory enactments. The numerous cases in the English courts, cited and commented on by the counsel for the Eagle, on the hearing, are all within that general principle. Accordingly, whatever may be the intrinsic importance of the service rendered by the Eagle in this capture, or the gallantry or hazard accompanying its performance, the court is not empowered to consider any other question than the legal right of the vessel to demand a compensation to herself out of the prize fund.

It is clear that right is not given by any statute or other authoritative public grant. It must, therefore, be denied by the court.

Decree accordingly.

[The case came again before the court on the question of costs taxable to prize commissioners. Case No. 9,477.]

Case No. 9,477.

The MERRIMAC.

[Blatchf. Pr. Cas. 585.] [1]

District Court, S. D. New York. Jan., 1864.

PRIZE—COMMISSIONERS — COSTS—COMPENSATION—CUSTODY FEES.

1. The question of the costs taxable to the prize commissioners considered.

2. The act of March 25, 1862 (12 Stat. 374), discussed as to the compensation provided by it for the prize commissioners.

3. The tariff of allowances to the prize commissioners, prescribed by the court under that act, explained.

4. The act of July 17, 1862 (12 Stat. 608), restricting the compensation to each prize commissioner to $3,000 per year, discussed.

5. The difficulty of carrying out the statutory provisions as to the compensation of the prize commissioners set forth.

6. A prize commissioner cannot have taxed to him custody fees in respect of a vessel.

7. Custody fees to a prize commissioner, in respect of a cargo, are a personal allowance to him for an individual trust executed by him. No third person is authorized to assume such custody, and a charge by a prize commissioner of such fees, where his possession of the cargo was merely constructive, and not personal, will not be allowed.

8. The court refused to allow to a prize commissioner a charge of one per cent. on the proceeds of a vessel and cargo, as custody fees, for holding them in possession less than thirty days, and until they came into the custody of the marshal, on a warrant of arrest.

BETTS, District Judge. A list of items for allowance or taxation in this cause was submitted to the court by one of the prize commissioners in November last. It was authenticated by the deposition of the commissioner, in the usual form required for the allowance of the particulars charged. The bill amounts to $2,184.81, and is thus verified: "Henry H. Elliott, being duly sworn, says that the foregoing bill is true and correct according to the best of his knowledge, information, and belief; that the charge of $2,184.81, above mentioned, is not more than a just and suitable compensation for his services in this cause, as he verily believes. Sworn November 30, 1863." To the bill was also appended a consent in writing, signed by the United States district attorney, and also by Messrs. Sandford and Woodruff, Messrs. Owen, Gray & Owen, and Mr. Donohue, proctors, representing various captors in the suit, that the bill be taxed at that sum. But there is no evidence offered proving that special services of any description were rendered, or liabilities incurred, by the commissioner, in consequence of the custody of the cargo. One item charged in the bill was of this tenor, the whole being in print, except the sums and the times of the services, which were filled in in writing: "Custody fees for taking and holding the prize property until it passed into the charge of the marshall, being less than thirty days, the same fees as are allowed by law to him for custody fees, viz., one per cent. on $202,741.16; the gross proceeds thereof, $2,027.41." The court returned the bill to the commissioner for further explication of the grounds upon which the item was charged, particularly inquiring what period of custody or actual keeping of the cargo was covered by it. The evidence presented in support of the item in that respect consists of the affidavit of John Perry, an employé of the prize commissioners. He testifies

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

"that, in the employment of the prize commissioners, he went on board the above prize vessel when she was brought into this port, with a steamboat chartered for that purpose; that the prize was lying in Buttermilk Channel; that he found her cargo in a very bad condition, and very much scattered about over the vessel; that he took charge of the cargo, and took the vessel into the Atlantic docks, under the orders of the prize commissioner; that, on reaching the docks, she was boarded by the commissioner, and her hatches and cargo duly secured and sealed; that he remained on board and kept the vessel and cargo in custody, on behalf of the prize commissioners, for two days steadily, and thereafter was on board from time to time; that night watchmen were placed and retained on board by the commissioners during his absence, until the vessel was duly delivered into the custody of the marshal; that, under the orders of the commissioners, he took an accurate inventory, at the time, of all the loose and exposed cargo, and reported it to them; that, when he took charge of the cargo, it was exposed to pilfering and loss; and that the charge and custody of the cargo, by the commissioners, was necessary for its protection and safety." In the commissioner's bill of costs no special charges are entered for the services and disbursements spoken of by this witness, but a general charge, in print, of $25, is made in the bill, independent of the item of $2,027.41 particularly in question on this taxation, in the following terms: "Proceeding to the steamer, and taking possession of the captured property; taking information in reference to the situation and condition thereof, and whether bulk had been broken, &c.; placing the seals of the commissioners upon the hatches, &c.; examining into the safety of the property, and attending to the proper care and protection thereof, &c." So, also, an antecedent item in the bill provides compensation to the commissioners for the receiving, receipting, &c., of the prize effects and papers by them from the prize-master, $5.50.

The account of proceedings in the initiation of the suit in the district attorney's office represents that the prize was brought into this port July 28, 1863, and states that the libel was filed, and process thereon issued, on the same day; and the account from the marshal's office is, that the process was served the same day upon the vessel and cargo. This discrepancy, no doubt, arises from inaccuracy of memory in the deponent Perry, who states his personal action and that of the commissioners regarding the prize, prior to her arrest by the marshal, from his recollection at the time his affidavit was attested to, December 24, 1863, which was five months after the business in which he took part was transacted, and who cannot be expected to be as exact and reliable as to time as official entries or files. The court must, accordingly, regard the claim for compensation charged in the main item in question at $2,027.41 as resting virtually upon services constructive in character, and not flowing from official acts performed by the commissioner personally, or any responsibilities imposed upon him in the particular which is made the basis of this claim. The verification attested to by the commissioner, November 30, 1863, comprehends the whole bill. He says "that the foregoing bill is true and correct, according to the best of his knowledge, information and belief; that the charge of $2,184.81, above mentioned, is not more than a just and suitable compensation for his services in the cause, as he verily believes." The judgment of the commissioner may be proper, that, in the aggregate, his compensation for his entire services in the cause should be rated and allowed at $2,184.81. But that consideration cannot be regarded in determining the value of the particular items set forth as subjects for allowance. Each of them must be passed upon on the strength of its individual legality or intrinsic worth.

The consent of the United States attorney, and of the proctors for the three other war vessels co-operating in the capture of this prize, to the allowance of the above bill as stated by the commissioner, cannot justify the court in directing an amount to be paid to the commissioner out of the prize proceeds under the control of the court, which is not within the provisions or contemplation of the law which places that fund at the disposal of the court. This court has never considered that it possessed a rightful authority to devote to the officers of the court moneys arising out of the captures in prize proceedings, upon any other principle than those which govern the judiciary in the exercise of fixed directions of law, and with as careful an adherence to its spirit as if literally declared by congress in a code of specific fees.

Limiting the operation of these general remarks at present to the case of compensation of prize commissioners, the following positions of law are deemed to exist in the respect to the reward they are entitled to obtain for their services under the adjustment and determination of the court: The act of congress of March 25, 1862, is the first specific regulation made by positive law for the services and compensation of prize commissioners as public officers. The first section of the act designates various duties to be performed by them; and the third section appoints the method of their compensation. The statute is obscure and indefinite in its main features, and very difficult of satisfactory interpretation and execution. It points out no method by which the courts are to ascertain the value of the services rendered by these officers, none of which are rendered in the face of the court, or within its personal knowledge, or

are of a character likely to fall within its familiarity, nor does the law indicate what limitation, if any, shall be applied to the amounts to be awarded. The duties prescribed are partly legal, partly clerical, partly mercantile, and in part miscellaneous, and appertaining to the skill and experience of persons conversant with mercantile and general business transactions, and not supposable to be familiar to the individual experience of members of courts of justice, or to their professional or official pursuits or habits. The statute supplies no assistance to the court by a jury, assessors, referees, or other agencies, through which a reasonable approximation to the measure of "suitable and just compensation" called for may be attained. No existing course of public employment is known which can be recurred to for a precedent or ground of proceeding to guide the action of the court with any appreciable certainty, particularly none which gives countenance to the awarding of a compensation to possibly a mere day-laborer on a scale adequate to recompense a high trust assumed to have been performed by a bailee acting in an official capacity.

Immediately on the passage of the act of March 25, 1862, the court applied itself, with the active aid of one of the prize commissioners, a lawyer of long experience and high distinction in the profession, to searching for precedents in books of practice, and to gathering the usages of the government in the allowances made under its authority to its employés for services of a similar character and nature, with a view to frame a scheme of compensation which might comport with and carry into effect the enactments of the law. The main purpose was to adopt a tariff of allowances for the particular services imposed upon the commissioners, which should be commensurate with what was anticipated would be their probable character and value, and should keep in view a restriction of the allowance, in the aggregate, to five thousand or six thousand dollars per annum. Congress had evinced, by long-continued legislation, its purpose to restrict the compensation of its officers discharging the highest civil and judicial functions within this district to rewards not exceeding in gross the sum of $6,000 yearly; such as the justices of the supreme and circuit courts, the subtreasurer, the collector, the postmaster, the naval officer, the United States attorney, the marshal, &c.; whilst other officers, charged with multifarious and responsible trusts, and frequently guaranteed by heavy pecuniary sureties, were remunerated for services, not dissimilar in character from those expected from the prize commissioners, with less than $4,000 per year; such as the judge of the district court, the clerks of the circuit and district courts, and all the subaltern officers of every other department of public service, military, naval, and financial; the tenure of most of such offices being, like that of the prize commissioners, at the discretion of the appointing power. In preparing the scheme of costs or compensation for the prize commissioners, the court was anxious to designate, with positiveness, the specific amount of allowance for each item of service, where it could be determined, from statutory appointments or well established usages, for like services in other situations under the government; and where such method could not be pursued, then to have the allowances claimed left to the judgment of the court upon specific evidence as to the quantum meruit, submitted for its guidance on taxation. The question arising on the present taxation is of the latter order. It was yet to be ascertained, from actual practice, whether the duties of the prize commissioners would be adequately paid by moderate additions to the stated fees appointed in the schedule arranged by the court, or whether, from year to year, the discretionary allowances reserved for special items must be varied so as to secure about the proposed compensation of five to six thousand dollars yearly, above necessary disbursements. The opportunity to meet that result substantially was expected to be obtained principally by the adoption of the provisions for unfilled blanks, one of which is now the subject of consideration. A provision of that kind had existed in the stated admiralty rules of this court since 1828. It was derived from a prior authority given by statute (1 Stat. 277, § 4), and was continued as a usage of the court of admiralty, in respect to the compensation of the marshal for the custody of seized goods, after the enactment ceased to be in force as to vessels and goods (Dist. Ct. Rules 49–51). All these allowances are subject to discretionary alteration by the court. Rule 52. But, independent of that qualification to the claim to this enhanced mode and rate of compensation, in prize proceedings, under the admiralty rules, the discretion which the court might exercise under section 3 of the act of March 25, 1862, is regarded as inhibited or limited by the act of July 17, 1862 (12 Stat. 608), which prohibits the annual salaries of prize commissioners being so increased, in any way, as to exceed, in the aggregate, the sum of three thousand dollars. Since the act of July, 1862, no amount of merit, or even losses, proved to have attended the performance of their duties by the prize commissioners, can authorize the court to enlarge their yearly emoluments above $3,000. The court is clothed with no power, by either act, to adjust that salary or maximum allowance, pro rata, upon prizes placed in the keeping of the commissioners during any other period than the particular year in which the services charged for were performed; and that, frequently, cannot be practically fulfilled by the court. Instances now exist in which cases of the condemnation of prizes in this court in the early stages of the war stand at this time undecided by the courts of appeal, and no execution can go from this court to

make out of other prizes the sum adjudged to the commissioners for their services in those cases. Nor, however ample to that end the proceeds of prize property captured and condemned within a year may be, in their general amount, can execution out of this court touch any portion of the fund, except that made out of the individual vessel in respect to which the services represented by the execution were rendered. So long as the captured prize proceeds exist, they must be made to contribute their proportion to this salary lien; and the demand cannot be lawfully attached to other prize proceeds held by the court. This state of facts leaves the court no means of fulfilling the direction of the two acts of March and July, 1862, but by an effort to compute conjecturally whether the current services of a commissioner, rated according to the tariff first adopted by the court, will amount to the sum of $3,000 for a particular year, which can alone be paid to him for his services during that year.

The court has not officially before it a return, in numbers, of the prizes seized and prosecuted to conviction, from July 17, 1862, to the close of the year directly succeeding, but a note taken from entries in one of the offices of the court shows that eighty-four arrests and condemnations were prosecuted during that period in this court. Evidence can be easily furnished from the papers in the respective causes, showing the exact amount of costs estimated in those suits; but it is assumed that the sum taxable against these eighty-four cases will average all of $100 in each case for the services of the prize commissioners, deeming both commissioners to be actually engaged in performing their duties. That will give $8,400 per year, which will be an excess of $2,400 above the legal compensation payable to the two, subject, of course, as is specified in the taxation, to the limitations prescribed by statute in the payment thereof. In the present case, however, it is to be observed, that only one of the commissioners presents, as claimant, a bill of services to be taxed. He cannot ask to have adjudged to him over $3,000 for a year. That is to be provided for out of pro rata assessments upon each of the 84 cases; and, in strictness, if the court could have made known to it the services performed in all of those suits, each case would be assessed, upon like items, exactly the same charges, up to a complement, from the whole, to the amount of $3,000, and nothing over that sum. Then, in this case of the Merrimac, the entire taxation to be levied for this bill would not, in all reasonable probability, surpass fifty or one hundred dollars. The terms of the two acts of March and July, 1862, do not supply the court the means to effectuate that intent of the law, by bringing together the proceeds of captures for any particular year and allotting them to discharge the assessment. That can be done only by the navy department. But, by the statute, each vessel is exempt from liability for this class of services, except for the year in which the services were actually performed in relation to her. It is to be further noted that the prize commissioners are not created accounting officers to the treasury for surpluses of moneys paid over to them under orders of the court; and that the government possesses no remedy against them for excesses paid to them, if such exist, other than through personal actions therefor, as multifarious as the prizes from which the surplus payments are derived. The court, in administering these complex enactments, in the spirit of justice and equity, will, accordingly, be actuated by wo prominent considerations: First, to so adjust the assessments imposed upon the prizes for the payment of the prize commissioners as to fairly cover the salaries of the persons performing the duties of those offices whenever the amount subject to taxation is reasonably sufficient to that end; and, second, to avoid, with equal care, withdrawing from the beneficiaries to whom prize proceeds are devoted by law, after payment of the legal costs, moneys not lawfully payable to any officers of court. The court cannot, in principle, regard the government as any more empowered to divert such surpluses from their lawful destination to other uses, than the court or its officers are to misappriate the moneys under their special charge.

In review of all the legal and equitable considerations applicable to the particular item of taxation in question,—the charge of one per cent. commission on $202,741.16, the aggregate amount of the proceeds of the prize vessel and cargo in this suit, resulting in a charge of fees or compensation, as above stated, of $2,027.41,—I observe: 1. The value of the steamer, $65,000, does not fall within the contemplation of the admiralty rule respecting "custody fees." That rule relates to goods or personal effects solely; and the value of the ship must necessarily be excluded from the charge. With regard to the cargo, it is not proved that extra labor or expense was imposed upon the officer by its custody, as it was all retained on board the vessel. 2. Custody fees on the cargo, ($137,741.16) are, in their nature, a personal allowance to the bailee, for an individual trust executed by him. The reading of the rule denotes that it contemplates the fulfilment of a special confidence imposed by the court upon an official person, intermediate the interposition of another official, the marshal, by a superseding authority. No third person is authorized to assume such custody. He must be the official, individually. The judge of the district receives the prize from the captors, under the directions of the prize law, and he only can designate the person who is to take into manual possession prior to its seizure by due process of law. The prize master has no authority to put the prize into the custody of a servant of a commissioner. His delivery must be an actual

one to the lawful substitute of the judge. The custody of the goods or cargo must pass in reality from the prize master to the commissioner, to constitute a legal delivery to the latter, and must be receipted for by him. The rule gives no compensation to the commissioner for the acts and doings of his servants or employés, independent of his special directions and supervision, so as to constitute the act personal by the officer. It is obvious that the rule contemplates a possession of the seized property purely official, and of the shortest duration practicable, until it is put under the guardianship of legal process. The allowances named are subject to variation, for cause adjudged by the court, in order to keep the compensation in reasonable correspondence with the labor and responsibility incurred.

The proofs in this case show that the commissioner had a mere constructive possession of the cargo, no further, and for no other purpose, than that which is provided for under the standing charge allowed for "taking possession of it, with the papers, and placing his seal upon the hatches," &c. The affidavit given by Perry, the employé of the commissioner, in the first instance, proved no personal services performed by the commissioner in respect to the custody of the cargo. A supplementary deposition made by him on the 7th of January, 1864, and a deposition made by Prize Commissioner Eagle, on the 8th of January, evidently under a misapprehension of dates, state that the commissioners had possession of this cargo, and performed acts for its safekeeping, previous to its being arrested by the marshal. This statement, however, if accepted as further proof, does not show that this was extra duty, entitled to a special compensation, under the principles adopted by the court in the above decisions. But Commissioner Eagle and Mr. Perry are, both of them, in error in supposing that they were in possession of the prize on the first of July. It appears, from the records and proofs in the cause, that the vessel was captured off Wilmington, North Carolina, July 24, and was brought into this port July 28, and was arrested and taken into actual custody, upon the process of attachment, on the same day, by the marshal.

I cannot, upon the evidence before me, regard the commissioner as entitled to have taxed any part of the item charged for "custody fees," amounting to $2,027.41. If application is made to permit further proofs to be given formally by the commissioner in support of that item, such privilege will be allowed, under a like power to any other party interested in the funds, to offer counteracting proofs; and evidence will also be allowed to be given by any party in interest, tending to determine whether it be necessary and lawful, for the satisfaction of salary due the commissioner for the year following the custody of this prize, that any portion of the item in question, or of other surplus commissions remaining in court, be appropriated to satisfy such arrearage. In case such power and necessity exist, it, doubtless, is within the competency of the court to rate such a proportionate allowance toward such deficiency as may, under all the considerations, be found to be reasonably proper for that purpose.

In arranging the tariff of charges, the court took into consideration the probability that the prosecutions, on the success of which the compensation of these officers is dependent, would occasionally be defeated, or fail to yield proceeds adequate to their satisfaction; and, accordingly, the estimates were framed with a view to meet such deficiencies. Moreover, the bills up to July 17, 1862, were allowed in contemplation of the payment of $6,000 per annum to each commissioner. Since the passage of the act of limitation of that date, the prospective assessment on prize proceeds should be diminished accordingly whenever the court is satisfied that the confiscation may be carried into effect, so as to secure their compensation to the commissioners upon a lesser rate of allowance out of the fund.

[For other cases concerning the Merrimac, see Cases Nos. 9,475 and 9,476.]

Case No. 9,478.

The MERRIMAC.

[2 Sawy. 586; 6 Chi. Leg. News, 248.] [1]

District Court, D. Oregon. March 31, 1874.

TOWAGE—CUSTOM—TOW-LINE—AT WHOSE RISK—NEGLIGENCE—DUTIES—COLLISION BETWEEN TUG AND TOW.

1. H. agreed with W. to tow his scow from Astoria to Cape Disappointment for twenty dollars, without mentioning which should furnish the tow-line: *Held*, that in the absence of any usage or understanding to the contrary, the tug was bound to furnish the tow-line as a part of the necessary means to perform the towage, as undertaken.

2. Where evidence was offered by H. to prove a custom to the effect that the tow was bound to furnish the tow-line in such cases: *Held*, that it was not sufficient, and that the master of the tow could not be affected by it, if established, unless knowledge of it was brought home to him.

3. Where a man on the tow furnished a line to the tug at the request of the master of the latter, but stated at the time that he did not think it sufficient to tow with: Quere, should the line be considered as furnished by the tow, and at her risk, or otherwise.

4. The contract to tow the scow and her cargo from Astoria to the cape was one of the hire of the carriage or transportation of the same for a compensation, and was, therefore, a bailment of the kind denominated "Locatio operis mercium vehendarum," in which the master of the tug was bailee, and responsible for ordinary skill and diligence.

[Cited in Ye Seng Co. v. Corbitt, 9 Fed. 428.]

5. The tug M. left Astoria with the scow J. F. in tow, two hundred feet astern, on the last of the ebb tide, for Cape Disappointment, and

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Chi. Leg. News, 248, gives only a partial report.]

met the flood tide and south-west wind abreast of Sand Island, as might have been reasonably expected, where such tide and wind always make a rough sea, and in attempting to tow said scow against the same, the tow-line of the tow and also of the tug parted, and the scow went on Chinook spit and was lost: *Held*, that the tug did not exercise ordinary skill and diligence in undertaking the voyage on the last of the ebb tide, or in attempting to tow the scow against the flood tide and wind; and therefore is responsible for the consequent loss of the same.

[Cited in The M. J. Cummings, 18 Fed. 183.]

6. Under the circumstances of the employment, with the exception of steering the tow, working her pump, and handling her end of the tow-line, the tug is responsible for the navigation of both vessels; and her duties were those of a private carrier for hire, just as much as if she had had her upon her own deck instead of astern, at the end of a tow-line.

[Cited in The Chickasaw, 38 Fed. 361.]

7. Where a tug negligently places a tow in a peril from which she is lost, it is no excuse that the tow might have been saved, but for a mistake of or want of skill in the crew of the latter, in bending a tow-line in a dangerous emergency, or the want of extraordinary ground tackle.

8. Where a tow has parted from the tug and gone adrift, and is in great peril, and the latter, at the request of the crew of the former, attempts to take them off, and in so doing collides with the tow and sinks her, the tug is not responsible for the consequences of such collision, unless it was intentional or the result of gross negligence.

[Cited in The Allegiance, Case No. 207.]

In admiralty.

John A. Woodward and H. H. Northrup, for libellants.

William Strong and Joseph N. Dolph, for respondent.

DEADY, District Judge. This suit is brought to recover $2,500 damages sustained by the libellant in the loss of the John Francis and her cargo of eighty cords of ash wood, through the negligence of the tug Merrimac, while engaged in towing said John Francis from Astoria to Cape Disappointment, on September 9, 1873.

The vessel lost was a "schooner scow," of ninety-five and one-half tons burden, one hundred and twenty feet in length, twenty-one feet in breadth, and four and one half feet in depth, with two masts and a rudder and steering gear; she was decked over, fore and aft, carried an anchor weighing two hundred and eighty pounds, with thirty to forty fathoms of chain; she was built in 1866 for the wood and hay trade on the Columbia river, at a cost of $4,500. Some time in 1872, libellant bought her for $1,100, and afterward put $800 worth of repairs, rigging and sails upon her.

The Merrimac is a single engine-propeller, of fifty or sixty horse power, and forty-eight tons burden, and has been engaged for some years in towing on the Columbia river, and over the bar to and from the sea. About September 1, 1873, the libellant met the master of the Merrimac, Richard Hobson, of Portland, where conversation was had between them, to the effect that the former expected to be at Astoria in a few days with his scow, bound for Cape Disappointment, when he would want a tug and that the latter would be ready to tow him over.

Early in the morning of the ninth the John Francis arrived at Astoria from the mouth of the Sandy, in tow of the libellant's little steamboat, the Wasp. The Merrimac having heard the previous evening that the scow was on the way, came over to Astoria from Cementville in the night to meet her.

Here the libellant and the master of the tug met and made a contract, whereby the latter agreed to tow the scow over to the cape for twenty dollars, nothing being said as to who was to furnish the tow-line. This was about eight o'clock, and near the last of the ebb tide. The master of the tug directed the libellant to have the anchor of the scow lifted, and let her drift out from the wharf, and he would come around with the tug and take her in tow, and in the meantime the libellant was to take the Wasp in near shore and secure her and come off to the scow in his skiff.

The tug came alongside of the scow, and asked libellant's brother, who was the only person on board, to give him the line that was lying on the forward part of the scow, which he did. The tug then steamed along slowly, with the scow astern, for nearly a mile, when the libellant and another brother came on board the tow, and the tug steamed away at the rate of four or five knots an hour.

The distance from Astoria to the cape is about fifteen miles. Abreast of Sand Island, and about four miles from the cape they met the flood tide and wind from the southwest. At this point the sea is always rough during the flood tide. The wind and tide being on the tow's quarters, she began drifting to leeward, when the tug turned up to the tide, and the strain or surge parted the line some feet outside of the scow. The tug then backed up and gave the tow her line, which very soon parted short off some fifteen or twenty feet from the scow. Thereupon the tug gave the tow the long end of her line, and directed it to be bent on to the long end of the tow's line, which was done; but the knot slipped while being drawn through the water, and the line parted before it was drawn taut. By this time the scow had drifted within one hundred feet of Chinook spit, and the master of the tug directed the tow to drop her anchor, which was done, in about three fathoms of water, with twenty-five fathoms of chain. This was near the first black buoy. The scow, under the force of the wind and tide, dragged her anchor slowly in the direction of the spit, and the men on her called to the tow to come and take them off. The tug backed up to windward and alongside the scow, but as she reversed her engine to go ahead, it caught on the center for a moment,

and she drifted closer to the tow. As she passed the bow of the scow a swell caught her, and carried her across it, where her propeller got foul in the anchor chain, until it was paid out further, when she got away. During this time the guard of the tug struck the bow of the scow at one corner, and broke it down, so that the sea poured in and filled her in a few moments, whereupon the crew of the tow ran aft, jumped into their skiff and got on board the tug, which was distant some two hundred yards waiting for them.

The tug proceeded to the cape and returned at ebb tide, but the scow had drifted so far into the breakers that it was not considered safe to go to her with the tug. By the next morning at ten o'clock her bow was pulled out of her with the fastening of the anchor chain, and she went on to the spit, and was lost. The cargo of wood floated out as soon as she filled, and was lost.

The line taken from the tow was a four-and-a-half-inch line, about forty fathoms in length, and apparently in good condition. Henry Wilson, who gave it to the tug, testifies that the Merrimac came alongside, and Hobson asked him if the line lying forward on the tow "was strong enough for a tow-line." He answered, "I do not know; I do not believe she is;" when Hobson sang out, "Heave that line, and not stand there to look at it."

Hobson testifies: I asked Wilson "if that was the line he was going to tow with?" What he said in reply "I do not recollect." I then ordered him "to give us the line quick before we drifted away."

Ingalls, who took the line from the tow, testifies: "We went alongside, and asked if they had a line, and they began to hunt one up. They said they had one, and I took the line myself, and made it fast to the bitts."

J. W. Bloomfield, a passenger on the tug, and the person to whom the wood was sold to arrive at the cape, testified that "Hobson asked one of the men on the scow whether he had a good line. The man said he did not know whether the line was good or not. I think the man was Wilson's brother. Hobson said, 'Hurry and give us the line anyway.'"

Upon this testimony, I conclude that the transaction of taking the line from the tow took place substantially as stated by Henry Wilson.

The line of the Merrimac was a four-and-three-quarter-inch Manilla rope of about forty fathoms in length. It had been spliced, and subjected to severe strain in towing rafts of saw-logs.

Either of them were probably sufficient to tow the scow in smooth water, or with the tide, but not against the flood-tide, between Sand Island and Chinook spit, as the fact of their parting as they did abundantly proves. In this case the result is a safe criterion by which to judge of the sufficiency of the lines. The Webb, 14 Wall. [81 U. S.] 414.

The contract being silent as to who should furnish the tow-line, the respondent alleged and gave evidence tending to prove that there was a custom at the mouth of the Columbia river that in such cases the tow should furnish the line. The evidence in support of the usage is weak—comes mainly from witnesses who are interested in tugs—and, in my judgment, falls far short of establishing any such custom. The most that can be claimed for it is, that it establishes a usage in the case of sea-going vessels, particularly when being towed astern, that the tow shall furnish the line or pay the tug extra for furnishing it, but in the case of scows and the like, that the tow shall furnish the line if she has one, but if not, the tug shall furnish it without extra charge. Besides, it is clear that no usage upon the subject was known to the libellant, and before he can be affected by a custom so recent and local as this is claimed to be, knowledge of it must be brought home to him. 2 T. Pars. Cont. 57.

My impression is, that the undertaking to tow the scow from Astoria to the cape bound the respondent to furnish the necessary means to do the service with, and in the absence of any custom or understanding to the contrary, to furnish a sufficient tow-line as a part of such means. But the tow did furnish the line, and I think the tug ought not to be held responsible for its sufficiency, unless it appears there was some understanding that it was to be used at the risk of the latter. If the master of the tug called for the tow's line, and it was given and used without anything further being said or done by either party, the reasonable inference would be that the parties understood the contract as requiring the tow to furnish the line, or that they thereby modified or supplemented it to that effect. But in this case the man on the tow, in giving the line, also said he did not think it was sufficient, and there is reason for holding that, if the master of the tug took the line, notwithstanding this opinion, he took it upon his own judgment and risk. He testifies that he thought the line was sufficient. Still, when the master of the tow came on board, he made no objection to the use of the line, and manifestly did not think it insufficient. Upon the whole, it is not clear to my mind whether the circumstances under which the line was given and taken from the tow constitute an implied agreement that it was to be used as the line of the tow, and at her risk, or otherwise. As the case may be satisfactorily disposed of upon another ground, it is not necessary to definitely decide this question.

The contract to tow the scow and her cargo from Astoria to the cape was one of the hire of the carriage or transportation of the same for a compensation, and was therefore a bailment of the kind denominated locatio operis mercium vehendarum. The services of the

tug, and her master and crew, were hired by the libellant for that purpose. This constituted the libellant the bailor, and the respondent the bailee, of the scow and her cargo. Story, Bailm. § 370; Edw. Bailm. 338.

This is a bailment which is beneficial to both parties, and the bailee is responsible for ordinary skill and diligence. Edw. Bailm. 371; Story, Bailm. 457. But he is not a common carrier, and may contract for a more restricted liability than the law imposes upon him. Alexander v. Greene, 3 Hill, 19; The Webb, 14 Wall. [81 U. S.] 414. Counsel for respondent insists that this hiring did not amount to a bailment of any kind, and in support of this proposition, cites a dictum of Bronson, J., in Wells v. Steam Nav. Co., 2 Const. [2 N. Y.] 208, to that effect. It was decided in that case that the proprietor of a tow-boat was not a common carrier, as to the boat towed, but the dictum that such proprietor was not a bailee, and that the transaction was not a bailment, is in direct opposition to the language of all the authorities, as well as that of the learned judge elsewhere in the same opinion, and in Alexander v. Greene, supra.

The master of the tug being a bailee for hire, and as such responsible for ordinary skill and diligence in the performance of his contract, what was his duty in the premises? Impliedly he undertook to furnish a tug, properly equipped, and of sufficient capacity and power to take the scow to the cape, and for the exercise of ordinary skill and prudence in selecting the proper time to make the voyage, with reference to the craft to be towed, and the wind and tide, or other ordinary peculiarities of the navigation, and in the conduct of the enterprise in the case of any unlooked for or extraordinary emergency.

Of course the relations between the tug and the tow may be modified by express agreement, or the reasonable implication arising from the circumstances and nature of the employment in a particular case, so as to make the tug the mere servant of the tow and under its direction. In such a case the liability of the tug may be limited to the mere point of furnishing a sufficient motive power for the tow, while the whole responsibility as to the time and manner of making the voyage or transportation would rest with the latter. Sturgis v. Boyer, 24 How. [65 U. S.] 121.

In this case the scow being towed astern a distance of some two hundred feet, with her own master and crew aboard, the tug is not responsible for the manner in which she was steered. It is evident from the circumstances that the tow relied upon her own steering gear and crew to keep her in the proper place in the channel, so far as the course of the tug would permit. Sproul v. Hemmingway, 14 Pick. 7. Neither is the tug responsible for any injury which may have happened to the tow by reason of any defect or deficiency in her condition, construction or appointments, considered as a scow. It was implied in the contract to tow her, that the John Francis was as seaworthy as vessels of her class and construction ordinarily are.

But as to all the other matters involved, or to be performed in the undertaking, I think the tug is responsible for any lack of ordinary care or diligence on the part of the respondent.

The water to be crossed was not an ordinary one. The peculiar difficulties and dangers of the voyage were well known to the respondent, and almost unknown to the libellant. The vessel to be towed was a flat-bottomed one, with a square head and stern, well loaded down with wood. She could be towed to the cape on the ebb tide with comparative safety, while it is almost certain that she could not be towed against a flood tide between Sand Island and Chinook spit.

Under the circumstances, there was a want of ordinary skill and diligence on the part of the respondent in leaving Astoria with this scow in tow for the cape on the last of the ebb tide. He could not expect to carry it with him, and must have known that he would meet the flood tide and wind at Sand Island, where it always made a rough sea against which it would be dangerous to tow the scow. The Brooklyn [Case No. 1,938]; The M. M. Caleb [Id. 9,680]; The Olive Baker [Id. 10,489]; The Blanche Page [Id. 1,523]; The M. A. Lennox [Id. 8,987]; The Deer [Id. 3,737]. To obviate the force of these facts counsel for respondent claims that the voyage was delayed half an hour waiting for the libellant to join the scow after the tug had hitched on to her, and that this was the cause of being caught in the flood tide.

Taking all the circumstances into consideration, I do not think this proposition is supported by the evidence, and if it was, it does not justify the respondent in putting the scow into the peril, from the effects of which she was lost.

The testimony as to the time which elapsed between the hitching on to the scow and the libellant's joining the latter, varies from fifteen to thirty minutes, and as to the distance made in the meantime, from a quarter of a mile to a mile. The weight of the evidence is, that the time was not to exceed twenty minutes, and the distance not more than three fourths of a mile.

The tug was making four to five knots an hour until she met the flood tide, and, had the ebb served, she would have made the cape in something more than three hours. The evidence is not clear and direct to the fact, but the reasonable inference from all the circumstances is, that the tug did not make more than two and a half knots an hour against the flood tide. The witnesses all agree that the vessels met the flood tide abreast of Sand Island, and this is very probable when it is remembered that they left Astoria on the last of the ebb tide—near low water. As indicated by the chart, this is

about four miles from the cape. If, then, there had been no delay in starting, the tug would have met the flood tide in apparently the roughest place in the channel—about two miles from the cape—and encountered substantially all the perils she did, with, in all probability, the same results.

But, for the sake of the argument, admit that the loss occurred on account of the delay. That does not excuse the respondent. The delay occurred while the respondent was in command and under his direction; and it does not appear that the libellant occupied any more time in making the Wasp fast and getting back on to the scow than was necessary and anticipated, and allowed for when the contract was made. By his undertaking he was bound to know whether it was prudent to start when he did or proceed on the voyage after the libellant came on board. The libellant gave no direction in the premises from the time the contract was made until he called to the tug to take them off the scow, and assumed no risks save those which the law necessarily cast upon him.

But suppose that the respondent had good reason to believe, when he started, that he could make the cape without encountering the flood tide, still when the fact proved otherwise, I think it was his duty, as a prudent man, to return to a place of safety and await the high tide and smooth water; particularly when it is considered that the only tow-lines on board were insufficient to draw the scow through that sea, even if she could ride it.

With the exception of steering the tow, working her pump and handling her end of the tow-line, the tug is responsible for the navigation of both vessels. Her duties were those of a private carrier of the tow for hire, just as much as if she had had her upon her own deck instead of astern at the end of a tow-line. In Sturgis v. Boyer, 24 How. [65 U. S.] 122, it was held that "whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels." While in this case the tow had her master and crew on board, yet they had nothing to do with the navigation of either vessel except to steer the tow in the wake of the tug, to work her pump and handle her end of the tow-line. In other respects the navigation of the tow was as much under the control of the tug as if there had been no one on board of her. The master of the tug selected his own time for starting, as he said that the scow could not be towed over the route except in time of smooth water. While they were under weigh no communication passed between them, except when the tug backed down to give the tow her line.

Respondent also insists that if the two pieces of lines had been properly bent together, the knot would not have slipped and the scow might have been saved. Each of these lines had just snapped like a mere thread, and there is nothing in the evidence or circumstances which makes it even probable that the increase in length, caused by fastening them together, would have made them sufficient to tow the scow against that tide and wind if the knot had held.

The fault alleged is, that the libellant did not seize the knot. But certainly it could not have been expected that when the scow was about going into the breakers the libellant would take time to go after and get some small cord and deliberately seize this knot. Nothing of the kind was directed or suggested by the respondent when he gave the order to bend the lines together. Apparently the knot was well made, but while being drawn through and against the water it loosened, and as the line became taut, slipped. But even a mistake in this matter by the libellant would not excuse the tug, which had already negligently brought the scow into this peril. The Webb, 14 Wall. [81 U. S.] 417.

As to what followed after the scow cast anchor I do not think it material. It is possible that the scow might have ridden safely at the place she was left by the tug, until the turning of the tide, if her anchor had been larger and the chain longer. But the peril, which resulted in her loss, had already been incurred by the negligence of the respondent. The Webb, 14 Wall. [81 U. S.] 417; The Merrimac, Id. 203; Union S. S. Co. v. New York & V. S. S. Co., 24 How. [65 U. S.] 313. The libellant was not bound to have provided his scow with ground tackle sufficient to hold her in such an extraordinary position as that. In my judgment her ground tackle was sufficient for all ordinary emergencies.

So with the collision that occurred in attempting to take the libellant and his brothers from the tow after the anchor was dropped. The responsibility of the tug, under the contract to tow the scow, was at an end. For the time being the undertaking had been abandoned by the tug. In going to the scow, at the request of the libellant, the tug was employed more as a salvor than otherwise, and is not responsible for an injury to the scow caused by a collision under such circumstances. There is no doubt but that the collision occurred, and that the scow was sunk and the wood washed away as the immediate consequence of it. But I do not think the tug was handled so unskillfully or carelessly as to make her liable for the consequences.

In the bill of particulars the scow is charged at $1,800, the wood $400, and the furniture, stores, clothes, etc., at $301. I find their value as follows: Scow, $1,200; wood, $280; other articles, $150; making in all $1,630. The wood cost libellant $2.50 a cord, on the bank, at Sandy, and he had sold it, to arrive at the cape, for $4.50. I have allowed $3.50 per

cord for it at Astoria. These are coin valuations, to which I add ten per centum for the difference between coin and currency, which makes it $1,793.

The libellant, within a day or two of the disaster, went out to the wreck and recovered the anchor and chain from the sand, and some blocks, ropes and rigging from the hull of the scow. Of these he has sold all but the rigging for $73, which he values at $40. Allowing him one third of this amount for saving these things the remainder—$75.33⅓—must be deducted from the above, which leaves the sum for which the libellant is entitled to a decree, $1,717.66⅔ and the cost of suit.

MERRIMAC, The (FORBES v.). See Case No. 4,927.

MERRIMAC HAT CO. (SANFORD v.). See Case No. 12,313.

MERRIMACK MANUF'G CO. (UNITED STATES & FOREIGN SALAMANDER FELTING CO. v.). See Case No. 16,789.

Case No. 9,479.

In re MERRIMAN.

[18 N. B. R. 411; 44 Conn. 587; 26 Pittsb. Leg. J. 120.] [1]

District Court, D. Connecticut. Feb., 1878.

BANKRUPTCY — EFFECT OF FORMER DISCHARGE — NEW PROMISE TO PAY—NEW CREDITORS —MARSHALING ASSETS.

1. A discharge by virtue of compliance with the terms of a composition in bankruptcy is a discharge by operation of law, even as against an assenting creditor, and an indebtedness thus discharged is a sufficient consideration for a new and express promise to pay the original debt.

2. Where a debtor who had been discharged under composition proceedings in bankruptcy, gave to one of his creditors who had signed the resolution a new note for his old debt, and afterwards again went into bankruptcy, *held*, that the claim so revived should not be postponed to those of the new creditors.

3. Under section 4972, the district court has power only to marshal assets according to priorities and rights which have been created or established by the act itself, or have been created by liens placed upon the assets by the act of one of the parties, or by operation of law, and has no power to discriminate between different classes of debts of the same legal character.

Appeal from a register in bankruptcy.

Application of the assignee of the estate of Matthew M. Merriman, bankrupt, to have the proof of a claim by the American National Bank expunged.

J. Hooker and A. D. Smith, for assignee.

H. C. Robinson and C. E. Gross, for bank.

SHIPMAN, District Judge. Matthew M. Merriman had been duly adjudicated a bankrupt by decree of this court, prior to August 17th, 1875, and his estate was then in settlement. On that day, upon his application, an order was passed directing a meeting of his creditors to be held on August 30th, 1875, to ascertain if they would resolve to accept a composition to be proposed by him in satisfaction of their respective debts. At said meeting he presented a proposition to pay, in full satisfaction and discharge of their respective claims, twenty-five per centum thereof, which payment was to be secured by his four equal promissory notes, indorsed by Joseph Merriman, to be dated on the day of the final confirmation of the resolution by the court, and payable in three, six, nine, and twelve months from the date thereof, with interest. The American National Bank had duly proved against the estate of said bankrupt his notes to the amount of four thousand four hundred dollars, indorsed by Joseph Merriman. Said resolution was passed at said meeting by the requisite majority in number and value of the creditors assembled at such meeting, and was confirmed by the signatures thereto of the debtor and of the requisite creditors in number and value. The American National Bank, by their duly constituted attorney, expressly accepted said proposition at the first meeting of creditors, and expressed said acceptance by their signature. At the second meeting of creditors, held on September 11th, 1875, the resolution was found by the court to be for the best interest of all concerned, and was ordered to be recorded. On November 27th, 1875, M. M. Merriman gave said bank his three notes, amounting in all to four thousand four hundred dollars, indorsed by Joseph Merriman, in renewal of the pre-existing notes which were due to said bank, paid the discount due thereon, and continued to renew said notes, making from time to time partial payments on the renewals, and paying the discounts thereon, until December 8th, 1876, when there was due upon the last renewals three thousand one hundred and eighty-five dollars, which sum with interest thereon is still unpaid. Joseph Merriman has continued to be the indorser upon each set of renewals. The bank received in one year after September 11th, 1875, either in reduction of the notes, or by way of interest, more than the amount which was payable by M. M. Merriman by the terms of the composition, but did not receive the same as a payment on the composition. No notes in accordance with the resolution were ever given to or demanded by said bank, but the giving of said notes was waived by the bank. Joseph Merriman's indorsement made the original notes and the renewals secure. It was not claimed by the assignee that said bank assented to or signed said resolution under any promise or expectation that the debt of four thousand four hundred dollars was to be paid by the bankrupt. Fraud on the part of either party to the composition was not claimed. M. M. Merriman was again adjudicated a bankrupt by decree of this court on February 16th, 1877, and John Hooker, Esq.,

[1] [Reprinted from 18 N. B. R. 411, by permission. 26 Pittsb. Leg. J. 120, contains only a partial report.]

was subsequently appointed assignee of his estate. Said bank has proved against said estate the last renewal notes, amounting to three thousand one hundred and eighty-five dollars. The assignee objects to the allowance of this claim upon the ground that the notes are without consideration, and that the debt which they represent has been legally discharged.

All the questions of law which arise upon the foregoing facts were discussed by counsel, the principal question being, whether an express promise made by a bankrupt to a creditor to pay the amount of his debt is valid, such creditor having theretofore expressly assented to a composition made and confirmed under the 17th section of the amended bankrupt act of June 22, 1874 [18 Stat. 182], and such composition having been substantially carried into effect, and exact compliance with its terms having been waived by the creditor. An express promise by a debtor to pay a debt which had been, previously to such promise, barred by some positive statute, or had been discharged by operation of law, is binding upon the promisor. Cook v. Bradley, 7 Conn. 57; Stafford v. Bacon, 1 Hill, 532. In such cases the moral obligation to make payment, although the debt has been legally discharged, is a sufficient consideration for a new and express promise. In order to revive a debt which had been discharged by bankruptcy or insolvency proceedings, the new promise must be clear, distinct and unequivocal. Allen v. Ferguson, 18 Wall. [85 U. S.] 1. A promise to pay a debt which has been voluntarily discharged by the creditor, as by accord and satisfaction, is not legally binding. Performance of an agreement of composition inter partes, in accordance with the terms of the agreement, or legal tender of performance of such agreement in accordance with its terms, is a discharge of the debt which has been agreed to be compromised, so that the discharged debt cannot legally be revived. An agreement of composition inter partes becomes an executed agreement by full payment on the composition, though not in accordance with the terms of the agreement, provided compliance with the terms is waived by the creditor.

I forbear to consider the question whether the payment within the year to the bank of an amount of money equal to the twenty-five per cent. and interest, which was payable by the resolution, is a satisfaction of the agreement, the money not having been paid to or received by the bank upon the composition, but upon the antecedent debt, and shall assume that, before the last renewal notes were given, the debtor had been legally discharged by his compliance with the terms of the resolution, legal compliance having been waived by the creditor.

The question which was first suggested resolves itself into this: Is a discharge, by performance of the terms of a bankruptcy composition, a discharge by operation of law, or is it a voluntary discharge from the debt which was due to a creditor who had expressly assented to the resolution of composition? The resolution to accept a composition, and the proceedings which result in an assent by the requisite number of creditors, and in the recording of the resolution by order of court, are proceedings in bankruptcy. They are a method of dividing the estate of the bankrupt among his creditors under the control of a court of bankruptcy. Payment under a composition is one mode of distribution; payment of dividends by an assignee is another mode. Theoretically, each mode divides the whole estate. A discharge by virtue of payment of the amount specified in the resolution of composition is confessedly a compulsory discharge as to the non-assenting creditor. The discharge is in a certain sense a voluntary act of an assenting creditor, because it is in his power to give or withhold his assent. Assent is a matter of his own election, and if the requisite number of creditors do not assent, the resolution has no effect. But the discharge is also by operation of law as to the assenting creditor, because the entire proceeding is a part of bankruptcy proceedings instituted under authority of a court, and this particular method of division of the bankrupt assets has no validity unless the court is satisfied that the proposition is for the interest of the creditors. The assent of the creditors is a means of ascertaining the fairness and propriety of the proposed division. The proceeding is not a composition inter partes, in which proceeding each creditor can make his assent or dissent final as to himself, but is a statutory composition wherein the assent only of a specified number is required, subject to a subsequent decree of court. The composition is as to the assenting creditor both a voluntary act and an act of the law, but its efficiency is derived from the compulsory power of the law. The differences are radical between the nature of a composition inter partes and of a bankruptcy composition. The root of their differences is the fact that the entire proceedings for and in a bankruptcy composition are proceedings in bankruptcy, and are a part of a system for the compulsory division of assets which is administered by a court, while a composition inter partes derives its validity merely from the will of the parties. These differences induced the supreme court of Massachusetts to declare recently that the proceedings for a composition under the statute "differ wholly in nature and effect from a voluntary composition which binds only those executing it." Guild v. Butler, Oct., 1877 [122 Mass. 498]. That a discharge by virtue of compliance with the terms of a bankruptcy composition is a discharge by operation of law, is indicated by the effect of such a discharge upon sureties or indorsers of the debtor under the corresponding section of the English act of bankruptcy.

Proceedings under the 126th section of the

English bankruptcy act of 1869 are substantially similar in character to proceedings under the section of our bankrupt act in regard to composition. A discharge of the principal debtor by virtue of an executed agreement inter partes is a discharge of his surety, unless such result is expressly avoided by the terms of the agreement of composition, but a discharge of the principal debtor by virtue of a composition under the 126th section of the English act is, after some hesitancy on the part of courts, and after a contrary decision, now clearly held not to be a discharge of the surety, although the creditor had expressly assented to the terms of the resolution. Ex parte Jacobs, 10 Ch. App. 211, overruling Wilson v. Lloyd, L. R. 16 Eq. 60. In the case of Megrath v. Gray, L. R. 9 C. P. 216, the same result was reached. The court of common pleas placed their decision upon the ground that it is a universal rule in bankruptcy law that the discharge of an insolvent debtor does not discharge his solvent co-debtor, and that this principle has always been recognized in English bankruptcy acts since the declaratory act in 10 Anne, and was again expressly incorporated in section 50 of the act of 1869, and that the discharge mentioned in section 50 applies also to a discharge which may be obtained as a result of the proceedings under section 126. In Ex parte Jacobs the court took a somewhat broader view of the subject. It stated the question as follows: "There can be no doubt that, if the holder of a bill, by becoming party to a deed or agreement, independently of the bankrupt act, agrees to accept a composition from the acceptor, he thereby discharges the drawer; but, on the other hand, it is equally clear that if the acceptor is discharged from his liability by operation of law by becoming a bankrupt, the liability of the drawer to the holder is not thereby affected. We have now to consider whether the discharge of the acceptor under the 125th and 126th sections of the bankruptcy acts of 1869, where the holder of the bill votes in favor of the liquidation or composition, is to be considered a discharge by the voluntary act of the holder, or a discharge by operation of law." The reasons which influenced the court were, first, that in a composition inter partes the discharge is the act of the creditor alone, whereas in a bankruptcy composition the proper majority have power to assent to the terms, whether the particular creditor chooses to attend or not, or chooses to vote or not; and, secondly, the injurious results of the doctrine that an assenting creditor was discharging his surety. "The consequences of holding that the holder could not vote without discharging the drawer would be, that in many cases a great number, and in some cases the majority, could not vote."

I have been pressed towards a conclusion that the discharge should be deemed to be the voluntary act of the assenting creditor by the fear that the contrary doctrine would open a door to fraud, and that a bankrupt would be enabled to obtain easily the requisite majority of his creditors, and then, disregarding forthwith the terms of the resolution, would give notes to the favored few, and thus revive his debts to the disadvantage of subsequent creditors, while he is also guilty of a breach of faith towards the unfavored majority. But a consideration of the character and nature of bankruptcy composition leads to the conclusion that while this improper course of conduct is possible and practicable, it is one which is permitted by the present terms of the bankrupt act.

The assignee also claimed that the case showed that M. M. Merriman's estate was deeply insolvent, which was not denied, and that the bulk of the debts were incurred after the first bankruptcy for goods which went into the new business, that the bankrupt obtained credit upon the faith of his discharge by virtue of his composition and in the belief that his old debts were cancelled, and that the goods which were then sold form the bulk of the assets of the estate. From these facts the assignee insists that an equity has arisen that payment of a dividend upon the revived debts should be postponed until the new debts have been fully paid.

If the conclusions which have heretofore been indicated are correct, each class of debts is alike legally due, and no express lien in favor of any one class of creditors has attached to the fund in the hands of the assignee. Section 4972 declares that "the jurisdiction conferred upon the district courts as courts of bankruptcy shall extend: * * * Fourth. To the adjustment of the various priorities and conflicting interests of all parties. Fifth. To the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors." I am of the opinion that these clauses confer upon the district court power only to marshal assets according to priorities and rights which have been created or established by the act itself, or have been created by liens which have been placed upon the assets by the act of one of the parties or by operation of law, and that it is not in the power of the court to discriminate between different classes of debts of the same legal character, although as matter of morals or of honor one class of debts should not have been incurred. The application to expunge the claim of the bank is denied.

Case No. 9,480.

MERRIMAN v. BOURNE et al.[1]

Circuit Court, N. D. California. June 2, 1865.[2]

EJECTMENT—JUDGMENT—CONCLUSIVENESS—CONFIRMATION OF INVALID TITLE.

[1. A judgment against plaintiff in ejectment merely determines the invalidity of his title,

[1] [Not previously reported.]

[2] [Affirmed in 9 Wall. (76 U. S.) 592.]

and not the validity of defendant's title, and where plaintiff subsequently, without force, fraud, or surprise, obtains possession, such judgment is unavailing in ejectment by defendant, who must stand upon his own title.]

[2. A judgment against plaintiff in ejectment does not bar the assertion by him of a subsequently acquired title.]

[3. The ordinance No. 822 of the city of San Francisco of June 20, 1855, confirming certain grants of land by the alcalde, the title to which had been relinquished to the city by the act of congress of March 11, 1858, operated as a full and complete grant to the persons therein mentioned, enabling them to set up such title in ejectment, notwithstanding a prior decision against the validity of the grant from the alcalde.]

[Ejectment by Charles Merriman against E. W. Bourne and others.]

Patterson, Wallace & Stowe, for plaintiff.
L. B. Crockett, for defendants.

Before FIELD, Circuit Justice, and HOFFMAN, District Judge.

HOFFMAN, District Judge. The only facts necessary to be noticed under the views we have adopted with regard to this case are the following: On the 15th April, 1847, S. E. Woodworth obtained from Edwin Bryant, alcalde of San Francisco, a grant for the 100-vara lot known as No. 22, and which embraces the premises in controversy. Shortly after receiving this grant he appears to have taken possession of the lot and enclosed it with a fence, which remained for some months, but which in 1849 had either fallen down or been removed by parties who entered on the premises, claiming under a grant made to one Fulton by Colton, a justice of the peace. Woodworth thereupon brought ejectment in the court of first instance, and having recovered judgment, ejected the persons who had taken possession of the lot. An appeal having been taken to the supreme court, the judgment was reversed, and a writ of restitution was awarded to restore the defendants in that suit to the possession of the premises from which they had been ejected under the writ of possession. From the report of the case (1 Cal. 295) it appears that the plaintiff claimed to recover, first, on his grant as constituting a perfect title to the lot, and secondly, on a possession prior to the entry of the defendant. The court held, first, that the grant by the alcalde was void and insufficient to give even color of title, and, second, that the prior possession as shown by the evidence was too loose, indefinite and equivocal to authorize a recovery against a defendant who had entered peaceably and without fraud. From the date of the writ of restitution awarded under this judgment up to 1853, the lot, or a large portion of it, appears to have been in the possession of parties claiming under Fulton, but in 1853, F. A. Woodworth, to whom Selim E. Woodworth had conveyed the land, instituted ejectments against the parties in possession, and in the course of the years 1853, 1854 and 1855, he succeeded in obtaining possession of the whole lot, which he still holds. In numerous instances the parties in possession were ejected under writs of possession issued in pursuance of judgments obtained in ejectment suits. In other cases, the persons being threatened with suits and desiring to avoid expense, and to have the privilege of removing these houses erected on the lot, consented to acknowledge the will of Woodworth, and to accept leases under him as his tenants.

The plaintiff in the present suit derives title from Fulton, one of the defendants in the former suit; and the defendant holds under F. A. Woodworth, the grantee of S. E. Woodworth. On the trial of the cause, the plaintiff offered in evidence, as showing color of title, a grant from Colton, justice of the peace, to Joseph F. Atwill, dated December 12, 1849, and a deed from Atwill to Fulton, dated February 11th, 1850. He also produced the record of the suit of Woodworth v. Fulton [1 Cal. 295], with the writ of restitution under which Fulton was restored to the possession. Testimony was also introduced tending to show a possession by Fulton prior to 1849; but the evidence was indefinite and unsatisfactory, and it was not urged by counsel as sufficient to constitute a ground of recovery. The defendant introduced and proved the alcalde's grant before alluded to, together with the records of the various ejectment suits in which he had recovered possession of different parcels of the land. He also proved the circumstances under which he had obtained possession of other portions of the lot without suit. To the introduction of the alcalde's grant the plaintiff's counsel objected on the ground that the decision in Woodworth v. Fulton was a final judgment involving and determining the invalidity of the grant relied on as a defence to this action; that this determination was, and is, not the only law of that case, but the law of that piece of property, and that the defendant Woodworth, and all claiming under him, are forever barred from setting up that title as against Fulton and his privies, and this notwithstanding that the case of Woodworth v. Fulton [supra] has been overruled, and alcalde grants similar to the one relied on in that case, have been subsequently adjudged to constitute valid titles. On these grounds the counsel for plaintiff contended, not only that the grant should not be received in evidence, but also that the plaintiff is entitled to a verdict.

We are clear that both these positions are untenable, conceding the law to be precisely as claimed by the plaintiff, and admitting that the judgment of the supreme court, declaring the alcalde grant to be wholly void, remains the law of the case and of this piece of property forever binding on Woodworth, and his representatives claiming under that title, it by no means follows that the plain-

tiff is entitled to recover. The judgment of the supreme court at most determined merely that the title relied on by Woodworth was invalid. It in no respect affirmed the validity of the title of the defendant in that suit. The case did not and could not have involved any inquiry into the validity of the Colton grant, under which the defendant claimed title. Had it done so, it is obvious that the court must have pronounced it to have been wholly void and insufficient to give color of title. Whatever effect, therefore, the judgment may have had as a bar to any future assertion by Woodworth, or his privies of any title under that grant, it could have no effect whatever as an affirmance of Fulton's rights under the Colton grant, nor to impart in that grant in his hands, even as against Woodworth, any validity as an independent source of title. Since that suit, Woodworth has, without force or fraud, or surprise, obtained possession of the lot in question; and his tenants are now sued by the grantee of Fulton. Conceding that Woodworth can claim nothing under his grant, he is, nevertheless, in possession of the land, and this plaintiff in ejectment, like any other, must recover on the strength of his own title. He has failed to show any prior possession, and the Colton grant produced by him is not pretended to possess any validity whatever as a source of title. Under these circumstances, it is clear to us that he must fail.

Secondly. But the title set up by the defendant is not the same title as that passed upon by the supreme court in Woodworth v. Fulton. It of course will not be contended that the judgment in that suit operates as a bar to the assertion by Woodworth of any subsequently acquired title to the premises in controversy. Assuming then, that the decision of the supreme court was not only the law of the case, but was in all respects correct, and that a grant by an alcalde possessed per se, no validity whatever, the subsequent action by the legislature of this state and by congress in respect to this class of titles has imparted to them unquestionable validity. In the act of the legislature of California, passed March 11th, 1858 [Laws 1858, p. 56], the provisions of the ordinance of the common council of this city, No. 822, passed June 20th, 1855, are recited. In section 2d of this ordinance it is provided that "all persons who hold grants to lots of land lying east of Larkin street and northeast of Johnson street, made by any ayuntamiento, town council, or alcalde of said pueblo, since 1846, and before the incorporation of the city of San Francisco by the state of California; and which grant, or the material portion thereof, was registered or recorded in a proper book of record deposited in the office, or custody, or control, of the recorder of San Francisco on or before the 3d day of April, 1850, * * * shall, for all purposes contemplated in this ordinance, be deemed to be the possessors of the land so granted; although the said lands may be in the actual occupancy of persons holding the same adversely to the said grantees." The second section of the act above cited provides that "the grant of relinquishment of title, made by the said city in favor of the several possessors, by sections 2 and 3 of the ordinance just above recited, shall take effect as fully and completely for the purpose of transferring the city's interest, and for all other purposes whatever, as if deeds of release and quit-claim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest said possessors with all the interests, rights, title, benefits and advantages, which the said order and ordinances intend or purport to transfer and convey according to the true intent and meaning thereof." By the 5th section of the act of congress of July 1st, 1864 [13 Stat. 333], it is provided that "all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the state of California on the 15th April, 1851 [Laws 1850–53, p. 944], are hereby relinquished and granted to said city, and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said state, approved on the 11th of March, 1858 [Laws 1858, p. 52], entitled 'An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city,' there being excepted from this relinquishment and grant all sites or other parcels of land which have been and now are occupied by the United States for military, naval or other uses," etc., etc. It is not disputed that the grant under which the defendant claims falls within the class mentioned in the second section of the ordinance No. 822. This ordinance, by the express terms of the act of March 11, 1858, operates as a full and complete grant of relinquishment of the title of the city, in favor of the persons therein described; and congress has, by the act above cited, granted and relinquished to the city for the uses and purposes mentioned in said ordinance, and in the act ratifying it, all the right and title of the United States. Whatever, therefore, may have been the invalidity, or even nullity of the grant under which the defendant claims, at the time the judgment in Woodworth v. Fulton was rendered, it has since become a valid and indefeasible title by the grant and relinquishment of title, to him, by the city, by the state of California, and by the United States. The title he now sets up is thus radically different from that relied on in his former suit, and no judgment in that suit declaring the grant to be invalid, can estop from asserting in this suit his subsequently acquired title derived from any source from which the title could flow, viz.: from the city, from the state, and from the congress of the

United States. Judgment must therefore be entered for defendant.

[The judgment of the circuit court was affirmed in the supreme court upon writ of error. 9 Wall. (76 U. S.) 592.]

Case No. 9,481.

MERRIMAN v. The MAY QUEEN.

[Newb. 464.] [1]

District Court, E. D. Louisiana. April, 1854.

CARRIERS—DAMAGE TO GOODS—PRIMA FACIE LIABILITY—NOTICE LIMITING—AGREEMENT—SHIPPER—GROSS NEGLIGENCE.

1. When loss or damage happens to goods while in the possession of a common carrier, the onus probandi is on the carrier to exempt himself from liability; for prima facie the law imposes upon him the obligation of safety.

2. In cases where the carrier has given notices qualifying or limiting his liability, the burden of proof of negligence is on the shipper, not of diligence on the carrier. This is contrary to the general rule where there is no notice.

3. A common carrier may qualify his liability by a general notice to all, of any reasonable requisition to be observed, as to the manner of delivery, entry of parcels, information of contents, rates of freight, and the like.

4. A common carrier cannot, by a general notice, limit, restrict or avoid the liability devolved on him by the common law, or the salutary grounds of public policy.

5. A common carrier's liability may be limited or restricted by an express agreement between the parties; but he cannot do so by any act of his own. It requires the assent of the parties concerned; and this is not to be inferred or implied from a general notice to the public; nor is it to depend upon doubtful or conflicting evidence, but it should be specific and certain, leaving no room for controversy between the parties.

6. Where a bill of lading had stamped upon it "Goods to be receipted for on the levee—not responsible for rust, breakage, leakage, cooperage —weight and contents unknown," and the witness who received the goods stated "that the vessel would not be responsible for breakage," this is not such a certain and specific contract as is required to free the carrier from liability.

7. Where an individual residing in Philadelphia was employed by a firm in Memphis, Tennessee, to construct glass cases, and from abundant caution superintended their shipment, he is in no legal or just sense the shipper, nor could he bind the owner by any contract he might enter into of so important a character as would exempt the vessel from the usual and well established responsibilities of a common carrier.

8. But even if an express agreement has been entered into, limiting the responsibility of the carrier, such a contract could not be pleaded as an exemption from liability for any loss or damage resulting from gross negligence or misfeasance of the master or his servants.

[Cited in Steele v. Townsend, 37 Ala. 247.]

9. Where the officers of a vessel knew perfectly well the contents of certain boxes to be glass cases, a failure to observe every precaution necessary to insure their safe stowage and safe delivery must be *held* gross negligence.

10. A protest cannot be received in our courts as evidence for the master or owner, but may be evidence against him and them.

[This was a libel in rem by Charles G. Merriman against the brig May Queen.]

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

Clarke & Bayne, for libelants.
Durant & Hornor, for respondent.

McCALEB, District Judge. The libelant has instituted this action in rem to recover the damages sustained by him in consequence of the failure on the part of the officers of the brig to deliver, in the like good order in which they were received on board, four glass counter cases, which were shipped by J. E. Caldwell & Co., in the port of Philadelphia, to be delivered to Wright, Williams & Co., at this port. The shipment was made on the 9th of August last, as appears by the bill of lading. There were five cases put on board the brig, and one, only, was delivered in good order. The other four were found, immediately after they were taken from the vessel and placed upon the levee, to be broken in pieces and utterly worthless. The libel alleges this breakage to have been caused by the careless, negligent and improper manner in which said cases were stowed and handled by the officers and crew of the brig. The answer of the respondents denies the allegations of negligence and carelessness, and avers that the brig was not accountable for breakage, and that the contents of the boxes in which the cases were placed were unknown: that they have delivered to the consignees, Wright, Williams & Co., the boxes of cases in the same good order and condition in which they received them on board their vessel: that the outward appearance of the cases of packages was, in all respects, as clean, fresh and new as when they were put on board the May Queen, in the port of Philadelphia. The answer further avers, that the vessel encountered heavy weather on her passage from Philadelphia to New Orleans. On the bill of lading annexed to the libel is stamped the following words: "Goods to be receipted for on the levee; not accountable for rust, breakage, leakage, cooperage; weight and contents unknown." It is upon these words, thus stamped upon the bill of lading, that the proctor of respondents has relied to show such a limitation of responsibility on the part of the vessel as should exempt her from all responsibility for the loss sustained by the breaking of the cases in question.

The issue raised by the pleadings must be determined by the evidence, and by the law applicable to such a case as that evidence presents. And let us first examine the evidence taken under a commission, in the city of Philadelphia, where the cases were shipped.

The witness Beal states that he is a member of the firm of Beal & Forman, who were employed by J. E. Caldwell & Co. to make the five show cases in question. They were made and finished in good order, in every respect. The glass was from a quarter of an inch to three-eighths in thickness, and was of the best quality English plate glass. The cases were packed on Monday, the 8th

of August, and shipped on Tuesday, the 9th. They were packed and shipped in five boxes, each case in a box by itself. The boxes were made by witness' firm, expressly for the cases. The witness himself assisted in packing them. He and three others were engaged in packing them, and they were employed until 3 or 4 o'clock in the afternoon. The wooden or bottom part of the cases were respectively secured fast to the boxes. The glass was then covered with paper, to prevent the straw from scratching the glass, and the German silver mounting, and the sides were then covered and filled in, the straw packed in closely, but not so tight as to cause any pressure. The straw was not packed so as to strain in any place, for the cases were screwed tight, and could not move. The tops were screwed on. The top and bottom were of inch stuff. The witness marked all the boxes himself. He believes they were marked "C. J. Merriman, care of Wright, Williams & Co., New Orleans." Also, in very large letters, on the lid of the boxes, respectively, was "Glass case;" and he thinks, "With care." On the edge of the boxes was written "This side up," or "This edge up." The witness did not deliver the boxes, but his partner did. The cases were so packed that unless they had been jarred or banged in some manner, they could not have been broken. The witness Forman corroborates all that was stated by his partner, in reference to the packing the cases and directing the boxes, and further testifies that he aided in putting the boxes on board the brig. He declared that he engaged four men who were working for the brig, to assist him in placing them in the vessel, and he saw them swung up by a tackle and lowered down between decks. They were placed between the two masts. He went down himself to see that they were handled carefully. They were handled carefully, but they were not finally stowed away when he left them; for the man who was stowing, said that he could not stow them away properly, until he got other goods to stow with them. The clerk, the captain and the mate were there, and he told them of the contents of the boxes, and that if roughly handled, they would be broken. The mate said that he would have the superintending of the taking them out, and that he would see that they were handled carefully. The witness asked particularly if there was any danger of the goods shifting in the vessel at sea. They (the captain and mate) replied there was not. The bill of lading was procured by Caldwell & Co., and the witness never saw it. The evidence of this witness is in many essential particulars sustained by the testimony of Jackson, and the whole taken together leaves no doubt whatever upon my mind that the cases were well made, properly packed, and safely deposited on board the brig. The testimony of the men who aided in putting the boxes on board, has also been taken under a commission, and introduced in evidence by the respondents. It substantially agrees with that of Beal and Forman. The testimony of Pettit, who was engaged in receiving the cargo on board of the May Queen, does not contradict that of Beal and Forman, but proves another fact to which the witness Forman does not allude. It is, that he (Forman) was informed at the time cases were put on board, that the owners would not be responsible for breakage.

The important question to be determined is, does the stamp on the bill of lading, to which reference has already been made, taken in connection with the declarations made by Pettit to Forman, so far limit the responsibility of the vessel, as to exempt her from all liability for the loss? There is no direct evidence to show when or how the breakage was caused. I am, however, perfectly satisfied that it was not caused by any carelessness or want of skill on the part of the witness Forman, and those employed by him, in putting the cases on board, and placing them between decks. Up to the time when they were left by Forman, I am satisfied they were safe and sound. The breakage then, must have occurred after the shipment, and before the boxes were delivered to the consignees on the levee in this city. The testimony of the cartmen shows that the contents of the boxes were broken before they were received into the carts. They were therefore broken while the boxes were in the care and custody of the officers of the vessel, or those employed by them. Whether the breakage was the result of the straining of the vessel, caused by the violence of the wind and waves, or of the carelessness or negligence with which the boxes were finally stowed, or in the handling them when they were delivered upon the wharf, are questions which can be settled by no direct evidence. And so far as the libelant is concerned, it would be difficult, if not impossible, to produce direct proof, if such should be required. The general rule of law is, that in all cases of loss, the onus probandi is on the carrier to exempt himself from liability; for prima facie, the law imposes upon him the obligation of safety. Story, Bailm. § 529. In cases where notices are given by the common carrier for the purpose of qualifying or limiting his responsibility, the burden of proof of negligence is on the party who sends the goods, and not of due diligence on the part of the carrier; which is contrary to the general rule in cases of carriers, where there is no notice. Story, Bailm. § 573. It is now well settled, that a common carrier may qualify his liability, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight and the like; as, for example, that he will not be responsi-

ble for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. But the right of a common carrier, by a general notice, to limit, restrict or avoid the liability devolved on him by the common law, on the most salutary grounds of public policy, has been denied in American courts, after the most elaborate consideration; and therefore a public notice by stage coach proprietors, that "all baggage was at the risk of the owners," though the notice was brought home to the plaintiff, has been held not to release them from their liability as common carriers. 2 Greenl. Ev. § 215.

But it is contended on behalf of the respondents, that the common law liability of the carrier, has been in this case limited or qualified by an express agreement. The question has often been made, whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of Gould v. Hill, 2 Hill, 623, and the conclusion arrived at that he could not. See, also, Hollister v. Nowlen, 19 Wend. 240, and Cole v. Goodwin, Id. 272, 282. The supreme court of the United States, however, in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, held that as the extraordinary duties annexed to his employment, concern only, in the particular instance, the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, no well founded objection to the restriction could be perceived, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties. The owner, by entering into the contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence. The right thus to restrict the obligation, is admitted in a large class of cases, founded on bills of lading and charter parties, where the exception to the common law liability (other than that of inevitable accident), has been from time to time enlarged, and the risk diminished by the express stipulation of the parties. The right of the carrier thus to limit his liability by the shipment of goods, has never been doubted. But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. The supreme court of the United States, having expressed these views fully in the opinion referred to, further declare that "the burden of proof lies on the carrier, and nothing short of an express stipulation by parol, or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence; but should be specific and certain, having no room for controversy between the parties." The special agreement relied on in this case, arises from the stamp on the bill of lading, and the declarations made by the witness who received the boxes on board, that the vessel would not be responsible for breakage. In regard to the stamp referred to, I confess I cannot attach to it any importance. It seems to have been kept ready for a convenient resort, to limit or qualify the obligations of the ship owner without any notice to the shippers. There is no evidence that the latter in this instance, assented to the limitations of the liability of the former, which it has been attempted to create, by means of this stamp. I am by no means convinced from such evidence, that there has been "such a certain and specific contract between the parties as leaves no room for controversy." The evidence in the cause shows, moreover, that the stamp is false in point of fact. It was not true that the contents of the boxes were unknown. The witness Forman, who put the boxes on board, states, that "the clerk, the captain and the mate were there, and that he told them of the contents of the boxes, and that if roughly handled, they would be broken. The mate replied that he would have the superintending of the taking them out, and that he would see that they were handled carefully. The witness asked particularly if there was any danger of the goods shifting in the vessel at sea. They, the captain and mate, replied, there was not."

But it is urged on behalf of the respondents, that the person who was engaged in receiving cargo on board the May Queen, expressly stated to the witness Forman, that the vessel would not be responsible for breakage. This witness it will be remembered, was the maker of the cases which are the subject of litigation, and from abundant caution, superintended their shipment; but in no just legal sense can he be regarded in the light of the shipper. The consignors and shippers acting for the owner of the cases residing in Memphis, Tennessee, were Caldwell & Co.; and I am aware of no principle of law which will hold them bound by the stipulations of a contract, to which there is no proof they ever assented. It is not shown that Forman had any authority to make on their behalf, a special agreement of so im-

portant a character as would exempt the vessel from the usual and well established responsibilities of a common carrier. It does not appear that the witness assented at all to the declaration on the part of the person who was receiving the cargo; it is perfectly clear that he did not assume authority to make a contract binding upon the shippers; and the court is therefore bound to say that the exemption from liability claimed for this vessel, has been made to depend upon implication or inference founded on doubtful or conflicting evidence; and that it is not of that specific and certain character, which according to the decision of the supreme court of the United States, already referred to, should leave no room for controversy between the parties. But even if we admit that there was a special agreement in this case between the shippers and the owners, by which the liability of the vessel as a common carrier was limited, it has never been held that such a contract could be pleaded as an exemption from responsibility for any loss or damage resulting for gross negligence or misfeasance in the master or his servants. 2 Kent, Comm. 607; Story, Bailm. § 558. It has been satisfactorily shown that these cases were put on board with great care under the superintendence of the witness Forman, and that they were left safe and in good order by him in the custody of the officers of the vessel. If they have not been delivered in like good order and condition, the conclusion is irresistible that the care and caution which were observed in putting them on board, were wanting on the part of those employed in unlading and placing them on the levee. The officers of the vessel knew perfectly well the contents of the boxes, and a failure on their part to observe every precaution necessary to insure their safe delivery, must be regarded as such gross negligence as subjects the vessel to the usual liability for the loss by breakage. The same conclusion must necessarily follow, if after they were left by Forman, they were finally stowed in such a manner as to render them liable to be jostled against other articles by the motion of the vessel.

The proctor for the respondents has relied upon a protest which was made by the second mate of the May Queen, and which was not afterwards extended in consequence of the death of the master, to show that the breakage may have been caused by the perils of the sea. Even if the protest could be received as conclusive evidence of all the facts it contains, there is no fact stated in it, which would justify the court in saying that the damage complained of was caused by the winds and waves, or by any other cause absolutely beyond the control of the officers of the vessel. Such a conclusion would be a mere presumption or inference from a general statement, that at certain intervals of the voyage the vessel experienced hard rain squalls which caused the vessel to labor hard. But whether these squalls actually produced the damage alleged to have been sustained in this case, must be left to conjecture only.

But I am satisfied that his protest cannot be received as evidence to establish the facts for which it was introduced. As a general rule it is difficult to perceive upon what ground such ex parte statements as are contained in protests, can be admitted to determine a controversy between the vessel and the shippers. The latter, having, as in this case, no opportunity of cross-examining the persons who make the statements, can rarely be prepared to counteract the effect which such statements, if admitted, would be calculated to produce. If such evidence could be permitted to prevail in a case like this, the shippers of cargo would be placed at the mercy of those who navigate the vessels upon the high seas, and who by their usually extravagant descriptions of the storms and tempests they encounter, would have it in their power to cause every case of damage involving a doubt, to be ascribed to the perils of the sea. "In a seaman's protest," says Judge Hopkinson in the case of Hand v. The Elvira [Case No. 6,015], "the waves are always mountain high, the winds never less than a hurricane, and the peril of life generally impending. There may be some pride of authorship in these compositions, and the writer may aim to exhibit his power and skill in describing dangers." In the case of The Betsey Caines, 2 Hagg. Adm. 28, the protest by the master attested by two of his seamen, was offered as evidence. It was objected to as quite inadmissible upon the ground that it was res inter alios acta; and Lord Stowell said: "I should be unwilling to allow a protest to be introduced that has been properly described as res inter alios acta. I therefore reject the protest and the article that pleads it." But I consider the authority of Abb. Shipp. 466, as conclusive on this point. "The protest," says that authority, "is a declaration or narrative by the master, of the particulars of the voyage, of the storms or bad weather which the vessels may have encountered, the accidents which may have occurred, and the conduct, in cases of emergency he had thought proper to pursue. With whatever formalities drawn up, it cannot be received in our courts as evidence for the master or his owners; but it may be evidence against him and them, and he should take care to supply from the log-book, his own recollection and that of the mate, or trustworthy mariners, true and faithful instructions for its preparation."

After an attentive examination of the law and evidence in this case, I am satisfied that the libelant is entitled to recover the damage he has sustained in consequence of the breakage complained of; and it is therefore ordered that there be judgment in his favor against the brig May Queen, for the sum of five hundred and sixty dollars, with five per cent. interest from the 17th of October, 1853, and the costs of suit.

Case No. 9,482.

In re MERRITT.

[A decision by the state court of South Carolina. See 5 Hall's Law J. 497.]

Case No. 9,483.

MERRITT et al. v. BREWER.

[4 Am. Law J. (N. S.) 334; 14 Law Rep. 452; 25 Hunt, Mer. Mag. 594.]

SHIPPING—AUTHORITY OF MASTER TO BIND OWNER—EVIDENCE—LIEN.

The libellants [William H. Merritt & Co.] supplied a ship belonging to the state of Maine, and owned by the respondent [J. N. M. Brewer], with ship stores, &c., in this port, at various times, between July, 1849, and August, 1850, on the orders of her master. In June, 1850, the respondent paid the indebtedness then accrued for such supplies, to the amount of $409.30, and interest. The ship then being in this port, and fitting for a voyage to the East Indies, under the same master, the libellants, on the like order, furnished her stores and supplies for the voyage, and allege also that they shipped cargo on board. The master died at Manilla before the voyage was completed. The libellants proved, by the admissions of the master who succeeded him, that a portion of the libellants cargo was appropriated at Manilla to the necessities of the ship. They also proved, that, in addition to ship stores and other supplies furnished the ship in New York, they advanced to the master various sums in cash, whilst she was here fitting out.

Held, that the master had competent authority in law to charge the ship or owner for such supplies, and that it was not necessary for the libellants to prove they were absolutely necessary for the ship, nor that they were actually placed on board. If they were such as were appropriated for the voyage, and were delivered pursuant to the order of the master, or in the usual mode of business, the owner was chargeable for them.

Held, that by paying the former credit to the master and ship, the respondent gave an implied authority to the master to contract the subsequent debt of the same character.

Held, that the declarations of the new master were incompetent evidence to charge the defendant on the claim of libellants for cargo shipped on board. They should proceed upon the bill of lading.

Held, that advances of cash to the master created no lien on the vessel and no liability of the owner, unless appropriated to her necessities, which the creditors must prove, as also the advance for insurance.

A reference ordered to take the account upon the basis of this decision.

MERRITT (FORSAITH v.). See Case No. 4,946.

MERRITT v. The J. B. LUNT. See Case No. 7,247.

Case No. 9,484.

MERRITT et al. v. SACKETT et al.

[2 Am. Law J. (N. S.) 341; 12 Law Rep. 511.]

District Court, N. D. New York. Nov. 27, 1849.

COURTS—ADMIRALTY—MATERIAL MEN—SUIT IN PERSONAM.

[Under rule 12 prescribed by the supreme court in 1845, admiralty courts have no jurisdiction over suits in personam brought by material men to enforce payment of their claims.]

[Cited in Cunningham v. Hall, Case No. 3,481.]

[This was a proceeding by Jacob T. Merritt and others against Edward Sackett and George Sackett for the value of supplies furnished the defendants for the schooners Arkansas and Alabama.]

CONKLING, District Judge. This is an action in personam, on the admiralty side of the court, instituted under the act of congress of February 26, 1845 [5 Stat. 726], conferring a quasi admiralty jurisdiction upon the district courts of the United States of certain cases arising out of the commerce and navigation of the lakes. The suit is for the value of certain articles of ship chandlery sold by the libellants, who are dealers in such articles, having their place of business in the city of New York, to the defendants, resident at Sacketts Harbor, in this district, alleged to have been designed for use, by the defendants, in the completion and fitting out of the schooners Arkansas and Alabama, at the latter place. A warrant of arrest having been issued and returned executed, it is now, on the return day of the process, objected, in behalf of the defendant, that the court has no jurisdiction of the case, and that the defendant ought therefore to be discharged from arrest, and the libel dismissed. The objection is founded on the domestic character of the vessel, and I am the more anxious explicitly to state the grounds of the conclusion at which I have arrived, because it was at variance with what was said by me some months ago, when called on to decide the admission of a libel of the like nature with this. My answer in that case to the application of the proctor for an order directing process to issue, was as follows: "Whether this suit is maintainable is a question which has not yet been directly decided by the supreme court. The admiralty jurisdiction of the American courts of suits in personam, by material men for labor, materials and supplies, in a home port, was however distinctly asserted by Mr. Justice Story in delivering the opinion of the court in the early case of The General Smith [4 Wheat. (17 U. S.) 438], and follows as a necessary consequence of the doctrines constantly asserted and acted upon by him in his circuit. The principle upon

which he is well known to have uniformly insisted is, that the admiralty jurisdiction in personam extends to all maritime contracts; and the contract in question is clearly of that character,—whether in the case of a domestic or of a foreign vessel. It is upon this ground alone that the admiralty takes cognizance of liens in favor of material men, given by state laws, for repairs and supplies furnished in a home port. Several of the judges of the supreme court, in dissenting opinions, and at the circuit, have controverted this general principle; but it has been uniformly acquiesced in and repeatedly applied by the majority of the court, as it has been by several of the district courts. Under these circumstances, I do not feel at liberty to decline to take cognizance of suits in personam, in favor of material men in the cases of vessels embraced by the act of congress, although the services may have been rendered, or the materials or supplies furnished, at the place of the owner's residence."

In the foregoing review of the question, it will be seen, no reference is made to rule 12 of the rules prescribed by the supreme court of the United States, 1845, to regulate the practice of the courts of the United States, in cases of admiralty and maritime jurisdiction. In fact the rule was then altogether overlooked. It is as follows: "In all suits by material men, for supplies, or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the freight and ship in rem, or against the master or owner alone in personam; and the like proceedings in rem shall apply in cases of domestic ships, where, by the local law, a lien is given to material men for supplies, repairs or other necessaries." The direct object of this rule was to prescribe, or declare, the various forms of remedy to which those known in admiralty jurisprudence as material men shall have a right to resort for the enforcement of their claims. It is one of a series of rules, by the others of which it is immediately followed, having the like objects in relation to other subjects of admiralty jurisdiction. The latter branch of the rule, authorizing a suit in rem, for supplies furnished to a domestic vessel, where by the local law a lien is given, may not necessarily require a construction which would exclude a farther remedy in personam, though there is strong color for such an interpretation, according to the legal maxim, "expressio unis exclusio est alterius." But these rules imply a consciousness, on the part of the judges of the supreme court, of the right, and, indeed, of the necessity, of exercising to some extent what savors strongly of discretionary authority, in determining the limits and conditions of this branch of the jurisdiction of the American courts; and no one who is familiar with the uncertainty and difficulty by which the subject, as left by the constitution and the judicial act of 1789 [1 Stat. 73], was environed, and the discussions to which it has given rise, can fail to perceive the impossibility of excluding considerations of expediency altogether from the inquiry. This is a point of some importance in the present case, because, although the general principle has been incidentally asserted on several occasions by the supreme court, that all maritime contracts fall within the scope of the admiralty jurisdiction, (and the contracts of material men are reputed to be of this description), yet what was said in the case of The General Smith 4 Wheat. [17 U. S.] 438, as to the right of the material man to sue in personam, in the admiralty, was but an obiter dictum; and in the subsequent case of Ramsey v. Allegre, 12 Wheat. [25 U. S.] 611, the court expressly waived any decision upon the question of this right, and one of the judges, in a very elaborate opinion, unequivocally denied its existence.

Under these circumstances, it seems not unreasonable to suppose that the supreme court thought proper, if not absolutely (by implication), to repudiate the remedy in personam in the case of domestic vessels, at least to reserve the question for future consideration. The contract of marine insurance is also, so far as I can discern, undeniably a maritime contract, and, as such, was very naturally held by the late Mr. Justice Story to be comprised within the admiralty jurisdiction of the courts of the United States. Still, in no instance is it believed, out of the First circuit, has a suit in the admiralty been maintained or instituted on this species of contract; and in the case of New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. [47 U. S.] 344, the distinguished counsel for the libellant, though arguing in favor of a comprehensive admiralty jurisdiction, expressly disclaimed its existence in the case of marine insurance. In order, however, to justify this disclaimer, it became necessary for him to qualify the general principle above mentioned, affirming the admiralty jurisdiction over all contracts in their nature maritime, and virtually to limit it to these for the performance of maritime services.

But the principle thus restricted, would exclude material men, as well in the case of foreign as of domestic vessels, and also bottomry bonds, which have at all times been admitted to be within the admiralty jurisdiction, even in England. If, therefore, policies of insurance are to be excluded from the admiralty jurisdiction, the exception, so far as I am able to discern, will be purely arbitrary: and yet the impression seems to be generally entertained, that the supreme court is not likely, if the question should ever be brought before it for decision, to uphold the admiralty jurisdiction over this species of contract.

With respect to the remedies for materials or supplies furnished for a vessel in her home port, it is also to be observed, that it is only in virtue of the lien given by a state law that the admiralty jurisdiction is held to attach at

all; and if the question has not already been determined, it might be worth while to consider, whether it would not be better to leave such liens to be enforced in the state tribunals alone. But the ground on which the established doctrine rests is, that while the lien given by the local law is to be regarded as in its nature maritime, and therefore fit to be enforced by admiralty process, yet that no lien is given by the general maritime law; the contract being but an ordinary personal transaction between the parties residing in the same place, and the exigencies of commerce not requiring that any lien should be implied. Would it be absurd, then, to hold the contract to be one with which the maritime law has no especial concern, and which therefore confers no right to resort to a maritime court for its enforcement?

Without pursuing the inquiry further, my conclusion is, that the omission in the rule above cited, of any mention of a remedy in personam in favor of material men in a home port, was made ex industria, and was designed to be significant. For this reason alone, therefore, I deem it more safe and discreet, for the present at least, to abstain from the exercise of this jurisdiction. There is another consideration also connected with the subject, which, under existing circumstances, is fitted to awaken additional caution in dealing with this question, and which might, perhaps not improperly, in some degree influence a decision upon the propriety of assuming a doubtful authority. To render the remedy in question more effective than a suit in common law in a state court, resort must be had to the process of arrest against the person of defendant; and it was doubtless in the hope of deriving superior advantage from the employment of this form of process, that the libellants have seen fit to come into this court at all. But imprisonment for debt by means of process issued from the state courts, having in this state been abolished by law, its continuance, through the process of the national courts, in cases of admiralty jurisdiction, is regarded with jealousy and distrust. In a recent case, the legality of such process from this court was denied, but was upheld by the court. And in the present case, as I am informed, a writ of habeas corpus has been sued out by the defendant, before one of the state judges, on the ground that the process of arrest was not warranted by law. Collision between the state and national authorities is always to be deeply regretted, and no enlightened and patriotic functionary can be insensible to the duty of carefully abstaining, as far as he can consistently with paramount obligations, from all acts likely to lead to so deplorable a result.

MERRITT HUNT, The (LUTHER v.). See Case No. 8,610.

MERRITT, The MARY. See Case No. 9,222.

Case No. 9,485.

MERRIWETHER v. SALINE COUNTY.

[5 Dill. 265.] [1]

Circuit Court, W. D. Missouri. 1878.

BONDS—TOWNSHIP—ACT OF LEGISLATURE—HOW PAYABLE—NEGOTIABILITY—DEFENCES.

1. The cases of Foster v. Callaway Co. [Case No. 4,967], and Sherrard v. Lafayette Co. [Id. 12,771], cited.

2. The bonds in suit, not being promises to pay money absolutely, are not negotiable, and are, therefore, open, in the hands of any holder, to defences which would have been available against the payee.

[Cited in Chaffee v. Rutland R. Co., 55 Vt. 123.]

3. A township bond containing a statement that "it is to be converted into a county bond" whenever a certain injunction shall be finally dissolved, and county bonds issued under the order enjoined, not being a promise to pay money absolutely, but a stipulation for bonds thereafter to be issued, is not negotiable in such a sense as to preclude the maker from defences, although it may be held by the plaintiff for value before due, and without actual notice of the maker's defences.

Action on township bonds issued under the act of March 23d, 1868. The cause was submitted to the court on agreed facts.

T. K. Skinker, for plaintiff.

Graves & Rathburn and T. C. Fletcher, for defendant.

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

KREKEL, District Judge. This suit is brought on coupons detached from Saline county bonds, issued in payment of a subscription of Marshall township, in Saline county, to the capital stock of the Louisiana and Missouri River Railroad. A vote was had under the so-called township act of March 23d, 1868, and the requisite two-thirds vote of those voting was given in favor of the subscription, on certain conditions embodied in the order of the county court. Saline county, as such, prior to the subscription of Marshall township, had made a county subscription of $400,000 to the same railroad. This last subscription had been attacked for illegality in the circuit court of Saline county, and such proceedings were had in the case as resulted in perpetually enjoining the issuing of the bonds. The ground mainly relied on in opposition to the issuing of the bonds was the unconstitutionality of the amendment of the charter of the said railroad company of March 24th, 1868.

The original charter of the Louisiana and Missouri River Railroad Company, granted in 1859, and the several amendments thereto prior to the amendment of March 24th, 1868, authorized the company to build a road from Louisiana, on the Mississippi river, to any point on the Missouri river, and authorized the counties along the line of the road to sub-

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

scribe stock thereto, without having the question of subscription submitted, as required by the constitution of 1865. By the amendment of March 24th, 1868, the railroad company sought to obtain the privilege of extending their road across the Missouri river, and, at the same time, to have the provision regarding subscribing without submission granted to the counties along the line of the extension on the south side of the Missouri river.

Acting under the supposition that these powers had been granted by the amendment, the company applied for and obtained the subscription of $400,000 of Saline county, the issuing of the bonds for which was enjoined. While the proceedings to enjoin were pending, the people of Marshall township, under the act of March 23d, 1868, petitioned the county court of Saline county to submit to the voters of Marshall township the question of subscribing $150,000 in aid of extending the road across the Missouri river, on the condition of building it to Marshall, the county seat of Saline county, and within Marshall township, and the further condition of establishing a depot within half a mile of the town of Marshall. Under this submission a vote was had, resulting in a two-thirds majority in favor of a subscription, and the bonds subscribed.

The constitutional power of the legislature of Missouri to grant powers such as are contained in the amendment of the charter of March 24th, 1868, as well as the negotiability of the bonds issued, are to be considered. Regarding the constitutionality of the amendment of March 24th, 1868, these questions were raised in the supreme court of Missouri, namely: The right to amend the original charter so as to extend the road across the Missouri river; secondly, the granting of the power to subscribe without submission; thirdly, the failing to recite in the title the subject embraced in the act.

Upon two of these questions the supreme court of Missouri has left us in doubt. On the question of the right to extend the road across the Missouri river, and the question of the title of the act, the judges were divided in opinion—the special judge called in deciding against the constitutionality of the amendment on both grounds, Judge Wagner, in a dissenting opinion, reaching an opposite conclusion, and the third judge expressing no opinion. As may be seen in the case of Foster v. Callaway Co. [Case No. 4,967], this court inclined to follow Judge Wagner's views on these questions. Upon the second question, "the granting of the power to subscribe without submission," all the judges agreed that the constitution of 1865 prohibited the legislature from granting such a power, and this court, in the case of Sherrard v. Lafayette Co. [Id. 12,771], followed that decision.

The so-called "Township Act" of March 23d, 1868, under the decision of State v. Linn County Court, 44 Mo. 504, and cases since, has been treated by this court as constitutional, the question of its constitutionality never having been directly raised; yet it must be confessed that the intimations in the Harshman v. Bates Co. case [Case No. 6,148] look to a different view. The doubt will soon be solved, as in some of the cases now pending before the supreme court of the United States the question is directly made.

Assuming the so-called "Township Act," of March 23d, 1868, to be constitutional, and the grant of power to extend the railroad across the Missouri river by the amendment of the charter of the company by the act of March 24th, 1868, as within legislative authority, we would hold bonds, so far as these questions are concerned, in conformity to decision rendered by this court prior to the decision of the Harshman v. Bates Co. case [supra]. If the views expressed in the latter case shall be maintained, they would control this case. The question of negotiability and consequent notice remains to be considered.

The Marshall township bonds read as follows: "United States of America, State of Missouri. Saline County Bond. No. 3; Class 'A'; nine years; $100; interest ten per centum per annum. Know all men by these presents, that, on the 1st day of January, A. D. 1880, the county of Saline, in the state of Missouri, promises to pay to the Louisiana and Missouri River Railroad Company, or bearer, the sum of one hundred dollars, at the Bank of America, in the city and state of New York, together with interest at the rate of ten per centum per annum, payable at the said Bank of America on the 1st day of January of each year, on the presentation and delivery of the annexed coupons of interest as they severally become due. This bond is issued in part payment of a subscription of one hundred and fifty thousand dollars made by Marshall township to the capital stock of the Louisiana and Missouri River Railroad Company, pursuant to an order of the county court of Saline county made on the 7th day of September, 1870, and is to be converted and exchanged for bonds of the county of Saline whenever the injunction now covering the subscription of four hundred thousand dollars made by the county court of said county on the 7th day of February, 1868, to said Louisiana and Missouri River Railroad Company shall be finally dissolved, and bonds issued under said order. In testimony whereof," etc.

The $400,000 of Saline county bonds referred to on the face of these Marshall township bonds were never issued, but their issue was enjoined, as stated. It would seem that the recital in the bond sued on, that it "is to be converted and exchanged for bonds of the county of Saline whenever the injunction now covering the subscription of $400,000 made by the county court of said county on the 7th day of February, 1868, to the Louisiana and Missouri River Railroad Company shall be finally dissolved, and bonds issued under said order," quite clearly expresses the intention of the parties. It is not a promise to pay

money absolutely, but a stipulation for bonds thereafter to be issued. Nor does the promise to pay, the manner in which payment is to be made, or the form of the bond, militate against this view, for all of this may well have been set out as indicating the terms and conditions of the new bond thereafter to be issued.

The bonds not being negotiable, notice as to the conditions upon which they were issued attaches. And here we find, from the order of the county court of September 7th, 1870, recited in the bond, and the agreed statement of facts, that they were issued, among others, on the condition that the said road should be graded from the point of crossing the Missouri river to the town of Marshall, and that a permanent depot be established within half a mile of the town of Marshall. The presumption arising from the issuing of said bonds as to the compliance of the conditions on which they were issued is relied on as showing that they were properly issued; and this would be the case were the bonds negotiable and in the hands of innocent holders. The object in making the subscription and issuing the bonds was to aid in the construction of a railroad to the town of Marshall, the county seat of Saline county, and not the having some valueless work done thereon, not accomplishing the object. The building of the railroad, as shown by the agreed facts, has been abandoned, and thus the object of the subscription and the issuing of the bonds defeated. The consideration for which the bonds were issued having failed, the coupons thereof constitute no legal obligation to pay. Judgment is therefore rendered for defendant. Judgment accordingly.

[NOTE. Subsequently the validity of the county bonds was put in issue in the case of Pepper v. Saline County, Case No. 10,972. This case was heard upon demurrer to answer. The bonds were held not negotiable, and therefore subject to the equities set up by defense of noncompliance with conditons on which they were issued. The demurrer was overruled.]

MERRY (BUFFUM v.). See Case No. 2,112.

MERRY, The LIZZIE. See Case No. 8,423.

Case No. 9,486.

MERRYFIELD et al. v. JONES.

[2 Curt. 306.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

BONDS—FOR INJUNCTION—ACTION FOR DAMAGES—POWER OF COURT OF EQUITY.

A court of equity cannot order the complainant and his sureties on an injunction bond, to pay the damages sustained by reason of the injunction. The defendant must resort to an action on the bond.

[Cited in Spencer v. Sherwin, 86 Iowa, 120, 53 N. W. 86; City of St. Louis v. St. Louis Gaslight Co., 82 Mo. 350; Sturgis v. Knapp, 33 Vt. 522.]

R. H. Dana, Jr., in behalf of [Edwin] Jones, moved the court to refer to a master, the question, how much damage Jones had suffered by reason of temporary injunction, restraining him from using a machine alleged to be patented; and that the complainants [William J. Merryfield and others], and their sureties, in a bond, conditioned to pay to Jones any damages he might suffer by reason of that injunction, if finally determined not to be rightful, might be decreed to pay the same. And he showed that the bill had been dismissed, and the injunction dissolved.

The motion was resisted by Mr. Brigham, for complainants.

CURTIS, Circuit Justice. It is not incident to the general powers of a court of equity to proceed against the principals and sureties on such a bond, and enforce payment of the damages secured by its condition, by a decree. It would be a convenient, and, perhaps, a proper power, to be conferred on the courts of the United States by congress. In Hiriart v. Ballon, 9 Pet. [34 U. S.] 156, it was held that by virtue of a rule of the state courts of Louisiana, adopted under the act of congress of May 26, 1824 (4 Stat. 62), by the circuit court of the United States, there might be a summary judgment against the principal and sureties in an appeal bond at law. The objection that a suit on a bond is, in its nature, a suit at the common law, and so that a right to a trial by jury is conferred by the seventh amendment of the constitution, seems not to have been overlooked in that case; though how far it was considered does not appear. If not determined, it is a grave question, Gwin v. Breedlove, 2 How. [43 U. S.] 29; Gwin v. Martin, 6 How. [47 U. S.] 7. But I do not find it necessary to consider it, in this case, because I am clearly of opinion, that aside from positive legislation, a court of equity does not afford a remedy on such bonds. It must be sought by an action at law. Bean v. Heath, 12 How. [53 U. S.] 168. Motion denied.

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

Case No. 9,487.

Ex parte MERRYMAN.

[Taney, 246; [1] 9 Am. Law Reg. 524; 24 Law Rep. 78; 3 West. Law Month. 461.]

Circuit Court, D. Maryland. April Term, 1861.

HABEAS CORPUS—POWER TO SUSPEND IN TIME OF WAR—PRESIDENT—MILITARY AUTHORITY—SUSPENSION BY CONGRESS.

1. On the 25th May 1861, the petitioner, a citizen of Baltimore county, in the state of Maryland, was arrested by a military force, acting under orders of a major-general of the Unit-

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

ed States army, commanding in the state of Pennsylvania, and committed to the custody of the general commanding Fort McHenry, within the district of Maryland; on the 26th May 1861, a writ of habeas corpus was issued by the chief justice of the United States, sitting at chambers, directed to the commandant of the fort, commanding him to produce the body of the petitioner before the chief justice, in Baltimore city, on the 27th day of May 1861; on the last-mentioned day, the writ was returned served, and the officer to whom it was directed declined to produce the petitioner, giving as his excuse the following reasons: 1. That the petitioner was arrested by the orders of the major-general commanding in Pennsylvania, upon the charge of treason, in being "publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government." 2. That he (the officer having the petitioner in custody) was duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus for the public safety. *Held*, that the petitioner was entitled to be set at liberty and discharged immediately from confinement, upon the grounds following: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the law of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.

[Approved in Re Kemp, 16 Wis. 367.]

2. Under the constitution of the United States, congress is the only power which can authorize the suspension of the privilege of the writ.

[Cited in Ex parte Field, Case No. 4,761; McCall v. McDowell, Id. 8,673.]

Habeas corpus. On the 26th May 1861, the following sworn petition was presented to the chief justice of the United States, on behalf of John Merryman, then in confinement in Fort McHenry:

"To the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States: The petition of John Merryman, of Baltimore county and state of Maryland, respectfully shows, that being at home, in his own domicile, he was, about the hour of two o'clock a. m., on the 25th day of May, A. D. 1861, aroused from his bed by an armed force pretending to act under military orders from some person to your petitioner unknown. That he was by said armed force, deprived of his liberty, by being taken into custody, and removed from his said home to Fort McHenry, near to the city of Baltimore, and in the district aforesaid, and where your petitioner now is in close custody. That he has been so imprisoned without any process or color of law whatsoever, and that none such is pretended by those who are thus detaining him; and that no warrant from any court, magistrate or other person having legal authority to issue the same exists to justify such arrest; but to the contrary, the same, as above stated, hath been done without color of law and in violation of the constitution and laws of the United States, of which he is a citizen. That since his arrest, he has been informed, that some order, purporting to come from one General Keim, of Pennsylvania, to this petitioner unknown, directing the arrest of the captain of some company in Baltimore county, of which company the petitioner never was and is not captain, was the pretended ground of his arrest, and is the sole ground, as he believes, on which he is now detained. That the person now so detaining him at said fort is Brigadier-General George Cadwalader, the military commander of said post, professing to act in the premises under or by color of the authority of the United States. Your petitioner, therefore, prays that the writ of habeas corpus may issue, to be directed to the said George Cadwalader, commanding him to produce your petitioner before you, judge as aforesaid, with the cause, if any, for his arrest and detention, to the end that your petitioner be discharged and restored to liberty, and as in duty, &c. John Merryman. Fort McHenry, 25th May 1861.

"United States of America, District of Maryland, to wit: Before the subscriber, a commissioner appointed by the circuit court of the United States, in and for the Fourth circuit and district of Maryland, to take affidavits, &c., personally appeared the 25th day of May, A. D. 1861, Geo. H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God, that the matters and facts stated in the foregoing petition are true, to the best of his knowledge, information and belief; and that the said petition was signed in his presence by the petitioner, and would have been sworn to by him, said petitioner, but that he was, at the time, and still is, in close custody, and all access to him denied, except to his counsel and his brother-in-law—this deponent being one of said counsel. Sworn to before me, the 25th day of May, A. D. 1861. John Hanan, U. S. Commissioner.

"United States of America, District of Maryland, to wit: Before the subscriber, a commissioner appointed by the circuit court of the United States, in and for the Fourth circuit and district of Maryland, to take affidavits, &c., personally appeared this 26th day of May, 1861, George H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God, that on the 26th day of May, he went to Fort McHenry, in the preceding affidavit mentioned, and obtained an interview with Gen. Geo. Cadwalader, then and there in command, and deponent, one of the counsel of said John Merryman, in the foregoing petition named, and at his request, and declaring himself to be such counsel, requested and demanded that he might be permitted to see the written papers, and to be permitted to make copies thereof, under and by which he, the said general, detained the said Merryman in custody, and that to said demand the said Gen. Cadwalader replied, that he would neither permit

the deponent, though officially requesting and demanding, as such counsel, to read the said papers, nor to have or make copies thereof. Sworn to this 26th day of May, A. D. 1861, before me. John Hanan, U. S. Commissioner for Maryland."

Upon this petition the chief justice passed the following order:

"In the matter of the petition of John Merryman, for a writ of habeas corpus: Ordered, this 26th day of May, A. D. 1861, that the writ of habeas corpus issue in this case, as prayed, and that the same be directed to General George Cadwalader, and be issued in the usual form, by Thomas Spicer, clerk of the circuit court of the United States in and for the district of Maryland, and that the said writ of habeas corpus be returnable at eleven o'clock, on Monday, the 27th of May 1861, at the circuit court room, in the Masonic Hall, in the city of Baltimore, before me, chief justice of the supreme court of United States. R. B. Taney."

In obedience to this order, Mr. Spicer issued the following writ:

"District of Maryland, to wit: The United States of America, to General George Cadwalader, Greeting: You are hereby commanded to be and appear before the Honorable Roger B. Taney, chief justice of the supreme court of the United States, at the United States court-room, in the Masonic Hall, in the city of Baltimore, on Monday, the 27th day of May 1861, at eleven o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there, do, submit to, and receive whatsoever the said chief justice shall determine upon concerning you on this behalf, according to law, and have you then and there this writ. Witness, the Honorable R. B. Taney, chief justice of our supreme court, &c. Thomas Spicer, Clerk. Issued 26th May 1861."

The marshal made return that he had served the writ on General Cadwalader, on the same day on which it issued; and filed that return on the 27th May 1861, on which day, at eleven o'clock precisely, the chief justice took his seat on the bench. In a few minutes, Colonel Lee, a military officer, appeared with General Cadwalader's return to the writ, which is as follows:

"Headquarters, Department of Annapolis, Fort McHenry, May 26 1861. To the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, Baltimore, Md.—Sir: The undersigned, to whom the annexed writ, of this date, signed by Thomas Spicer, clerk of the supreme court of the United States, is directed, most respectfully states, that the arrest of Mr. John Merryman, in the said writ named, was not made with his knowledge, or by his order or direction, but was made by Col. Samuel Yohe, acting under the orders of Major-General William H. Keim, both of said officers being in the military service of the United States, but not within the limits of his command. The prisoner was brought to this post on the 20th inst., by Adjutant James Wittimore and Lieut. Wm. H. Abel, by order of Col. Yohe, and is charged with various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government. He is also informed that it can be clearly established, that the prisoner has made often and unreserved declarations of his association with this organized force, as being in avowed hostility to the government, and in readiness to co-operate with those engaged in the present rebellion against the government of the United States. He has further to inform you, that he is duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety. This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration, that those who should co-operate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments. He, therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the president of the United States, when you shall hear further from him. I have the honor to be, with high respect, your obedient servant, George Cadwalader, Brevet Major-General U. S. A., Commanding."

The chief justice then inquired of the officer whether he had brought with him the body of John Merryman, and on being answered that he had no instructions but to deliver the return, the chief justice said: "General Cadwalader was commanded to produce the body of Mr. Merryman before me this morning, that the case might be heard, and the petitioner be either remanded to custody, or set at liberty, if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here, at twelve o'clock to-morrow." The order was then passed as follows:

"Ordered, that an attachment forthwith issue against General George Cadwalader for a contempt, in refusing to produce the body of John Merryman, according to the command of the writ of habeas corpus, returnable and returned before me to-day, and that said attachment be returned before me at twelve

o'clock to-morrow, at the room of the circuit court. R. B. Taney. Monday, May 27 1861."

The clerk issued the writ of attachment as directed. At twelve o'clock, on the 28th May 1861, the chief justice again took his seat on the bench, and called for the marshal's return to the writ of attachment. It was as follows:

"I hereby certify to the Honorable Roger B. Taney, chief justice of the supreme court of the United States, that by virtue of the within writ of attachment, to me directed, on the 27th day of May 1861, I proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ. I sent in my name at the outer gate; the messenger returned with the reply, 'that there was no answer to my card,' and therefore, I could not serve the writ, as I was commanded. I was not permitted to enter the gate. So answers Washington Bonifant, U. S. Marshal for the District of Maryland."

After it was read, the chief justice said, that the marshal had the power to summon the posse comitatus to aid him in seizing and bringing before the court, the party named in the attachment, who would, when so brought in, be liable to punishment by fine and imprisonment; but where, as in this case, the power refusing obedience was so notoriously superior to any the marshal could command, he held that officer excused from doing anything more than he had done. The chief justice then proceeded as follows:

"I ordered this attachment yesterday, because, upon the face of the return, the detention of the prisoner was unlawful, upon the grounds: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law. It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment. I forbore yesterday to state orally the provisions of the constitution of the United States, which make those principles the fundamental law of the Union, because an oral statement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the clerk of the circuit court, in the course of this week."

He concluded by saying, that he should cause his opinion, when filed, and all the proceedings, to be laid before the president, in order that he might perform his constitutional duty, to enforce the laws, by securing obedience to the process of the United States.

TANEY, Circuit Justice. The application in this case for a writ of habeas corpus is made to me under the 14th section of the judiciary act of 1789 [1 Stat. 81], which renders effectual for the citizen the constitutional privilege of the writ of habeas corpus. That act gives to the courts of the United States, as well as to each justice of the supreme court, and to every district judge, power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. The petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county; while peaceably in his own house, with his family, it was at two o'clock on the morning of the 25th of May 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as aforesaid to Fort McHenry, by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused: and it is not alleged in the return, that any specific act, constituting any offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. Having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of habeas corpus, upon the ground that he is duly authorized by the president to suspend it.

The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized

as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.

When the conspiracy of which Aaron Burr was the head, became so formidable, and was so extensively ramified, as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to congress, with all the proofs in his possession, in order that congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that, upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended, under the orders, and by the authority of the president, and believing, as I do, that the president has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills, requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act, without a careful and deliberate examination of the whole subject.

The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing "that all legislative powers therein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives." And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants [and legislative powers which it expressly prohibits];[2] and at the conclusion of this specification, a clause is inserted giving congress "the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

The power of legislation granted by this latter clause is, by its words, carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles, essential to the liberty of the citizen, and to the rights and equality of the states, by denying to congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined, that there should be no room to doubt, where rights of such vital importance were concerned; and accordingly, this clause is immediately followed by an enumeration of certain subjects, to which the powers of legislation shall not extend. The great importance which the framers of the constitution attached to the privilege of the writ of habeas corpus, to protect the liberty of the citizen, is proved by the fact, that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true, that in the cases mentioned, congress is, of necessity, the judge of whether the public safety does or does not require it; and their judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise, before they give the government of the United States such power over the liberty of a citizen.

It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers

[2] [From 9 Am. Law Reg. 524.]

conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the executive power shall be vested in a president of the United States of America, to hold his office during the term of four years; and then proceeds to prescribe the mode of election, and to specify, in precise and plain words, the powers delegated to him, and the duties imposed upon him. The short term for which he is elected, and the narrow limits to which his power is confined, show the jealousy and appreliension of future danger which the framers of the constitution felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government which were considered as dangerous to the liberty of the subject; and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office; he is, from necessity, and the nature of his duties, the commander-in-chief of the army and navy, and of the militia, when called into actual service; but no appropriation for the support of the army can be made by congress for a longer term than two years, so that it is in the power of the succeeding house of representatives to withhold the appropriation for its support, and thus disband it, if, in their judgment, the president used, or designed to use it for improper purposes. And although the militia, when in actual service, is under his command, yet the appointment of the officers is reserved to the states, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the states.

So too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the senate, and cannot appoint even inferior officers, unless he is authorized by an act of congress to do so. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person "shall be deprived of life, liberty or property, without due process of law" —that is, judicial process.

Even if the privilege of the writ of habeas corpus were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the constitution immediately following the one above referred to (that is, the sixth article) provides, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

The only power, therefore, which the president possesses, where the "life, liberty or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.

Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for

the tenth article of the amendments to the constitution, in express terms, provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

Indeed, the security against imprisonment by executive authority, provided for in the fifth article of the amendments to the constitution, which I have before quoted, is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the declaration of independence. Blackstone states it in the following words: "To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison." 1 Bl. Comm. 137.

The people of the United Colonies, who had themselves lived under its protection, while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it.

The right of the subject to the benefit of the writ of habeas corpus, it must be recollected, was one of the great points in controversy, during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new and, as they supposed, a freer government than the one which they had thrown off by the revolution. From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Car. II., commonly known as the great habeas corpus act.

This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. Until the statute of 13 Wm. III., the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, time-serving and partisan judges, often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decision, from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the habeas corpus act of the 31 Car. II. is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law on this subject, and the abuses which were practised through the power and influence of the crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explain briefly, but fully, all that is material to this subject.

Blackstone says: "To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible. But the glory of the English law consists in clearly defining the times, the causes and the extent, when, wherefore and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon a habeas corpus, may examine into its validity, and according to the circumstances of the case, may discharge, admit to bail or remand the prisoner. And yet early in the reign of Charles I. the court of kings bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they would not, upon a habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the 'Petition of Right' (3 Car. I.) which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the king and the government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable; and when at length they agreed that it was,

they however annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time, declaring that 'if they were again remanded for that cause, perhaps the court would not afterwards grant a habeas corpus, being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years." 3 Bl. Comm. 133, 134.

It is worthy of remark, that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject that the delay of the time-serving judges to set him at liberty, upon the habeas corpus issued in his behalf, excited the universal indignation of the bar.

The extract from Hallam's Constitutional History is equally impressive and equally in point: "It is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Car. II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the court of king's bench a writ of habeas corpus ad subjiciendum, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta (if indeed it is not more ancient), that the statute of Car. II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of the crown lawyers, had impaired so fundamental a privilege." 3 Hall. Const. Hist. 19.

While the value set upon this writ in England has been so great, that the removal of the abuses which embarrassed its employment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at, that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of parliament can suspend or authorize the suspension of the writ of habeas corpus. I quote again from Blackstone (1 Bl. Comm. 136): "But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the parliament only or legislative power that, whenever it sees proper, can authorize the crown by suspending the habeas corpus for a short and limited time, to imprison suspected persons without giving any reason for so doing." If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question, from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the Commentaries on the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the supreme court of the United States; and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking, in his Commentaries, of the habeas corpus clause in the constitution, says: "It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress, since the establishment of the constitution. It would seem, as the pow-

er is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body." 3 Story, Comm. Const. § 1336.

And Chief Justice Marshall, in delivering the opinion of the supreme court in the case of Ex parte Bollman and Swartwout, uses this decisive language, in 4 Cranch [8 U. S.] 95: "It may be worthy of remark, that this act (speaking of the one under which I am proceeding) was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means, by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus." And again on page 101: "If at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide; until the legislative will be expressed, this court can only see its duty, and must obey the laws." I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show, that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

Yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The constitution provides, as I have before said, that "no person shall be deprived of life, liberty or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.[3]

[3] The constitution of the United States is founded upon the principles of government set forth and maintained in the Declaration of Independence. In that memorable instrument the people of the several colonies declared, that one of the causes which "impelled" them to "dissolve the political bands" which connected them with the British nation, and justified them in withdrawing their allegiance from the British sovereign, was that "he (the king) had affected to render the military independent of, and superior to, the civil power."

In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

MERS (CONOVER v.). See Cases Nos. 3,122 and 3,123.

Case No. 9,488.

MERSEROLE et al. v. UNION PAPER COLLAR CO.

[3 Fish. Pat. Cas. 483; 6 Blatchf. 356.] [1]

Circuit Court, S. D. New York. March 27, 1869.

COURTS — JURISDICTION — AVERMENT OF CITIZENSHIP — STATE COURTS — JURISDICTION OVER PATENTS — AUTHORITY TO ADJUDGE VOID — LICENSE — SUIT TO REPEAL.

1. It is not sufficient to aver that the complainants are citizens of the United States. It should appear, affirmatively, that they are not citizens of the same state with the defendants.

[Cited in Lewis v. Hitchcock, 10 Fed. 6.]

2. The only authority to adjudge letters patent void, conferred by any statute of the United States, is found in section 16 of the act of 1836 [5 Stat. 123], and section 10 of the act of 1839 [Id. 354], and extends no farther than to a case of two interfering patents, and to a case where the granting of a patent is refused by the commissioners of patents, or by one of the justices of the District of Columbia on appeal.

3. Whether the suit be one by a licensor, to enforce the covenants contained in a license granted under a patent, or be one by the licensee to destroy and annul the license and its covenants, it is equally impossible to find in the subject matter any basis for the jurisdiction of a circuit court of the United States.

[Cited in White v. Lee, 3 Fed. 224; Teas v. Albright, 13 Fed. 413; Albright v. Teas, 106 U. S. 620, 1 Sup. Ct. 556.]

4. If the license is void, because the patent is void, the fact that the plaintiff must show that the patent is void, in order to get rid of the license, does not make the case one arising under the patent act so as to give jurisdiction to a circuit court.

5. A state court has jurisdiction to decree a license to be void and inoperative for fraud, or any other adequate reason, and the fact that, in the investigation, the state court will be obliged to inquire whether there was anything new in the patents which could operate as a consideration for the license, can not deprive the state court of jurisdiction, or confer it upon a circuit court of the United States.

[Cited in brief in Havana Press Drill Co. v. Ashurst, 148 Ill. 121, 35 N. E. 873. Criticised in Continental Store Service Co. v. Clark, 100 N. Y. 368, 3 N. E. 335.]

6. A state court can not take cognizance of a suit brought for the infringement of a patent nor of a direct suit brought to decree a patent to be void, but when a patent comes in question collaterally, its validity must become a subject of inquiry in the state courts.

7. Every citizen has, abstractly, the same interest with every other citizen, that a void patent shall not be in existence. Yet such interest is not sufficient to warrant the maintenance of a suit to repeal a patent.

8. A suit to repeal a patent, except in the cases stated in section 16 of the act of 1836, and section 10 of the act of 1839, can not be brought either in a state court or a circuit court of the United States.

9. Section 16 of the act of 1836 and section 17 must be construed together, and the confiding of authority by section 16, to declare a patent void, in certain specified cases, must be regarded as intended not to confer such authority in any other cases.

[This was a bill in equity, to which a demurrer was interposed by the defendants. The plaintiffs [Cornelius M. Merserole and James L. Libby] were described, in the bill, as "citizens of the United States," but they were not averred to be citizens of any state of the United States. The defendants were described as "The Union Paper Collar Company, claiming to be a corporation created under the laws of the state of New York, and having its office and principal place of business in the Southern district of New York." The plaintiffs were manufacturers of paper collars. On the 9th of January, 1868, they became the assignees, by an assignment in writing, of a license in writing, granted by the defendants, on the 11th of May, 1866, to the Norwich Paper Collar Company, to make and sell collars, cuffs, and bosoms of paper, or of cloth and paper, according to any or all of nine several letters patent, granted by the United States, and set forth in the license, on the payment to the licensors of certain specified current tariffs. The assignment of the license to the plaintiffs was made with the consent of the defendants, and on the assumption, by the plaintiffs, of the covenants of the license as to the payment of tariffs, and otherwise. The bill averred, that the plaintiffs purchased the license on the strength of representations, previously made to them by the defendants, that the patents were valid, and that the plaintiffs, if they purchased the license, would be allowed to make and sell four millions of paper collars, without paying therefor. It also averred, that the patents were, all of them, invalid, for want of novelty; that the consideration for the purchase of the license by the plaintiffs was void; that the plaintiffs had paid

[1] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 3 Fish. Pat. Cas. 483, and the statement is from 6 Blatchf. 356.]

some tariffs under the license; and that the defendants were now claiming tariffs, under the license, from the plaintiffs, on such four millions of collars. The prayer of the bill was, (1.) That, during the pendency of the suit, the defendants might be enjoined from commencing any suit at law upon the license, to recover from the plaintiffs the tariffs reserved therein upon the collars manufactured by the plaintiffs, and from alienating the license; (2.) That this court would decree all of the patents void for want of novelty, and that thereby the consideration for the license had entirely failed; (3.) That the defendants might be decreed to cancel the license, and the agreement made by the plaintiffs in the assignment of it to them, and to return the amount of tariffs paid by the plaintiffs. The demurrer was interposed on the ground that it did not appear, from the bill, that this court had jurisdiction of the subject-matter of the suit, or of the parties thereto, or to grant the relief therein prayed for.][2]

Clarence A. Seward, for plaintiffs.
George Gifford, for defendants.

BLATCHFORD, District Judge. In order to give this court jurisdiction of the suit on the ground of parties, it must be a suit between a citizen of the state of New York and a citizen of another state. Act Sept. 24, 1789, § 11 (1 Stat. 78). The necessary averments of citizenship to confer jurisdiction must appear on the face of the bill. This bill is defective in that respect. The plaintiffs are not averred to be citizens of any state, but only citizens of the United States. It should appear, affirmatively, that they are not citizens of the same state with the defendants.

The other ground of jurisdiction invoked is that of the subject-matter of the suit. In that respect, the bill is founded wholly on the alleged invalidity of the patents; for, if this court has not jurisdiction, growing out of the subject-matter, to decree the patents to be void, it has none to enjoin the defendants from suing on the license under the patents, or to decree that the consideration for the license has failed, or to decree the canceling of the license or the agreement, or to decree a return of paid tariffs.

The only authority conferred on this court, by any statute of the United States, to adjudge any letters patent to be void, is that given by section 16 of act of July 4, 1836 (5 Stat. 123), as extended by section 10 of the act of March 3, 1839 (5 Stat. 354). Such authority extends, by those provisions, no farther than to a case of two interfering patents, and to a case where the granting of a patent is refused by the commissioner of patents, or by the chief justice of the District of Columbia on appeal.

The jurisdiction of this court fails, therefore, in this case, as respects the subject-matter, so far as regards the conferring on it of any special authority to declare the patents in question void. It is urged, however, on the part of the plaintiffs, that section 17 of the act of July 4, 1836, confers upon this court jurisdiction to declare these patents void. That section provides that "all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law by the circuit courts of the United States." It is claimed that this suit is one arising under the laws of the United States which grant to the patentees named in the patents in question the exclusive right to the inventions covered thereby.

So far as regards the right of the defendants to sue the plaintiffs upon the license, to recover from the plaintiffs the tariffs reserved therein, and the rights of the defendants to alienate their interest under the license, and their right to hold in force, as against the plaintiffs, the license and the agreement made by the plaintiffs in the assignment of the license to them, and the right of the defendants to retain the amount of tariffs paid by the plaintiffs, it needs no argument to show that those rights arise, all of them, out of and under the license and the agreement and the transactions thereunder, and not in any proper or legal sense, out of or under the patents or the law under which they were granted; and that this suit, so far as it seeks to impair or destroy those rights, has the same origin and basis. It is well settled that such a subject-matter does not confer on this court jurisdiction of a suit. Wilson v. Sandford, 10 How. [51 U. S.] 99; Goodyear v. Union India Rubber Co. [Case No. 5,586]. Whether the suit be one by a licensor to enforce the covenants contained in a license granted under a patent, as in the cases just cited, or be like the present suit, one by the licensee to destroy and annul the license and its covenants, it is equally impossible to find in the subject-matter any basis for the jurisdiction of this court. So far as the suit is based on any alleged false representations made by the defendants, it arises out of a fraud committed by the defendants, and not under any act of congress.

If the license and the agreement of the plaintiffs are void because the patents are void, the fact that the plaintiffs must show that the patents are void, in order to get rid of the license and the agreement, does not make the case one arising under the patent act, so as to give to this court jurisdiction of it. A state court has jurisdiction to decree the license and agreement to be void and inoperative for fraud, or any other adequate reason, and the fact that, in the investigation, the state court will be obliged to inquire whether there was anything new in the patents which could operate as a consideration for the license and agreement, can not de-

[2] [From 6 Blatchf. 356.]

prive the state court of jurisdiction, or confer it on this court. It is true that a state court can not take cognizance of a suit brought for the infringement of a patent; nor of a direct suit, brought to decree a patent to be void. But, as is well said by Chief Justice Williams, in Rich v. Atwater, 16 Conn. 409, 414: "That the validity of patent rights is a subject peculiarly within the jurisdiction of the courts of the United States is true. But it is equally true, that when they come in question collaterally, their validity must become a subject of inquiry in the state courts. Thus, in a suit upon a note if it is claimed that the note was given for a patent right, and the patent is invalid, and so there was no consideration for the note, the state courts constantly exercise jurisdiction." In Rich v. Atwater, the plaintiff owned a patent for a machine which the defendant was infringing. The defendant, by a covenant, agreed not to use the infringing machine any longer, but nevertheless, went on using it, and the plaintiff brought a suit founded on the agreement for an account and an injunction. The defendant offered to prove that the patent was invalid for want of novelty. The plaintiff objected to the evidence, and took the point before the full court, which held that the evidence was admissible. In Cross v. Huntley, 13 Wend. 385, the suit was brought on a note given on the sale of a patent for a machine. In defense, it was proved that the machine was not new, and that the specification of the patent was so defective as to avoid the patent. Mr. Justice Nelson, in delivering the opinion of the court, says: "It is insisted by the defendant below that the patent is void on the grounds: (1) That the machine, for the making and vending of which the patent was granted, is not a new invention; and (2) if new in parts, the patent is void, inasmuch as it is for the whole machine, and not for the improvement. If either of these positions were sustained by the proof, the defendant was entitled to judgment in the court below, as in such case a failure of the consideration of the note was shown. From the evidence, there can not be a doubt but that the patent, in both respects, is defective and void. * * * The patent being void, nothing passed to the plaintiff in error, and the note was given without consideration." The case of Head v. Stevens, 19 Wend. 411, was one of the same character. It can make no difference whether the payee of the note or the licensor in the license brings the suit to enforce the note or the license, or whether the suit is brought by the maker of the note, or the licensee in the license, to cancel the instrument. The state court has jurisdiction in either case, to inquire collaterally into the validity of the patent.

It is true, that a state court can not entertain jurisdiction of a direct suit to repeal a patent. Every citizen has, abstractly, the same interest with every other citizen, that a void patent shall not be in existence. Yet, such interest is not sufficient to warrant the maintenance of a suit to repeal a patent. Such a suit can not be brought in a state court. If not embraced within section 16 of the act of 1836, and section 10 of the act of 1839, it is not within the jurisdiction of this court; for it can not be contended that every citizen has a right to bring a suit in the circuit court of the district where the proper defendant may be found, to repeal a patent, for the reason that such suit is a suit arising under a law of the United States. If such right existed under section 17 of the act of 1836, the provisions of section 16 would be useless. The two sections must be construed together, and the confiding of authority, by section 16 to declare a patent void, in certain specified cases, must be regarded as intended not to confer such authority in any other cases. The bill must be dismissed with costs.

Case No. 9,489.

The MERSEY.

[Blatchf. Pr. Cas. 187.] [1]

District Court, S. D. New York. July 28, 1862.[2]

PRIZE—VIOLATION OF BLOCKADE—ENEMY PROPERTY—LOG-BOOK—MUTILATION—NEUTRAL OWNER—PRETENDED SALE—CONSIDERATION.

1. The log-book was mutilated with intent to mislead and deceive with regard to the purposes of the voyage, in fraud of the belligerent rights of the United States, and the culpability thus shown, coupled with other marks of disguised and dishonest practice, demands the condemnation of vessel and cargo. Vessel and cargo condemned on the following grounds: (1) The vessel left the enemy's country as enemy property, and no attempted change of it to neutral property was made until her arrival in a neutral port. There is no evidence of a bona fide consideration paid for her purchase, or of a bill of sale executed, or of actual possession delivered to the alleged purchaser, or that he ever exercised acts of ownership over the vessel, or claimed to be her owner. (2) She had previously come out of an enemy port by evading the blockade, and was seized on her first voyage subsequent thereto. (3) Her ostensible voyage from a neutral port to a loyal port was simulated, and she was really bound to a blockaded port.

2. The rule of the English prize law is emphatic that the absence of a bill of sale from the ship's papers, and the want of proof of payment of the purchase money, in support of a claim by a neutral to an enemy vessel, are circumstances so strongly suspicious, and so vitally defective to a bona fide title to her, that the court, after condemnation of the vessel on the preparatory proofs, will not even allow further proof to be given in support of the title.

3. A transfer of property to a neutral by an enemy in time of war, or in aid of a contemplated war, is illegal, as in violation and fraud of vested belligerent rights.

4. The court will take judicial notice of the notorious course of trade between the neutral port of Nassau and the blockaded ports of the enemy.

[Cited in The William H. Northrop, Case No. 17,696.]

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

[2] [Reversed in Case No. 9,490.]

5. Suspicious circumstances as to the destination of the vessel commented on.

6. The intentional mutilation of the log-book of the vessel is convincing evidence of an attempt by her to perpetrate a fraud, in violation of the law of nations, for which she and her cargo are subject to forfeiture.

7. It will always be inferred that the papers of a vessel which have been destroyed related to the vessel and cargo, and that it was of material consequence to some unlawful interests that they should be destroyed.

8. The spoliation of papers is not per se a ground for necessarily condemning a vessel, but it raises a strong presumption of fraudulent purposes in those having charge of her, which will effect her condemnation it not satisfactorily accounted for.

9. The particulars of the mutilation of the log-book in this case stated.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured on the 26th of April, 1862, in the Atlantic Ocean, two days' sail from Nassau, N. P., by the United States steamer Santiago de Cuba, and were sent into this port for adjudication as prize of war. A libel for their condemnation was filed on the 17th of May. On the 17th of June, Joseph Roberts, a resident merchant of Nassau, New Providence, intervened and filed his claim and answer and test oath to the libel, averring and testifying that he is a subject of the queen of Great Britain, and a resident of Nassau aforesaid, and owner of the said vessel and her tackle; that, when seized, the vessel was in the Gulf of Florida, about eighty or one hundred miles from land, and that she was laden with an honest cargo, belonging to Sawyer & Menendez, of Nassau, and was on an honest voyage from Nassau to Baltimore. Robert H. Sawyer and Ramon A. Menendez answer and claim that the cargo of the vessel belonged to them, that the voyage was a lawful one, and that the vessel was unlawfully seized. The test oath to the claim of Sawyer & Menendez is made by Montell, the consignee. The papers found on the vessel were, first, a certificate of British registry at Nassau, N. P., Bahamas. This certificate bears date at Nassau, the 15th of April, 1862. It states the vessel to be foreign built, and that her foreign name was Elizabeth. Second, the shipping agreement signed between William H. Sweeting, master, a mate, four seamen, and a cook, dated April 21, 1862. Third, a bill of lading and invoice of the cargo from the shippers Sawyer & Menendez, dated Nassau, April 20, 1862, consigned to J. I. Montell, of Baltimore. Fourth, a clearance at the port of Nassau of the same cargo for the port of Baltimore, April 21, 1862. Fifth, a letter of advice from the shippers to the consignee of the consignment, dated April 22, 1862. Sixtn, the leaves of a portion of what appears upon its face to be a log-book of the voyage. The examination of the master, the mate, and one seaman, is also put in evidence, the same having been taken in preparatorio.

Upon the pleadings and proofs the libellants contended—First. That the vessel and cargo were subject to forfeiture, she having, on the voyage immediately preceding that of her capture, unlawfully run the blockade of the port of Charleston, existing at the time. Second. That the voyage which was being performed, and which purported to be to Baltimore, and with an honest neutral lading, was simulated and untrue, and the vessel and cargo on board being really enemy property and destined for the port of Charleston. Third. That the log-book was mutilated on the voyage for fraudulent purposes; and that the evidence in the case, furnished by the witnesses and the documents, was intended for deception and fraud as to the facts of the voyage and its objects. The claimants urged, on the contrary, that they were honest owners of the vessel and cargo, and that the whole adventure was truly represented in the answers and claims interposed.

The master testifies, in his examination in preparatorio, that he had no knowledge of the vessel until he saw her in Nassau, in March last, and that he was appointed her master by Sawyer & Menendez, who delivered possession of her to him as master. He states his belief that she was an American-built vessel, and that when she took out a British register in April her name was changed from the Elizabeth to the Mersey. He states that he heard that the schooner came to Nassau, with a cargo of cotton, from Charleston, on her last voyage; that he saw the cotton on board of her, and that she came to Nassau the last of March. He states that he had heard that while her name was the Elizabeth, she belonged to a man in Charleston by name Comall; that Roberts, the claimant of the vessel, resides at Nassau, where he has known him for four or five years; and that he knows of his ownership by the registry, and also heard that he was owner, but never heard anything about any sale. He states that he believes that the cargo belongs to Sawyer & Menendez, who have resided five or six years in Nassau; that the consignee, Montell, was formerly a resident of Nassau, but has resided in Baltimore for twenty-seven years; that he, the witness, has been acquainted with him from boyhood; that he does not believe that the consignee has any interest in the cargo; and that he knows nothing of any bill of sale of the vessel, or of any agreement about her, or of any charter-party. He further states that he knew that all the Southern ports were under blockade; that he understood that the vessel came to Nassau from Charleston, and, therefore, supposes she run the blockade there; that he knows no more of the history of the vessel than he has stated; and that no papers or writings on board of the vessel were altered or mutilated or suppressed on the voyage.

This brief synopsis of the evidence of the

master plainly manifests that the vessel was not put in his charge by her registered owner, and that he went into her service with a clear understanding that she was not to be sailed to Baltimore in the interest of Roberts, or of Montell, the nominal consignee of the cargo. The letter of instructions which she carried to Montell from Sawyer & Menendez evinced that an ulterior voyage remained to be performed by the vessel, other than a return to Nassau, had she reached Baltimore, and that the master was the confidential agent to be consulted by the consignee, "both in selling and also in purchasing a return cargo." This language evidently denoted that the master was not a mere carrier of the cargo to Montell, and also that Roberts acted in no way in fitting out or directing the voyage, that being exclusively the act of the shippers of the cargo, who were corresponded with by the master as the actual owners of the vessel. In answer to the 14th interrogatory, the master says: "The cargo is owned by Sawyer & Menendez, I believe, because they shipped it, and it is stated in the invoice that they were the shippers;" but to the 28th interrogatory he says: "If the vessel had arrived at her destined port, I suppose the cargo would have belonged to S. T. Montell, the consignee. The shippers, I suppose, took the chances of the market." The two suppositions of this last answer are incompatible with each other, and one of them with the statement of the witness in reply to the 14th interrogatory. No bill of sale or other conveyance of the vessel to Roberts was found with the papers on board, and no payment of a consideration on her transfer, nor any act of possession or ownership on his part, other than the registration of her in his name, was proved or asserted by Roberts. The testimony from the claimants is, that the master had been acquainted with Roberts four or five years in Nassau. The master offers no further evidence of the fact of sale than that he had seen the registry and had heard that Roberts was the owner; but, under these circumstances, the manner of proof leads to the implication that the hearsay of which the master testifies was from the shippers rather than from Roberts' own declaration or assertion of ownership, which Lord Stowell regarded as very feeble and equivocal evidence in proof of ownership. The Two Brothers, 1 C. Rob. Adm. 131. The rule of the English prize law is emphatic that the absence of a bill of sale from the ship's papers (it being the title-deed to the vessel), and the want of proof of payment of the purchase money, in support of a claim by a neutral to an enemy vessel, are circumstances so strongly suspicious and vitally defective to a bona fide title to her that the court, after condemnation of the vessel on the preparatory proofs will not even allow further proof to be given in support of the title. The Christine, 1 Spinks' Prize Cas. 82. For aught that appears before the court, this vessel retained the same character and ownership she bore when she left Charleston and entered the port of Nassau the last of March, and at the time the British registry on board of her was executed at Nassau; but, beyond that subsidiary principle is the higher doctrine that a transfer of property to a neutral by an enemy in time of war, or in aid of a contemplated war, is illegal, as in violation and fraud of vested belligerent rights. The Bernon, 1 C. Rob. Adm. 102; The Noydt Gedacht, 2 C. Rob. Adm. 137, note; The Minerva, 6 C. Rob. Adm. 396, 400, note; The Rosalie and Betty, 2 C. Rob. Adm. 343. The cargo on board was documented as neutral, and by the papers was directed to a neutral port; and unless it was on carriage under false and fraudulent semblance, with intent to cover and disguise its character, and to convey it to an enemy port, or in some other way fraudulently evade the belligerent right of the United States, it must be restored to the claimants thereof.

The question, then, specifically touching the suit for the condemnation of the cargo, rests upon the inquiry whether it is virtually shown to be enemy property, or to have been exported from Nassau with the view and purpose of evading the blockade and carrying it to the enemy, or whether any deception has been practiced in relation to its transportation, calculated and intended to mislead the government and disguise the true character of the voyage and violate the belligerent rights of the United States. The intrinsic and extraneous circumstances insisted upon by the libellants as indicating a culpable intention in the vessel and voyage consist essentially in the imputation that it was matter of notoriety at Nassau, and personally known to all the vessel's company, that the Southern ports were in a state of blockade, and that the court is judicially informed that the open and steady course of navigation and trade at the time of the fitting out of the vessel at Nassau was that of running cargoes in and out of Charleston in violation of the blockade of that port by neutral and enemy vessels notoriously and publicly employed in and prosecuting that object and pursuit; and that this vessel on her last voyage evaded the blockade of Charleston with an enemy cargo, and immediately on her arrival at Nassau assumed a neutral ownership, and was reladen with a cargo specially adapted to the wants of Charleston, and of the character of the cargoes constantly being shipped from Nassau to Charleston in violation of the blockade. Sir William Scott, in The Rosalie and Betty, 2 C. Rob. Adm. 344, says that the judiciary is not to shut its eyes "to what is generally passing in the world—to that obvious system of covering the property of the enemy which, as the war advances, grows notoriously more artificial. Not to know these facts, as matters of frequent and not unfamiliar occurrence, would be not to know the general nature of

the subject upon which the court is to decide; not to consider them at all, would not be to do justice." The fact is proved that a large quantity of salt, particularly, was laden directly from a vessel bringing it from Liverpool on board of the Mersey, and the circumstances attending the discharge of the Mersey and the reloading her for her outward voyage strongly import that the transactions were under a common interest and superintendence. The master had been for years acquainted with Roberts and with Sawyer & Menendez, yet treated with the latter as owners of the vessel and cargo, and was to act as their agent in the disposition of the cargo and in obtaining a return one at the port of alleged destination. The mate, contrary to the assertion of the master, considered him to have been appointed by Roberts. So hurried and confused does the business seem to have been in its transaction, that the master says, on his examination, that he does not know the capacity of the vessel. The mate says that she was of about fifty tons burden, and the steward estimated her at two hundred tons. The shipping agreement with the crew is from Nassau to Baltimore and back, without specification of time of employment; and the letter of instruction and advice to the consignee, for the disposition of the adventure, gives no other directions as to a return cargo than a reference to the counsel and advice of the master. Such obscurity and looseness in conducting a mercantile voyage gives occasion for suspicion that something was connected with it, and designed to be carried into effect by it, which was cautiously kept out of view; and the notorious course of trade and intercommunication between Nassau and Charleston, from the breaking out of the war to this day, gives occasion to a strong presumption that it was purposed, on the part of those who managed the Mersey, that she should fulfil the business on which she started at Charleston, by returning directly back to the place of her departure with a cargo adapted to that market. It would be no uncommon device to adopt a circuitous back track, and remove from the papers all outward marks of culpability in its initiation.

The evidence bearing upon this branch of the inquiry, although negative in form, is efficient in character if it sustains the interpretation put upon it by the libellants. They charge that the log-book, arrested with the vessel, has been mutilated and spoliated so as to destroy or conceal entries evidently made upon it originally. Such an act, if committed, supplies convincing evidence of an attempt by the vessel to perpetrate a fraud or deceit, in violation of the law of nations, for which she and her cargo are subject to forfeiture. The master of the vessel testifies that she was captured and taken in tow at about 30° north latitude, but he does not remember the longitude. The mate answers the interrogatory in about the same language; and the steward says he does not know and never heard what was the longitude of the capture, but it was somewhere in the Gulf Stream. And they all say that the vessel was thence taken to Port Royal. It is marked on the log of the vessel to have been latitude 30° 17′, longitude 79° 33′, at 3½ p. m., when she was taken in tow by the captors, and that she, in tow of the capturing vessel, made land the next morning between nine and ten o'clock, against heavy weather. The portion of the log-book taken with the vessel notes the latitude of the place of departure of the vessel to be 27° 7′, and the longitude 79° 13′. The latitude of Baltimore is laid down on the charts as 39° 17′ N., and the longitude 76° 36′ W., and Charleston is in longitude 79° 54′, and latitude 32° 47′. It will be perceived, by the statement of the longitudes of the point of departure of the vessel and that of her alleged point of destination, that she had, between 10 o'clock a. m. of Thursday and 3½ p. m. of Saturday, varied her position towards the coast of the blockaded states, southerly, off and below Charleston, about three degrees of north latitude and one degree of west longitude, and was three degrees west of the longitude of Baltimore. No reason or excuse is assigned for such apparent approach to the coast, nor is it shown to have been the regular line of navigation for Baltimore. Indeed the ship's company deny all knowledge of her position in that respect. Whether such ignorance is real or simulated might be explained by a perfect log, recording the route intended to be run on the voyage, and the impediments or causes preventing the fulfilment of such purpose.

This renders the solution of the inquiry pertinent and important, whether the log found on board had been mutilated or varied surreptitiously after the vessel left Nassau. Her transit directly in front of the line of blockaded ports would pass through about eleven degrees of latitude. The English and American prize law regards the act of destroying or mutilating the ship's papers (among which log-books rank as of primary importance) to be proof of mala fides in the actors, and to demand the worst presumption against those concerned in it. It will always be inferred that the papers relate to the ship or cargo, and that it was of material consequence to some unlawful interests that the papers should be destroyed or suppressed. The suppression or spoliation of papers is not now considered in the American or English courts as, per se, the necessary damnatory cause of forfeiture of vessel and cargo (The Pizarro, 2 Wheat. [15 U. S.] 227), but it raises a strong presumption of fraudulent purposes in those having charge of the ship and papers, which will effect the condemnation of the prize if not satisfactorily explained and accounted for. The Two Brothers, 1 C. Rob. Adm. 131; The Hunter, 1 Dod. 480.

Notwithstanding the exceedingly positive assertion of the master, mate, and steward,

in their examination in preparatorio, that no alteration or destruction of any papers on board had been made, the log is produced palpably mutilated by having the first leaf torn or cut from the paper book out of which the log is formed, so as to leave marks of writing or figuring visible upon the first page thereof, and leading to a strong presumption that other entries had also been made upon the second page, because that method of keeping the log is subsequently followed to the time of the capture of the vessel. The other half of that sheet, the left side of the outward one, remains entire, and the whole book is stitched through the middle folding of the same, the broken edge of the displaced leaf showing marks of writing still upon it outside of the stitching which fastened it. Two circumstances thus apparent on the face of the log, as it stands, demand clear explanation from the testimony of the master and mate. One is, why no regular entry is made by name of the port of departure on the voyage and of the port of destination, if really a fair trading adventure was contemplated between two neutral ports. Another particular gathered from the dismembered log contrasts very unfavorably with the positive averments of the master and mate in their examinations. The note on the bottom of the first written entry in the log represents the longitude of the vessel at the hour of her departure (10 a. m., Thursday, April 24, 1862) to be 79° 13′, and on Saturday, April 26, when taken in tow by the captors, the entry represents the vessel to be in longitude 79° 33′, only twenty minutes west of her point of departure, whilst the mate testifies that she was arrested about one hundred miles from land, and the master, in the face of that entry, swears he had no knowledge of the longitude of the place of her capture. It is, moreover, observable that the remarks heading the first two remaining pages of the log omit naming the month as well as the place of beginning of the voyage, leaving the implication very strong that those particulars, as well as others tending to shed light upon the enterprise, had been duly registered in the first opening of the log account thereof, and that the after leaves had been continued as if the preliminary facts and others characterizing the voyage were already duly recorded. I therefore hold that, upon the evidence, the log must have been thoughtfully changed or spoliated, and that in judgment of law such alteration or suppression was made with intent to mislead and deceive with regard to the purpose of the voyage, and is, therefore, fraudulent, as against the rights of the United States as a belligerent power, and affords evidence of culpability which, coupled with other marks of disguised and dishonest practices, authorizes and demands the condemnation of the vessel and cargo.

Without dwelling longer upon special points of law or fact in the case, the result is—

1st. The vessel left Charleston as enemy property, and no attempted change of it to neutral property was made until her arrival in Nassau. There is no evidence of a bona fide consideration paid for her purchase, or of a bill of sale executed thereof, or of actual possession delivered to the alleged purchaser, or that he ever exercised acts of ownership over the vessel, or claimed to be her owner.

2d. She came out of Charleston by evading the blockade of the port, and was seized on her first voyage subsequent thereto. The Christiansberg, 6 C. Rob. Adm. 376, 382, notes; The General Hamilton, Id. 62.

3d. The alleged voyage from Nassau to Baltimore was simulated and unreal and was meant for a blockade port. The mutilated log, the description of cargo on transportation, the mode of fitting out and conducting the enterprise, the notorious course of dealing and trade to and from Nassau since the war, and the misrepresentations in the log and in the testimony of the master and mate of the approach of the vessel, when captured, towards Charleston, are facts justifying strong suspicions of her integrity and honesty, and must prevail against her in the absence of exculpatory proof.

For the causes indicated I adjudge the vessel and cargo confiscable in this suit, and decree their condemnation and forfeiture accordingly.

This decree was reversed on appeal by the circuit court, July 17, 1863. [Case No. 9,490.]

Case No. 9,490.

The MERSEY.

[Blatchf. Pr. Cas. 658.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE — VIOLATION OF BLOCKADE — ENEMY PROPERTY — MUTILATION OF LOG-BOOK.

Decree of the district court condemning vessel and cargo reversed, they not being enemy property, and there having been no violation of, or attempt to violate, the blockade.

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

[The schooner Mersey and cargo were captured as a prize of war, and it was decreed that both be condemned and forfeited. Case No. 9,489. The case is now before this court on an appeal.]

NELSON, Circuit Justice. This vessel and cargo were captured on the 26th of April, 1862, in the Gulf Stream, about one hundred miles from land, and two days out from Nassau, N. P., on a voyage from the latter place to Baltimore and back. Her cargo, which was put on board at Nassau, consisted of salt, coffee, soap, merchandise, &c. The vessel is owned by Roberts, a merchant and resident of Nassau, and a British subject. The cargo is owned by Sawyer & Menendez, of the same place,

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

[2] [Reversing Case No. 9,489.]

one of them a British subject, and the other a Spanish. According to the evidence the vessel was in her proper course, pursuing her voyage to Baltimore, and without any intent to run the blockade of any of the Confederate ports. She seems to have been convicted on suspicion, from hearsay evidence and report that she had run the blockade of Charleston on her previous voyage, and that she was still the property of a citizen and resident of some of the Southern states. I am not satisfied that these facts, or any of them, have been established by competent proof. The cargo, it is admitted, belongs to British and Spanish subjects. Much stress is laid upon a mutilation of the log-book, which is fully explained by the further evidence of the mate and steward. Decree below reversed.

MERWIN, The F. See Cases Nos. 4,893 and 10,369.

Case No. 9,491.

MESA v. UNITED STATES.

[Hoff. Land Cas. 66.] [1]

District Court, D. California. June Term, 1855.

MEXICAN LAND GRANT—OBJECTION BY BOARD—ADDITIONAL TESTIMONY.

The objection by the board to the confirmation of this claim obviated by the additional testimony taken in this court.

Claim for about half a league of land in Santa Clara county, rejected by the board, and appealed by the claimant [Maria Antonia Mesa].

Jeremiah Clarke, for appellant.

S. W. Inge, U. S. Atty., for appellees.

Before HOFFMAN, District Judge.

This case has been submitted to the court without argument; we are referred, however, by the district attorney to the opinion of the board of commissioners for a statement of the objection to the validity of the claim on which he relies. The ground on which the claim was rejected by the board was that there was no description of the granted land, either in the grant itself or the map which accompanies it, sufficient to designate it and effect its segregation from the public domain, or rather from the adjoining mission lands, out of which it was to be taken. The land is described in the grant as the land known as the [Rancho] Rinconada del Arroyo de San Francisquito, and bordering on the land of the Pulgas, belonging to Doña Soledad Ortega, and on the land of the establishment of Santa Clara. By reference to the map, the course of the Arroyo San Francisquito, which is the southern boundary of the Pulgas land, appears clearly laid down. The northern boundary of the land intended to be granted is thus ascertained, but the claim was rejected by the board because "there are no other indications or lines on the map to show the size, the shape, or the location of the tract," the only information conveyed by the map being that the land fronts somewhere on that creek, but on what portion of it, or to what extent does not appear. It is unnecessary to inquire how far the legal principle upon which the decision of the board is founded, is affected by the case of Fremont v. U. S. [17 How. (58 U. S.) 542]. From additional testimony of Aaron Van Dorn taken in this court, it appears that, as a deputy United States surveyor, he has surveyed the adjoining ranchos, and is acquainted with the surrounding country, and that there is no difficulty whatever in locating the land by means of the calls in the grant and the map. This witness testifies that the principal objects mentioned for boundaries are natural objects, well known and defined. That those objects exist to the witness' own knowledge, and that while making a survey of the adjoining ranchos, a certified copy of the map in this case constituted a part of his instructions from the surveyor general. The objection therefore raised by the board to the claim would seem to be entirely obviated by this testimony. In confirmation of this evidence, it may be observed that the tract of land solicited appears from the documents in the expediente to have been well known to the governor, and by those officers whom he directed to report upon the application.

The petition asks for a piece of land adjacent to the lower part of San Francisquito creek on the south, the situation of which forms a corner, as will appear by the map; said location is bordering on the Pulgas rancho, and its extent is probably half a square league. The petitioner further states that about two years before, he had obtained permission to occupy this land from the administrator of Santa Clara. The officers to whom reference for information is had, report that the land solicited is known to belong to the mission of Santa Clara, and that, as the map shows, part of it belongs to the widow Soledad Ortega. José Estrada reports that the land on which the house is situated, belongs to the heirs of Don Louis Arguello, and on the land in the direction of Santa Clara, on this side of the San Francisquito, the cattle and horses of the ex-mission pastured, and that it is the only watering place on said location. The prefect to whom the governor refers the whole matter, reports that the house, which, according to the map, stands on the land belonging to the widow Soledad, has been moved, as he is informed by the petitioner, and that the cattle of the ex-mission have enough land above what the petitioner solicits. We think it evident from the general tenor of these reports, that the governor and the officers must have had a clear and definite idea of the situation and extent of the land intended to be granted, and when in addition we have the direct testi-

[1] [Reported by Numa Hubert, Esq., District Judge, and here reprinted by permission.]

mony of a deputy United States surveyor that the land can, by means of the map and the calls on the grant, be readily located, we think that no ground remains for the rejection of this claim for want of definiteness. No other objection is mentioned by the commissioners. The genuineness of the grant is not disputed, and the grantee appears to have fully complied with the conditions.

A decree of confirmation must therefore be entered.

Case No. 9,492.

MESA v. UNITED STATES.

[4 Sawy. 551.] [1]

Circuit Court, N. D. California. May 11, 1865.

MEXICAN LAND GRANTS—APPEALS TO CIRCUIT COURT—WHEN AUTHORIZED.

The act of congress of July 1, 1864 [13 Stat. 332], "to expedite the settlement of titles to lands in the state of California," did not authorize appeals to the circuit court from all past decrees in land cases of the district court, but only from decrees of that court then appealable to the supreme court, but from which no appeal had been taken, and from decrees of the district court which might be subsequently rendered.

Appeal from the district court, heard at the February term of 1865.

[This was a suit by Maria Antonio Mesa against the United States, concerning certain Mexican land grants.]

W. H. Patterson, for appellant.

Delos Lake, U. S. Atty., for respondent.

FIELD, Circuit Justice. This case comes before the court on appeal from the decree of the district court approving the official survey of the land confirmed to the claimant. [Case unreported.] The decree was entered in April, 1861, and the appeal was taken in March of the present year. The question presented is whether under the act of July, 1864, "to expedite the settlement of titles to lands in the state of California," this court can take jurisdiction of the case. The object of that act was to relieve the supreme court from the necessity of considering cases of survey and location of private land claims, which raised few questions of interest except to the parties engaged in the litigation, and to vest in the circuit court the jurisdiction of future cases of this character. While, therefore, the jurisdiction of the supreme court was retained over pending appeals, jurisdiction was vested in the circuit court over cases in which appeals might subsequently be taken. The language of the statute is: "That where a plat and survey have already been approved or corrected by one of the districts courts of the United States for California, and an appeal from the decree of approval or correction has already been taken to the supreme court of the United States, the said supreme court shall have jurisdiction to hear and determine the appeal. But where from such decree of approval or correction no appeal has been taken to the supreme court, no appeal to that court shall be allowed, but an appeal may be taken within twelve months after this act shall take effect, to the circuit court of the United States for California, and said court shall proceed to fully determine the matter." From the general language here used, counsel contend that the right of appeal to the circuit court from all past decrees is conferred; and thus that surveys and locations which have become absolute by lapse of time, may be again opened to contestation. Such is not, in our judgment, the proper construction of the act. We are clear that the act was only intended to authorize a review by the circuit court of decrees which were then appealable, but from which no appeal had at the time been taken to the supreme court; and of decrees which might be subsequently rendered in cases pending undetermined in the district court, the time within which to appeal to the circuit court in both classes of cases being limited to the period of twelve months after the passage of the act. The construction for which counsel contend would take from the act its just designation as an act to expedite the settlement of land titles, and render it an act to cloud the titles and delay their settlement. It follows that the motion to dismiss the appeal must be granted. In considering the question presented we have not noticed the fact that an appeal had already been taken in this case to the supreme court of the United States and there dismissed, as it was unnecessary for the disposition of the motion. Appeal dismissed.

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

Case No. 9,493.

MESNER et al. v. SUFFOLK BANK.

[1 Law Rep. 249.]

District Court, D. Massachusetts. Nov., 1838.

SALVAGE—DERELICT—PROPERTY OF PASSENGER—REWARD OFFERED—SALVORS—SHIP'S COMPANY—COMPENSATION—EXTRAORDINARY EXERTIONS.

1. The steamboat New England, on her passage from Boston, for ports and places on the Kennebec, by collision with the schooner Curlew, sailing in an opposite direction, was so severely injured as to be deemed in immediate danger of sinking, and, under that apprehension, was left by all on board. The passengers, and part of the crew went on board the Curlew, the master with other officers and the residue of the crew remained in small boats about the wreck, employed in saving articles found floating, and after a brief interval, judging it safe so to do, again went on board, for the purpose of saving, and did save baggage of passengers, money and other property to a large amount.

2. The New England under these circumstances, and at the time when the alleged services of the libellants were performed, ought not to be considered as derelict.

3. The rules of the marine law, relative to the exertions required of seamen in cases of shipwreck, or of disaster at sea, are equally applicable to navigation by steamboats.

4. The distinction, or exception, by which pilots in the usual mode of navigation, have, in some instances, been admitted as salvors, is not applicable to pilots or engineers of steamboats, belonging to the ship's company.

5. A promise of reward from a passenger, in the circumstances above described, to officers, or crew of the distressed vessel, to secure their exertions for saving his property, held not to be legally binding.

6. Where there is a presumption of blame, as to the collision on the part of the steamboat, if such presumption be not repelled by evidence, a claim of compensation by any of the officers or crew of such steamboat, for extraordinary exertions, is not maintainable.

7. Nor is a suit against a passenger, or other person having property thus saved, to be sustained, when instituted separately and after the payment of wages, in full, to those engaged in that service, without claim or demand on their part at that time or previously for any such extra compensation.

[This was a libel by George Mesner, late chief engineer of the steamboat New England; George Stillfin, late pilot of said boat; Fitz Goodin, late deck hand, and James Collins, late a wheelman, on said boat,—against the president, directors and company of the Suffolk Bank, for salvage.]

B. R. & G. T. Curtis, for libellants.

S. Hubbard, B. R. Nichols, and C. Atwood, for respondents.

DAVIS, District Judge. This libel is for salvage service alleged to have been performed, for the benefit of the respondents, in saving two packages of bank bills, of the declared value of $50,000, asserted to have been saved, under circumstances of great peril and extremity from the captain's office in the steamer New England, in which that property had been deposited by Joseph H. Dorr, agent of the Suffolk Bank, the said steamer having been previously deserted by all on board from apprehension of her sinking, after a disastrous collision with another vessel, the schooner Curlew; the exertions of the libellants in the premises being, as they assert, induced by a reward of five thousand dollars, offered by said Dorr, one of the passengers in the New England. The respondents place their defence on the following averments, summarily collected from their answer. First. That the night on which the collision occurred, was very pleasant with little wind, the sea calm, and the atmosphere so clear, that a vessel could be seen at the distance of several miles; that the schooner was sailing at a slow rate, and under usual sails; that the steamer was proceeding with great velocity, under high steam, and with several sails spread, and that under such circumstances, the collision could not have occurred, but through a defect of duty, on the part of the officers and crew of the steamer, who were at the time, in special charge of the engine and navigation of the New England, and that the libellants, themselves, or some of them, were in said special charge of the engine and navigation of the steamer. Secondly. That the respondents had delivered to Mr. Joseph Dorr, their agent, two packages of bank bills, one package containing bills of the Globe Bank, of Bangor, to the nominal amount of 20,000 dollars, and the other package containing bills of the Commercial Bank, of Bangor, of the nominal amount of 26,000 dollars, both packages being placed in one carpet bag, which was delivered with its contents to the clerk of said steamer, for safe keeping; that the said bank bills were comprehended in an agreement, subsisting between the respondents, and the said Globe and Commercial Banks, respectively, relative to the redemption of their bills, by which the said banks had been charged for the amount by the Suffolk Bank, and that the said bills, by the terms of such agreement were at the risk of said Globe and Commercial Banks respectively. Thirdly. That they do not admit, that the said Dorr made such offers of reward, nor any offer of reward, to the libellants as they allege, and that he was not authorized or empowered in behalf of the respondents, to promise such, or any reward whatever, for the recovery of said bills, or for any purpose whatsoever. Fourth. That the said steamer and property on board, were not abandoned by the officers and crew, as in the libel alleged, but, that from and after the collision, and until the libellants themselves finally left the steamer, the officers and crew thereof remained, and were on duty, on, or about that vessel, without abandoning the same, or any property on board; that the libellants, themselves, were acting under the orders of the captain, and other officers, and continued, and acted under such orders until long after the time of the services alleged in the libel. Fifth. That the libellants in the premises, were not acting in their private or individual capacity, but that said bank bills, together with other large amounts of bills, money and other property, belonging to various persons, were taken from said steamer by her officers and crew, only in discharge of their several duties, and to relieve themselves, and the owners of said steamer, from the legal liabilities which would have been incurred by the dereliction or loss of said property; that the same was done under the direction of the captain and other officers; that the said bills and other property being recovered were delivered to, and remained in the possession and control of the said captain and other officers, and were, afterwards, delivered by them or some of them, to the several owners, or to others for said owners, without any claim or pretence of claim by the libellants, or any of them, or by said officers, or others, of any right of salvage thereon; that the bills were delivered by the captain of said steamer, to the respondents, without any claim of salvage, or notice of such claim, or any allegation or pretence, that he, or any of the officers, or crew, had, in respect to said bills, done more or acted otherwise, than was re-

quired in the performance of their several duties, and for their protection and discharge from their legal liabilities. Sixth. That the motives, or inducement, by which the libellants were actuated, were not such as they allege, but that they acted as the respondents verily believe, in all the premises, only in performance of their several duties, and under the orders of the officers, and for earning, and securing their own customary wages; that the libellants, and each of them, in fact, claimed, and received, from the owners and officers of said steamer, their customary wages, for all said time, and until their arrival at Boston, the day following, as also all their wages at the time of the collision pending, or at any time earned; that the libellants were, thereby, fully paid for all services alleged or done by them, at the time aforesaid, and that they, nor any of them, ever made any or further claims upon said owners or officers, than for their wages so paid in full. Seventh. It is denied that the labor and risks incurred by the libellants, in the premises, were in nature or degree as in the libel alleged. They were, it is asserted, by the respondents, comparatively slight, in a very little (if any) degree, exceeding the common services and risks of seamen, the whole having been done in full daylight, and in a very short time, and in the particular mode pointed out by others; that the sea was calm, the weather pleasant, and numerous boats and assistants constantly at hand; that, in fact, equal or greater labor and risk were incurred by other persons than the libellants, on board and about the said steamer, who have made no claim for compensation. Eighth. That if the bills so saved, were in fact the property, and at the risk of the respondents, the saving was of no pecuniary benefit to them, the same being of known amount, and the whole matter capable of explicit proofs; that independently of the agreement with the Globe and Commercial Banks, the claim of the respondents, upon those banks, from which the bills had been issued, for the amount, would not have been defeated or affected, by the total loss of said bills. That in the event of such loss, the fact of the prior receipt of said bills by the respondents, and of their loss and destruction were capable of proof, and would, in fact, have been proved by the respondents, and that they would have been able to sustain their charges, for the amount, with interest against the said banks, and that the said banks, as the respondents have been assured, would have readily allowed said charges, without the production of the bills; that the said bills, when taken from the steamer, were saturated by the salt water, and greatly stained and injured, and that the fact of the loss of them would have been so notorious, that any attempt to pass them by any person who might have found them would have been unsuccessful, as they would easily have been identified as the lost bills; that the said banks which issued them, were in no danger of being compelled, nor would they have been liable to pay them, to any holders of them, and further that the bills of said banks, were at that time, generally uncurrent, and have so continued to the time of filing the answer of the respondents in this suit. Ninthly. That if the libellants can be considered as rightfully entitled to salvage in the premises, there were other, and large amounts of bills, and other property belonging to various persons, taken from the said steamer by the libellants, under the same circumstances, or other persons acting with them, and equally entitled to come in and claim with them, and that said other bills and property, or their owners, ought to bear or pay a contributing share of such compensation or salvage, as may be decreed. The proof in the case on the part of the libellants, is contained in the depositions of George Mesner, and James Collins, two of the libellants, and in the depositions of William Rush, William Griffin, Jason Collins, and Andrew McCausland, firemen on board the New England, at the time of the disaster, and of Isaac Powell, the cook. The respondents produce the testimony of Nathaniel Kimball, master of the New England, William L. Stone, the clerk, Joseph H. Dorr and Samuel G. Stimson, passengers.

The testimony is unusually voluminous, from the very extended and searching examination which was pursued by the contending parties, and is in some instances, not easily reconcilable. The following facts, however, are admitted, or satisfactorily proved: The steam packet New England, Nathaniel Kimball, master, sailed from Boston, on the 30th day of May last, bound to Bath and Gardner, on the Kennebec river, and between 1 and 2 o'clock, of the next morning, about 16 miles south from Boon Island light came in contact with the schooner Curlew, deeply laden with lime, bound for Boston, from an Eastern port, the steamer being under rapid way, at the rate of 12 miles an hour, impelled by her machinery in full operation, and with her sails set, a foresail and jib. The stroke was particularly severe in its effect on the steamer. A large hole, some of the witnesses say as large as a hogshead, was made in her bow, and in about twenty minutes she was filled with water. The alarm and dismay of all on board, as they rushed on deck, most of them aroused from sleep by the shock, was excessive. The vessel was fast settling, and, from a persuasion that she would soon sink, all applications for arresting the influx of water proving ineffectual, it was decided to take refuge on board the Curlew, a measure in which the master and officers of the steamer, and all on board concurred for the preservation of their lives. This was effected partly by boats, with which the steamer was well furnished, but principally, by immediate transit to the Curlew, which haled alongside, not having sustained any considerable injury by the concussion.

When the Curlew stood off, as she soon did, from apprehension of danger, if the steamer should sink, while attached to her, she had received on board all the passengers, sixty-three in number, excepting one, who was killed, (in what manner does not appear in the evidence,) and all the crew of the steamer, excepting Capt. Kimball, and some of his officers and men, who remained in the boats, and were actively employed in saving such baggage of the passengers and materials of the wreck, as were found floating, which they collected and delivered on board the schooner. Some time was spent in this operation, when it was perceived, that the steamer, instead of gradually sinking as was expected, became stationary. Hopes were then entertained, that she would not sink, and the appearances were so promising, that she would continue thus stationary, the weather also being clear and mild, and the sea smooth, that Capt. Kimball, and the men with him were encouraged to go on board the wreck in their boats, and to make an effort to save the baggage and other valuable articles, which might be accessible. At that time, the only part of the New England, above water, was the promenade deck, which the party in the small boats, or some of them, ascended, and forthwith proceeded to recover the baggage, breaking through the sky-light, beneath which was the baggage rack. In this, good progress was made, and the trunks, bags and other packages which were in this mode recovered, were sent in boats and delivered on board the Curlew, then standing off and on, at varying distances from the wreck. After a considerable portion of the baggage had thus been received and placed on board the Curlew, there appeared urgent motives that the Curlew should be relieved from her uneasy situation, and proceed to Boston, in contemplation of being replaced, for assistance to Capt. Kimball and the men remaining with him, by another schooner then nearly approaching them. Mr. Blanchard, first pilot of the New England, by appointment from Capt. Kimball, left the boats and went on board the Curlew, to take all proper charge of the property saved, and placed on board the vessel, and of that part of the crew of the New England, who were on board the schooner. The Curlew departed before sunrise, and was replaced by the schooner Evelina, of Portland. The recovery of the baggage through the sky-light aperture, was industriously pursued, and all or nearly all the remaining contents of the baggage rack, were saved, and conveyed in the boats to the schooner Evelina. This being accomplished the more difficult task remained, the recovery of the valuable property in the captain's office, which could only be effected by cutting a passage through the promenade deck. This was performed, by means of an axe, brought by Mr. Stone, the clerk, from the schooner Curlew, before her departure. From the opening thus made, there was fished up (as the witnesses expressed it) two carpet bags, one containing the packages of bank bills, which had been deposited by Mr. Dorr, with the clerk of the boat; the other holding the smaller amount of bank bills, belonging to Mr. Stimson. In this operation, the libellants were all actively and laboriously employed. The carpet bags, with their contents were delivered to Mr. Stone, and by him to Capt. Kimball, who was alongside in one of the boats; Mr. Stone was despatched with them to the schooner Evelina, and did not return again to the wreck. After his departure an iron safe, containing Capt. Kimball's money, about six hundred dollars in specie, was drawn up. The men next proceeded to save other articles of small value, such as the bell which they disengaged from its fixtures, and a portion of copper pipe, part of the machinery. "We supposed," says Capt. Kimball, "that we had saved everything that could be saved by the small boats, unless we had towed the steamer in." The men then left the wreck and repaired to the small boats, by direction or advice of Capt. Kimball, who appears to have been vigilantly attentive for the safety of all in concert with him in the undertaking, and who, after the saving of the articles mentioned, noticed some small change of position in the wreck, inducing him to advise the men to leave the wreck, and go into the boats. Soon after they left the wreck she turned bottom upwards. Capt. Kimball and the men with him, went on board the schooner Evelina, and proceeded in her forthwith to Boston. They had been employed in the service described about five hours. The reentrance on board the steamer, was, as I should infer from the testimony, not far from the commencement of twilight. When the carpet bags were extracted from the captain's office, it was near sunrise, and the safe was drawn up, about an hour after sunrise. On arrival at Boston, the packages saved, belonging to the Suffolk Bank, were forthwith delivered to the proprietors, containing the whole amount of bills delivered by Mr. Dorr, to the clerk of the steamer, forty-six thousand dollars. At the time when the steamer, which it had been supposed would sink, became stationary, and the boats were about proceeding to go from the Curlew for the purpose of boarding her, Mr. Dorr, it appears from the evidence, made urgent requests, and large offers of pecuniary reward, first of $2000 and then of $5000 to those would save for him the packages of bills, which he had lodged in the captain's office. These offers it is testified were made in the hearing of the libellants, and received a reply from one of them, Mr. Mesner, that as to both sums, Mr. Dorr might as well offer the whole, for he must know that it could not be done. These asserted offers are denied by Mr. Dorr, who affirms, that he made no offer of any particular sum, but that he did promise a reward, and in presence of many

of the crew. Mr. Stone, however, testified that he was promised 1000 dollars, by Mr. Dorr, if he should succeed in saving his money; and so many witnesses testify to the offers of 2000 and 5000 dollars, made to those in the boats, that I am bound to believe, that some such offers were made by that gentleman, but made in such a state of anxiety and excitement, that the expressions which at such a moment escaped him, are not recollected. The libellants, with all the rest of the crew of the New England, received their wages, in full, on the 1st day of June, reckoned at their respective rates, up to that time, one day after the disaster. Receipts, in common form, were given by them, without claim or demand of any further compensation or allowance, excepting that one of the witnesses testifies that he did say, at the time of the payment of wages, that he thought he ought to receive something more. After that time and before the filing of the libel, Mr. Stone, in consideration of his services in the premises, received from the bank, three hundred dollars, through Mr. Dorr, their agent, for which he gave a receipt. This transaction was without any previous consultation with Capt. Kimball, or any of the other officers, or with any of the crew of the New England, none of whom have participated with Mr. Stone in that donation.

Have the libellants, from the facts proved, a legal claim in the application of the law marine to those facts, a right to any further allowance than the wages which they have received, and, if so, to what amount? If they are thus entitled, it must be as salvors, or by virtue of the offer or promises made by Mr. Dorr, agent of the Suffolk Bank, or on the ground of extraordinary gallantry and enterprise. The general rule of law, respecting salvage, excludes the ship's company. A salvor is a person, who, without any particular relation to a ship in distress, performs useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the ship. The Neptune, 1 Hagg. Adm. 236; Hobartsal v. Drogan, 10 Pet. [35 U. S.] 122. The allowance to be made to the crew of a vessel, for their services, is, in the language of our decisions, on the subject, denominated salvage, or more frequently qualified salvage or compensation in nature of salvage. The adjudications in England do not adopt the term salvage in reference to such services, but consider the requisite compensation as due by the contract. In our legal nomenclature, on this head, we have two descriptions of civil salvage; general salvage, to which the definition that has been cited is applicable; and special or qualified salvage, a remedy for seamen against property saved by their exertions from a ship to which they belonged. Such suit is ordinarily limited to wages due, but it is understood, that it is competent to the court to award additional recompense, in cases of extraordinary danger and gallantry. The Two Catherines [Case No. 14,288].

In regard to wages, there is in this case, no question, the libellants having received their wages in full. Their claim for additional recompense, for extraordinary danger and gallantry, is reserved for separate consideration in another connexion. They cannot claim as general salvors, from their relation to the New England; being part of the ship's company, they are excluded by a rule of marine law, of ancient standing, approved acceptance, and of such familiar application, that the learned counsel at once yielded to its government for the exclusion of claim under that head, unless they should show that the libellants, according to the facts of the case, were in a position and character at the time of the alleged service, entitling them to be admitted as salvors, notwithstanding their engagements, as officers and men on board the New England. For this purpose it is contended in the first place, that the New England was abandoned, and derelict, and that the libellants' contract, in reference to service on board of her, was at an end; that the services which were rendered by them after she was first left, were purely voluntary, and could not be required by any duty incumbent on them under those circumstances. They allege, "that the passengers, captain, officers, and crew of said boat, within the space of thirty minutes after the collision, left the said boat under the apprehension, and expectation, that the said boat would go down, and went on board the schooner Curlew, with the intention to leave and abandon, and did leave and abandon, all further navigation of said boat." The navigation of the boat was abandoned, but the circumstances of the case do not present a case of derelict. The situation of the New England was deplorable but not desperate. She was left, indeed, by all on board, under an apprehension that she was sinking, but the master and a portion of the crew remained about her, in their boats, and very soon entered on board again, for saving the property of the passengers and owners as might be practicable. It would be carrying the doctrine of derelict to an undue extreme, to consider this a case of absolute abandonment. In the case of The Emulous [Case No. 4,480], in this particular of similar character, it was suggested that it was a case of derelict. But that ground was not sustained by the court, there being not only the animus revertendi, but the actual presence of the master when the salvage service was performed. Here was the actual presence of the master, through the whole transaction, in all its phases. Capt. Kimball appears to have been assiduously attentive, vigilant, and faithful in reference to his trust; he was not at any time on board the Curlew, and during the brief interval which elapsed before re-entering his vessel, being employed with the small boats about the wreck, and having improved the earliest moment while the vessel was under his watch,

to enter on board, when it could be with safety, the animus revertendi, may reasonably be presumed to have existed. The agency and exertions of the officers and men accompanying him must in my opinion be considered as under his direction, and, in performance of the duties which their obligation in connection with the New England, imposed. It is further argued in regard to two of the libellants, Mesner and Stillfin, that they held such official stations, in the employment of the steamer, one being second pilot, and the other first engineer, that they were not bound to the exertions, labor, and hazard, which are incumbent on seamen, in such emergencies, though the other two libellants, Collins and Goodin, may have been subject to the performance of such duties, arduous and severe as they may have been. Mesner and Stillfin, it is contended, are entitled to claim as salvors, on the same ground, as pilots are known to have been thus admitted.

The few cases, in which pilots have been admitted to share as salvors, rest on grounds which do not appear to me applicable in the present instance. "It is clear," says Judge Hopkinson, in the case of Hand v. The Elvira [Case No. 6,015], "that a seaman is much more closely bound to a ship than a pilot, and the duties to her are far more extensive, permanent and severe." Pilots, in ordinary navigation, are engaged occasionally, and for a particular service, and for the established reward for such special services; for extraordinary services, of another description, foreign to their line of duty, they have been considered to be entitled to claim as salvors. The pilot of a steamboat, is of a different character, he is one of the ship's company, and if styled sailing master, it would more fully and correctly indicate his line of duty. Ordinarily he satisfies all claims, by confining himself to his appropriate duties. But in trying emergencies, as in shipwrecks or in distress, or disaster at sea, he must, I think, from his intimate relation to the ship, be considered to be on a different footing from pilots in ordinary navigation, and to be holden to like exertions for preservation of life and property as if belonging to a ship's company in common navigation. So is it also with the engineers, or any other officers belonging to a steamboat, and with the whole crew. In some remarks which I have recently seen, respecting the anticipated extension of steamboat navigation on the ocean, the writer notices the effect of the "daring achievement," and of the application of a power "which takes the mind up from former associations." The animating views connected with these remarks, there is certainly no disposition to depreciate. But it must be remembered, that the extensive application of the new power, has its peculiar dangers, imposing corresponding duties, on those by whom it is exercised. In the dissipation of former associations, we are to take a sober view of probable contingencies, and be careful to retain the good old rules of the marine law, which have proved efficacious and salutary in the progress of navigation, and essentially subservient to the safety and security of all concerned. With these views I cannot but consider the claim of the pilot and engineer of the New England, of exemption from the legal duties belonging to a ship's crew, in cases of extremity, and to become general salvors, in consequence of holding those offices, not to be sustained. Those who may be about to embark in a steamboat, may reasonably be considered as entertaining no expectations of such exemption; and, if it were decided otherwise, masters and owners of steamboats, would probably find it expedient, to ensure confidence and custom, by express stipulations, publicly announced.

On the same ground that the libellants are incapacitated, by law, from being general salvors, rests the invalidity of the promise, or offer made by Mr. Dorr. In the case of Harris v. Watson, Peak, Cas. 72, a promise made by the master of a ship, of extra wages, in a case of extremity, was held not to be binding, on principles of general policy. "If this action was to be supported," says Lord Kenyon, "it would materially affect the navigation of this kingdom." Neither as I conceive, will the law enforce a promise of pecuniary reward made by a passenger to one or more of the crew of the wrecked vessel, for the purpose of engaging him or them to his particular interest in such a season of general calamity. If the libellants could be considered as general salvors, any promise of pecuniary reward would be of little or no importance. It might be too much or too little. The court would in such case adjust the reward according to merit and benefit. Being as they are deemed to be, not general salvors, but engaged in saving the property conformably to their duties, they were not at liberty to place themselves under engagements which an admission of the validity of the promise would import. Capt. Kimball, I conceive, could not legally act under a promise of this description, neither could any under his command. The preferences which such engagement would involve, are inadmissible.

In regard to the pecuniary loss, which one of the libellants, Mr. Mesner, asserts that he sustained, it is not alleged in the libel nor is it duly proved, and if the sum mentioned were in his chest, at the time, the loss cannot be imputed to his attention to saving the property in the captain's office. There was ample time, after he entered on board before the opening was commenced into that office to repair to his berth, and save any valuable articles which it contained, if it were practicable. I cannot but conclude therefore, that the berth, which was forward, was entirely under water, and inaccessible; and that his failing to resort to it, for saving his property.

in that place, was from its impracticability, and not occasioned by his devotion to saving the respondent's money.

In regard to the only remaining ground, taken in support of the libellants' claim, that of deserved recompense for extraordinary danger and gallantry, it is readily conceived how those characteristics should lead to augmentation of compensation, in awards for salvage service, and the American authorities distinctly authorize an allowance, for such cause, in the salvage suits by seamen, on account of property saved by them from the wreck of a vessel to which they belonged. There would seem, indeed, to be a difficulty in reconciling an allowance of this description, in addition to wages, with the strong language of the maritime law, in reference to the seaman's duty on such occasions. He is required as has been repeatedly decided, and as the digests on the law of shipping repeat, to exert himself, to the utmost, to save as much as possible of vessel and cargo, in terms so intense, as would seem to embrace any services comprehended under the expression cited in support of this claim. Lord Stowell, in the case of The Neptune, emphatically states the inconveniences and embarrassments, from suits of this description, for an unliquidated sum, "the one party hardly guessing what is proper for him to ask, and the other equally ignorant what he ought to refuse, and the court having to find the proper liquidation, often on evidence sworn to, on both sides, with equal intrepidity." These remarks of that distinguished jurist, are entitled to serious attention, but the law as declared by our own courts is to be taken, for guide and government on the subject. Lord Stowell would limit the compensation in such cases, to the wages; our decisions are of more extensive import, and authorize a recompense in addition to the wages. In connexion with a distinct declaration of this doctrine, in the very instructive case of The Two Catherines [supra], the court appears to have in a degree anticipated the difficulties, which so strongly impressed the mind of Lord Stowell two years afterwards in the case of The Neptune. "It appears to me," says Mr. Justice Story, "that there is sound policy and wisdom in fixing in ordinary cases of this sort a settled salvage, at least to the extent of wages earned, leaving an additional recompense to be made in cases of extraordinary danger and gallantry, where the service is greatly enhanced by the preservation of life and the great value of the property at stake." There are exceptions, according to frequent decisions, to the general rule, which precludes seamen from being admitted as salvors, in reference to the vessel to which they belong or its cargo. Such is the case of recapture of their vessel, a dangerous service, which they are not bound to perform, and their contract being dissolved or suspended by capture. In the instance of Toole in the case of The Blaireau, "the captain," says Chief Justice Marshall, "who was entrusted by the owner, with power over the vessel and her crew, had discharged him from all further duty, under his contract, so far as any act whatever could discharge him." The distinction prevailing, in cases of such description, is, that there is a change of state or condition, but where the service is merely heightened in degree, being in the performance of the duties required by the mariner's engagement, there is, manifestly, opened a wide field for claims and controversies, requiring, if practicable, some definite limits, though it may be difficult to assign them. In the case of The Two Catherines the limit recommended in ordinary cases is the amount of wages due, an additional recompense to be decreed for extraordinary merits. Where the wages have been paid, I am not prepared to sustain a separate suit against individuals, passengers or shippers, whose property may have thus been saved. When an allowance is made, on that ground, in connexion with a suit for the wages, it is admissible, by analogy with the reward allowable in such case for the preservation of life, for which a separate and distinct demand cannot be maintained. In a salvage suit, where such claim for extra allowance is associated with the claim for wages, admiralty rules and practice are well adapted to bring all parties and interests before the court, and to comprehend the entire merits in one decision. But the party is not, I think, at liberty to break his case into fragments, and after wages are received, to maintain separate suits against individual owners of property saved for such extra allowance. On this ground, the libellants having received wages without claim of any further demand, cannot in my opinion, legally maintain this suit.

If the case were free from this objection, I am not satisfied, that the facts in evidence would sustain the claim which is made. The services rendered by the libellants, were, indeed, prompt, energetic and efficient, and the value of the property saved, for the respondents, cannot, I think, be reduced to the low estimate, expressed in their answer, and in the arguments of their counsel. But the time employed by the libellants was brief, and considering the mildness of the weather, the smoothness of the sea, the number of boats well manned, which were around the wreck, under the direction of Capt. Kimball, whose vigilant attention to the safety of the men employed was in constant exercise, they were not, as appears to me, in any very imminent danger. The most alarming apprehension, probably, was the fall of the steam-pipes. This it appears engaged the particular attention of Capt. Kimball. He directed the rods, on one side to be loosened, to secure the expected fall in a safe direction. This, he says, was done, and the steam-pipes fell without injury to any one. The men, says Capt. Kimball, "worked jovially;" by which I understand, that they worked with alacrity,

without fear, and with that hilarity which is usually the happy accompaniment of strenuous action in the performance of duty. It is to be considered, however, that if their services should be estimated as of a high order, that they were under peculiar obligations to extraordinary exertion to save the property of the passengers, considering the character, and origin of the disaster. There is presumptive evidence, that the steamer was at fault, in the collision, from want of due vigilance or attention by those who had her in charge at that moment. It is certain that such was the impression of the passengers, generally and emphatically expressed. Under such circumstances, the officers and crew of the New England were bound to the utmost exertions, after the passengers were placed in safety, to save their property. If the effect of the concussion had been reversed, and the Curlew had been the sufferer, and had been laden with valuable commodities, no one, I think, will say, that the officers and crew of the New England, could legally or reasonably claim pecuniary compensation for the relief that they might afford in such extremity, which their vessel had been instrumental in producing. In the actual event of the shock, they were equally bound to render all practicable aid, for the preservation of life and property intrusted to their care, and without demanding extraordinary reward for their exertions. Such, indeed, it is believed, was the spirit with which the libellants were actuated.

Remarks were made in the argument, relative to their motives, in their proceedings, and it was inferred that in the saving of the money from the captain's office, they were not influenced by the promise of reward, made by Mr. Dorr. Their motives, I should say, were probably various. They were told repeatedly, that the payment of their wages depended on saving the captain's money, contained in the iron safe. This, it may be presumed, had its influence. That they were not primarily prompted by Mr. Dorr's offers, would appear from the fact, that they did not forthwith employ themselves in recovering the property in the captain's office; but, very properly, began their labors in saving the contents of the baggage rack, by the opening at the sky-light. Their prevailing motive, may be considered to be a sense of duty, and respect to the orders and influence of their superior officer.

The bounty of the bank to Mr. Stone, probably produced new views and determinations in the minds of those who thought themselves equally entitled to reward. That gratuity, has no legal bearing on the case before me. If previously to that bestowment, Captain Kimball had been consulted, in regard to the application of such donation as the respondents might be willing to grant, or if the libellants themselves had made a claim on the bank, prior to the payment made by Mr. Stone, distribution might perhaps have been made, obviating all umbrage, and preventing the institution of this suit.

Such are my views of this case, and the libel will be dismissed. It is a relief to know, that, if the decision be erroneous, the libellants have their remedy by appeal, in the result of which any mistakes in matters of law, or in the application of law to the facts, may be corrected. Libel dismissed. It is understood that costs are not claimed for the respondents.

MESRITZ (CHUCK v.). See Case No. 2,710.

MESSENA v. The A. B. NEILSON. See Case No. 9,493a.

Case No. 9,493a.

MESSENA et al. v. The NEILSON.

[24 Betts, D. C. MS. 13.]

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

COLLISION—DEFENSES—TITLE—CONTRIBUTORY NEGLIGENCE—LIGHTS.

[1. The fact that a pilot vessel is cruising off her station is no defense to a libel against another pilot vessel for a collision.]

[2. The fact that the owners of a vessel in possession have placed the title temporarily in another, to secure moneys borrowed to pay her purchase price, will not prevent their maintaining a libel for collision.]

[3. Libellant in a collision case must show freedom from contributory negligence.]

[4. There can be no recovery for the loss of a pilot boat in a collision where she was lying to in a thick cloud at night, without any light exhibited on deck, so as to afford a warning to approaching vessels, and with only a small boy on deck, where the colliding vessel was properly manned, and did not see the other until too late to avoid the collision.]

The pilot schooner Julia was built by Messrs. Grinnell & Woolsey, of this city, and enrolled and licensed in their name September 5, 1854. She was built under an arrangement with the libellants [Edward D. Messena and others] that they were to become purchasers and owners of her on payment of the costs and charges of her building. April 29, 1856, Grinnell & Woolsey licensed the vessel to the libellants; and on the 4th of March, 1857, Grinnell assigned her to his co-owner, Woolsey, and the libellants, as also all claims and demands against the pilot boat A. Bleeker Neilson and owners, and all persons concerned in producing the collision in question in this action. To fulfill the contract of purchase, the libellants, through Mr. Blunt, obtained from an insurance company a loan of money to pay the purchase price of the vessel under an arrangement that the ownership should be vested in G. W. Blunt for the security of that loan. Mr. Blunt accordingly took the legal title in his own name, for the security of that loan, with the privilege reserved to the libellants to pay off the debt by installments out of their earnings as pilots in

the employment of the boat. When the debt was satisfied, the vessel was to become the property of the libellants, as co-owners, in the proportion they should have respectively paid towards the extinguishment of the debt. The loan has not yet been fully satisfied, and the title of the boat still remains in the name of Blunt at his disposal for satisfaction of that debt.

On the 19th of October, 1856, the pilot boat, under the command and in the employment of the libellants, was allotted to keep station near the Hook, in conformity to the by-laws of the board of commissioners of pilots; and in violation of their duty in that respect, she was that evening removed from that station seven or eight miles, and employed in cruising for vessels outside the Hook, and between eight and nine o'clock in the evening she encountered the collision which is the subject of this action. The Julia was lying to, under headway of about 1¼ knots the hour, heading S. S. W., the wind W. S. W., and moderate. It was a dark starlight night, but a thick cloud or bank lay in the S. E., towards which the two vessels were steering. The Julia had two hands in charge of the deck, the rest of the crew having their watch below; one of these assigned to her charge was a lad of 17 years old, and the other, an able seaman. The boy had charge of the helm, and the other was below, when the schooner A. B. Neilson was discovered from the Julia approaching on her starboard side, from the north, the two vessels then being 3 or 4 miles southerly of the station ship, and running pretty much in the same direction. No light was on the Julia except a small hand-lamp, standing in the binnacle, and there was no lookout on deck. The man below was hailed by the boy, and told that a vessel was approaching; he answered the hail, but not coming on deck, the boy shortly after caught the binnacle lamp, and ran forward, calling again earnestly that a vessel was coming right at her, when the man came out, took the lamp from the boy, and held it out over the railing, as a warning towards the Neilson. The light was then first seen on the Neilson, but she was too near the Julia to be able to avoid her. The Neilson was well manned, with a competent lookout upon deck, stationed about midships, and as far forward as is usual in small vessels, and as far as could be and keep out of the spray thrown over her bows, and he was moving backwards and forwards, and across the deck, looking out attentively in all directions. She also had a lantern lighted, and in good order, suspended in the shrouds, 10 or 12 feet above the deck. The Julia was not seen from her until the binnacle lamp was held out as a warning, and when the two vessels were nearly in contact, and too late for anything to be successfully done on board either to avoid the collision. The Julia was struck on her starboard side, and shortly after went down, and became a total loss.

BETTS, District Judge. I shall lay out of view in this case the fact that the Julia was off her station at the time of the collision, as affording any excuse for a trespass committed upon her. This was no malfeasance which the claimant could set up as a bar to his liability for his own illegal conduct. The libellants may have been liable to fine or disability, because of disobedience to the regulations of the service in which they were subordinate, but such delinquency would not outlaw them in respect to the fullest protection and remedy in this suit, if wronged in their persons or property, by the unjustifiable acts of the claimant or his agents. Their act was not a fault in itself conducing to the collision, and thereby also inflicting an injury upon the claimant, because the Neilson had no reason for guarding herself specifically against the Julia, or to suppose she was near the station ship or in any other particular position. Her being found in this place, therefore, could in no way mislead the colliding vessel in the choice of her own course, or in the manner in which she pursued it.

Nor shall I regard the question of title to the Julia, or the competency of the libellants to maintain this action upon the footing of the provisional interest accruing to them in the vessel under the arrangement for her purchase, whether set up as a legal or equitable ownership, or a right to an exclusive possession and use of the vessel. Mr. Blunt's testimony proves that he considers himself the trustee of the Insurance Co. creditor, and to be to the libellants no more than a pipe of conveyance, by which the title is to be transmitted to the libellants, when the debt owed the company is extinguished. To that period he regards himself the trustee of that creditor; and if the debt is not paid, he supposes the boat is to be devoted by him to that end. The libellants do not produce proof of the paper title to the boat, from Grinnell to them, although they offer in evidence papers prepared and partially executed for that purpose. Passing by those collateral points, I shall look only at the merits of the case involved in the charge of culpability of the Neilson, and the right of the Julia to damages incurred in the transaction which occasioned the loss, assuming that the libellant had a possessory interest in her at the time, which was destroyed or injured by the collision.

A cardinal principle lying at the bottom of actions for collision at sea is that the party setting up an offence or tort, to have been committed to his damage by another, must show himself clear of any misfeasance or remissness conducing to or promoting the injury. He grounds himself in his plaint essentially on the assumption that every thing incumbent on him by law to do in respect to the preparation and management of his vessel on the occasion was duly performed, and in a cautious and skillful manner, and these matters must be clearly proved by him. Abb.

Shipp. 306; Story, Bailm. § 609. And if that was not so, he could stand only upon his common-law remedies, under which he is debarred all remuneration in his losses, when what he suffers is attributable wholly to the want of proper diligence or precaution on his part. As the complaining party, he must supply preponderating proof that the injury he sustained proceeded from negligence or the want of skill in the management of the vessel he proceeds against, and charges with causing him the loss he has sustained. The Catherine of Dover, 2 Hagg. Adm. 145; The William Young [Case No. 17,760]; The Relief [Id. 11,693]. The position of the Neilson to the rear and windward of the Julia imposed upon the former the duty of keeping clear of the latter in passing her. The Governor [Id. 5,645]. But she is relieved of blame in failing to do so, if, from causes not under her own control, but, on the contrary, created or promoted by the Julia, she was prevented discovering her until too late to escape her. Peck v. Sanderson, 17 How. [58 U. S.] 178. It appears to me the evidence on the part of the libellants themselves clearly casts the blame upon them in this respect. If not actually lying to at the time, the Julia was enveloped in a thick cloud in almost a motionless state. She was discernible only a few yards distance from a vessel proceeding from northerly towards the east, and there being no more than a small binnacle light in use, and that not exhibited on deck in a way calculated to afford warning to vessels nearing her, and with only one small boy on deck to manage the vessel and keep a lookout. Each of these particulars are evidence of culpable negligence on the part of the libellants, and would excuse the Neilson from responsibility for the consequences of the collision, especially upon the clear and positive testimony given by the claimants, that the Julia was not in fact discovered from the Neilson until too late for her to take any effectual measures to escape a collision.

The case before cited—[Peck v. Sanderson] 17 How. [58 U. S.] 178—declares the rule to be that the omission of a vessel injured by a collision to supply proper notice of her position to another known to be in a dangerous proximity to her relieves the colliding vessel from liability for the injury done in consequence. The fact implied by the court in that case is distinctly proved in this by the libellants' testimony that the helmsman on the Julia saw the light of the Neilson approaching and bearing directly upon the former, before he called the watch from below, and in time to allow a second call and several minutes to intervene, before he came on deck, and any warning light was shown to the Neilson, and which was the first notice to her that the Julia was in the way. These acts of neglect and culpable mismanagement on board the Julia are sufficient to bar all right of recovery in this case; but, independent of the faults of which the libellants were guilty, it is, in my judgment, satisfactorily proved that the Neilson was properly manned and conducted, and the rate of six or eight knots the hour at which she was running was not unsafe or imprudent at the time. It is further to be remarked that although the excusatory evidence offered by the libellants for the neglect and irregularity in the management of the Julia comes in part from the libellants themselves, and therefore, if admissible at all, must be received with distrust and great allowance, yet the testimony given by witnesses indifferent to the parties and the controversy is overpowering to prove a plain and culpable neglect and want of precaution in failing to signalize the Neilson in some proper way, and apprize the latter of her position, after the boy at her helm became aware the other was nearing her in her position, and whilst there remained ample time to give such warning as would have placed it in the power of the Neilson to protect both from harm. It was not necessary that the Neilson, to exonerate herself from responsibility for this injury, should show she exercised the highest possible diligence and precaution to avoid it. That might require her to come to absolutely and suspend all movements during the night; it is sufficient for her to exercise the usual and ordinary precaution of vessels under way, and with that restriction she was entitled to continue her voyage notwithstanding possible circumstances might intervene rendering her navigation dangerous to other vessels. Stuart v. Foster, 1 How. [42 U. S.] 93. The testimony of disinterested witnesses satisfactorily proves the speed of the Neilson at the time to have been no greater than was prudent as she was manned and managed, not exceeding 6 to 8 miles the hour, and the boy on the Julia proves he saw her light distinctly a mile or more off. Under the facts in evidence, I hold, therefore, that the fault of the collision lies primarily with the Julia, and that the libellants cannot therefore sustain this action to charge the consequences of it upon the Neilson.

Libel dismissed, with costs to be taxed.

MESSENGER, The (SMALL v.). See Case No. 12,961.

MESSER (SANFORD v.). See Case No. 12,314.

Case No. 9,493b.

MESSEREAU v. The SOPHIA.[1]

District Court, S. D. New York.[2]

COLLISION—STEAMER AND SAIL VESSEL.

[A steamer meeting a sail vessel beating against wind and tide is bound to anticipate the sail vessel going in stays for another tack when necessary or proper to do so, and so regulate her speed as to avoid the sail vessel.]

In admiralty.

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1 [Not previously reported.]

2 [Date not given.]

SHIPMAN, District Judge. This libel in rem is brought by John T. Messereau, owner of the sloop David D. Crum, against the steam propeller Sophia, to recover damages suffered by the sloop in a collision with the propeller in the Kills, between Staten Island and the New Jersey shore, on the 10th day of June, 1859. The sloop was bound from the Palisades to Elizabethport, and the propeller was on her voyage from Philadelphia to New York. The wind was blowing fresh at the time down the Kills toward New York Bay, and the tide was ebb, setting with a pretty strong current in the same direction. The collision occurred about 11 o'clock in the morning, and while the propeller was moving with considerable speed. The sloop was under single reef mainsail and jib, heavily loaded with stone and was beating against wind and tide. The captain of the propeller states that when he first saw the sloop she was just standing on her long tack toward Bergen Point; that she did not continue on that tack as long as she might, and as long as he had a right to expect she would, but that she suddenly went in stays and stood for the Staten Island shore, on her short tack. He states that when she went in stays for this latter tack she was rather astern of the propeller, and that if she had kept her course close she would have passed to the westward of and under the stern of the propeller, but that, on the contrary, she kept away, as if making a long instead of a short tack toward Staten Island, thereby coming across the bows of the propeller; that when he saw the course of the sloop he slowed and stopped his engine, and ported his helm, thereby endeavoring to avoid the collision.

Now I think the evidence clearly shows that the captain of the propeller both mistook the position of the sloop and his duty towards her, and that he failed in his duty towards her in several important and decisive particulars. (1) I think he was bound to anticipate that the sloop would go in stays and come on to her short tack near the spot where she did. (2) That, if the vessels had occupied the relative positions which he claims they did when the sloop went in stays for her short tack, the collision would have been impossible; for the steamer, with her speed as stated by him, would have passed the point of collision before the sloop could have reached it. (3) That, seeing this sailing vessel, beating up a narrow channel against wind and tide, the propeller going in the opposite direction with the wind and tide in her favor, under the power of steam, should have had her speed effectually checked, and, if necessary, stopped, in season to have passed the sloop in safety. (4) It is evident from the whole evidence, including that of the captain of the propeller, that he did not accurately calculate the position of the sloop, the necessary course which she must take on her short tack, and the inevitable effect of the wind and tide in carrying her on this tack to the eastward, down the Kills, and that he erroneously supposed he could safely pass to the southward of her, and that in attempting to do so the collision occurred, through the fault of the propeller, and without fault on part of the sloop.

It follows from these conclusions that a decree must be entered for the libellant, and an order of reference to ascertain the damages.

MESSERSMITH (McVEIGH v.). See Case No. 8,931.

MESSINGER (CARTER v.). See Case No. 2,478.

MESSMORE (TRADER v.). See Case No. 14,132.

Case No. 9,493c.

METAL STAMPING CO. v. CRANDALL.

[18 O. G. 1531.]

Circuit Court, N. D. New York. Oct. Term, 1880.

BILL OF REVIVOR—BY ASSIGNEE—SUPPLEMENTAL BILL—PRACTICE IN EQUITY—UNINCORPORATED COMPANY—HOW SUIT PROSECUTED.

1. A bill of revivor will not lie when filed by the assignee of the original complainant, as the right to file such a bill is confined to cases of representation of the party deceased by the mere operation of law.

2. In case of the death of an original complainant and assignor the proper course for the assignee is to file a supplemental bill.

3. The bill of an unincorporated company should be prosecuted in the names of the individual partners, and not in the name of the company.

In equity.

A. v. Briesen, for complainant.

R. H. Duell, George W. Hay, and Charles H. Duell, for defendant.

WALLACE, District Judge. This cause comes here upon the bill of revivor filed by the complainants, the plea of the defendant, the replication of the complainant, and the proofs taken under the issue thus raised. The original bill was filed by Charles Schuessler, March 24, 1879, to restrain the infringement of letters patent [No. 61,628] for an "improvement in buckle-fastenings," originally issued to Robert Meyers on the 29th day of January, 1867, assigned by him to Schuessler, May 8, 1874, and reissued to Schuessler, as assignee of Meyers, May 23, 1876 [No. 7,129]. There was an answer and replication in the original suit, and proofs were taken therein [Case No. 12,485]; but before a hearing, and on the 6th day of September, 1879, Schuessler died. The proofs show that March 16, 1874, Schuessler and one Walters entered into an agreement to become partners under

the name of the Metal Stamping Company, by which, among other things, they agreed that all inventions or improvements made by either party, or for which either party should obtain letters patent, should be owned by the parties jointly and equally. November 27, 1877, one Loercher was, by articles of agreement admitted as a partner into the firm of the Metal Stamping Company, the agreement reciting that Loercher was to have a fifth interest in the assets and business of the firm as manufacturers under various letters patent including the Meyers reissued letters patent. By a further agreement made between the partners August 13, 1879, Schuessler transferred to the Metal Stamping Company the sole and exclusive right and privilege to manufacture, use, and sell the invention and improvement described in the letters patent during the life of the partnership, and the agreement of transfer also provided that upon the dissolution or extinction of the partnership the letters patent should only be assigned by the joint signatures of the partners or their legal representatives. It thus appears that when the original bill was filed Schuessler held the legal title to the patent in question; but the equitable title to the patent and the right to recover for damages by reason of its infringement since its assignment to Schuessler was in the Metal Stamping Company, and by the instrument of August 13, 1879, the legal title to the patent became vested in the Metal Stamping Company, because after that nothing remained in Schuessler which he could transfer without the participation of the other members of the firm.

The case thus presents the single question whether a bill of revivor will lie to introduce the Metal Stamping Company into the controversy, and I am of opinion that it will not, because the complainant's interests have not been acquired by the death of Schuessler, but by the transfers and agreements made between him and the complainants. After the complainants acquired the legal title to the patent they were in a position to file a supplemental bill. Story, Eq. Pl. § 346. The right to file a bill of revivor is confined to cases of representation of the party deceased by the mere appointment and operation of law. Story, Eq. Pl. § 354. On the other hand there may be a priority of right and title under the deceased by a transfer or conveyance of that right to a person who is not in by mere operation of law, and is not the heir or personal representative of the deceased, and in such a case a bill of revivor will not lie. 2 Barb. Ch. Prac. 51.

It is proper to suggest that as the Metal Stamping Company is not a corporation, but the name of a partnership, neither a bill of revivor nor a supplemental bill can be prosecuted except in the names of the individual partners. This point has not been raised, but should not be overlooked if further proceedings are taken. Judgment is ordered for the defendant upon the plea.

Case No. 9,494.

In re METCALF et al.

[2 Ben. 78; Bankr. Reg. Supp. 43; 1 N. B. R. 201; 6 Int. Rev. Rec. 223; 1 Am. Law T. Rep. Bankr. 46.] [1]

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

BANKRUPTCY—STAYING PROCEEDINGS IN STATE COURTS—APPEAL.

1. A judgment in a state court against a bankrupt, which has been duly appealed from by him, is not a final judgment under the twenty-first section of the bankruptcy act [of 1867 (14 Stat. 526)].

2. The prosecution of the case, under such appeal, is forbidden to the creditor by that section.

[Approved in Re Leszynsky, Case No. 8,278.] [Cited in Brandon Manuf'g Co. v. Frazer, 47 Vt. 89.]

3. A motion to compel the bankrupt to furnish new security on such appeal, or abandon the appeal, is embraced within that prohibition.

[In the matter of Benjamin F. Metcalf and Samuel Duncan, bankrupts.] This case came before the court upon a petition filed by Henry D. Brookman and John U. Brookman, for relief from an injunction issued by this court restraining all proceedings in a certain cause pending in the court of appeals of the state of New York, wherein the petitioners were plaintiffs, and one of the bankrupts the defendant. It appeared that the case had been tried, and judgment given for the plaintiffs, which judgment had, however, been appealed from by the defendant, who had given security upon such appeal, as required by law. It also appeared that one of the sureties upon the appeal had become insolvent, and the plaintiffs had, since the commencement of the proceedings in bankruptcy, given notice of a motion to compel the bankrupt to furnish new security, or abandon his appeal; whereupon the bankrupt obtained from this court, in which his petition in bankruptcy had been filed, an injunction staying all proceedings in the cause referred to, which injunction the plaintiffs in that cause now asked to have dismissed.

Owen, Nash & Gray, for the motion.

Emerson & Goodrich, in opposition.

BENEDICT, District Judge. The twenty-first section of the bankruptcy act declares that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined." This is a very clear provision, the object of which is to prevent a race of diligence between creditors, and to protect the bankrupt from being harassed with suits pending the question of his discharge. It seems to apply to all cases where the personal liability of the debtor is sought

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 46, contains only a partial report.]

to be fixed or ascertained by a final judgment pending the determination of the question of his discharge, and, in my opinion, it applies to a case like the present, where an action against one of the bankrupts is pending in the court of appeals of the state, to which an appeal had been taken by him prior to the filing of the petition in bankruptcy. In such a case there is no final judgment within the meaning of the bankruptcy act; the debtor's liability has not been finally determined, and there being no final judgment, the bankruptcy act declares that the suit shall stop, pending the determination of the question of the bankrupt's discharge. This option to endeavor to obtain a discharge in bankruptcy, and, failing in that, to defend all undetermined personal actions, is a right given a debtor by the bankruptcy act under the constitution of the United States, and he is entitled to be protected in that right by this court. But it is said that the motion for further security, which has been noticed by the creditor in the actions pending in the court of appeals, is not strictly a proceeding against the bankrupt. I think otherwise. It is just the proceeding which will compel the bankrupt to determine, pending his application for his discharge, whether to defend the suit or allow a final judgment. But the bankruptcy act does not permit him to be forced to decide that question now. It declares that no such suit shall be allowed to proceed until he has had a reasonable time to obtain his discharge, if he can, and the mandate of the act to this court is to stay such a proceeding in whatever court it may be pending. My opinion, therefore, is, that it is the clear duty of this court to maintain the injunction heretofore granted against the petitioners until the bankrupt shall have had a reasonable time to obtain his discharge. What effect the discharge, if obtained, will have upon the proceedings pending in the state courts, I do not undertake to decide. The motion must be denied.

Case No. 9,495.

METCALF v. DAVIES SCREW CO. et al.

[3 Cin Law Bul. 456.]

Circuit Court, S. D. Ohio. 1878.

TAX SALE—TAX ON CHATTELS—SALE OF LAND—REMEDY.

Taxes on chattels are not a lien on the real property of the owner until after judgment on suit to recover them.

The real and personal property of the Davies Screw Company, at Dayton, Ohio, having been sold, under mortgage and judgment liens, and the fund being insufficient to pay the liens, two claims in respect to taxes were interposed, each claiming priority over the creditors. One was by Samuel Bigger, purchaser of the real property at tax sale. This was contested on the ground that the auditor's certificate was void for want of certainty; the description of the property being "six acres of land, east of Troy Road, sections 4 and 34, township 1, range 7,. in said county." The other claim was by the treasurer of Montgomery county, who claimed priority for payment of the taxes assessed against the company, upon its chattel property, for the years 1866 and 1867. Upon this assessment the treasurer obtained judgment in the court of common pleas, and execution was levied, but it was subsequent to the mortgage and levies by the marshal in favor of the creditors, who resisted on the ground that the statute creates no lien for taxes upon personal property.

King, Thompson & Maxwell, for complainant.

Thomas & Kemper, for Bigger.

W. Munger, for treasurer.

SWING, District Judge. Two questions are presented for decision. The first grows out of the claim of Samuel Bigger, purchaser at tax sale. Under this sale the purchaser claims a lien for the amount of the taxes paid, and fifty per cent. penalty, and six per cent. interest thereon. To this claim it is objected that the tax sale was void by reason of the imperfect description of the land sold. Was this sale void? We think this is not an open question. In Raymond v. Longworth [Case No. 11,595], in which the description was as in this case, it was held insufficient, and the sale was declared void. Upon error to the supreme court of the United States (14 How. [55 U. S.] 76) this decision of the court below was affirmed. And see, also, the various cases decided by the supreme court of Ohio, holding the same doctrine as referred to in the opinion of the court. The description in this case is literally within the cases referred to, and their authority is conclusive upon the question. The tax sale must be held void; and under the statute of Ohio, and the decision of the supreme court of the state in Johnson v. Stewart, 29 Ohio St. 498, the purchaser at tax sale is entitled to the sum by him paid at such sale, and the subsequent taxes, with 6 per cent. interest thereon.

The second question grows out of the claim of the treasurer of Montgomery county for the taxes due upon the personal property belonging to the Davies Screw Co., for the years 1866 and 1867. The personal property was, under an execution issued from this court, levied upon and taken into possession by the marshal in January, 1877. By the laws of Ohio a lien is created in favor of the state upon all real estate for the taxes thereon, but no such lien is created upon personal property; the only provision of law in relation to personal property in that respect is that all personal property subject to taxation shall be liable to be seized and sold for taxes. Such lien would be wholly impracticable, and therefore the legislature has never attempted to

create one. It follows, therefore, that the marshal holds this property freed from any claim of the state for taxes assessed prior to his levy thereon.

As to the taxes assessed subsequent to the levy of the marshal there may be some question. It is claimed that the taking of the property under execution by the marshal did not relieve it from taxation; that it was the duty of the marshal to return it for taxation. There is certainly no express, and I think no implied, provision of the law which requires the marshal to do so. Indeed, a provision of this character would be attended with greater difficulty than that of a lien; and the officers in this case seem to have so regarded the law, for they never made any demand upon the marshal to do so. When the Davies Screw Co. failed to return the property for taxes, they listed these chattels in its name, and as its property, and levied the taxes thereon against said company; and subsequently, in pursuance of the provisions of the statute, they obtained a judgment against the company for the amount thereof which was levied upon the property. There being no law requiring the marshal to list this property for taxation, and no proceeding against him in relation thereto, and there being no lien upon this property for the payment of the taxes, the only lien, if any, which exists, is that by the levy of the execution issued upon the judgment against the Davies Screw Co. for the taxes; and this, being subsequent to the title of the marshal, is postponed to it.

The application must therefore be overruled.

Case No. 9,496.

METCALF v. OFFICER et al.

[5 Dill. 565.] [1]

Circuit Court, D. Iowa. 1879.

BANKRUPTCY — ADJUDICATION OF BANKRUPTCY AGAINST A PARTNERSHIP—NECESSARY PARTY —DORMANT PARTNER.

1. It is not essential to the validity of an adjudication of bankruptcy against a partnership that a secret or dormant partner should be made a defendant.

2. The firm property is bound by an adjudication made against the ostensible partners.

3. A dormant or secret partner is not a necessary defendant at law or in equity.

4. Effect of non-joinder of a joint party to a contract discussed.

[This was a suit by Henry H. Metcalf, assignee of the estate of A. Bernard, John G. Mead, and M. E. Mead, trading as A. Bernard & Co., against Thomas Officer and William H. M. Pusey, trading as Officer & Pusey. The defendants demur.]

A. B. & J. C. Cummings, for plaintiff.

C. C. Cole and N. M. Pusey, for defendants.

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

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

LOVE, District Judge. This case is before the court upon the demurrer of the defendants to the plaintiff's petition. The plaintiff, who sues as assignee in bankruptcy, shows that the petition in bankruptcy was filed on the 1st of May, 1877, by certain creditors of A. Bernard & Co., against A. Bernard and John G. Mead as the members composing that firm, and that on the 13th day of May, 1877, they were duly adjudged bankrupts; that on the 5th day of May, 1877, the plaintiff was elected assignee of said estate of A. Bernard & Co., and received a conveyance of the same from the register under the order of the court; that thereafter, on the 12th day of October, 1877, a supplemental petition was filed in the court of bankruptcy by said creditors, alleging that M. E. Mead was a partner in said firm of A. Bernard & Co., and praying that she might be made a party and adjudged a bankrupt upon the original petition, and that such proceedings were had that she was, on the 19th day of November, 1877, made a party thereto and adjudged a bankrupt on said original petition as a member of said firm; that on the 24th day of January, 1878, an assignment was duly made, by order of the court, of all the estate that the bankrupts, or either of them, possessed on said 1st day of May, 1877. The plaintiff further states that about the 5th day of April, 1877, said firm of A. Bernard & Co. made a payment to defendants in the sum of $3,500, defendants being then creditors of said A. Bernard & Co. in said sum, and that said sum was paid under circumstances which made it a fraudulent preference under the bankrupt law.

The court having caused the papers in the original case to be certified for its inspection, finds it to be alleged in the supplemental petition, among other things, that the petitioning creditors were informed by both A. Bernard and John G. Mead, at the time of the purchasing of the goods which formed the basis of their claims, that said A. Bernard and John G. Mead were the persons composing said firm of A. Bernard & Co.; that they filed their petition in bankruptcy to put said partnership into bankruptcy under that belief; that, at the time of filing said creditors' petition, each of said petitioning creditors had been informed and believed that said firm of A. Bernard & Co., then carrying on business in Council Bluffs, Iowa, was composed of A. Bernard and John G. Mead; that each of said petitioning creditors continued in the belief that said A. Bernard and John G. Mead composed said firm until about the 27th day of September, 1877, when, upon the trial of a certain action brought by this plaintiff to recover assets claimed to belong to said estate, A. Bernard testified that Mrs. M. E. Mead, the wife of said John G. Mead, was a partner in said firm of A. Bernard &

Co., and that, until it so appeared by the testimony of said A. Bernard, each of said petitioning creditors was ignorant of the fact that Mrs. M. E. Mead was a member of said firm. It also appears by the original petition that the acts of bankruptcy were committed in the month of April, 1877, to-wit, on the 21st day of April, 1877, and at other times within the same month.

It is clear that the foregoing statements, taken together, amount to an allegation that Mrs. M. E. Mead was a dormant or secret partner of said firm, and that A. Bernard and John G. Mead were the ostensible partners; and this court will presume, after judgment, at least, that the district court, in which said supplemental petition was heard and determined, so found.

The object of the present suit is to compel Officer & Pusey, the defendants, to restore to the assignee the sum of money which they received from A. Bernard & Co., the bankrupts, in payment of the bankrupts' debt to them. It is claimed that the payment was an illegal preference, in fraud of the bankrupt law.

In support of this demurrer the defendants contend: (1) That a partnership can be put in bankruptcy only by proceedings against all the partners. (2) That the fact that there was a secret or unknown partner does not affect the question. (3) That the proceeding by supplemental petition was absolutely void, since common law governs proceedings in bankruptcy, and amendments are not allowed. (4) That the limitation prescribed by the bankrupt law ran till the amendment or supplemental petition was filed, which was after the expiration of the two months fixed by the amendment to that statute, and that, inasmuch as the amendment or supplemental petition was not filed until more than two months after the alleged acts of bankruptcy were committed, this action cannot be maintained.

Thus the question is whether or not it is essential to the validity of an adjudication of bankruptcy against a partnership that a secret or dormant member of the firm should be made a defendant. The adjudication ordinarily brings the individual as well as the partnership property, debts, and assets into bankruptcy to be administered, but this result follows the adjudication only where the individual members whose property is to be affected are served with process or duly notified by publication. But may not the partnership property, debts, and assets be brought into bankruptcy and bound by the adjudication by serving the ostensible partners only? Is it absolutely necessary that the petitioning creditors should, in order to reach the partnership property, bring before the court an unknown member of the firm, whose existence as such is kept a secret by the ostensible members? If so, the most serious inconvenience and confusion would follow as a consequence.

The petitioning creditors cannot, in the first instance, do what to them is impossible. They cannot make members of the firm who keep themselves out of view, and with whom they have made no contract, parties defendant to the petition; and this is by no fault of the petitioning creditors, but rather by that of the members of the firm, both secret and ostensible. The cause against the ostensible members proceeds to adjudication; the creditors meet, choose an assignee, and by the order of the court all of the partnership property, and all of the individual property of the ostensible members who are served, is conveyed to the assignee; the assignee takes possession of the property and assets, collects and pays debts, adjusts liens, sells and conveys property, and makes dividends. After all this, it turns out that there was a secret partner, whom the petitioning creditors, not knowing, did not serve. What follows, according to the doctrine of this demurrer? The adjudication was an absolute nullity. The adjudication was the sole fountain of authority for all that has been done in pursuance of it. The counsel for the defendants contend that there is no remedy but to set aside the adjudication and serve the secret members of the firm; and I suppose that if at some future stage of the proceedings another secret member should be discovered, it would be necessary to set aside the adjudication again and begin de novo. But how, in the meantime, are the confusion and mischief arising from the sale and conveyance of the property of the bankrupt by the assignee, and the administration generally by that officer, to be remedied? Upon this point the counsel have given us no light. It cannot, of course, be denied that the resulting mischief is the direct consequence of the misconduct of the ostensible partners, in first keeping the fact of there being another partner concealed, and in not, in the second place, pleading the existence of the secret partner in abatement.

Counsel, in order to justify a doctrine leading to such consequences, appeal to the analogies of the common law. I see, myself, no reason why a different rule as to parties in this respect should prevail in bankruptcy from that which obtains in equity and common law proceedings. What, then, is the rule at law and in equity as to the necessity of bringing in a secret partner in order to make a judgment valid as to the firm? It may be safely affirmed that it never was essential that a secret or dormant partner should be served in a proceeding at law or in equity. If any district court in bankruptcy has affirmed the contrary, it has simply mistaken the law, and it would have done well not to publish its opinion.

At common law the non-joinder of a party to a joint contract could be taken advantage of only by plea in abatement, in which it was incumbent on the defendant to give his adversary a better writ, as the phrase was—that is, it was necessary in the plea to name

the parties jointly liable and not included in the original writ. If the defendant failed to plead in abatement, he could not avail himself of the omission to make the joint obligor a party on the trial by moving for a non-suit, and the plaintiff was entitled to judgment. But if the plaintiff failed to make a joint contractor with himself a party plaintiff, the consequence was much more serious, for the defendant might, at the trial, in such case, move for a non-suit, and the plaintiff's action fail. Such was the law even as to ostensible parties to a joint contract. With respect to dormant or secret partners, it never was, at common law or in equity, necessary for the plaintiff to join them in the action. The law was not so unreasonable as to require the plaintiff to join in his suit a party defendant with whom he had no contract or privity whatever, and of whose existence he had no notice.

The true rule is now settled to be that if the plaintiff has no means of knowing the existence of the dormant partner's relation to the firm, the partner sued cannot plead in abatement the non-joinder of the dormant partner. De Mautort v. Saunders, 1 Barn. & Adol. 398; Ex parte Hodgkinson, 19 Ves. 294; Ex parte Norfolk, Id. 458; Ex parte Watson, Id. 462; Ex parte Matthews, 3 Ves. & B. 126; Baldney v. Ritchie, 1 Starkie, 338; Sylvester v. Smith, 9 Mass. 119; Cookingham v. Lasher, 38 Barb. 656; Bird v. McCoy, 22 Iowa, 549; T. Pars. Partn. 290, 291. If the plaintiff was unaware of the dormant partnership at the time of making the contract sued upon, he might or might not, at his election, join the dormant partner. Ex parte Hamper, 17 Ves. 412; Ex parte Liddel, 2 Rose, 36; Grellier v. Neale, 1 Peake, 146; Robinson v. Wilkinson, 3 Price, 538; Ex parte Layton, 6 Ves. 438; Hoare v. Dawes, 1 Doug. 371, 373; Wilson v. Wallace, 8 Serg. & R. 55; Page v. Brant, 18 Ill. 37; Cleveland v. Woodward, 15 Vt. 302; Blin v. Pierce, 20 Vt. 25; Hagar v. Stone, Id. 106.

The question really is with whom the contract was intended to be made. It would be a most strange doctrine to hold that a party should be compelled in an action on a contract to join one as defendant with whom he has no covenant whatever; but since a dormant partner participates in the profits, and is in fact a partner, a creditor of the firm may, at his election, hold him responsible, notwithstanding the fact of the want of privity of contract between them.

It was, moreover, the practice at common law to proceed by scire facias against a partner who, though liable, was not joined in the original action. Indeed, the plaintiff could not proceed otherwise. He could not sue the dormant partner without joining the ostensible partners, and he could not unite them in a new and independent action against the dormant partner, because he already had a judgment against them. The plaintiff's true course, therefore, was to proceed by scire facias on his judgment, in which he recited the previous proceedings and judgment, and averred the fact of dormant partnership and the consequent liability of the dormant partner, and prayed that he should be required to show cause why he should not be made a party to the judgment.

In the present case the writ of scire facias could not be employed. It is a common law writ wholly inapplicable to the original proceeding in bankruptcy. By analogy to it, however, the petitioning creditors in this case obtained leave to file a supplemental petition, stating the same facts and asking substantially the same relief. I have, myself, no doubt that in this way the secret partner was brought regularly into court and made a party to the adjudication. It is equally clear to my mind that all her effects and property were thus brought into bankruptcy to be administered. It does not, however, follow that third persons who were individual creditors of the secret partner, and who dealt with her as such, are to be affected injuriously by the delay in commencing the proceedings by supplemental petition to make her a party.

The supplemental petition was not filed until the two months had expired within which, by the provisions of the bankrupt law, it was necessary that it should be filed in order that the assignee might commence a suit to divest a third person of a fraudulent preference; and if this suit was an action by the assignee against an individual creditor of the dormant partner to impeach a payment to him out of the dormant partner's individual estate, I should, myself, strongly incline to the opinion that such individual creditor might successfully plead the limitation.

But this is not a suit to compel an individual creditor to restore a payment alleged to have been made to him out of the dormant partner's effects in fraud of the bankrupt law. This is a suit against a partnership creditor to compel him to repay to the assignee a sum of money which it is alleged the bankrupt firm paid him in fraud of the law. The proceeding to put the partnership into bankruptcy was commenced within the prescribed time. The limitation of the statute does not, therefore, apply to that proceeding. Both of the ostensible partners were served with process, and were regularly before the court. They had informed the petitioning creditors that they were the only members of the firm. The service upon the ostensible partners was, as we have seen, sufficient to put the firm into bankruptcy. The adjudication was strictly regular as to the firm. The firm was, to all intents and purposes, by a valid judgment, subjected to the orders of the court of bankruptcy. The fact that a subsequent petition was filed to bring in a dormant partner did not in the slightest degree invalidate the adjudication against the partnership. The utmost that can be said of the supplemental proceeding

is that it was irregular, erroneous, and insufficient to bring the dormant partner and her estate into bankruptcy. The ostensible members of the partnership could not complain of the error in the judgment under the supplemental petition. It was owing to their misrepresentations that the secret member was not made a party to the original petition. To allow them to conceal the existence of their secret partner, and then to defeat the action of the creditors by the plea that the adjudication was erroneous and void as to them, would be to countenance a direct fraud upon the creditors of the partnership.

There seems to be no solid ground whatever for the argument that the adjudication of bankruptcy against the partnership was not only erroneous, but null and void, because the secret partner was not originally made a party, and because she was subsequently brought into court by the supplemental petition.

The original petition in bankruptcy was filed within two months from the time when the acts of bankruptcy were committed. It was, therefore, in time to enable the assignee to sue a party who had obtained a fraudulent preference, to the prejudice of the creditors. But counsel insist that the filing of the original petition, without making all the partners, ostensible as well as dormant, defendants, was a void act, and that it was, therefore, wholly unavailable to the creditors. Now, it was a thing simply impossible for the petitioning creditors to make the secret partner a party until they discovered that she was a partner, and this they did not discover until it was too late. Why did they not make the discovery till after the expiration of the two months? Whose fault was it? It was the fault of the partners themselves. All of the partners by concealment, and the ostensible partners by express representations, led the petitioning creditors into the erroneous belief that the ostensible partners were the only partners.

Shall the defendants be permitted to take advantage of their own wrong, or at least of their own fault, and defeat altogether the remedy of the petitioning creditors by pleading a delay caused by their own misconduct? Demurrer overruled.

[Subsequently a motion was made for a new trial, which was denied. 2 Fed. 640.]

Case No. 9,497.

METCALF v. ROBINSON.

[2 McLean, 363.] [1]

Circuit Court, D. Indiana. May Term, 1841.

ACTION OF DEBT—DECLARATION—PROMISED TO PAY—AGREED TO PAY.

1. A declaration in debt on simple contract is bad, if it alledge the defendant promised to pay. The word "agreed," instead of "promised," should be used.

[Cited in Cruikshank v. Brown, 10 Ill. 78.]

2. The action of debt is founded upon the contract. The action of assumpsit on the promise. And this is the principal distinction between the two actions.

[Cited in Carrol v. Green, 92 U. S. 513.]

3. Though the declaration, in other respects, have the form of debt, yet if it alledge a promise, it has the form of assumpsit and not of debt.

At law.

M'Kinney & Gookins, for plaintiff.

Mr. Lockwood, for defendant.

OPINION OF THE COURT. This action was brought on a bill of exchange, for $627 33, drawn by the plaintiff on the defendant, accepted by him and protested for nonpayment. The first count of the declaration complains, &c., of a plea that the defendant render unto the plaintiff one thousand dollars, which he owes and unjustly detains from him. For that whereas, &c., setting out the bill, its acceptance and protest for nonpayment. And that the plaintiff, as drawer, was forced and obliged to pay the holder, &c., of which the defendant had notice, "by means whereof said defendant then and there became liable to pay said plaintiff said sums of money; and being so liable, he, the said defendant, then and there undertook and promised to pay," &c. The second count states that the defendant was indebted to the plaintiff for so much money, &c., had and received to and for the use of the plaintiff at defendant's request. And, also, in the further sum of seven hundred dollars for money laid out and expended, &c.; and being so indebted, he, the said defendant, in consideration thereof, then and there undertook and promised to pay to the said plaintiff said sums of money, when he, the said defendant, should be thereunto requested. Yet the said defendant has refused, &c., to the damage of the said plaintiff two hundred dollars. To this declaration the defendant demurred, and assigned as cause of demurrer a misjoinder, the first count being in debt and the other in assumpsit.

The forms of a declaration in an action of indebitatus assumpsit, and in debt on simple contract are very similar. There are, however, certain words by which they are distinguished, and which give the one or the other character to the action. The action of debt is founded upon the contract, the action of assumpsit upon the promise, and in this consists the principal distinction between the two actions. In the action of debt, on simple contract, express or implied, the subject matter of the debt should be described precisely as in the common counts in assumpsit. The consideration for the contract must be stated, as also any inducement necessary to explain the contract of consideration, and it should be stated the party agreed to pay. Stating that he promised to

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

do so would be bad. Emery v. Fell, 2 Term R. 28; 2 Bos. & P. 78. In the case of Brill v. Neele, 3 Barn. & Ald. 208, the record stated, that the plaintiff had brought his bill, &c., in a plea of debt, and the commencement of the declaration was in the common form in debt. The first count then stated, that defendant was indebted to the plaintiff for work and labor, &c., and, being indebted, that the defendant undertook and promised to pay upon request, &c. The second count was upon a quantum meruit, and in form like the first. The other counts were properly framed in debt. To this declaration there was a demurrer, assigning for cause the misjoinder of debt and assumpsit. In support of the demurrer the case of Dalton v. Smith, 2 J. P. Smith [Eng.] 618, was cited, where the court held a declaration containing counts precisely similar to be bad; and Lawrence, Justice, there said, that the counts laid with a promise were counts in assumpsit without a breach.

There can be no doubt, that in the case under consideration, the counts were intended to be in debt. This is plainly seen from the general form and language of the counts. The damages are laid at the conclusion of the declaration, as in debt, in a less amount than the sum demanded. But in both counts it is alledged that the defendant, "in consideration thereof, undertook and promised to pay." This, under the above authority, makes the counts assumpsit. They are counts in assumpsit without a breach. The breach assigned in the last count, which lays the damages at two hundred dollars, when the amount demanded is the sum of one thousand dollars, is wholly irregular. Leave given to the plaintiff to amend his declaration.

Case No. 9,498.

The METEOR.[1]

District Court, S. D. New York. March 14, 1866.[2]

VIOLATION OF NEUTRALITY LAWS — FITTING OUT VESSEL — CONSTRUCTION OF STATUTES — ADMISSIBILITY OF EVIDENCE — RES GESTAE — PRESUMPTIONS.

[1. Where a libel of forfeiture is filed against a vessel under the act of 1818 (3 Stat. 448), on the ground that she was fitted out, or attempted to be fitted out, to cruise against a nation with which the United States are at peace, the suit is solely against the vessel herself, and the court is not concerned with the question, who are her real owners? *Held*, therefore, that where exceptions were filed to the claim on the ground that the persons claiming to be owners of the vessel were not her sole, true, and lawful owners, the court was under no obligations to try this issue before going into the merits of the libel, as it was wholly immaterial to the case.]

[2. A libel or forfeiture against a vessel which has been seized upon water navigable from the sea is a civil cause, of admiralty and maritime jurisdiction, and must be tried to the court sitting as a court of admiralty, without a jury.]

[3. In order to condemn a vessel for violation of the neutrality laws, it is not necessary that any person should be first convicted of the crime of fitting out and arming her, or attempting to do so, for the purpose of cruising against any foreign country with which the United States are at peace. Nor is it necessary that there should be satisfactory evidence, produced under the libel of condemnation, of the commission of the personal offence by some person whose action concerning the vessel can, from his relation to it or to its owners, be imputed to the owners as their actions. On the contrary, it need not be shown that the owners were concerned in any violation of the law. All that is required is proof that the vessel was fitted out and armed, or attempted to be fitted out and armed, by some person or persons, with the unlawful intent, but their individuality or identity need not be shown.]

[4. To subject the vessel to forfeiture, it is not necessary that she should have been actually fitted out and armed in the United States, but it is sufficient if any person has been engaged, within the United States, directly or indirectly, in preparing the vessel with the intent that she should be employed in committing hostilities against a power with which the United States are at peace, whether the intent was to arm her in the United States or elsewhere.]

[5. The act of 1818 being clear and unambiguous on its face, the court will not look, for the purpose of interpreting it, to any arguments drawn from the history of the neutrality legislation of the United States, the condition of foreign relations, the political correspondence of the public authorities, or to the discussion in congress preliminary to its passage.]

[6. A certificate by the secretary of state of the United States, under his hand and the seal of the department, certifying that, from authentic information on file in his department, it appears that a state of war has existed from a given date between certain foreign nations, that the United States are at peace with both of them, and that a certain person named is the recognized consul for one of these nations in a certain port of the United States, is competent evidence, under the act of September 15, 1789, to prove the facts therein stated. And it is competent, also, under this act, to prove a declaration of war by one foreign nation against another by means of a translation, certified by the secretary in the same manner, of a document officially communicated to that department, which document is the promulgation by one of these foreign nations of its declaration of war.]

[7. It is within the discretion of a court of admiralty to permit amendments to a libel of forfeiture, even after the evidence is all in and the arguments thereon have been completed, in matters of substance as well as of form, when public justice and the substantial merits of the controversy require it, the only limitation being that such amendments shall not introduce any new res or subject of litigation.]

[8. Where a number of persons were associated together, according to a common plan, in an attempt to fit out and arm a vessel contrary to the neutrality laws, *held*, that certain testimony given by these persons, which was of a hearsay or secondary character, was admissible as declarations in reference to the common object, and as forming part of the res gestae.]

[9. Where the evidence on the part of the government creates a well-grounded suspicion that the vessel was intended to be fitted out and armed for the unlawful purpose mentioned in the statute, the failure of the claimants to put in any evidence explaining the suspicious circumstances must lead to the condemnation of the vessel.]

[1] [Not previously reported. 1 Am. Law Rev. 401, contains a partial report.]

[2] [Reversed in Case No. 15,760.]

[This was a libel of forfeiture filed by the United States against the steamship Meteor because of an alleged violation of the neutrality act of April 20, 1818 (3 Stat. 448).]

Samuel G. Courtney, Asst. U. S. Dist. Atty., for the United States.

William M. Evarts and Joseph H. Choate, for claimants.

BETTS, District Judge. In directing, on the 13th of July last, the entry of a decree condemning and forfeiting the vessel, her tackle, &c., in this case, the court appended to the decree, as signed, a memorandum to the effect that it would proceed as early after the entry of the decree as might comport with the health and physical ability of the judge, to place on file, in connection with the decree, the positions of law and fact governing the judgment of the court in the decision thus rendered. The intention thus expressed will now be fulfilled.

The libel of information in this case is filed by the attorney of the United States for this district, on behalf of the United States, against the steamship Meteor, under seizure by the marshal of the district, and her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, in a cause of seizure and forfeiture. The original libel was filed on the 23d of January, 1866. A monition was issued thereupon, on the same day, against the vessel, her engines, tackle, &c., returnable on the 13th of February, 1866. The monition was duly served on the day of its issue, by an attachment of the vessel, her engines, tackle, &c., by the marshal, and by the giving of due notice to all persons claiming the same.

On the 24th of January, 1866, an amended libel was filed, setting forth more particularly the alleged causes of action. The cause of action set forth in the original libel was simply that the vessel had been fitted out to commit hostilities against the government of Spain, in violation of the neutrality act of congress of 1818 [3 Stat. 447]. The amended libel states (1st) that the vessel "is now lying in the port of New York, on waters navigable from the sea by vessels of the burden of ten tons and upwards, within the Southern district of New York, and within the jurisdiction of this court, and is ready to sail for certain places to the attorney of the United States unknown, with intent to cruise and commit hostilities, in the service of the government of Chile, against the subjects, citizens, and property of the government of her majesty the queen of Spain, with whom the United States are at peace"; (2d) that the vessel "has, on the 23d day of January, 1866, within the limits of the United States, to wit, at the Southern district of New York aforesaid, been fitted out and armed by certain persons to the said attorney unknown, with intent that such steamship or vessel should be employed in the service of the agents of the government of Chile, to commit hostilities against the subjects, citizens, and property of the aforesaid government of Spain, with which the United States then were, and now are, at peace, as aforesaid"; (3d) that the vessel "has, on the 23d day of January, 1866, within the limits of the United States, to wit, at the Southern district of New York aforesaid, been fitted out by certain persons to the said attorney unknown, with intent that such steamship or vessel should be employed in the service of some persons to the said attorney unknown, to commit hostilities against the subjects, citizens, and property of the said government of Spain, with which the United States then were, and now are, at peace as aforesaid"; (4th) that the said vessel "has, on the day and year aforesaid, and at the place aforesaid, and within the limits of the United States as aforesaid, been attempted to be fitted out by certain persons to the said attorney unknown, with intent that such steamship or vessel should be employed in the service of some persons to the said attorney unknown, to commit hostilities against the subjects, citizens and property of said government of Spain, with which the United States are at peace"; (5th) "that certain persons whose names are to the said attorney unknown, on the day and year aforesaid, and at the place aforesaid, and within the limits of the United States, were knowingly concerned in the furnishing and fitting out of the said steamship or vessel, with knowledge and intent that such steamship or vessel should be employed in the service of some persons to the said attorney unknown, to commit hostilities against the subjects, citizens, and property of the said government of Spain, with which the United States were, and now are, at peace"; (6th) "that all and singular the matters hereinbefore secondly, thirdly, fourthly, and fifthly articulated, are all and each of them contrary to the third section of the act of congress approved April 20th, 1818, entitled 'An act for the punishment of certain crimes against the United States, and to repeal the acts therein mentioned' "; and that, by reason of the premises and by virtue of the said act, the said steamship, her tackle, &c., and arms, &c., became forfeited. The prayer of the amended libel is as follows: "Wherefore, the said attorney of the United States, on behalf of the said United States, prays the usual process and monition of this honorable court against the said steamship, now under seizure by the marshal of this district aforesaid, and her tackle, apparel, furniture, arms, and ammunition, in this behalf to be made, and that all persons interested in the said steamship and her tackle, apparel, furniture, arms, and ammunition aforesaid, may be cited to answer the premises, and that, all due proceedings being had thereon, this honorable court may be pleased to decree for the forfeiture aforesaid, and that the said steamship

Meteor and her tackle, &c., and arms and stores aforesaid, may be condemned for the use of the United States, according to the said act of congress," &c.

On the 13th of February, 1866, William F. Cary filed a claim to the vessel, her tackle, &c., which was subscribed by him and duly sworn to. The claim is in the words following: "And now William F. Cary, of the city of New York, merchant, intervening as agent for the interest of Robert B. Forbes and John M. Forbes, of Boston, in the state of Massachusetts, in the said steamship, her tackle, &c., appears before this honorable court, and makes claim to the said steamship, &c., &c., as the same are attached by the marshal, under process of this court, at the instance of the United States, and the said William F. Cary doth aver that he was in possession of the said steamship, &c., at the time of the attachment thereof, and that the persons above named are the true and bona fide sole owners of the said steamship, &c., and that no other person is the owner thereof, and the said Cary was and is the true and lawful bailee thereof, as agent and consignee; wherefore he prays to defend accordingly." On the same 13th of February, 1866, the said claimant, William F. Cary, filed his answer to the libel. The answer is as follows: "The answer of William F. Cary, of the city of New York, intervening for the interest of his principals, Messrs. John M. Forbes and Robert B. Forbes, of Boston, in the state of Massachusetts, to the libel of information of Daniel S. Dickinson, attorney of the United States for the Southern district of New York, who prosecutes on behalf of the said United States, against the said steamship Meteor, her tackle, apparel and furniture, in a cause of seizure and forfeiture, alleges as follows: First, the said respondent admits that the said steamship Meteor is now, and was at the time of her seizure, lying in the port of New York, within the Southern district of New York, and within the jurisdiction of this court, and that, at the time of her seizure, she was ready to go to sea. Second, but the said respondent denies each and every other allegation in the said libel contained, and avers that the same are untrue, and he denies that by reason of the premises in the said libel set forth, or for any other cause, the said steamship, her tackle, &c., became or is forfeited, or subject to forfeiture. Wherefore the said respondent prays that the said libel may be dismissed with costs, and that the said steamship, her tackle, &c., may be restored to the possession of this respondent, as the agent of her said owners."

On the 15th of February, 1866, the attorney of the United States filed exceptions to the claim. The exceptions allege "that the said Robert B. Forbes and John M. Forbes were not at the time of the forfeiture alleged, in the libel aforesaid, and are not now, the sole, true and lawful owners of the said steamship Meteor, her tackle, &c., in manner and form as the said Robert B. Forbes and John M. Forbes have above claimed"; and the exceptions pray that the claim may be dismissed.

On the 26th of March, 1866, the cause, being upon the calendar for trial, was called in its order. The attorney of the United States insisted before the court that the hearing on the exceptions to the claim must be brought on before the trial of the issue raised by the answer to the libel, and that the affirmative upon the allegations made in the claim was cast upon the claimant. The counsel for the claimant controverted this position, and claimed that the attorney of the United States should proceed to trial upon the issue raised by the answer to the libel, and produce proofs in support of the libel, or submit to a decree dismissing it. The court decided that no triable issue had been framed on the exceptions to the claim; that any issue which might be framed on such exceptions would be an immaterial issue; that the suit was one in rem, prosecuted solely against a vessel and her appurtenances under seizure, and not a suit in personam, in any manner affecting personally the claimant, or the principals represented by him; that the court possessed no authority or jurisdiction over or in respect to the claimant or his principals, otherwise than through and by means of the res itself; and that the trial of the cause must proceed on the issue raised by the libel and the answer. It was accordingly proceeded with upon that issue.

The counsel for the claimant then insisted that the court, sitting as a court of admiralty, was incompetent to adjudge the cause and give the relief prayed for in the libel, and that the case must be tried by a jury, and moved that a jury be summoned and impannelled to try it. The court decided that the case was one of the seizure of a vessel upon waters navigable from the sea by vessels of ten or more tons burden, for a breach of the law of the United States, and was a civil cause, of admiralty and maritime jurisdiction, and was within the cognizance of this court, sitting as a court of admiralty, and must be tried without a jury. The jurisdiction of the courts of admiralty of the United States, in cases like the present, is unquestionable, and is based upon constitutional and statutory authority, and settled by judicial decisions of long standing. Const. U. S. art. 3, § 2; Act Sept. 24, 1789, § 9 (1 Stat. 77); Glass v. The Betsey, 3 Dall. [3 U. S.] 6; Penhallow v. Doane, Id. 54; U. S. v. La Vengeance, Id. 297; U. S. v. The Betsey, 4 Cranch [8 U. S.] 443; Whelan v. U. S., 7 Cranch [11 U. S.] 112; U. S. v. The Little Charles [Case No. 15,612]. The four cases of The Slavers, 12 Wall. [69 U. S.] 350–403, were all libels of information filed in the district court in admiralty. Those cases were all carried by appeal to the supreme court, and in all of them the vessels were condemned and forfeited for vio-

lations of the acts against the slave-trade, without any question being raised by either the court or counsel as to the jurisdiction of the district court in admiralty.

The counsel for the claimant then insisted that the libel must be dismissed for the reason that under the third section of the act of April 20, 1818, upon which the libel is founded, an indictment and conviction of the person or persons committing the offence named in that section is a necessary prerequisite to a decree for the forfeiture of the vessel. It was admitted by the attorney of the United States that there had been no such indictment or conviction. The third section of the act of April 20, 1818 (3 Stat. 448), enacts "that if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof shall be forfeited, one half to the use of the informer, and the other half to the use of the United States." The court ruled that such previous conviction or indictment is not necessary under the statute, and denied the motion of the claimant to dismiss the libel.

As this question in regard to the necessity of a prior conviction of some person upon an indictment for violation of the third section of the act of 1818, before a condemnation of the offending vessel can be had, was much debated on the trial, it is deemed proper to state somewhat at length the reasons for the decision made by the court that such prior conviction is not necessary. The counsel for the claimant, in summing up the case before the court, after the evidence had all been put in, somewhat modified the views he had previously urged as to the necessity of a prior conviction of some person under the act, and maintained that, under the third section, the forfeiture of the vessel follows as a consequence of the completion of the offence forbidden by that section, and only as such consequence; that, before the vessel can be forfeited, there must either be an ascertained conviction of some person for the commission of the offence in question, or else there must be, on the trial of the issue raised by the libel and answer, satisfactory evidence of the commission by some person of the personal offence; and that such person must be some one whose action concerning the vessel can, from his relation to the vessel or its owners, be imputed to the owners as their action.

The positions thus maintained by the counsel for the claimant overlook the clearly marked distinction between a forfeiture resulting from a seizure under the admiralty and maritime jurisdiction of the courts of the United States, and a forfeiture resulting from a conviction and judgment in a court of law. This clearly marked distinction is founded upon the character of a proceeding in rem in the admiralty. The proceeding in the present case is wholly one in rem, and the character of such a proceeding is nowhere more accurately defined than in the opinion of Chief Justice Marshall in the case of U. S. v. The Little Charles [Case No. 15,612]. The vessel in that case was seized, as forfeited to the United States, for a violation of the embargo laws of December 22, 1807, and January 9, 1808 (2 Stat. 451, 453). A libel was filed against her, alleging that she departed from a port of the United States to a foreign place, with a cargo on board, contrary to the provisions of the embargo laws, and that she had therefore become forfeited to the United States, and had been seized within the jurisdiction of the court, as forfeited, and it prayed for a decree of forfeiture. On the trial of the cause, the district court rejected as testimony the report and manifest of the cargo of the vessel, signed by the master, as incompetent evidence, upon the ground that the ex parte oath of the master thereto could not be read as evidence in the cause, he being no party to it. On an appeal taken by the United States to the circuit court, an objection was made to the admissibility in evidence of the report and manifest, with the oath of the master, upon the ground that the case was a criminal case, and that the declarations of the master could not affect the vessel or the owners. Upon this point Chief Justice Marshall says: "The argument that in criminal cases no authority can be given, that the character of principal and agent disappears, and the parties become accomplices, will not be controverted. If this was a prosecution against the owner personally, and the confession of the master was adduced, to prove that he acted under the authority of the owner, the argument would be entitled to great consideration. But this is not a proceeding against the owner, it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without

the authority, and against the will of the owner. It is true that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore, not unreasonable that the vessel should be affected by this report. But this vessel is the property of another, and his property, it is said, ought not to be wrested from him by evidence which would be inadmissible in an ordinary question concerning property. The court thinks otherwise. The master is selected by the owner, as his agent, for the purpose, among others, of reporting the vessel on her coming into port. The report is not a criminal act, but one prescribed by law. It must state truly the voyage, and, however criminal that voyage may be, in reporting it, the master is in the precise line of his duty, and in the execution of an authority inseparable from his character as master. This report, then, which is in the very terms prescribed by law, contains, according to the mandate of the law, an averment of the place from which the vessel last sailed. This averment, then, the owner has authorized the master to make for him; and although he may certainly be permitted to controvert it, the court deems it prima facie evidence of the fact. Such evidence has often been considered in the supreme court sufficient to warrant a forfeiture in the absence of that testimony which would be in the power of the claimant, if innocent, and was so considered in the case of The Aurora, 7 Cranch [11 U. S.] 382." The circuit court reversed the decree of the district court, and condemned the vessel.

A proceeding in rem against a vessel or other thing for a forfeiture, because of the violation of a statute of the United States, is an entirely distinct proceeding from a prosecution of a person through whose agency or procurement the offence has been committed; and it is well settled that no conviction of any person for the offence is necessary to warrant a condemnation of the res. This was decided by the supreme court in the case of The Palmyra, 12 Wheat. [25 U. S.] 1. That was a libel of information against the vessel to forfeit her for a piratical aggression committed in violation of the acts of congress of March 3, 1819, and May 15, 1820 (3 Stat. 510, 600). The district court restored the vessel without damages for the capture. The circuit court, on appeal, affirmed so much of the decree as acquitted the vessel, and reversed so much of it as denied damages, and itself awarded damages. The United States and the captors appealed to the supreme court, and the objection was there taken by the appellees that the offenders were not alleged in the libel to have been convicted upon any prosecution in personam, of the offence charged in the libel, and that there must be a due conviction, upon a prosecution and indictment for the offence in personam, averred and proved, in order to maintain the libel in rem. Upon this point Mr. Justice Story, in delivering the opinion of the court, says: "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was in part or at least a consequence of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be malum prohibitum or malum in se. The same principle applies to proceedings in rem, on seizures in the admiralty. Many cases exist, where the forfeitures for acts done attach solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understand the law to be, that the proceeding in rem stands independent of, and wholly unaffected by, any criminal proceeding in personam. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America the jurisdiction over proceedings in rem is usually vested in different courts from those exercising criminal jurisdiction. If the argument at the bar were well founded, there could never be a judgment of condemnation pronounced against any vessel coming within the prohibitions of the acts on which the present libel is founded; for there is no act of congress which provides for the personal punishment of offenders who commit 'any piratical aggression, search, restraint, depredation, or seizure,' within the meaning of those acts. Such a construction of the enactments which goes wholly to defeat their operation, and violates their plain import, is utterly inadmissible. In the judgment of this court, no personal conviction of the offender is necessary to enforce a forfeiture in rem, in cases of this nature."

In the Case of the Embargo Laws, the third section of the act of January 9, 1808 (2 Stat.

454), provided, in addition to the forfeiture of any vessel which should violate the law, that the master of the vessel and all persons knowingly concerned in the prohibited voyage should forfeit and pay for every offence, a sum not exceeding twenty thousand dollars nor less than one thousand dollars, "whether the vessel be seized and condemned or not." In the case of the piratical aggressions there was no provision made by the statutes for the personal punishment of the offenders. But, as is said by Mr. Justice Story, in his opinion just quoted in the case of The Palmyra, it has never been held that the prosecutions were dependent upon each other in either class of cases, that is, whether the forfeiture for the act done attaches solely in rem, without any accompanying penalty in personam, or whether there is both a forfeiture in rem and a personal penalty prescribed by the statute. This doctrine was affirmed by the supreme court in the case of U. S. v. The Malek Adhel, 2 How. [43 U. S.] 210, which was a libel in rem against the vessel and her cargo for a violation of the piracy act of March 3, 1819 (3 Stat. 510). In that case it was admitted at the trial that the owners of the vessel never contemplated or authorized the piratical acts complained of, and it was contended before the supreme court that the property was not liable to condemnation, because the owners neither participated in nor authorized the piratical acts. Upon this point, Mr. Justice Story, in delivering the opinion of the court, says: "The next question is whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of congress. Here again it may be remarked that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of congress) from which such piratical aggression, &c., shall have been first attempted or made, shall be condemned. Nor is there anything new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel, in which or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws, and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." The judge then cites, as authority for these positions, the cases of U. S. v. The Little Charles [supra] and The Palmyra [supra] and adds: "The same doctrine has been fully recognized in the high court of admiralty in England, as is sufficiently apparent from the Vrouw Judith, 1 C. Rob. Adm. 150; The Adonis, 5 C. Rob. Adm. 256; The Mars, 6 C. Rob. Adm. 87; and indeed in many other cases where the owner of the ship has been held bound by the acts of the master, whether he was ignorant thereof or not. The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crews thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party. The act of congress has therefore done nothing more on this point than to affirm and enforce the general principles of the maritime law and the law of nations."

The conclusion drawn from these authorities is that under the third section of the act of 1818, under which the libel in this case is filed, it is only necessary, in order to secure a condemnation of the vessel, for the libellants to show that the vessel has been fitted out and armed, or been attempted to be fitted out and armed, or been furnished, fitted out or armed, with the intent on the part of any person fitting out and arming her, or attempting to fit out and arm her, or procuring her to be fitted out and armed, or knowingly concerned in the furnishing, fitting out or arming of her, that she should be employed in the service of any foreign state, or of any people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any people with whom the United States are at peace; that it is not necessary for the libellants to prove the individuality or identity of such person, any further than to prove that the prohibited acts were done by some person; that it is not at all necessary for the libellants, to show that the owner of the vessel or his authorized agent was concerned in the commission of the prohibited acts; but the law imposes upon the owner the necessity of withholding his property from being made by any person the instrument of violating the law; and that, if the law has been violated, the vessel may be forfeited if the prohibited acts have been committed by any person, whether the owner was concerned in the violation of the law or not. The evidence given on the trial was voluminous, but was

wholly confined to the testimony put in on the part of the libellants, no evidence having been given on the part of the claimant or his principals.

After the testimony had all been put in and the summing up had been concluded, the libellants, on due previous notice, moved the court to amend the amended libel filed January 24, 1866, by inserting at the end of the fifth count the following additional counts, namely: "Sixth. That the said steamship or vessel Meteor has, on the 23d day of January, 1866, within the limits of the United States, to wit, at the Southern district of New York aforesaid, been furnished, fitted out, or armed by certain persons to the said attorney unknown with intent that such ship or vessel shall be employed in the service of a foreign state, to wit, the service of the republic of Chile, to cruise or commit hostilities against the subjects, citizens, or property of the government of her majesty the queen of Spain, with whom the United States then were and now are at peace. Seventh. That certain persons, to the said attorney unknown were, on or before the 22d day of January, 1866, within the limits of the United States, to wit, at the Southern district of New York aforesaid, knowingly concerned in the furnishing, fitting out, or arming of the steamship or vessel Meteor, with intent that such ship or vessel shall be employed in the service of a foreign state, to wit, the service of the republic of Chile, to cruise or commit hostilities against the subjects, citizens or property of the aforesaid government of Spain, with whom the United States then were and now are at peace as aforesaid"; and also by changing the numbering of the last count in the amended libel on file from "sixth" to "eighth." The counsel for the claimant objected to the granting of the motion to amend at that stage of the trial, as unprecedented. The necessity for the proposed amendments, as urged by the counsel for the libellants, was that the first count of the amended libel averred no offence within the act of 1818; that the second count was a count for fitting out and arming the vessel; and that the third, fourth, and fifth counts, which severally averred that the vessel had been fitted out, and that she had been attempted to be fitted out, and that certain persons had been knowingly concerned in furnishing her and fitting her out, all of them averred an intent that she should be employed "in the service of some persons, to the said attorney unknown," to commit hostilities against the subjects, citizens, and property of the government of Spain, and did not any of them aver, in the language of the third section of the act of 1818, an intent that the vessel should be employed in the service of some foreign prince or state, or of some colony, district, or people. The question as to allowing these proposed amendments to be made was held open for consideration.

Courts of admiralty are little trammelled by a regard for mere technicalities, substantial justice without unnecessary delay or expense being the object which they keep in view. Accordingly they acknowledge no limits to their right to allow amendments when conducive to this end, in every stage of a cause, and not only in the court of original jurisdiction, but in all appellate courts, and not only in matters of form, but in matters of substance. Conk. Treatise (3d Ed.) p. 562. In the case of The Edward, 1 Wheat. [14 U. S.] 261, which was an information against a vessel for the violation of one of the embargo acts, the district court having condemned the vessel, the circuit court, on appeal, allowed the libel to be amended by inserting an averment naming the particular foreign interdicted port to which the vessel was destined. The case was then taken to the supreme court, and Mr. Justice Washington, delivering the opinion of the court, says: "It is contended for the claimant, that the circuit court has only appellate jurisdiction in cases of this nature, and that to allow the introduction of a new allegation would be in fact to originate the cause in the circuit court. This question appears to be fully decided by the Cases of The Caroline and The Emily, determined in this court. These were informations in rem under the slave-trade act, and the opinion of the court was that the evidence was sufficient to show a breach of the law, but that the informations were not sufficiently certain to authorize a decree. The sentence of the circuit court was therefore reversed, and the cause remanded to that court with directions to allow the informations to be amended." In the case of The Marianna Flora, 11 Wheat. [24 U. S.] 1, which was a libel founded on an act of congress [3 Stat. 510], against a Portuguese vessel, for an alleged piratical aggression on The Alligator, a United States armed vessel, the district court ordered restitution with damages. The circuit court, on appeal, allowed the libellants to file a new count or allegation, in which the aggression was stated to be hostile, and with intent to sink and destroy The Alligator, and in violation of the law of nations, and reversed the decree for damages, the libellants consenting to the decree for restitution. On appeal to the supreme court, Mr. Justice Story, delivering the opinion of that court, says: "An objection, which is preliminary in its nature, has been taken to the admissibility of this new count to the libel filed in the circuit court, upon the ground that the original subject-matter was exclusively cognizable in the district court, and to allow this amendment would be to institute an original and not an appellate inquiry in the circuit court. But the objection itself is founded on a mistaken view of the rights and authorities of appellate courts of admiralty. It is the common usage and admitted doctrine of such courts to permit the parties, upon the appeal, to introduce new allegations and new proofs, 'non allegata allegare, et non probata probare.' The courts of the Unit-

ed States, in the exercise of appellate jurisdiction in admiralty causes, are, by law, authorized to proceed according to the course of proceedings in admiralty courts. It has been the constant habit of the circuit courts to allow amendments of this nature in cases where public justice and the substantial merits required them; and this practice has not only been incidentally sanctioned in this court, but on various occasions, in the exercise of its own final appellate jurisdiction, it has remanded causes to the circuit court, with directions to allow new counts to be filed." It is well settled in the practice of the courts of admiralty of the United States, that where, on the evidence, the merits are clearly with the libellant, but the libel is defective, it will not be dismissed, but the party will be allowed to assert his rights in a new allegation. The Adeline, 9 Cranch [13 U. S.] 244; The Palmyra, 12 Wheat. [25 U. S.] 1. A new res or subject of controversy cannot be introduced under such privilege of amendment. but the court will not permit substantial justice to fail in respect to the matter which is the subject of the action, by reason of defects or informalities in the libel. The foundation of this power of allowing amendments is the 32d section of the judiciary act of 1789 (1 Stat. 91); and by rule 24 of the rules of practice for the courts of the United States in admiralty and maritime jurisdiction, on the instance side of the court, prescribed by the supreme court at the December term, 1844, in pursuance of the act of August 23, 1842 [5 Stat. 516], it is provided as follows: "In all informations and libels, in causes of admiralty and maritime jurisdiction, amendments in matter of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matter of substance may be made, upon motion, at any time before the final decree upon such terms as the court shall impose." The same power of amending informations in any stage of the cause is given by rule 186 of this court.

In the present case, the court is of opinion that the proposed amendments will not introduce any new res or subject of litigation, and that public justice and the substantial merits of the controversy require their allowance, and without the imposition by the court of any terms on the libellants. The amendments are, accordingly, allowed to be made, with like effect as if they had been contained in the amended libel when it was filed, and the libellants are at liberty to enter an order of amendment to that effect. If any prejudice to the claimant could arise from the allowance of these amendments, or if it were alleged that he could thereunder aver or prove matters of defence which he could not or did not adduce on the trial, the court would take care to guard him from any such prejudice. But no such objection arises, especially in view of the fact that the claimant put in no testimony in defence on the trial.

On the merits, the sole question for determination in this case is whether the averments of the libel, as thus amended, are supported by the testimony, and whether any offence prohibited by the third section of the act of April 20, 1818, was committed prior to the filing of the libel, so as to require the forfeiture of the vessel, her tackle, &c. The offences set out in the section must have been committed within the limits of the United States, and are properly classified thus: First. The fitting out and arming by any person of any vessel, with the intent on the part of such person, that she shall be employed in the service of any foreign state, or of any people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any people, with whom the United States are at peace. Second. The attempting by any person to fit out and arm any vessel with the like intent. Third. The procuring by any person to be fitted out and armed, any vessel with the like intent. Fourth. The being knowingly concerned by any person in the furnishing of any vessel with the like intent. Fifth. The being knowingly concerned by any person in the fitting out of any vessel with the like intent. Sixth. The being knowingly concerned by any person in the arming of any vessel with the like intent. Seventh. The issuing or delivering by any person of a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid. If any one of these offences has been committed, the vessel in respect to which it is committed is, with her tackle, &c., to be forfeited.

It was strenuously urged by the counsel for the claimant, on the hearing, that the only crime created by the third section of the act of 1818 is the crime of fitting out and arming a vessel with the intent named in the statute; and that, although the attempt to commit that crime, or the procuring that crime to be committed, or the being knowingly concerned in committing that crime is punishable under the statute, yet the body of the crime is the fitting out and arming, and nothing short of that is punishable under the statute, either against the wrong-doer personally, or against the offending res; and the interpretation sought to be put by the counsel upon these words of the statute, "or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent," &c., is, that it is not necessary to the criminality of the individual that he should have performed every part of the crime, but it is enough if he was knowingly concerned in any one step in the chain of conduct which completed the criminality, or would have completed it if carried out, but still the crime must be the crime of fitting out and arming, either completed or attempted. But the court cannot adopt this interpretation of the statute. The mischief against which the statute

intended to guard was not merely preventing the departure from the United States of an armed vessel, but the departure of any vessel intended to be employed in the service of any foreign power, to cruise or commit hostilities against any foreign power with whom the United States are at peace. The neutrality of the government of the United States, in a war between two foreign powers, would be violated quite as much by allowing the departure from its ports of an unarmed vessel with the clear intent to cruise or commit hostilities against one of the belligerents, as it would be by permitting the departure from its ports of an armed vessel with such intent. If the intent to cruise or commit hostilities exists when the vessel departs, and the vessel is one adapted to the purpose, the subsequent arming is a very easy matter. The facility with which this can be done was made manifest in the case of The Shenandoah and other vessels which, during the late Rebellion, left England unarmed, but with the full intent on the part of those who sent them forth that they should be used to cruise and commit hostilities against the United States, and were subsequently armed in neutral waters. It would be a very forced interpretation of the statute to say that it was not an offence against it to knowingly fit out a vessel with everything necessary to make her an effective cruiser, except her arms, and with the intent that she should become such a cruiser, because it could not be shown that there was any intent that she should be armed within the United States. The evil consequences which would flow from interpreting the statute to mean that the crime must include the arming of the vessel within the United States, become especially apparent in reference to that part of the third section which forbids the issuing or delivering a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed for the purpose named in the section. Under such an interpretation of the statute, it would be no offence to issue or deliver a commission within the United States for any vessel, unless such vessel were actually armed at the time, or perhaps were intended to be armed prior to her departure from the United States; and it would be no offence to issue a commission within the United States for a vessel fitted and equipped to cruise or commit hostilities, and intended to cruise and commit hostilities, so long as such vessel was not armed at the time, and was not intended to be armed within the United States, although it could be shown that a clear intent existed, on the part of the person issuing or delivering the commission, that the vessel should receive her armament the moment she should be beyond the jurisdiction of the United States. The court cannot give any such construction to the statute. Such a construction was repudiated by the supreme court in the case of U. S. v. Quincy, 6 Pet. [31 U. S.] 445. That was an indictment founded on the same section of the act of 1818 on which the libel in the present case is based. It came before the supreme court on a certificate of a division of opinion from the judges of the circuit court for the district of Maryland. The division of opinion arose on two counts of the indictment, and on the evidence given in reference to the matters in those counts. Those counts were alike in substance, and averred that the defendant, within the limits of the United States, was knowingly concerned in the fitting out of a vessel called the Bolivar, with intent that such vessel should be employed in the service of the United Provinces of Rio de la Plata, to commit hostilities against the subjects of the emperor of Brazil, with whom the United States were at peace. There was no averment in either of the counts that the vessel was armed or was intended to be armed. On the trial before the circuit court evidence was given of the repairing and fitting out of the vessel, under the superintendence of the defendant, at Baltimore. It was contended before the supreme court by Mr. Wirt, on the part of the defendant, that the only mischief which the act of 1818 was intended to remedy was the arming and equipping of vessels in our ports, and the sending them forth, in warlike array, to cruise and commit hostilities on foreign nations with which we were at peace, and that the act was not intended to reach a vessel whose equipments were so equivocal as to be applicable either to commerce or war; that the statute, being a penal statute, should be interpreted strictly; that the third section of the statute required that the vessel should be completely fitted out and armed in our own ports, and be there put in a condition to commit hostilities immediately; that in order to convict any person of an attempt under the section, it must be shown that his object was to fit out and arm completely, and to place the vessel in all respects in a state for immediate hostilities; that, in order to be guilty of a procurement under the section, the charge must not be that the accused procured the vessel to be fitted out, merely, but that he procured her to be fitted out and armed; that with respect to that part of the section which speaks of persons knowingly concerned in the furnishing, fitting out or arming of a vessel, the participation of those persons is of an accessorial character; that there is under the statute a principal in the offence and an accessory; that the offence must have been committed, that is, there must have been a fitting out and arming, or an attempt to fit out and arm, or the principal actor has been guilty of no offence; that it could not have been intended to punish the secondary or accessorial actor, if the principal actor has not been guilty of an offence; that this consequence would follow, if any one had knowingly furnished articles to the vessel to be used for that purpose, and yet if, before the complete fitting out and arming had been accom-

plished, the vessel had been seized and this consummation prevented, the prime actor thus not being indictable under the law; that thus a part of a transaction would become a crime in one citizen while the whole of it would not be a crime in another; and that if the fitting out per se is, under the third section, a crime, without arming, the copulative "and" would have found no place in the section, and the language of the law would have been "fit out or arm" and "attempt to fit out or arm." The supreme court unanimously overruled these views. Mr. Justice Thompson, delivering its opinion, after stating the prayers upon which the opinions of the judges of the court below were opposed, says: "The instruction which ought to be given to the jury under these prayers involves the construction of the act of congress touching the extent to which the preparation of the vessel for cruising or committing hostilities must be carried before she leaves the limits of the United States, in order to bring the case within the act. On the part of the defendant, it is contended that the vessel must be fitted out and armed, if not complete, so far at least as to be prepared for war, or in a condition to commit hostilities. We do not think this is the true construction of the act. It has been argued that although the offence created by the act is a misdemeanor, and there cannot, legally speaking, be principal and accessory, yet the act evidently contemplates two distinct classes of offenders,—the principal actors, who are directly engaged in preparing the vessel, and another class, who, though not the chief actors, are in some way concerned in the preparation. The act in this respect may not be drawn with very great perspicuity. But should the view taken of it by the defendant's counsel be deemed correct (which, however, we do not admit), it is not perceived how it can affect the present case. For the indictment, according to this instruction, places the defendant in the secondary class of offenders. He is only charged with being knowingly concerned in the fitting out the vessel, with intent that she should be employed, &c. To bring him within the words of the act, it is not necessary to charge him with being concerned in fitting out and arming. The words of the act are, 'fitting out or arming.' Either will constitute the offence. But it is said such fitting out must be of a vessel armed, and in a condition to commit hostilities, otherwise the minor actor may be guilty when the actor would not, for as to the latter there must be a fitting out and arming, in order to bring him within the law. If this construction of the act be well founded, the indictment ought to charge that the defendant was concerned in fitting out the Bolivar, being a vessel fitted out and armed, &c. But this, we apprehend, is not required. It would be going beyond the plain meaning of the words used in defining the offence. It is sufficient if the indictment charges the offence in the words of the act; and it cannot be necessary to prove what is not charged. It is true, that with respect to those who have been denominated at the bar the chief actors, the law would seem to make it necessary that they should be charged with fitting out 'and' arming. These words may require that both should concur, and the vessel be put in a condition to commit hostilities, in order to bring her within the law. But an 'attempt' to fit out 'and' arm is made an offence. This is certainly doing something short of a complete fitting out and arming. To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it. Any effort or endeavor to effect it will satisfy the terms of the law. This varied phraseology in the law was probably employed with a view to embrace all persons of every description who might be engaged, directly or indirectly, in preparing vessels with intent that they should be employed in committing hostilities against any powers with whom the United States were at peace. Different degrees of criminality will necessarily attach to persons thus engaged. Hence the great latitude given to the courts in fixing the punishment, viz. a fine not more than ten thousand dollars, and imprisonment not more than three years. We are accordingly of opinion that it was not necessary that the jury should believe or find that the Bolivar, when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment."

In view of this decision, it must be regarded as the settled interpretation of the third section of the act of 1818, that that section applies to every person who is engaged within the United States, directly or indirectly, in preparing a vessel with the intent that she shall be employed in committing hostilities against any power with which the United States are at peace, and to every such vessel, whether such vessel be armed in the United States or not, or be intended to be armed in the United States or not.

Having determined the true interpretation of the section of the statute on which the libel in the present case is founded, the next inquiry is, as to whether any of the offences prohibited by that section have been committed; and, as it is not claimed that the Meteor was armed in the United States, or was intended to be armed within the United States, the inquiry may be limited to the question as to whether any person was knowingly concerned in furnishing or fitting out the Meteor with intent that she should be employed in the service of the government of Chile, to cruise or commit hostilities against the subjects or property of the queen of Spain, the United States being at the time at peace with the queen of Spain.

The libellants put in evidence a certificate

made by the secretary of state of the United States under his hand and the seal of the department of state, dated the 29th of March, 1866, certifying "that it appears, from authentic official information on file in this department, that a state of war has existed between Spain and the republic of Chile, from the 25th of September, 1865, up to the present time; that the United States are, and have been during the same period, at peace with both the aforesaid nations; and that Stephen Rogers was recognized as consul, ad interim, of the republic of Chile, for the port of New York and its dependencies, from the 13 of October, 1864, to February 12, 1866, when his exequatur was revoked." The libellants also put in evidence a certificate made by the secretary of state of the United States, under his hand and the seal of the department of state, dated March 31, 1866, embodying the translation of a document officially communicated to, and then on file in that department, being the promulgation by the government of Chile, at Santiago, on the 25th of September, 1865, of the declaration of war between the republic of Chile and the government of Spain. The counsel for the claimant objected to the admissibility in evidence of these certificates, upon the ground that they were not made evidence by any statute, and were not competent evidence of the existence of the facts stated in them. The court overruled the objection. There can be no doubt as to the competency of the testimony. By section 5 of the act of September 15, 1789 (1 Stat. 69), it is provided that all copies of records and papers in the office of the secretary of state, authenticated under the seal of office of the department, shall be evidence equally as the original record or paper. It is laid down in 1 Greenl. Ev. § 479, that the certificate of the secretary of state of the United States is evidence that a particular person has been recognized as a foreign minister. In Bingham v. Cabot, 3 Dall. [3 U. S.] 19, it was held that a certified copy, under the hand and seal of the secretary of state of the United States, of the letters of the agent of congress resident abroad, addressed to that body, relative to the business of his trust, and of the official order of a foreign colonial governor concerning the sale and disposal of a cargo of merchandise, were admissible evidence of those transactions. In U. S. v. Liddle [Case No. 15,598], which was an indictment for an assault and battery on a member of the Spanish legation, it was held that the certificate of the secretary of state was good evidence, and the best, to prove that the person on whom the assault and battery was committed had been received by our government as a secretary attached to the Spanish legation; on the ground that the secretary of state was the proper organ of the government, his certificate, being an acknowledgment by the government that the person had been received in the character attributed to him, was the best evidence of the fact. In U. S. v. Benner [Case No. 14,568], which was an indictment for arresting and imprisoning the secretary of legation of the minister from Denmark, it was held that a certificate from the secretary of state, under the seal of the department, that the person had been recognized by the department as attached to the legation of Denmark, was full evidence that he had been authorized and received by the president in the character referred to. The same principle was held in the case of U. S. v. Ortega [Id. 15,971], which was an indictment for an assault upon a Spanish chargé d'affaires. It is well settled that public documents, properly authenticated, and whose contents are pertinent to the issue, when authenticated by the public officer whose duty it is to authenticate them, and when their contents are such as belong to the province of the officer or come within his official cognizance and observation, are admissible to prove at least prima facie the facts they recite. 1 Greenl. Ev. § 491. In Thelluson v. Cosling, 4 Esp. 266, it was held that a paper being a declaration of war made by Spain against France, transmitted to the office of the secretary of state in England by the ambassador of England at Madrid, and produced in court from that office, was sufficient evidence of the date of the declaration of war. These principles cover all the facts embraced in the certificates from the department of state, and those certificates are sufficient primâ facie evidence of the facts covered by them. It is, therefore, established,—First, that a state of war existed between Spain and Chile from the 25th of September, 1865, to the time of the trial; second, that the United States during that period were at peace with both Spain and Chile; third, that Stephen Rogers was the recognized consul of Chile at New York from the 13th of October, 1864, to the 12th of February, 1866.

The court is not left to speculate as to the character and capacity of the Meteor, as a vessel capable of being used to cruise or commit hostilities in a warlike character. In many, if not most cases of prosecutions under neutrality acts, it appears that artifices and subterfuges have been resorted to, which leave it very much in doubt, on the evidence, whether the vessel were not fitted and intended equally well for innocent commercial purposes and for purposes of war; just as, in cases of prosecutions under the slave-trade acts, it often appears difficult to determine whether the vessel fitted out was intended for a whaler or for a slaver. This embarrassment in determining whether a warlike character could be affixed to the vessel beyond doubt was manifested in a very marked degree in the case of the prosecution against the Alexandra, in England, under the British neutrality law. But, in the present case, the Meteor is characterized by Mr. Robert B. Forbes, one of her owners, in a letter written by him from Boston, on the 13th of September, 1865, to a gentleman in New York, in the

following terms: "The Meteor is for sale, but I have not offered her, because she needs cleaning up and painting, after her late experiences carrying troops and cargoes. She can be bought for much less than cost, and much less than she can be built for today. I can not name a price until I consult the other owners. I am open to an offer. Am I to understand that you are acting as a broker, and, if so, whether you expect to earn a commission out of us, and how much, if you should buy her? She was destined to carry one heavy pivot amidships, on gun deck, or two 10-inch or other guns at the same point, namely, just before the mainmast; forward of this are four ports (two on each side), where 8 or 9 inch Dahlgrens would have been mounted, had she been taken by the United States navy department; and abreast of the engine-hatch, aft, there are two ports on each side, where she could have mounted short 32's, or 24 pound howitzers; and on upper deck there are beds for two 30 pound Parrots: making one pivot 11 inch, or two 10 inch; four broadside, 8 or 9 inch; four 32 or 24 pound howitzers on gundeck; two light chase guns on upper deck. She has two 62½ by 36 inch cylinders, four tubular boilers; propeller of brass, 13½ feet diameter and 23 feet pitch. The motive-power, boilers, &c., were imported from Scotland, at a very large cost, and are first quality. The ship was built by myself and a few friends, to cruise after British pirates, and she would have been taken by the U. S. had not Fort Fisher fallen just as it did. She was first under steam at sea last December, and was tried under the auspices of the Navy Dept. at the measured mile, below New York, on the 5th January, when, according to the report, she attained a rate of speed said to be superior to that of any propeller tried over that ground by the United States. Since April 1, she has been three trips South with troops, and one to New Orleans with cargo. H. B. Cromwell & Co. loaded her out, and wrote that she was the most capable ship they had loaded, being full of heavy cargo on 16 feet 4 by 14 feet draught." This letter proves that the Meteor was a vessel of war, constructed to cruise and commit hostilities, and intended to be mounted with eleven or twelve guns, and of great speed and carrying capacity; that there were other owners of her besides Mr. Forbes; and that she was for sale, and at a price much less than her cost, and much less than a similar vessel could be built for. The fact that there were other owners of the Meteor besides the Messrs. Forbes is shown by the testimony of Mr. Robert B. Forbes, and he gives the names of such owners. Three of them, Messrs. Abiel A. Low, William H. Aspinwall, and Leonard W. Jerome, were examined as witnesses for the libellants on the trial, and it appears that all of these witnesses advised and desired the sale of the vessel. It also appears that a person by the name of Benjamin V. Mackenna left Chile to come to this country on the 1st of October, 1865, and arrived here on the 19th of November, 1865; that he occupied the position in Chile of a member of the house of deputies, and secretary thereof; that he was appointed before he so left Chile, confidential agent in the United States of the government of Chile; and that he held that position from the time of his so leaving Chile down to the time of the trial.

The only testimony adduced upon the trial as to any direct conference between any one of the owners of the Meteor and any person holding an official relation to the Chilian government, in respect to the Meteor, is that given by Mr. Jerome. He was called by the libellants as a witness, and was examined on the 7th of April, and testified, on his direct examination, that he had once, and but once, been on board the Meteor; that that was some four or five months ago; that Mr. Asta Buruaga, the Chilian minister, was in his company at the time; that the vessel was lying at the time at Jersey City; and that he met the Chilian minister at the vessel by agreement. The witness was then asked: "Q. What was the agreement you made with him by which you met him there? A. I asked him to look at the ship. Q. For what purpose? A. To see if he would buy her. Q. And he did look at the ship? A. He did. Q. Did you and he examine the ship together on that occasion? A. We went through her partially, not much." Again, he says in reference to conversations with Asta Buruaga: "I never had any conversations with Asta Buruaga after the Chilian war began; my conversation with him was some time previous to the war. Q. What time did you visit the Meteor as she lay at Jersey City? A. It was some time previous to the arrival of the news of the declaration of war between Spain and Chile. Q. What month was it that you and Buruaga visited the Meteor together? A. I cannot tell. Q. Was it the month of November last? A. I cannot tell you; my memory is very poor about dates. Q. Was it in the month of October? A. I don't know. Q. Was it in the month of September? A. I don't know the month. Q. What year was it? A. I should think it was in the year 1865. Q. Have you any doubt about its being in the year 1865? A. Very little. Q. How long was it before the seizure of the vessel? A. Well, I cannot tell, several months. Q. When you use the expression 'several months,' how many months do you mean? A. Well, I cannot say how many, I should say over two. Q. Is that as near and as definite as you can be as to the time? A. On reflection, I should say it was three instead of over two. Q. Is that as near and as definite as you can be as regards the time? A. Yes; I cannot tell you any exact dates about it. Q. When was the vessel seized? A. That I do not know. Q. She was seized on the 23d of January, 1865. How long before that was it you were with Asta Buruaga on board the vessel? A. I do not

recollect dates. If you wish to fix the time, I can give it positively; it was some time before the arrival of the news of the declaration of war. Q. When was the news of the declaration of war? A. That I do not know. Q. When did you first hear of it? A. I heard of it the next morning after it arrived here by the Aspinwall steamer. Q. How long ago was it? A. I do not know; I cannot give the date. Q. About how long ago was it? A. Sometime in the year 1865. Q. Is that as near and as definite as you can be,—that it was sometime in the year 1865? A. You asked me when the news of the declaration of the war came; I am positive it was in that year. Q. Is that as near and as definite as you can be,—that it was sometime in the year 1865? A. No, I can bring it down, I think, subsequent to the 1st of July; I would not be perfectly positive of that, but I think so." On his cross-examination, the witness testified: "Q. You said that you met the minister on board the Meteor by previous appointment. Was that appointment made the day before or the week before? A. I cannot recollect that. Q. Was it made soon before you met on board? A. It was very soon before; I cannot tell but that we went right over the same morning; I merely asked him to look at the ship. Q. How long had the ship been for sale? A. She had been for sale ever since the close of the war. Q. Since about a year ago? A. Yes, sir. Q. Was there anything else between you except that he was to look at the ship as a matter for sale? A. That is all. Q. To see whether he would buy it? A. I don't think he had much intention of buying it, anyway; he went over there; I wanted to see the ship myself; I had never been on board of her. Q. Was there anything but the sale talked of, or suggested, on either side? A. No, sir. Q. The sale of the ship as she lay? A. Yes, sir." On his redirect examination, he testified: "Q. What time did you and Asta Buruaga make this appointment to see the ship? A. I don't know. Q. Have you any recollection on the subject that is at all definite? A. I have not; it was not an event that fixed itself very particularly in my mind. Q. I understood you, on your direct examination, that he wanted to buy the ship? (Mr. Evarts objects that the witness did not use that language.) Q. Did I understand you as stating, on your direct examination, that the Chilian minister desired to purchase the ship? A. No, sir. Q. What did you say in regard to that matter? A. I said I asked him to go and look at her. (The stenographer was called upon to read the witness his testimony.) Q. Do you desire to change your testimony, in that respect, or is it correct? A. Not exactly; I am recorded there as saying that I asked him there to see if he would buy her. Q. In what particular is your testimony incorrect? A. I could not expect him to buy her, because he had no power to buy her, as I understood; the ship was for sale, and I wanted him to look at her; perhaps he might recommend her. Q. You say you did not expect him to buy her? A. No, sir. Q. Because he had not the authority to buy her? A. No. Q. Who did you suppose had the authority to buy her? A. I did not suppose any one had at that time; I thought the occasion might turn up. Q. How did you know he had not authority to buy her? A. I did not know. Q. What did you mean when you said you did not suppose he had authority to buy her? A. I simply did not suppose he had. Q. Who did you suppose had? A. I did not suppose anyone had. Q. Why, then, did you ask the Chilian minister to look at the ship? A. Well, I thought the occasion might turn up that he might want to buy her."

It is quite apparent, from the whole of this testimony, taken together, that Mr. Jerome, as one of the owners of the vessel, put himself into communication with the representative of the Chilian government, with a view to the sale of the vessel to that government; and whether this visit of Mr. Jerome, in company with the Chilian minister, to the Meteor, took place after intelligence of the declaration of war between Chile and Spain was received in the United States, or at a period so shortly before that time that affairs between Chile and Spain were in such a condition as to give rise in Mr. Jerome's mind to the impression that the occasion was likely to "turn up" when the Chilian minister might want to buy the vessel, is immaterial to the point under consideration. That point is the direct communication between one of the owners of the Meteor and the representative of the Chilian government, at a date not far distant from the time when the war broke out between Chile and Spain, in reference to the sale of the vessel to that government. And the evidence of Mr. Jerome establishes this point.

It also appears that the claimant, Cary, was in treaty with the Chilian government for the sale of the Meteor to them, after the war between Chile and Spain had broken out. Cary was the authorized agent of the owners. A letter is in evidence written by the Messrs. Forbes to Charles L. Wright & Co., ship-brokers, dated Boston, December 13, 1865, stating that an engagement of Messrs. Cary & Co., in regard to the sale of the vessel, would be duly ratified by the Messrs. Forbes. Charles L. Wright testifies, that within a day or two after the receipt of that letter of the 13th of December from the Messrs. Forbes, he had a conversation with Cary, at his, Wright's, office, in regard to the sale of the Meteor; that Cary asked for the names of the witness's principals; that the witness told him he believed that the parties represented the Chilian government; that the parties he referred to were then in fact in an adjoining room; that he, Wright, then went into that room, and had an interview with those parties (McNichols, Byron and

Conkling), in which they said that they represented the Chilian government; that after that he saw Cary again, and told him that he, the witness, believed the parties wished to purchase the boat for the Chilian government, and Cary replied: "If these are your parties, I don't think you can do anything with them, because I don't believe they have any money;" and that Cary also said that he, Cary, had had an application of that kind before, and they had no money. Again, this witness, being asked if anything was said by Cary, at the interview with him, to the effect or in substance that he had already had negotiations for the sale of the Meteor to the Chilian government, answers: "As I have said, at that time he said he had already been in treaty with them, and they had no money." Wright states in his testimony how he came to have this interview with Cary. It was as follows: About the 1st of December, 1865, three men, named Byron, McNichols, and Conkling, called at Wright's office in New York. These were the same persons before referred to as being in an adjoining room, at the time of the interview between Wright and Cary, after the receipt by Wright of the letter from Forbes. These men opened negotiations with Wright for the purchase of the Meteor for the Chilian government. Wright saw the three men almost every day during the month of December. About the middle of December, and in consequence of the negotiations he was having with the three men, Wright went to see Rogers, the Chilian consul, at Rogers's house in New York, and Rogers then gave Wright to understand that the three men who were so negotiating for the purchase of the Meteor were in communication with him, Rogers, in regard to the matter. The negotiations that were thus carried on between Byron, McNichols, and Conkling on the one part, and Wright on the other, satisfactorily appear to have been carried on, on behalf of the Chilian government on the one side and the owners of the Meteor, represented by Cary, on the other. We therefore find the authorized agent of the owners of the Meteor knowingly concerned in negotiating for the sale of the vessel to the Chilian government in December, 1865, after the announcement of the war between Spain and Chile. Wright further testifies, that in reply to Cary's remark that the parties had no money, he, Wright, stated to Cary that he believed they could make arrangements for some money, and that if so, he, Wright, would communicate with him, Cary, further; and that Cary called again at his, Wright's office about the 20th of December, to inquire if there had been anything done. McNichols testifies that Rogers, the consul, told him, in November or December, 1865, that the special agent or the Chilian minister (the witness forgot which) had been negotiating about the Meteor, and the delay was for want of funds, and that the Meteor had been offered to the functionary for a little less than two hundred thousand dollars in gold.

The testimony, therefore, is abundant that the owners of the Meteor, both directly and through their recognized agent, Cary, were knowingly carrying on negotiations with persons whom they recognized as authorized to represent the Chilian government, and who did in fact represent that government, for the sale of the Meteor to that government; that the negotiations between Cary and Wright were carried on during the war between Spain and Chile; and that Wright disclosed to Cary that his principals were the Chilian government.

The Meteor was seized on the 23d of January, 1866. The manifest of her cargo furnished to the custom-house by her master, and put in evidence, sets forth her cargo as being fuel and stores, and her destination as being Panama, with a crew fifty-seven in number.

The government inspector, Louis J. Kirk, testifies, that the day before she was seized, she being put up for clearance, and some question being raised in regard to her, he went on board of her and examined her at her dock at Brooklyn, at the request of the surveyor of the port; that he saw large quantities of ordinary ship's stores on board and a large quantity of coal; that he examined her cargo-book; that he saw no freight or merchandise on board; that the mate told him they had no freight; and that the mate said he was going to Panama and had signed papers for a year, and calculated to be in New York in three months from the time he left. James K. Ford testifies, that two Parrot guns, and eleven cases supposed to contain shell or shot, six gun tackles, and some other appurtenances for cannon, were placed by a Mr. Smith, acting for the firm of Cary & Co., in his, the witness's, public store in Brooklyn, on the 18th day of January, 1866. Wright testifies, that about the middle of December he told Rogers, at Rogers's house, that he did not think it possible to get an armed vessel, like the Meteor, away from New York.

William Jarvis, a deputy marshal, testifies, that under orders from the marshal he arrested the Meteor on the 23d of January between 12 and 1 o'clock; that at the time she had steam up and the crew on board, and was getting ready to go to sea; that Mr. Robert B. Forbes was on board; that Mr. Forbes stated to the mate in the witness's presence, that he was sorry he had missed his trip down to the Narrows in the boat; and that Mr. Forbes called for his carpet-bag and took it ashore with him.

Thomas H. Sease testifies, that after the seizure of the Meteor by the marshal, he acted as one of the ship-keepers on board of her and lived on board of her; that on the 2d of February the captain of the Meteor asked of the witness permission to take on shore five and a half boxes of shot for Parrot guns, and stated that the guns belonging to the ship had been stored in the Pierrepont stores; that the

witness saw the boxes of shot and the shot in one of the boxes which had been opened; that the captain said to him, in reference to the boxes, that he had ordered all the things to be taken on shore, and these had been in some way overlooked and left on board; that the witness told him that he could not take them on shore without the marshal's permission; that the captain then said, "Never mind, don't say anything about it."

Frederick Nichols, a mariner, testifies, that on the Friday before the Meteor was seized he was on board of her and saw barrels of stores going on board, and was told by the stevedore, who was engaged in loading them, that the vessel was bound to Chile; that he saw on board a large quantity of coal in bags and in bins, and a case of rifles, and a small box of cartridges for Sharpe's rifles; that the hold of the vessel appeared to be nearly full; that on that day he saw Mr. R. B. Forbes on board, and heard him, in answer to a question from the mate of the vessel, reply, "Put them in the racks, certainly;" that Forbes and the witness left the vessel together; that on the way up the wharf Forbes remarked to the witness that the vessel was very buoyant for a vessel that 750 tons of coal on board and six months' stores; that the witness told Forbes he thought she was bound for Chile, and Forbes said she was cleared for Panama, or she will clear, and the witness added: "I will not say whether he said she was cleared, or bound, for Panama"; and that the witness and Forbes crossed the ferry together. The witness gives this account of a conversation with Forbes on the ferry-boat: "Q. Did you have any conversation with him crossing the ferry? A. We talked in the same strain over in the boat. Q. What did you say? A. I told him I supposed if that vessel had gone to Chile, I would have gone in command of her, or something like that. That was the only remark I made. Q. State in what tone of voice you talked with Mr. Forbes,—whether loud or otherwise. A. I talked pretty loud, because Captain Forbes is a little troubled with deafness or does not hear accurately. Q. When you told him that, what did he say? A. He told me that I had not ought to talk quite so loud in public about such matters; I would not say that these were his words, but that this was the meaning, and I think the words were used." The witness also says, that on the same day or the next he, in company with Wright, went to see Rogers at his house, and the witness and Wright remarked that they thought the Meteor was off for Chile; that Rogers remarked, during the conversation, that Mackenna had done this business through some other brokers, and they thought they had got a good bargain in the Meteor, because they had got 750 tons of coal in the contract; that Rogers, in reply to a remark from the witness or Wright about the stores being marked for Panama, said that the vessel was to go to Panama and there was to be turned over and change command. The witness then says: "Q. Did he say to whom she was to be turned over? A. Our conversation was of Chile, but I cannot swear that he used the word Chile on that occasion. Q. Was anything said as to the officer to whom she was to be turned over at Panama? A. I think he said Williams. Q. (by the Court) Who was Williams? A. One Williams was a man in command of the Esmeralda. Q. Nothing was said about what Williams it was? A. No, sir. Q. What did you say about Williams being an officer of the Chilian navy? A. The one I had reference to was in command of the Esmeralda when she captured the Carvadonga. Q. Did he call him anything else but Williams? A. I do not remember that he did; he might." This witness also says that on the Monday before the seizure of the vessel, he saw Mackenna, and that this conversation took place between them: "I told him I supposed that the Meteor was off; he shrugged his shoulders and said he did not know she was; I told him I had supposed that I would go out in command of her if she went out, but I saw that no officer that had served in the Union army had any chance with him, but that all the officers I heard of his appointing were the meanest rebels he could get hold of, and I thought he would make a very good rebel himself. He said: 'Wait, wait! there may be an opportunity yet to ship.' That was all that occurred." This witness also says, that the master of the Meteor, Captain Kemble, told him, before the seizure, that if the parties Byron, McNichols, and Conkling bought her, he, Kemble, would go out and deliver her over to some other parties or some other officers.

We are now brought to an examination of the testimony given by the witnesses Wright, Hunter, McNichols, Conkling, Nichols, and Ramsay, upon the subject of the negotiations between the parties who acted for the Chilian government on the one side and the agent of the owners of the Meteor on the other, in reference to the sale of that vessel. The parties employed by Rogers, the Chilian consul, to enter into negotiations for the purchase of the Meteor, were McNichols, Conkling, and Byron. Byron has not been examined as a witness. McNichols and Conkling testified as witnesses for the libellants, and it will be proper first to examine their testimony.

McNichols says, that he knows Wright and Rogers, but not Mackenna; that he first saw Rogers about the latter part of October, or the beginning of November, 1865, and he identified Rogers in the court-room; that Conkling went with him on that occasion to see Rogers, at Rogers's house in New York; that Rogers told McNichols and Conkling, at that interview, that he wanted vessels for war purposes for the Chilian government, wooden screw propellers, and heavy guns, for the Chilian navy, and wished to know whether McNichols and Conkling had any facility in finding such a class of vessels; that he, McNichols, told Rogers that that was in their line, and they could furnish him with

estimates; that the witness and Conkling saw Rogers again at his house three or four days afterwards; that the witness furnished Rogers on that occasion with a description in writing of different steamers, not including the Meteor, however; that on that occasion the witness had some conversation with Rogers in reference to the style of clearing vessels at New York, and in reference to arms, and left with Rogers estimates of arms for the navy; that Rogers said he would leave them with the special agent or the Chilian minister and report again; that the witness saw Rogers, at different times before taking to him the list of the Meteor; that about three weeks after the last-named conversation the witness and Conkling went to Rogers's house with the estimate of the Meteor; that on that occasion Rogers said that he did not think the brokers had control of the sale of the Meteor, and that he understood there were arrangements made concerning her, and that she was out of the market, as it were, and that the special agent or the Chilian minister (the witness forgot which) had been negotiating about the Meteor, and the delay was for want of funds; that Rogers also stated, at that time, that the Meteor could be had on more advantageous terms if there was a good capitalist who could advance the funds to buy her from Mr. Forbes, and that the Meteor was offered to the special agent or the Chilian minister (the witness forgot which) for a little less than two hundred thousand dollars in gold, and that the estimate of Mr. Wright was much larger than that; that Rogers also then told the witness to ascertain if Wright & Co. actually had the control of the sale of the vessel, and to be sure if they had; that he, the witness, believed that there was some mention made at that interview, that if a capitalist would undertake to advance the money to purchase the Meteor from Forbes & Co. and clear her from New York, there could be no dispute of the agent or special agent at New York paying a very handsome price or a very liberal price; that the witness, in company with Conkling, saw Rogers on the next night after that, at Rogers's house, and told Rogers that Wright represented that he had the entire control of the sale of the Meteor; that some conversation then took place about the way they wanted the broker or capitalist to advance his funds, and that there was some talk about drafts on the Chilian government; that Rogers said that the only way that they could at that time arrange for the payment of the vessel was to arrange with any capitalists in giving drafts on the Chilian government; that they had some conversation in reference to the drafts; that Rogers said he could not tell until he could hear from the minister in Washington, and wanted to know if the brokers or any capitalists had the means of advancing the money to purchase the vessel; that Rogers said it would require a large amount of money, and wanted to know if the brokers could control the money to purchase her; that when Rogers told the witness, on the previous occasion, to be sure to ascertain whether or not the brokers had control of the sale of the Meteor, he, the witness, went down and saw the brokers, Wright & Co., and asked Wright if he had the control of her; that Wright came in from his front office, and told the witness that Mr. Cary was in the front office, and showed the witness a telegram from Mr. Forbes to Mr. Wright, and said that he had authority to sell the vessel, and asked the witness who his principals were, and the witness told him the Chilian government; that Wright then went into the other room; that the price of the vessel had been before that named by Byron to the witness; that one or two days after this interview with Wright, the witness called again on Wright in regard to the purchase of the Meteor, as Wright wanted to know the style of the bonds or drafts for the payment of the vessel,—whether they were bonds or drafts,—and to see whether he could negotiate them with a capitalist in New York, and wanted to know very minutely about it, and said he was going to call, or had called, on Duncan, Sherman & Co. in reference to them, and proposed that he should be introduced to Rogers, so that he could be in a better position to understand the thing,—the difference in exchange; that Wright made an appointment, and the witness went up with him to Rogers, with Rogers's consent; that the conversation at that interview was about the clearing of the vessel, and about the difference of exchange, and the class of bonds they would give; that Wright mentioned that the thing was almost impracticable, because no house or capitalist would run such a risk unless the exchange could be negotiated here, and thought the Chilian government should run part of the risk themselves in advancing the money here; that at a subsequent interview between the witness and Rogers, Rogers said that he thought he could get Mackenna to run one-third the risk, and that the capitalist would only have to run two thirds of the risk in clearing the vessel out from New York; that at different interviews Rogers said that Mackenna did not wish to advance any money on the Meteor or any steamer, until she was delivered outside of Sandy Hook; that at one interview Rogers said that the capitalist that would take the thing in hand should take all the risk of clearing the vessel from New York, and it would be preferable to any port in South America, and that the captain should name Buenos Ayres, as a courier could go from Buenos Ayres across the mountains in two days and a half, so that it would be an advantage to any capitalist who would accept the drafts, in getting them cashed; that Rogers said that the vessel could be accepted at sea, or outside of Sandy Hook; that at one interview Rogers

said that Captain Jones, whom the Chilian minister had sent, was acting for Mackenna as inspector, and helping to carry out business in regard to vessels; that on the Saturday before the Meteor was seized, the witness and Conkling had an interview with Rogers at Rogers's house; that on that occasion Rogers said that the sale of the Meteor was settled, and he understood she was to clear next week for Panama, and that the purchase of the Meteor was all settled; that Rogers told the witness that the Meteor was going to clear for Panama, and said that it was an understood thing what purpose she was to go for; that at the interview on the Saturday before the Meteor was seized, Rogers said that Mackenna was making use of the information that Wright and the witness had taken up to him, Rogers, and had employed other parties to accomplish his object; that on the following Monday Rogers told the witness, at the witness's office, that the Meteor was expected to clear that morning from the custom-house; that the witness took up to Rogers for Wright, estimates as to the fitting of the vessel with stores and coal for the voyage; that estimates had been left with Rogers, in reference to coaling as part of the cost; and that at the same time an estimate was left with Rogers of the armament that would be necessary for the Meteor.

Conkling testifies, that he became acquainted with Rogers about the 1st of November, 1865; that he, in company with McNichols, saw Rogers at Rogers's house in New York, on the Saturday evening prior to the seizure of the Meteor; and that Rogers then said to McNichols that the vessel would probably sail on the first of the week, perhaps on Monday, and that all the arrangements had been completed for her sale to the Chilian government, he believed, by Mackenna.

Wright testifies that he is a ship-broker; that about the 1st of December, 1865, a man calling himself Byron called at his office, and asked him if he had any sea-going steamers for sale; that the witness asked Byron what kind he wished, and he said he wished to purchase three or four good fast sea-going steamers; that the witness made a memorandum of it, and told Byron he would see if he could look up such ones as he wanted; that Byron called again the next day and the witness gave him a list of two or three steamers, including the Meteor, and asked him who he wished the vessels for; that he told the witness he would bring the parties to the office; that the next day he brought McNichols and Conkling to the witness's office and introduced them to the witness as his principals; that the witness then asked McNichols and Conkling if any of the vessels named in the list would suit them, and they told them that the Meteor was the vessel they wanted,—that had been selected from the list; that then they asked the witness if he could get the price of the Meteor, and he told them that he would communicate with the owners of the Meteor; that the witness then sent a dispatch to his, the witness's, brother, who was in Boston on a visit, to see Mr. Forbes, of Boston, and get a price for the Meteor; that the witness got a reply from his brother and then wrote a letter to Mr. Forbes, of which the following is a copy: "New York, Dec. 12, 1865. R. B. Forbes, Esq., Boston. Dear Sir. We telegraphed our Mr. H. H. Wright, at your city, to obtain from you the price of the Meteor, subject to com. of five per cent. to us, and have his reply offering the ship at $350,000. In your absence, we called on Messrs. Cary & Co., who furnished us particulars, which we have handed to our parties. They have made a slight inspection of the ship and propose sending their engineers on board to-morrow, when, if they mean business, we shall be prepared to make an offer. Mr. Cary has called on us to-day, and says he is the party through whom the purchase is to be made. We telegraphed as above, supposing you were the only party. Please set us right on this point, as we do not wish any collision, should we effect a sale. Yours truly, Chas. L. Wright & Co."; that the witness received, in reply, from J. M. Forbes & Co., the following letter: "Boston, Dec. 13, 1865. Gent. Anything which Messrs. Cary & Co. engage will be duly ratified by us. Truly, J. M. Forbes & Co., Agents Steamer Meteor, Messrs. C. L. Wright & Co."; that on the receipt of that letter the witness replied to it as follows: "56 South Street, New York, Dec. 14, 1865. Messrs. J. M. Forbes & Co., Boston. Gent. We have your favor of yesterday. We will arrange all matters with Mr. Cary according to your request. Some matters of detail have prevented us from making an offer for a day or two, but we are quite confident that we shall shortly be in shape to close with you. We are, very truly, Chas. L. Wright & Co."; that the witness saw Cary on the day he, the witness, telegraphed to his brother, or on the day that he wrote the letter to R. B. Forbes,—on the 11th or 12th of December,—at the witness's office in South street; that Byron, McNichols and Conkling were in the private office when Mr. Cary came; that Mr. Cary at that time understood the witness had been communicating with Mr. Forbes about the Meteor, and told the witness that he, Cary, had as much to say about the ship as Mr. Forbes had; that the witness told Cary that he, the witness, had parties who he thought would buy the ship, and that he would communicate with him, Cary, as soon as he could do so definitely, and would treat through him, Cary, for the purchase of the vessel; and that on that occasion nothing was said by the witness to Cary as to who the principals were. The remainder of the testimony of Wright has been heretofore recited, in considering the point as to whether the Meteor

was purchased for the Chilian government, and as to whether Cary, representing her owners, was advised of the fact that the Chilian government were the parties negotiating for the vessel through Wright.

Frederick Nichols, a mariner, testifies, that he knows R. B. Forbes, Wright and Rogers; that the first time he saw Rogers was at Rogers's house in New York, between the 15th of September and the 10th of December, 1865; that he went to the house of Rogers, the Chilian consul, on that occasion, with a man named Bates, of Valparaiso, to see if two letters of marque which Bates held were genuine; that Bates showed Rogers the two letters of marque and asked him if the signature was genuine, and said he had no doubt of it; that Bates left the letters of marque with Rogers and took from Rogers a receipt of them; that Rogers said there was to be a Chilian minister or special agent appointed for Chile, who would be here soon, and that when he arrived he, Rogers, would know then what they should do; that Bates told Rogers to let the witness have one of the letters of marque if the witness wished or if he raised stock for a privateer; that Bates asked the witness to take one of the letters of marque; that on that occasion Bates handed to Rogers a printed paper containing instructions in Spanish, some parts of which Rogers at the time translated to the witness; that the witness had a number of interviews subsequently with Rogers; that at one of those interviews Rogers said that some parties representing Chile (the witness afterwards said he thought Rogers said it was the Chilian minister) had been on board the Meteor, had seen her and liked her very much, and Rogers wanted the witness's opinion of her; that Rogers asked the witness what he thought of her and what kind of a vessel she was: that the witness replied that he had never seen her, but had often heard of her, and knew what vessel she was and what she was built for, and knew Mr. Forbes; that the witness was told by Rogers that the special agent from Chile had arrived; that Rogers called him Mackenna; that some time in December the witness went on board of the Meteor, at the request of Wright, to meet McNichols, Byron, and Conkling, and met them there and was introduced to McNichols and Conkling, having been introduced to Byron previously at Wright's office, on an occasion when Wright, at the request of Byron, sent for the witness; that the witness made an estimate, at the request of Byron, of the guns the Meteor would carry and the ammunition she would require, &c., for three or six months and gave it to Conkling or McNichols; that shortly after that the witness, in company with Wright, saw Rogers, and Rogers asked what it would require to fit the vessel out with guns and ammunition and deliver her at some foreign port (the witness did not remember exactly what,—it was called Montevideo, he thought,—or outside of the harbor); that the witness gave Rogers an estimate of it, or assisted to make up the estimate with Wright, and thinks it amounted to about $390,000; that at one of the interviews with Rogers, Rogers said there was difficulty in raising money to buy these vessels, but that if they could get drafts cashed on the Chilian government they could pay for the boats,—for the Meteor; that Rogers gave the witness a card of introduction to Mackenna, and the witness saw Mackenna at Mackenna's house the last of December, 1865, or the first of January, 1866, and gave him the card, and told him that he, the witness, would like to have an appointment in some way in the Chilian navy, or get command of some vessel fitting out in New York, that he had just left the United States navy and was willing to go into the Chilian service for awhile; that Mackenna said that he had heard of the witness from Rogers, and would bear him in mind, and if any opportunities offered, would let him know of it; that at that interview the witness told Mackenna that he understood that Catesby Jones had been appointed inspector of vessels for the Chilian government, and Mackenna replied: "Well, he has inspected some"; and that the witness, at that interview, suggested the names of several vessels, and that Mackenna said he wanted vessels whose machinery would run at least two or two and a half years, to go on that station. The remainder of the testimony of Nichols has been before referred to, on the point as to the knowledge by Forbes that the Meteor was destined for the service of Chile.

Daniel J. Hunter testifies that he was employed by Mackenna as translator, and resided with him, commencing in December, 1865; that he knows Rogers, and also a man called Captain Wilson; that he first saw Captain Wilson nearly a year ago in Chile, and had seen him on several occasions in this country, and had seen him three weeks ago in New York, and had seen him at Mackenna's house, and had been present at interviews between Mackenna and Wilson, and had heard them discuss, in a general way, the subject of fitting out privateers in behalf of Chile against Spain; that in those interviews the witness heard the subject of the purchase or the getting of the Meteor discussed; that the witness knows Captain Kemble; that the witness had been on board of the Meteor twice, the first time nearly three months before the time he was giving his testimony; that on the first occasion three Chilians were in company with him; that the witness had seen Captain Kemble at Mackenna's house when Kemble came and called on him, the witness; that Kemble called at Mackenna's house twice, some two or three months ago, and saw Mackenna there on both occasions, and remained at Mackenna's at those times an hour or so; that the witness knows Mr. Asta Buruaga, the Chilian minister at Washington, and had

seen him in New York, at Mackenna's house, after the arrival of Mackenna in the United States, and had seen Rogers at Mackenna's house, on a great many occasions, and had heard the subject of fitting out privateers discussed between Rogers and Mackenna in a general way, and had heard the Meteor mentioned between them.

George M. Ramsay testifies, that he knows Mackenna and Rogers, and he produces a paper, which he saw Mackenna sign in two places. The paper is signed, "Benj. Vicuna Mackenna, confidential agent of the government of Chile, in the United States of America," and is a contract dated New York, December 27, 1865, between Mackenna of the one part, and Ramsay, as the inventor and owner of certain boats called "torpedo boats," and also of torpedoes, for the delivery by Ramsay, in Chile, of two torpedo boats and ten torpedoes, within ninety days from the date of the contract, and for the personal service of Ramsay in Chile, with "the necessary skilled men to assist him to efficiently operate said two torpedo boats against the enemy's vessels of war and transports, for and in behalf of the government of Chile, for a period of one (1) year from the delivery of the said torpedo boats as herein provided, but with the proviso that should the present war with Spain terminate before the expiration of that year, then his term of service also expires." The contract also provides for the payment by the government of Chile to Ramsay of "a premium for the destruction of any and all Spanish vessels of war or transports which he may accomplish," with a provision as to fixing the amount of such premiums. In the contract, Mackenna agrees to furnish Ramsay "and his associates, such commissions as they may require, to show they are legally authorized by the government of Chile to perform such service as is herein implied and expressed." This contract has appended to it a certificate signed "Stephen Rogers, Consul for the Republic of Chile in New York," &c., &c. Hunter states that he had a talk with Rogers in regard to his giving this certificate before he, the witness, received it; and that after that conversation, he received the certificate as being provided for in the contract, and attached it himself to the contract. The certificate is dated December 29, 1865, and is as follows: "I certify that one Benjamin Vicuna Mackenna, now in this city, is duly and fully authorized by his government, the republic of Chile, to execute contracts, and sign any and all agreements for the said government, that in his discretion may promote her interests, and that, in my presence, he did sign, on the 27th inst., a contract with George M. Ramsay, respecting the sale and the operating of torpedo boats."

The testimony thus reviewed leads clearly to the conclusion, that Wright, McNichols, Conkling, and Byron, within the limits of the United States, were knowingly concerned in procuring the Meteor to be put within the control of the authorized representatives of the Chilian government, with intent that she should be employed in the service of Chile, to cruise or commit hostilities against Spain. This is, in the judgment of the court, a furnishing of the Meteor to the Chilian government with such intent. The testimony is also abundant to show that the active owners of the Meteor, and their authorized agent, Cary, were themselves knowingly concerned in offering the vessel to the Chilian authorities, and placing her within their power and control, with such intent. They, therefore, in a like sense, were concerned in furnishing the vessel, with that intent, to the Chilian government. But the evidence is also clear that Captain Kemble and others concerned in putting stores and coal on board the Meteor did so with the intent that she should be employed in the service of Chile to cruise or commit hostilities against Spain, and were thus knowingly concerned, within the limits of the United States, and with such intent, in furnishing the Meteor with stores and coal, and in fitting her out with what was necessary to make her an effective vessel. This would bring what was done within the inhibition of the third section of the statute, even though the meaning of the word "furnishing" should be limited to the act of providing the vessel with supplies, fuel, and other articles necessary or proper for her use.

Much stress was laid, in the course of the argument, by the counsel for the claimant, upon the fact that the testimony of the witnesses Wright, McNichols, Byron and Conkling, as to conversations between them on the one side, and Rogers and Mackenna on the other, was hearsay and secondary in its character. The testimony of these witnesses clearly shows that a common plan was entered upon by them and Rogers and Mackenna to procure the Meteor for the service of Chile, in the war between that country and Spain. Rogers set McNichols, Byron and Conkling in motion as his agents for that purpose. The law is well settled, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the res gestae, may be given in evidence against the others. American Fur Co. v. United States, 2 Pet. [27 U. S.] 358. Upon this principle the court admitted at the trial the evidence in regard to which the objection was made.

In the course of the trial, considerable evidence was received by the court provisionally, under the objection of the counsel for the claimant that such evidence would be irrelevant, if standing by itself, and if unconnected with other evidence. But, in the judgment of the court, the evidence thus objected to was made competent by being satisfactorily

connected with the rest of the evidence in the case. The court, on the trial of a cause in admiralty, is not embarrassed by the apprehension which exists on the trial of a cause before a jury, as to the effect likely to be produced by evidence which may, after it has once been given, be afterwards stricken out as incompetent. In the conduct of all trials, the evidence must come in at different stages of the trial, and it is often absolutely necessary to admit evidence the strict legal competency of which cannot be shown until after it is received. In the present case, the court has applied to the evidence the rules which govern in trials in the admiralty, and has not taken into consideration any testimony which is not admissible under those rules. The court cannot, in the present case, overlook the fact that neither Mr. Cary, nor any one of the owners of the Meteor, nor any other witness, was put upon the stand on the part of the claimant, to make any explanation as to the object for which the Meteor was about to go to sea when she was seized, or as to her real destination. In view of the testimony put in by the libellants in this case, the court is clearly of opinion that the onus probandi rested on the claimant to show the real character of the transactions in regard to the Meteor and her actual destination, if such character and destination were different from those so clearly indicated in the testimony given on the part of the libellants. The exculpatory testimony, if any existed, was within the control of the claimant, Cary, and of his principals, the Messrs. Forbes. The libellants seem to have produced as witnesses nearly every person who had any active connection with the transactions in regard to the Meteor. The absence of such exculpatory testimony is not accounted for, and the legal presumption follows, that the facts testified to by the witnesses for the libellants do not admit of a satisfactory explanation. The Short Staple [Case No. 12,813]; s. c., 9 Cranch [13 U. S.] 55; Ten Hogsheads of Rum [Case No. 13,830]; The Struggle v. U. S., 9 Cranch [13 U. S.] 71; The Robert Edwards, 6 Wheat. [19 U. S.] 187. The very recent cases of The Slavers, 2 Wall. [69 U. S.] 350, 366, 375, 383, cases of libels under the slave-trade act [1 Stat. 347; 3 Stat. 450] three of which were originally brought in this court, lay down principles which are very pertinent to the present case. In The Kate, 2 Wall. [69 U. S.] 350, the principle laid down by this court was affirmed by the supreme court,—that when the evidence on the part of the government creates strong suspicions or well-grounded suspicions that the vessel seized as being employed in the slave-trade was fitted out or fitting out for that purpose, such evidence must produce her conviction and condemnation unless rebutted by clear and satisfactory proofs on the part of the claimants, showing her voyage to be a lawful one. In another of those cases, The Reindeer, 2 Wall. [69 U. S.] 383, the supreme court say: "Suits of this description necessarily give rise to a wide range of investigation, for the reason that the purpose of the voyage is directly involved in the issue. Experience shows that positive proof in such cases is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." In the case of Clifton v. U. S., 4 How. [45 U. S.] 242, which was a libel of information on a seizure for the fraudulent undervaluation of goods in an invoice, the circuit court instructed the jury that "to withhold testimony which it was in the power of a party to produce in order to rebut a charge against him, where it was not supplied by equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge," and "that if the claimant had withheld proof which his accounts and transactions with these parties afforded, it might be presumed that, if produced, they would have operated unfavorably to his case." This instruction having been excepted to by the claimants, the case was taken to the supreme court by writ of error. Mr. Justice Nelson, in delivering the opinion of that court, says, in regard to these instructions: "They were not only quite pertinent to the question in hand, but founded upon the well-established rules and principles of evidence. The prosecution involved in its result not only the forfeiture of a considerable amount of property, but also the character of the claimant, both as a merchant and an individual. He was charged with a deliberate and systematic violation of the revenue laws of the country by means of frauds and perjuries, and the court had pronounced the proof sufficient to establish the offence unless explained and rebutted by opposing evidence. Under these circumstances, the claimant was called upon by the strongest consideration, personal and legal, if innocent, to bring to the support of his defence the very best evidence that was in his possession or under his control."

Much reliance was placed by the counsel for the claimant, in his summing up, upon the doctrine supposed by him to have been laid down by the supreme court in the case of The Santissima Trinidad, 7 Wheat. [20 U. S.] 283. That doctrine was stated by the counsel in various forms, but the principle contended for was that freedom of commerce is allowed to a neutral to furnish to a belligerent warlike materials or warlike vessels as articles of merchandise or traffic; that while the principle of the law of nations is recognized, which prohibits neutral territory from being used by either belligerent as a vantage-ground from which he may sally forth to commit hostilities upon the other

belligerent, yet the right of citizens of the neutral country to sell all that their industry produces for purposes of war, as fair matter of trade, to any belligerent, cannot be interfered with, that it is no offence and no violation of neutrality to sell a vessel of war, armed or not armed, in our ports, to a belligerent power; and that there is the same right under the law of nations, to sell in our ports an armed vessel, under such circumstances, that there is to sell guns or ammunition or any other raw material. At another stage of his argument, the counsel maintained the proposition, that unless it appeared affirmatively that the vessel was to sail out from the port of New York as an enlisted hostile ship of one belligerent, there was no criminality, although it should be made to appear by indisputable proof that she had been built, fitted, armed, and equipped as a ship of war, complete and ready for action.

The views thus pressed upon the court have, in its judgment, no foundation in public law, or in any decision that has been made by the highest judicial tribunal of the United States. The case of The Santissima Trinidad was decided by the supreme court at the February term, 1822. It was a libel filed by the consul of Spain, in the district court of Virginia, in April, 1817, against certain property originally constituting a part of the cargo of the Spanish ship Santissima Trinidad, which was alleged to have been unlawfully and piratically taken out of that vessel on the high seas, by a squadron consisting of two armed vessels called the Independencia del Sud and the Altravida, and manned and commanded by persons assuming themselves to be citizens of the United Provinces of the Rio de la Plata, commonly called the government of Buenos Ayres. The libel was filed by the consul on behalf of the original Spanish owners of the property, and claimed the restitution of the property principally upon three grounds,—First, that the commanders of the capturing vessels were native citizens of the United States, and were prohibited by our treaty with Spain of 1795 from taking commissions to cruise against that power; second, that the capturing vessels were owned in the United States and were originally equipped, fitted out, armed and manned in the United States, contrary to law; third, that their force and armament had been illegally augmented within the United States. The district court decreed restitution of the property, and the circuit court affirmed the decree, and the case was then taken by appeal to the supreme court. That court (Mr. Justice Story delivering its opinion) decided that the Independencia was in point of fact a public ship belonging to the government of the United Provinces, and that all captures made by her were to be regarded as valid. It appeared that the property in question was captured by the Independencia alone, and the Altravida being a tender, or despatch vessel, to the Independencia. The supreme court also decided that the evidence showed that there had been a clearly illegal augmentation of the forces of the Independencia and the Altravida, within the jurisdiction of the United States, by an increase of their crews there, prior to the capture in question, and that such illegal augmentation was a violation of the laws of nations as well as of our own municipal laws, and required restitution to be made of the property subsequently captured by the vessels. The court, therefore, affirmed the decree of the circuit court. In the course of his opinion Mr. Justice Story discusses the point taken, that the Independencia was originally armed and fitted out in the United States contrary to law, and says: "It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband indeed, but in no shape violating our laws, or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemnable as a good prize, for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a bona fide sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid." These views of Mr. Justice Story were, as is apparent from the statement which has been made of the case, obiter dicta, and not necessary to the decision of the cause, restitution of the property being decreed upon the ground of the illegal augmentation of the force of the capturing vessel in our ports prior to the capture. The facts in regard to the commercial adventure of the Independencia, referred to by Mr. Justice Story, as they appear in the report of the case, were, that that vessel, having been a privateer during the war between the United States and Great Britain, was, after the peace, sold by her original owners, and loaded by her new ones, at Baltimore, in January, 1816, with a cargo of munitions of war; that she sailed from Baltimore with them, and armed with twelve guns, part of her original armament, to Buenos Ayres, under written instructions from her owners to her supercargo, authorizing him to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price; and that she was sold at Buenos Ayres to parties who again sold her, so that she became a public commissioned vessel of the government of Buenos Ayres. It was on these facts that

Judge Story remarked that the vessel, though equipped as a vessel of war, was sent to Buenos Ayres on a commercial adventure in no shape violating our laws or our national neutrality, in that there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels to foreign ports for sale. If the Messrs. Forbes, or any of the owners of the Meteor, or Mr. Cary, their agent, or any of the parties concerned in the transactions in regard to the Meteor, had testified before the court, on this trial, that the Meteor was going out to Panama on a purely commercial adventure, to be sold there, if a suitable price could be obtained, and if it appeared that there was no intent on the part of the owners, or any other person, that the vessel should be used to violate the neutrality of the United States, there might be some pretence that this case was within the principle thus laid down by Mr. Justice Story. But the whole testimony points in a different direction. The transaction with the agents of Chile at New York, in regard to the Meteor, was, it is true, a commercial adventure, in so far that the vessel was sold, and that such sale was a matter of trade or commerce at New York, between her owners and the agents of the government of Chile. But, in the sense in which Mr. Justice Story speaks of the sending of the Independencia to Buenos Ayres on a commercial adventure, there was no commercial adventure in the case of the Meteor.

What the supreme court regard as not being a commercial adventure is shown by the opinion of that court, delivered by Chief Justice Marshall, in the case of The Gran Para, 7 Wheat. [20 U. S.] 471, which came before that court at the same term as the case of The Santissima Trinidad [supra]. It was a libel filed in the district court of Maryland, by the consul-general of Portugal, praying for the restitution to Portuguese owners of a quantity of gold and silver coin alleged to have been taken from the Portuguese ship Gran Para by a private armed vessel called the Irresistible, fitted out in the United States in violation of the neutrality acts. It appeared that the Irresistible was built as a war vessel in the United States, and sailed from Baltimore for Teneriffe, between February and June, 1818, with a crew of fifty men, and with cannon, small arms and ammunition in her hold, entered outwards as cargo; that she proceeded to Buenos Ayres, and was commissioned as a vessel of the government of Buenos Ayres, to cruise against Spain, and sailed from Buenos Ayres on a cruise, in June, 1818; that the next day her master produced a commission from the chief of the Oriental Republic, to cruise under that commission, and sent back the commission of the government of Buenos Ayres; that during the cruise the money in question was captured; and that the Irresistible subsequently brought the money to Baltimore. Chief Justice Marshall, in his opinion, says: "That the Irresistible was purchased, and that she sailed out of the port of Baltimore, armed and manned as a vessel of war, for the purpose of being employed as a cruiser against a nation with whom the United States were at peace, is too clear for controversy. That the arms and ammunition were cleared out as cargo cannot vary the case. Nor is it thought to be material that the men were enlisted in form as for a common mercantile voyage. There is nothing resembling a commercial adventure in any part of the transaction. The vessel was constructed for war, and not for commerce. There was no cargo on board but what was adapted to the purposes of war. The crew was too numerous for a merchantman, and was sufficient for a privateer. These circumstances demonstrate the intent with which the Irresistible sailed out of the port of Baltimore. But she was not commissioned as a privateer, nor did she attempt to act as one, until she reached the river La Plata, when a commission was obtained and the crew re-enlisted. This court has never decided that the offence adheres to the vessel, whatever changes may have taken place, and cannot be deposited at the termination of the cruise in preparation for which it was committed; and, as the Irresistible made no prize on her passage from Baltimore to the river La Plata, it is contended that her offence was deposited there, and that the court cannot connect her subsequent cruise with the transactions at Baltimore. If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as their enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted out in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and reenlisting their crew, to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance were acquired. This would, indeed, be a fraudulent neutrality, disgraceful to our own government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts, that the arms and ammunition taken on board the Irresistible at Baltimore were taken for the purpose of being used on a cruise, and that the men there enlisted, though engaged in form as for a commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe that there was one. Although there might be no express stipulation to serve on board the Irresistible, after her reaching the La Plata and obtaining a commission, it must be completely understood that such was to have been the fact. For what other purpose could they have undertaken this voyage? Everything they saw, everything that was done, spoke a language too plain to be misunderstood." The court af-

firmed the decree restoring the money, on the ground that it had been captured by a vessel which had violated our neutrality law. The court held that the Irresistible came within the prohibitions of that part of the third section of the neutrality act of June 5, 1794 (1 Stat. 383), which makes it penal for any person, within any waters of the United States, to be knowingly concerned "in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace." The court also referred to the fact that the neutrality act of March 3, 1817 (3 Stat. 370, § 1), adapts the previous laws to the actual situation of the world, by adding to the words "of any foreign prince or state," in the third section of the act of 1794, the words "or of any colony, district, or people." The third section of the act of April 20, 1818, is in substance the same with the first section of the act of 1817. The Meteor, although she did not have on board of her, when seized, any cannon, small arms or ammunition, except the boxes of cannon-shot testified to by the witness Sease, was not, on the evidence, really engaged any more in a commercial adventure, in taking out her clearance for Panama, than was the Irresistible in her voyage to Buenos Ayres. The Meteor, although not completely fitted out for military operations, was a vessel of war, and not a vessel of commerce. She had in no manner been altered from a vessel of war so as to fit her to be only a merchantman, and so as to unfit her to be a vessel of war. It needed only that she should reach a point beyond the jurisdiction of the United States, and there have her armament and ammunition put on board of her to become an armed cruiser of the Chilian government against the government of Spain. To permit a transaction of the kind shown by the proofs in this case to be consummated, would, in the language of Chief Justice Marshall, in the case of The Gran Para [supra] be "a fraudulent neutrality."

The case of Moodie v. The Alfred, 3 Dall. [3 U. S.] 307, decided by the supreme court at the August term, 1795, was pressed, upon the argument, by the counsel for the claimant, as sanctioning the freedom of commerce for which he contended. In that case, a British prize had been taken by a French privateer and sent into Charleston. The privateer had been built in New York, with the express view of being employed as a privateer against Great Britain, in case there should be a war between the United States and Great Britain. Some of the equipments put upon her in New York were calculated for war, though they were frequently used for merchant ships. She was sent to Charleston, where she was sold to a French citizen. He carried her to a French island, where she was completely armed and equipped and furnished with a commission, and she afterwards sailed on a cruise, during which the prize in question was taken. It was contended, in that case, that the original construction or outfit of the privateer was an original construction or outfit of a vessel for the purposes of war, and that therefore, the capture of the prize was illegal; but the court overruled this view. That case affords no countenance to the doctrine in support of which its authority is adduced. The only fact appearing in the case bearing on the illegality of the transaction was, that the vessel was built in the United States, was furnished there with some warlike equipments, and was there sold to a French citizen. But the main ingredient was wanting of any furnishing, fitting out or arming of the vessel with intent that she should be employed in the service of France, to cruise or commit hostilities upon the subjects or property of Great Britain. She was built with the intent to cruise in the service of the United States against Great Britain in the contingency of a war between those two powers, and no circumstance appears in connection with the sale of the vessel, except that she was sold in the United States to a French citizen. If it had been shown that she was purchased by the French citizen with intent to employ her in the service of France to cruise against Great Britain, the case might have been a different one, and the decision might have been different; but the case as it stands furnishes no support to the doctrines urged by the counsel for the claimant. Nor is there anything to be found in the decision of the supreme court in the case of U. S. v. Quincy, 6 Pet. [31 U. S.] 445, which sanctions those doctrines. According to that decision, the question of intent is the main question under the neutrality law, and, as the court say, "all the latitude necessary for commercial purposes is given to our citizens, and they are restrained only from such acts as are calculated to involve the country in war."

The sale of a fully armed vessel of war in the United States to a belligerent government, or to a subject or citizen of such government, may be, as a naked act, lawful and no offence against the law of nations or the statutory law of the United States; but, if such vessel passes virtually, and to all practical intents and purposes, in the United States, into the control of the belligerent power, or of its subject or citizen, with the intent on the part of those concerned in putting the vessel under such control that she shall be employed in the service of the belligerent power, to cruise or commit hostilities against the subjects, citizens or property of a power at war with such belligerent and at peace with the United States, the neutrality of the United States is compromised, and the neutrality law of the United States is violated. To say that, with such an intent proved in the sale of the vessel, nothing has been done in violation of the

third section of the act of 1818, is to make such section virtually a dead letter. The doctrine contended for would result in this,—that the building and arming of the vessel would be perfectly lawful, because, in building and arming her, there was no intent to have her unlawfully employed; and the sale would be perfectly lawful, although such intent existed at the time of the sale, because no such intent existed when she was built or armed; and no interference could be had with her after the sale because, as she was fully armed and equipped at the time of the sale, it would be unnecessary to do anything to her after the sale to enable her to cruise or commit hostilities. This consequence would follow; not only in respect to a vessel fully armed, but in respect to one which had been merely attempted to be fitted out and armed, and in respect to one which had been only partially fitted out and armed. The intent is, under the third section, the thing which marks the offence. If the prohibited intent does not exist, a citizen of the United States may not only sell a fully armed vessel in a port of the United States to a belligerent power, or to a subject or citizen of such power, but may also send a fully armed vessel to a foreign port for sale as a purely commercial adventure. To say that the neutrality laws of the United States have never prohibited the sale of a vessel of war as an article of commerce is merely to say that they have not prohibited the fitting out and arming, or the attempting to fit out and arm, or the furnishing or fitting out or arming, of a vessel within the limits of the United States, provided the unlawful and prohibited intent did not exist.

The language of the act of 1818 is not ambiguous, and does not admit of any latitude of construction, nor is there any provision in any section of it conflicting with any provision in any other section of it. It is, therefore, unnecessary to look outside of the statute for any aid in arriving at the intention of the legislature in its enactment. While it is the duty of the court, in interpreting a statute, to effect the intention of the legislature, that intention must be searched for in the words which the legislature has employed to convey it. Where the language of an act is explicit, there is a great danger in departing from the words used to give to the law an effect which may be supposed to have been designed by the legislature. The Paulina's Cargo v. U. S., 2 Cranch [6 U. S.] 52; Denn v. Reid, 10 Pet. [35 U. S.] 524. When, as in the present case, such intention is, in the face of the statute, not at all ambiguous, the court cannot look elsewhere than into the statute itself for any aid in interpreting it. These considerations dispose of any argument in favor of the interpretation urged by the counsel for the claimant, drawn from a history of the neutrality acts of the United States, and the condition of the foreign relations of the United States, at the time of the enactment of the statute, and the political correspondence of the public authorities of the United States, and the discussions in congress preliminary to the passage of the act.

The importance of this case, not merely in view of the pecuniary value of the vessel proceeded against, but also in respect to the principles of public law involved in it, has led the court to a more extended discussion of those principles than would otherwise have been necessary. The court, however, entertains no doubt as to the correctness of the doctrines of public law which it has applied to the present case. Those doctrines are the result of the legislative, executive and judicial action of the public authorities and courts of the United States in a great variety of cases, and the court has nowhere found a more excellent summary of them than in Wheat. Int. Law (8th Ed.) with notes by Dana, pp. 562, 563, note 215: "As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, towards such preparation, with the intent that the vessel shall be employed in hostile operations he is guilty, without reference to the completion of the preparations or the extent to which they may have gone, and although his attempt may have resulted in no definite progress towards the completion of the preparations. The procuring of materials to be used, knowingly and with the intent, &c., is an offence. Accordingly, it is not necessary to show that the vessel was armed, or was in any way, or at any time, before or after the act charged, in a condition to commit acts of hostility." "Our rules do not interfere with bona fide commercial dealings in contraband war. An American merchant may build and fully arm a vessel, and provide her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments is as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of cap-

ture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent." The evidence in the present case leaves no rational doubt that what was done here in respect to the Meteor, was done with the intent that she should be employed in hostile operations in favor of Chile against Spain, and that what was done by her owners towards despatching her from the United States was done in pursuance of an arrangement with the authorized agents of Chile for her sale to that government and for her employment in hostilities against Spain, and that the case is not one of a bona fide commercial dealing in contraband of war.

With these views, there must be a decree condemning and forfeiting the property under seizure, in accordance with the prayer of the libel.

[The case was taken, on appeal, to the circuit court where a decree was entered reversing this court and dismissing the libel. Case No. 15,760.]

[The following note is reprinted from 3 Am. Law Rev. 234.]

NOTE. On the 23d January, 1866, the steamship Meteor, lying at her wharf in New York, was seized by the United States marshal, by virtue of a warrant filed by the United States district attorney, in the district court for the Southern district of New York. The libel charged that the Meteor had, within the jurisdiction of the court, been furnished and fitted out, or attempted to be fitted out, by persons to the district attorney unknown, with the knowledge and intent that she should be employed in the service of the government of Chili, to cruise and commit hostilities against the subjects and property of the government of Spain (with which power we were then at peace), contrary to the third section of the act of congress, approved April 20, 1818, commonly called the "Neutrality Act."

On the 14th March following, Mr. Evarts, of counsel for the owners moved to have the vessel appraised and released to them on bond, according to the customs in causes in admiralty on the instance side of the court. He supported his motion on the ground, that it was matter of ordinary right in such causes. He adduced the analogy in the practice under the slave trade act, and the piracy act; and urged that a privilege never withheld from the nefarious traffickers in human beings ought not, certainly, to be refused to men of the well-known high standing and integrity of the owners of this vessel, constructed, as she has been, upon the most patriotic motives. The district attorney, in reply, argued that the neutrality act was a complete whole in itself, which in some cases directly authorized bonding, and in others by a necessary implication withheld the privilege. He suggested that to bond the vessel was simply to set her free at once to depart upon her illegal cruise. He further insisted that even if the court had power to bond the ship, it was, at least, a matter of judicial discretion; and as a consideration, which in this view would be "fatal to the motion," he read and "made part of his argument" certain letters from the state department, embodying "instructions" to himself. Probably no error can be committed in construing the contents of these letters as the district attorney himself construed them; that is to say, as imperative exhortations to use all the machinery of the law for the purpose of securing the forfeiture of this vessel. In the same connection, he argued strenuously, as a fact which "ought to have some bearing on the question now before the court," that an application had been made to the state department to release the vessel, and been refused. This matter and the "instructions" of the letter were dwelt upon at length and emphatically; and thus, at this early stage in the proceedings, the government counsel, with a faint deprecation, took the ground, which they afterwards deliberately and distinctly assumed, that the whole was an affair of state, rather than a question of law, and that the judge was for the purposes of this cause, not so much a judicial magistrate as a political subaltern.

Mr. Evarts replied. He said that the court had no precautionary power which could be exerted to prevent any further offence by the vessel; that such power, in an ample degree, was lodged with the executive. That the bonding was a matter of obligation, not of discretion; but, if it should be held matter of discretion, he stated facts which he thought should induce the court to grant his motion. In reference to the application stated to have been made to the state department, he explained that it was only an application for the entire discontinuance of the suit and absolute release of the vessel, grounded on the belief of the owners that the government "in plain view of the rights and purposes of the owners, could not seriously intend to make it a matter of judicial inquiry;" that the request was properly preferred to the executive, within whose province lay the duty of deliberation and the power of control as to whether the suit should go on or be discontinued; that the owners had never "asked the government, by any intimation of its wishes, to affect the court's direction and conduct of questions arising in the prosecution;" that if the prosecuting attorneys insisted upon having the secretary of state and the president "heard on questions touching the due administration of justice, except by argument and in methods for which the law provided," then they "introduced an impropriety into the administration of justice," not justified by the secretary's letter, and which the "judiciary of the United States would not submit to tolerate for a single moment."

On the 23d March, the opinion of the court was rendered, refusing the motion. The position taken was, that the statute itself was conclusive to the effect that "the vessel, while held under seizure by process in favor of the United States for the violation of that statute, cannot be discharged on bail by order of a judge of the United States under the authority of the common rules and practice of this court." . . . That the "clear purport and intent" of the statute was that "the vessel [should] herself be detained, so that the forfeiture, which is the penalty, &c., may be forced against her specifically in case of condemnation." The court thus decided that it had not the power to bond the vessel at this time when she had in her favor the legal presumption of innocence. Soon afterwards the trial upon the merits was had, and the court pronounced a decree of condemnation. Thereupon the vessel became tainted with guilt, and the necessity of enforcing the forfeiture "against her specifically" seemed then to be in a fair way to be executed. But just at this juncture the judge reversed his former decision, and the decree of condemnation was promptly followed by an order that the Meteor should be appraised and bonded, if her owners so wished. It was accordingly done, and she was released. No opinion was delivered, either at the time or afterwards; no reasons or explanation were vouchsafed for this astonishing contradictory action. The record simply remains thus: On 23d March, the court had no legal power to bond the vessel which was then presumably innocent; on 20th July, it bonded her after she had been adjudged guilty. We of the outside are remitted to our own cleverness to account for these

strange series of incongruous acts. No new law, no new legislation, occurring between March 23d and July 20th, aids us.

To take up again the thread of the history of the case, we will go back to the 28th March. On this day the trial of the case began. The vessel was then still in the custody of the United States marshal. The substance of the evidence adduced by the government was briefly as follows: The Meteor was a swift seagoing steamship; she was built by a number of public-spirited citizens, with the intention of offering her to the United States government, for the purpose of pursuing and destroying the Alabama; to this end she was capable of carrying a moderate armament; but her chief merit lay in her speed, to which every other consideration had been made subordinate. Before she was finished, the need for such vessels had ceased. She had since been used by government as a transport ship for troops, and afterwards had been employed as a freighting vessel, in the merchant service, between home ports. Originally two Parrot guns had been placed on board her, which had been subsequently removed; and beyond this, she had received no warlike equipment whatsoever. She had on board 750 tons of coal, being about 12 tons per day for the shortest voyage to Panama, and provisions for six months, a portion of which were marked "reserved stores." She was for sale for several months. There was war between Spain and Chili, pending which a certain accredited agent of Chili, in New York, wished to buy stanch seagoing steamers; the Meteor, among others, attracted his attention (though through no act of her owners), and suited his purpose. Three "adventurers," of that nondescript hand-to-mouth occupation which furnishes a mysterious livelihood to so many inhabitants of large cities, sought to get a handsome commission, by bringing about a sale of the Meteor to this Chilian agent. One of these men was an army and navy claim agent, interested in petroleum and mining stocks; the other sometimes "speculated in oil stocks," and had been a "bounty broker." For want of ready money, their efforts ended only in egregious failure, as they themselves very freely acknowledged. The owners, the Messrs. Forbes, were ready and willing to sell the vessel to this Chilian agent; but she was to be sold and delivered in precisely the condition in which she was then lying at the wharf, for the full price in cash down. This money could not be thus raised. The whole plan, for this reason, fell through; and the negotiations conclusively ceased. The vessel, with the coal and provisions before named, was cleared or about to clear for Panama, when she was seized under the libel. The informer was one of the three disappointed adventurers. The evidence was explicit to the effect that in the negotiations with the Messrs. Forbes, nothing was for a moment contemplated, save an outright sale of the vessel as she lay for cash down in full. It was further explicit and consistent, to the effect that the negotiations concerning the sale were understood by all parties to have been finally and totally abandoned, without having accomplished any thing, a long time before the seizure. The only connection between the three middle-men, or "runners" as they were called on the trial, and the owners of the vessel, consisted in two or three visits of inquiry made by the middle-men, to a shipbroker, who communicated the offers made to him for the ship to the New York agent of the owners, and who received authority from him to sell her upon the terms above stated.

To breathe into these historical facts, in themselves apparently innocent, a guilty life, the district attorney and his associate counsel relied upon testimony which they were permitted to introduce contrary to the strict rules of law; because, as they frankly stated, unless this permission was accorded to them, they should be quite unable to make out their case. The evidence which was admitted through the door of this cogent necessity was as follows: One witness testified that a man who looked very like a stevedore, but who might, nevertheless, have been some other species of laborer, told him that the ship was going to Chili. The same witness was allowed to add that "stevedores were apt to know" the destination of vessels. One Conkling, the man who had stated himself to be an "oil speculator" and "bounty broker," was even permitted to state that one man had said to another man, that "he believed" the arrangement for the sale of the vessel had been completed by a third individual. It was further shown, that when the vessel was seized, with her steam up, Captain R. B. Forbes was on board; that he said he was sorry to lose his trip down the Narrows; called for his carpet bag, received from the errand boy a small black hand-bag, and went ashore; that afterward, as he was crossing on the ferry boat, he encountered a seafaring man. This man was placed on the stand, and stated substantially, that when he met Mr. Forbes, he "wanted to talk;" that he had himself been actively urging some of the third parties to put him in command of the ship, if they should succeed in buying her, and that he was disappointed at the non-success of his demands. In other words, this "captain" was an American citizen, who had been disappointed in the laudable design of becoming a Chilian privateersman. In a loud tone the "captain" said to Mr. Forbes, that he thought the Meteor was going to Chili; Mr. Forbes said she was bound or cleared for Panama; the other responded, that if she had gone to Chili. he had supposed that he should have gone in command of her. The folly of this speech, which, however harmless for others, might have been damaging to the speaker, was rebuked by Mr. Forbes, with the admonition that the captain had better not make such remarks in so high a tone. Further, it was stated that Captain Kemble, in command of the Meteor when she was seized, and previously, had been heard to say that if she was sold, he should take her out to Panama and there deliver her over to a "fighting captain." Besides this, the tale of the fiasco of the three disappointed adventurers was narrated in full. In the course of the narration, hearsay testimony was introduced by wholesale, when the very witnesses who could have given it at first-hand were sitting in the court-room. Neither was any link established between this story, which was a thing of the past, that had found its death and burial in empty words and nothing more, and the subsequent condition and history of the vessel. On this ground, the defendants' counsel took exception to the admission of that part, even, which was not hearsay; objecting that it related wholly to a separate, distinct, and completed transaction, having no bearing upon or connection with any fact that could be proved, or had been offered, or attempted to be proved, against the vessel under the libel.

Upon this evidence the government rested its case. Mr. Evarts then rose and stated that it was not his intention to introduce any testimony, inasmuch as he was fully satisfied with that given by the witnesses called by the government. We do not propose to dwell upon the arguments at any great length. The ground assumed by the government counsel was double: they urged that, under the law as it stood, the facts warranted a decree of forfeiture. The strongest point which they made in this branch of their argument ought, perhaps, to be briefly suggested, for it was so subtle and ingenious, though withal so weighty and pregnant, that it might escape the attention of the reader, and fail to meet that consideration which it deserves, and which Judge Betts awarded to it. As oaks from acorn grow, so this theory in all its completeness sprouted from the little piratical-hued carpet bag of contents unknown, or at least unproved. It was suggested that this bag contained the muniments of title of the ship; that Mr. Forbes was going with her outside of Sandy Hook; that there he was going to make formal delivery of her, with all the legal documents, to certain agents of the Chilian government, who

were to turn up from somewhere and be outside Sandy Hook; that when Mr. Forbes would return, and from some source not known, or at least not named by the government, an armament would be put on board the vessel; that she would then hoist the Chilian flag and begin her career of destruction. The whole story had the incontrovertible force of being a physical possibility. If true, it would certainly have plunged the owners deep into a guilty collusion with a belligerent purchaser. While the ingenuity of the conception challenges admiration, the question, whether or not this elaborate plan, with all its minute details, could be considered as reasonably proved to the conviction of an ordinary mind, by the appearance of the carpet bag, with its peculiar traits of size and color, is a matter on which each of our readers must make up his own mind. Whatever each one may decide, none will fail to draw the obvious moral against carrying small black hand-bags.

The second ground of the government counsel was purely diplomatic. In this branch of their argument, they urged, that, if the law had been previously against them, yet the necessities of the nation now required that this law should be changed: Referring directly to the Anglo-rebel cruisers, they said that "public reasons" demanded "an interpretation" of the act, such as would make their case good. The leading case on the subject is that of the Santissima Trinidad. The famous ruling of Judge Story, in his opinion delivered in that case, has always since been assumed by judges, lawyers, and publicists as laying down what had before been supposed to be the sound law in such matters, and what could never, after the publication of that opinion, be doubted. This obstacle it was thought more advisable to crush beneath the juggernaut car of the state department, than to seek to undermine or circumvent by legal subtlety. The language used in discussing it was as follows: "If the supreme court maintains the broad dictum of the Santissima Trinidad, after the late positive utterances of the department of state on that very point, there will be a conflict of opinion between the executive and judicial departments of the government, on a matter of international law, not at all creditable to the United States, which, since its peremptory demand on England for indemnity for losses occasioned by Anglo-rebel cruisers, cannot well change its attitude."

From this pregnant text issued a long, urgent, elaborate, politico-diplomatic argument, crammed full of the various phases of the Alabama discussion, and the present position and real or supposed needs and wishes of the secretary concerning the same. In speaking thus of these diplomatic features of this trial, we are advancing no novel views. Severe animadversions upon them have been reiterated again and again in other quarters. But we do not wish to be understood as undertaking to utter such animadversions. Neither do we wish to be understood as making any unreasonable imputation against the motives of either the counsel or the judge. There can be no question that they were actuated solely by a regard to what they supposed to be the public good. They conceived that they had the best authority for believing that the condemnation of the vessel would be a national advantage, that it could almost be called a national necessity, in view of the great aid which this condemnation would furnish in the negotiations with England. Their patriotic anxiety probably blinded their eyes to the obvious impropriety of introducing such arguments as those which we have narrated above, into legal proceedings which could properly deal only with the facts in evidence and the law bearing upon them. But it would seem to be shown by the history of this case that the question, whether or not it is justifiable to seek to change the established interpretation of a statute, and to overrule decisions, on the ground of public utility, is one of legal ethics on which honorable members of the profession are able to differ.

When the case came upon appeal before Mr. Justice Nelson, it was for the first time stripped of such foreign accompaniments, and was tried by that eminent judge upon the sole basis of its legal merits. It is at this stage that the case becomes very valuable to the profession. Judge Nelson is probably the first authority in the land upon questions of marine and commercial law. His rulings in this case were clear and decisive, and were given without any expression of doubt. It was a piece of great good fortune that the cause fell within his circuit. The evidence which we have above commented upon as hearsay, and a part of which we have narrated, had been admitted by Judge Betts on the ground that it was the testimony of some of several co-conspirators against others. Judge Nelson disposed of it briefly in the statement, that "the principle that Judge Betts lays down is all right; but it does not cover the evidence that was allowed." Referring to the evidence of Conkling, above stated, he suggested, with a certain satirical humor, that "if you want to prove what a person has said, you cannot prove it by one man saying that another said he had said it."

On the matter of the sufficiency of the proof offered, Judge Nelson stated that he regarded it as absolutely indispensable for the government to show some outfit of a warlike nature; some furnishing which had prepared, or aided in preparing, the vessel for belligerent use. Coal and provisions, to the amount which she was shown to have had on board, he did not consider as constituting such a furnishing or fitting out as was contemplated by the use of these phrases in the act. If a simple sale was legal, he said, and that it was so admitted by the government counsel, then fuel and provisions were a necessary concomitant to enable the vessel to leave the port. The naked right of sale, unless it included these indispensable privileges, was an utter nullity. It was ex necessitate rei that if she could be legally sold, she could be legally delivered, and if coal and provisions were requisite to make delivery possible, they could be legally placed on board her. The judge said, "These owners had a right to sell the ship, and the government must make out that she has been fitted and equipped for a military or naval expedition . . . It must be an arming or fitting out for war purposes . . . I do not see any evidence of that fitting out . . . I agree that if the agents of a hostile government should make a contract to build a ship for service in war, then suspicion would commence in the origin of the contract, and very slight circumstances might go to make out the purpose and the intent. But this vessel was built as a war vessel for our own government. Being no longer required for that use the owners had a right to sell her; and therefore, having that right, the mere fact that stores were put on board of her, that were necessary to convey and transfer her abroad to the parties to whom she was sold, forms no ground of suspicion at all; because the right to sell carried with it the right to put on board these provisions and stores. In order to make out that there was a hostile purpose intended, as an expedition against a country with which we were at peace, in violation of this law, you must show there was some fitting out, in the military or naval sense, with intent to commit this hostile act against a government with which we were at peace . . . I do not see that you have made out anything. No munitions of war on board and no evidence that any were to be put on board . . . There was nothing illegal in the furnishing of stores and supplies,—nothing in the act to forbid it. You must connect this with the military or naval expedition, which you have not done . . . I cannot decide this case on conjecture or suspicion . . . I have been waiting for you to show any naval equipment, either in fact or intention." The judge proceeded to say, that, since the prosecuting counsel acknowledged that the vessel might be legally sold to the Chilian government, he

thought, with their evidence, "they might as well give up their case." The want of any proof even that there had been a sale, the judge stated, was one of his "troubles in the case." It was his own impression, from the evidence, that there had been no sale; an opinion, which later in the progress of the cause, he stated decisively. But at any rate, he said, it was a "transparent" fact that there was "no evidence of fitting out within the sense of the act."

Much extraneous matter having been thus cleared away, the judge came to the consideration of the important point of the intent. He said, "I think the only question in the case is one of intent." He considered that the vessel had undoubtedly been furnished with stores and fuel by the owners, with the intent to carry her to Panama, and there or elsewhere, to sell her "to the Chilian government, if they could, or anybody else; knowing, if they sold her to the Chilian government, that she would be employed in the war between Chili and Spain." If this knowledge of the result to be expected upon the fulfilment of a contingency, was a breach of the act the government had made out its case. Judge Betts had declared that it was so. In other words, he had declared that a knowledge of the use to which she would be put was equivalent to, and identical with, an intent that she should be put to that use, as the phrase "intent" was to be construed in the act. That is to say: A sale is legal; but if the seller knows that the thing sold will be used for the purpose for which it is made, and to which it is adapted, the sale is illegal. The reductio ad absurdum is evident. It was well put by Judge Nelson: "I cannot imagine a sale to a government at war that can be upheld upon that doctrine; because, while as a mere commercial transaction the sale of a war vessel is conceded to be legal, yet if you connect with it that the vessel is known to be used by the belligerent against his enemy, then it is illegal. That I understand to be the doctrine of Judge Betts. I do not see, therefore, but that he virtually annuls the right to sell." This point is, doubtless, the most important in the case. It is the point of divergence between the case of the Meteor and the cases of the rebel cruisers. It is the distinction which leaves the former innocent, and makes the latter guilty. The correctness of Judge Nelson's views seems obvious almost to the degree of an axiom. To say that a man may sell a knife, but that he shall not do so if he knows that it will be used to cut with, is an imbecility. Yet the legality of simple sales of war vessels to a belligerent, is a privilege which congress has insisted upon preserving to all American citizens. The history of the legislation on the subject is at once instructive and conclusive. The first neutrality act was passed in 1794. The case of The Mermaid [Case No. 1,897] and the case of Moodie v. The Alfred, 3 Dall. [3 U. S.] 307, which was probably the same case under a different name, decided that under this act a sale of a war vessel to a belligerent was legal. The further legislation in 1797, subsequent to both these decisions, made no change in the act in this respect. In 1816, during the long war between Spain and her South American colonies, the Spanish minister to this country was anxious to have the sale of war vessels wholly prohibited. President Madison consulted Attorney General Rush, concerning the force of the existing law. In the opinion which Mr. Rush returned, he said: "I am aware of no law of the United States that can prevent a merchant or ship owner selling his vessel and cargo (should the latter even consist of warlike stores) to a citizen or inhabitant of Buenos Ayres or any part of South America, nor will it, do I think, make any difference whether such sale be made directly, in a port of the United States, with immediate transfer and possession thereupon; or under a contract entered into here with delivery to take place in a port of South America." 1 Op. Atty. Gen. p. 190 (July 27, 1816). Thereupon the president called the attention of congress to the subject, that they might, if they thought expedient, legislate afresh in the matter. The debates which followed were long, warm, and animated. There can be no question but that the matter was thoroughly discussed, and the conclusion was the deliberate judgment of congress upon the policy which it behooved the United States to maintain. The history of the debate is important. A bill was introduced, entitled "A bill to prevent citizens of the United States from selling vessels of war to the citizens or subjects of any foreign power, and more effectually to prevent the arming and equipping vessels of war in the United States, intended to be used against nations in amity with the United States." The first section of this bill enacted, "that if any citizen of the United States shall, within the limits of the same, fit out, &c., any private ship or vessel of war, to sell the said vessel or contract for the sale of the said vessel, to be delivered in the United States or elsewhere, to the purchaser with intent or previous knowledge, that the said vessel shall or will be employed to cruise or commit hostilities, &c.; such person so offending shall, on conviction thereof, be adjudged guilty, &c." This bill emerged from the hands of our national legislators so wonderfully shorn of its important features as to be scarcely recognizable. Congress did not propose to take away, or in any degree to trammel, the full right, as it then existed, of dealing in vessels of war. So the phrases about "selling vessels of war" disappeared equally from the title and the body of the act which was finally passed in 1817. Neither did it escape the keenness of the statesmen who were engaged in the discussion, that this right of sale would be, as Judge Nelson said, a "mere nullity," if the "previous knowledge" of the seller that the vessel "will be employed" to cruise, &c., were allowed to remain a part of the law. They were resolved to retain the right of sale as a practical right. So when they struck out the words which forbade a sale, they also struck out these words about "knowledge" which would otherwise have been potent wholly to frustrate an essential object of the legislation. The codification in the following year, 1818, constituting the present law, left this matter unchanged. In 1822, the whole subject being still freshly remembered, Judge Story delivered the famous opinion in the case of The Santissima Trinidad, 7 Wheat. [20 U. S.] 283. This sustained the legality of sales of war vessels to one of two belligerents, with the other of whom we were at peace. This has ever since been considered the leading case on the subject. Ten years later, in 1832, it was followed and affirmed in U. S. v. Quincy, 6 Pet. [31 U. S.] 445. Since then, there has been no adjudication until this Meteor Case arose.

In comparing the case of the Meteor with those of the Anglo-Confederate cruisers in connection with this principle that a naked sale is legal if unaccompanied with circumstances showing an illegal intent, we must again seek for a clear exposition of the law, in a quotation from Judge Nelson. He said, "It is impossible to say that these owners of the Meteor took any interest in co-operating with or aiding the Chilian government in war with Spain, or are connected with that idea." Also, we would refer again to his remark previously quoted, that if a vessel were built under a contract made with the agents of a belligerent government, then suspicion would rest upon her from the very inception. In these words of the learned justice, the whole distinction lies as in a nutshell. Precisely those essential circumstances indicative of an illegal intent which were absent in the case of the Meteor, were notoriously present in the cases of the rebel cruisers. Some, at least, of these, were built by a contract, with agents of the Confederate government, and according to specifications furnished by these agents. The English builders, owners, and sellers of all of them certainly "took an interest in co-operating with and aiding" the rebels "in war with" our government, and were "connected with that idea." It was by their

aid, or rather by their sole action, that the armament and munitions of war, the stores and supplies, were placed on board, and the crews were enlisted and shipped. It is on these very facts that we base our demands. The Alexandra was built in pursuance of a contract with, and according to directions furnished by, Confederate agents. The Alabama sailed from Liverpool to a small port near Holyhead; there took in a part of her fighting crew, which had been enlisted in Liverpool; thence sailed to the Azores, and there took in her armament, which was brought to her by two vessels from Liverpool. The Georgia, or Japan, sailed from Greenock, to a small French port in the channel, whither her armament, officers, and crew were brought out to her from Liverpool. The Shenandoah, or Sea King, sailed from London to Funchal, and there received her armament and crew from a steamer which brought them to her from Liverpool; sailing from that port at the same time that she sailed from London. It seems hardly necessary to point out the particulars in which the facts in all these cases transcend the facts in the Meteor Case. In each one of them, the guilty intent is clear. In no one of them did the transaction bear any resemblance to a simple matter of outright bargain and sale. There was "co-operation,"—active, essential, and important "co-operation" and "aid,"—furnished by the sellers to the buyers, up to the very moment when these vessels were completed fighting ships of the Confederate "navy." The English parties intended to do, and actually did, more than merely dispose of ships for cash, after the fashion of the ordinary and innocent sale which was at one time projected by the owners of the Meteor; but which Judge Nelson found that they failed to accomplish. The English vendors lent active, efficient, and indispensable assistance to the rebel vendees, up to the very point of cruising in the vessels themselves. They only stopped short of becoming actual combatants. They were partners in the proceeding up to the very moment when the vessels began to burn and destroy. They took the active part in all the previous undertakings. They built the ships by contract and under directions; they made the arrangements for their departure, and for the simultaneous departure and safe transportation and sure transfer of the munitions and crew, upon receipt of which the vessels were at once in fighting trim. If these circumstances do not constitute proof of an "intent" such as that designated in the statute, then the United States has no case against England; and if they do not show an intent utterly different from an intent to sell outright for cash a wholly unequipped ship, long since built for most honorable purposes, and there to drop all connection with her, then there is no precision or intelligibility in language.

We have forborne to criticise the opinion rendered by Judge Betts, because we have not intended so much to criticise as to narrate. But it is a suggestive fact, that at the trial before Judge Nelson, the district attorney put it in as his brief in the case, because, as he said, it "puts it in a better manner than I can do." Judge Nelson simply rendered a short decree reversing that of Judge Betts, on the ground that the evidence did not sustain the allegations of the libel. The government gave notice of their intention to appeal to the supreme court of the United States, but have since withdrawn their appeal. So the case is closed with the decree of Judge Nelson. Under these circumstances it is to be regretted that his honor did not see fit to write an elaborate opinion discussing both the law and the facts in the case, which must have been of very great value, by reason of the peculiar fitness of Mr. Justice Nelson to adjudicate in causes of this nature. The quotations which we have made, are from his rulings at the hearing before him, and are, of course, much less elaborate than could have been expected in an opinion.

Judge Betts suggested a melancholy consolation for the owners, when he refused to bond the vessel. He said, in case of acquittal, congress might see fit to compensate them for their injuries and losses unjustly incurred. It is not a cheerful prospect for men who have lost money enough to ruin a prosperous merchant, to be remitted to the uncertain success, and the certain vexation, labor, expense and delay, attendant upon the effort to secure reimbursement by a private bill in congress. A rich man might well be utterly ruined if his vessel is to be kept rotting at the wharf, while his case is slowly passing through the many stages of litigation which precede the final judgment. The power of the informer to levy black-mail in such a case is enormous, and wholly disproportioned to the power which it has been deemed safe to allow him in any other class of government prosecutions. We should incline, as a question of law, to consider the argument of Mr. Evarts as conclusive to the effect that bonding is, at least, a matter of discretion, if not of obligation. But the point is a doubtful one and the first action of Judge Betts certainly affords a precedent for holding that bonding is not even permissible. These facts seem to suggest the advisability of some supplementary legislation which should place this important matter upon a certain and a just ground. It would be easy to declare that bonding shall be either obligatory or discretionary, as shall seem good. Also, it would seem quite worthy of a fatherly government to provide some better means than the alarming prospect of an appeal to congress for reimbursing a citizen whom the law declares innocent, and who has, in the course of the litigation which has led to this conclusion, lost, it may be, some hundreds of thousands of dollars. The hardship in these cases is not only vastly greater in degree, but it is entirely different in kind, from the hardship suffered in ordinary cases of governmental prosecution of men, finally found innocent; and seems to admit and to demand some recognized method of restitution, at least, for the injury inflicted upon their property. Such restitution would still leave them, like other men acquitted in government suits, to bear their own costs of court and counsel fees; a rule which is equally unjust and universal, and which it would be hopeless to try to change. But if a ship, worth $200,000 or $300,000, had grown so unseaworthy, that at the close of the trial, she was worth only $50,000 or $25,000, her innocent owner ought certainly to have a surer and an easier remedy than the privilege of lobbying a private bill through congress.

METEOR, The (UNITED STATES v.). See Case No. 15,760.

Case No. 9,499.

The METIS.

[4 Ben. 120.][1]

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

COLLISION — STEAMER AND SCHOONER — COURSES SLIGHTLY CROSSING—CHANGE IN EXTREMIS.

1. The schooner C. was in Long Island Sound, heading west, with the wind east, and sailing wing and wing, with lights properly set and burning. The night was dark, but without fog or haze. The steamer M. was heading east three quarters south, going 8 or 10 miles an hour. The green light of the schooner was seen from half a point to a point on the steamer's starboard bow. The steamer ran on till the schooner was about 300 yards off, when her wheel was starboarded, and her head was swung to port about a point and a half, and she was

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

steadied on a course east by north half north. The schooner's green light suddenly became invisible, and the vessels came together, the steamer striking the schooner on her port side, about amidships. The engine of the steamer was stopped and backed as soon as the green light became invisible. *Held*, that, if the disappearance of the green light had been caused by the schooner's having changed her course, under those circumstances, such change would not have been a fault on the part of the schooner.

2. On the evidence, she did not change her course, and the disappearance of the green light was caused by the steamer's crossing the line of direction of the schooner.

3. The steamer should have starboarded earlier or not at all. She was solely in fault.

In admiralty.

E. H. Owen and R. D. Benedict, for libellants.

J. H. Choate, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the schooner Cosmos, which was sunk and totally lost, with a cargo of lime in barrels, being carried on freight by her from Rockland, Maine, to the city of New York, through a collision which took place between her and the steamer Metis, between 1 and 2 o'clock, a. m., on the 4th of September, 1868. The collision occurred in Long Island Sound, off Plum Island. The Metis was a screw steamer, bound from New York to Providence. The wind was about due east, and blowing an eight knot breeze, at which rate the schooner was going about dead before the wind. The night was dark, but without fog or haze, and a vessel could, irrespective of her lights, be seen at the distance of at least half a mile. The schooner had set, her mainsail, foresail, jib, flying jib and main gaff-topsail, and was heading west.

The answer of the Metis, recognizing her duty to keep out of the way of the schooner, sets up, that the Metis was on her course, heading nearly due east; that those in charge of her discovered the schooner at a distance of about three quarters of a mile, bearing about a point off the starboard bow of the Metis; that only the green light of the schooner was seen; that this indicated that the schooner was on a course to the southward of the Metis; that no red light of the schooner was seen; that the Metis continued on her course, merely putting her wheel to starboard a little, so as to give the schooner plenty of room, but keeping the schooner's green light plainly in view all the time, and seeing no red light on the schooner; that the steamer continued running so, until the vessels had approached very near to each other, and, as near as could be judged, within about 100 to 150 yards, at which time there was a wide berth for the vessels to pass each other, if each kept her course, when suddenly the schooner's green light became invisible, and she made a complete change of her course, bringing her across the bow of the Metis; and that thereupon the engine of the Metis was stopped and backed, but it was impossible to avoid the collision, and the Metis struck the schooner about amidships on the port side.

This defence is thus put wholly on the alleged change of course in the schooner. It is to be noted that the answer puts the green light of the schooner only a point on the starboard bow of the Metis, when discovered; that the Metis does not claim to have done anything except starboard a little; that there is no allegation that, by such starboarding, the green light of the schooner was at all opened, or thrown any more to the starboard; and that the allegation of a change of course in the schooner is based on the fact that her green light became invisible.

The evidence on the part of the Metis shows, that she was running on a course east three quarters south, when the schooner was sighted, sailing winged out, about from half a point to a point on the starboard bow of the Metis; that, notwithstanding the schooner was thus made out nearly ahead, and was seen to be winged out, and, therefore, moving with the full force of a wind dead aft, and the Metis was going at the rate of 8 to 10 knots an hour, the Metis ran on, making no change, until she had approached to within some 300 yards of the schooner, when her wheel was starboarded and her head was swung to port about a point and a half, and she was then steadied on her course at east by north half north; and that, after all this, the schooner bore only from one to two points on the starboard bow of the Metis. This shows that the starboarding of the Metis had no substantial effect in the way of throwing the schooner more on the starboard bow of the Metis, but that the Metis really ran at the schooner. As the Metis was heading east three quarters south, and the schooner was heading west, the courses of the two vessels were in fact crossing. The error of the Metis is shown in her answer, by the statement, that, as she saw only the green light of the schooner, and saw that a point on her starboard bow, she concluded that the schooner was on a course to the southward of the Metis, that is, that their forward courses were not crossing courses. Hence, as her answer says, she did nothing but put her wheel to starboard a little, thinking that all was safe so long as the green light of the schooner was kept in sight to the starboard.

The testimony of the mate of the schooner, who was at her wheel, corroborates this view of the movements of the Metis. He says, that, on the steamer's being reported, by the lookout, as ahead, he looked, and saw her red light, and her forward and after white lights; that the forward white light was a little to the port from him of the after white light; and that this view continued until just before the collision, when the red light of the steamer disappeared, and her green light came into view, and her forward white light went more to the starboard of him than her after white light. This shows that the

courses of the vessels were crossing, and that the Metis did not starboard until she was close upon the schooner, and substantially ran directly at her.

Now, if, under these circumstances, the schooner, running thus rapidly before the wind, and seeing a large steamer coming upon her without making any movement to avoid a collision, had, in alarm, changed her course in the jaws of danger, at a distance off from the steamer, which, at the combined speed of 16 miles an hour, would be traversed in a space of less than 40 seconds, or according to the answer, of not over 20 seconds, such change could not be imputed to her as a fault.

But I am satisfied that there was no change of course by the schooner. The green light of the schooner disappeared, because the Metis crossed the projection forward of the schooner's course. It did not disappear until after the Metis had starboarded and steadied. She did not begin to starboard until she had got within 300 yards or so of the schooner. She must have nearly lost the green light when she starboarded. Her starboarding caused the green light to keep in view a little longer, while she was really running straight at the schooner. Then, as the forward course of the schooner carried her green light out of sight, the Metis, running on, struck the port side of the schooner forward of her main rigging, angling aft. This produced the impression on board of the Metis, that the schooner had changed her course, and had run across the bows of the Metis, at a time when otherwise the schooner would have gone clear, to the southward of the Metis. But the fact was, that the Metis actually ran across the course of the schooner, from north to south, and then, as the result of her starboarding, ran into the port side of the schooner. If she had starboarded earlier, or had not starboarded at all, when she did starboard, there would probably have been no collision. In the former case, she would have passed to the northward, and in the latter case to the southward, of the schooner.

The evidence is satisfactory, that the schooner had her proper lights set and burning. Even if she had no red light burning, as is claimed by the Metis, the absence of it could not have contributed to the collision. She kept her course at all times from the time she sighted the Metis, and she had a proper and competent lookout, who saw and reported the lights of the Metis at some two miles' distance. It being the duty of the Metis to avoid the schooner, it is for her to establish a change of course by the schooner. As the change claimed is one that would have brought the schooner's head to about northwest, the Metis running east by north half north, and the wind being east, it follows that, if the schooner had ported to make such change, both of her booms would have gone to port, and her jibs would have filled to port. But the evidence is satisfactory, that, up to the actual blow, her main boom was off to starboard, and her fore boom to port, and her jibs were hanging amidships, not filled.

There was no fault on the part of the schooner, and the Metis was solely in fault in the collision. There must be a decree pronouncing her liable for the damages caused to the libellants thereby, with costs, and ordering a reference to ascertain such damages.

[The case was heard, at a later date, when exceptions to the commissioner's report were overruled, and the report confirmed. Case No. 9,500.]

Case No. 9,500.

The METIS.

[5 Ben. 203.][1]

District Court, S. D. New York. June, 1871.

COLLISION—DAMAGES—TOTAL LOSS—INSURANCE—PARTIES.

1. In a case of collision for the sinking of a schooner by a steamer in Long Island Sound, the libel alleged that the schooner was "sunk," and the answer admitted that "the schooner with her cargo was sunk and lost." The steamer was held liable, and the commissioner, to whom it was referred to ascertain the damages, reported, as such damages, the whole value of the schooner and her cargo. Exceptions were filed to the report, because the commissioner had allowed such whole value in the absence of any proof that the libellants had tried to raise the vessel, or that she could not be raised; because he had allowed such whole value although one of the libellants who owned half of the schooner had insurance on her, and had been paid by the insurers for a total loss; and because one-half of the cargo was the property of a party who was not a libellant: *Held*, that, on the pleadings, no proof was necessary that the schooner could not be raised.

2. The facts in relation to the insurance constituted no defence.

3. The owners of the schooner, who were carriers of the cargo, could recover for the damage to the cargo, without joining the other owner of it as a libellant.

In admiralty.

Owen, Nash & Gray, for libellants.

Evarts, Southmayd & Choate, for claimants.

BLATCHFORD, District Judge. These are exceptions to the report of the commissioner in a case of collision, wherein the schooner Cosmos, and her cargo, were sunk by the steamer Metis, and there was a decree for the libellant. [Case No. 9,499.]

The first, second and third exceptions may be considered together. The first exception is, that the commissioner improperly received evidence of the value of the schooner at the time of the collision, as fixing the amount of the damage to her, instead of requiring evidence as to the amount which it would have cost to raise and repair her. The second exception is, that the commissioner erred in allowing $5,000 for the

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

schooner, on the basis of her value at the time of the collision, without evidence of any efforts, on the part of the libellants, to raise and repair her, or that the circumstances of her sinking were such that she could not have been raised and repaired, or that the cost of raising and repairing her would have exceeded or equalled her value after the repairs were made. The third exception is, that he commissioner erred in allowing $5,000 for the schooner, as damages, without any evidence on which an assessment of the damages could be properly computed. The commissioner allowed for a total loss of the vessel, and for her value when lost. The claimants insist, that the libellants should have shown that they tried to raise her and failed, or that she could not have been raised and repaired, or that the cost of raising and repairing her would have at least equalled her value after being repaired. She was sunk in the night, in Long Island Sound, off Plum Island, going down in some two minutes after the steamer struck her, and her cargo was 1,123 barrels of lime. The libel alleges that she was "sunk" by the steamer; that she "sank" so quickly that the officers and crew with difficulty saved their lives; and that the steamer ran against her and "sank" her. The answer states, that, in consequence of the collision, the "schooner, with her cargo, was sunk and lost." This state of the pleadings is sufficient to relieve the libellants from showing that the vessel was totally lost by the sinking, or that they tried to raise her, or that she could not have been raised, or would have been worth less than the cost of raising and repairing her. The case is not like that of The Baltimore, 8 Wall. [75 U. S.] 377. In that case the libel alleged that the vessel and cargo were sunk in such deep water as to make both of them a total loss. That allegation was expressly denied by the answer, and the libellants failed to introduce any proof to support their allegation. In the present case, there being no other proof, the allegation of the answer is sufficient proof that the vessel was so lost as to have been totally lost.

The fourth, fifth and sixth exceptions go to the point, that the allowance of $5,000, as the value of the vessel, was excessive, on the evidence, and that the amount allowed for such value should not have been more than $3,600. I think that the commissioner was fully justified in fixing the sum of $5,000 as the value of the vessel.

The seventh exception is, that the commissioner erred in allowing the $5,000, on the basis of the value of the whole of the vessel, and that he should not have allowed more than one-half thereof, inasmuch as one-half of the schooner was owned by the libellant Hall, and such interest of his was insured, and the underwriters had paid him $1,500, as and for a total loss thereon, and had thereby become the owners of the claim for the damages to such one-half interest, and Hall no longer had any interest therein. This defence, in substance, was taken in the answer. Such a defence was expressly overruled in the case of The Monticello v. Mollison, 17 How. [84 U. S.] 152, 155. See, also, Newell v. Norton, 3 Wall. [70 U. S.] 257, 267.

The eighth exception is, that the commissioner erred in allowing $1,263.67, for loss of cargo, on the basis of the full value thereof, without evidence as to the ownership of the cargo, except as to the one-half interest therein owned by the libellant Hall, and without evidence as to whether the vessel or her owners were liable to the owners of the cargo for the loss of the cargo or any part thereof. The cargo was owned by the libellant Hall and another person jointly. Such other person is not a libellant. Hall was master of the schooner. The cargo was being transported on freight. The owners of the vessel are libellants. As such owners and carriers of the cargo on freight, the libellants can recover for the damage to the cargo, without the joining, as co-libellant, of the person who, jointly with Hall, owned the cargo. The Commander-in-Chief, 1 Wall. [68 U. S.] 43, 51, 52; The Commerce, 1 Black [66 U. S.] 574, 582; Newell v. Norton, 3 Wall. [70 U. S.] 257, 267.

The ninth and tenth exceptions, which relate to the value of the personal effects belonging to the libellants Hall and Grindle, are overruled.

All of the exceptions are disallowed, and the report is confirmed.

Case No. 9,501.

The METROPOLIS.

[Betts' Scr. Bk. 694.]

District Court, S. D. New York. June, 1862.

COLLISION—PASSENGER STEAMER—LOOKOUT — OBLIGATION TO CARRY LIGHTS—DEFENSE—VESSEL LOST WITHOUT LICENSE.

[1. It is no defense to a libel for a loss by collision that the vessel lost was engaged in the coasting business without any license as required by law.]

[2. It is inexcusable negligence for a large passenger steamer navigating Long Island Sound at night not to have a lookout other than the pilot in the pilot house.]

[3. The absence of a lookout forward on a large steamer navigating Long Island Sound on a moonlight night at great speed will be held to have contributed to a collision with a small propeller, which should have been seen by a competent and diligent lookout in time to have avoided the collision.]

[4. Local inspectors cannot release a vessel from the obligation to carry colored lights as provided by law.]

[5. The fact that a steam propeller sunk in a collision did not carry her mast light at a proper elevation, and carried no colored lights, as required by law, will not prevent a recovery where the colliding vessel, travelling at great speed on a moonlight night, had no lookout, and her pilot

would not have seen the colored lights had they been carried, did not see the bow light, and in fact saw the mast light in ample season to have avoided a collision.]

[This was a libel by The New London Transportation Company, owners of the steam propeller J. N. Harris, against the steamboat Metropolis and William Brown, master, for collision. The Bay State Steamboat Company appeared as claimants.]

E. C. Benedict, W. R. Beebe, and W. Q. Morton, for libellants.

F. B. Cutting, for claimants.

SHIPMAN, District Judge. This suit is instiuted by the libellants, owners of the steam propeller J. N. Harris, to recover damages suffered by the latter in a collision with the steamboat Metropolis, owned by the claimants. It appears from the proofs taken in the case that the two boats, at the time of the collision, were running regularly through Long Island Sound; the Harris between New York and New London, and the Metropolis between New York and Fall River. The Harris was a small vessel, a little over two hundred tons burthen, and of power proportionate to her size. Her business was principally the transportation of freight, though she carries some passengers, and had several on board at the time of the accident, which has given rise to the present controversy. The Metropolis belonged to the largest class of side-wheel passenger steamers, and was capable of moving with great speed and power. At the time of the collision the vessels were pursuing opposite courses, the Harris being bound from New York to New London, and the Metropolis from Fall River to New York. They met and collided in the open Sound, a few miles to the south, and eastward of New Haven Light, the Harris having passed it about an hour before. Both boats were moving at the time of the collision, the Harris very slowly, and the Metropolis at a high rate of speed. The latter struck the Harris about twelve feet forward of her pilot house, cutting her nearly in two, and sinking her almost instantly. The owners of the Harris have filed this libel, and are seeking to recover for the injuries suffered by their boat. The disaster was a very serious one, involving a considerable loss of life, as well as large damage to property. But the only question presented for our consideration on the merits of the case is that which relates to the cause of the collision.

The claimants have raised a question of a preliminary character, which if it prevails, must operate as a complete bar to the suit. It is proper, therefore, to consider it before we proceed to the other points of the controversy. This point is founded on the alleged non-compliance of the Harris with the regulations of the coasting-trade, and the equipment of steamers as prescribed by the several acts of congress relating thereto. The second section of the act of July 7, 1838 [5 Stat. 304], "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam,"—provides, "that it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, * * * without having obtained from the proper officer a license under the existing laws, and without having complied with the conditions of this act." The act fixes a penalty of five hundred dollars for every violation of this provision. The license referred to in the act cited is conceded to be the coasting license provided for by the act of February 18, 1793 [1 Stat. 305], and which is to be issued by a collector,—in this case by the collector of the port of New London. The act of August 30, 1852 [10 Stat. 61], was an act to amend that of July 7, 1838; and section one provides "that no license, register or enrolment, under the provisions of this act or the act to which this is an amendment, shall be granted, or other papers issued, by any collector, to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which this is an amendment." This act of August 30, 1852, also provides for the inspection of hulls and boilers of steam vessels, by officers appointed for that purpose, who are to give certificates of such inspection, and of their approval of the equipment of the boats.

The Harris took out her annual coasting license on the 11th of August, 1857, which was, by its terms, to continue in force one year and no longer. The accident occurred on the morning of the 15th of August, 1858, at about 2 o'clock. It is conceded that no new license had been taken out. The claimants insist that the license had expired, and that the Harris was, at the time of the collision, running in violation of law. The libellants contend that by the terms of the 9th section of the act of 1793, the Harris had three days after her return to the district of New London, within which to deliver up her license, she being out of the district when the term for which it was granted expired, and that it was still in force at the date of the collision. On this claim of the libellants I express no opinion, but proceed to consider the point as raised by the claimants. Their argument is that the Harris was at this time engaged in prosecuting an unlawful voyage,—she was carrying freight and passengers without a license and without a certificate in viola-

tion of the statute, and for which she and her owners were liable to heavy penalties, and are therefore not entitled to come into this court or claim damages for injuries received in this collision while she was thus illegally employed. Two cases have been cited as directly supporting this proposition, together with others which are claimed to rest on analogous principles. The first case cited is that of The Maverick [Case No. 9,316], determined by Judge Sprague in the district of Massachusetts. An attentive examination of this case satisfies me that it does not sustain the position assumed by the claimants in the present suit, although some remarks of the learned judge, in his opinion, would seem to favor that view. The libellant in that case was the mate of a brig which had run a warp or line across the track of a ferry in Boston harbor, and the Maverick, a steamboat, ran forcibly against the line, in which the leg of the libellant had become entangled, by which he was seriously injured. The libel was brought to recover damages for this injury, and the defense justified this forcible act by pleading a license to run the ferry. This license the owners of the Maverick held by assignment from the original grantees. The court held that a license to run a ferry, under the statutes of Massachusetts, was not assignable; that the defendants took nothing by the assignment, and that therefore the defence failed. The other case referred to on the argument is that of The Leopard [Id. 8,264], and is very similar to that of The Maverick [supra]. The doctrine of the latter case is cited by Judge Ware in giving his opinion in that of The Leopard; and it must be admitted that he seems to take the same view of its effect as that urged by the learned counsel for the claimants in the case now under consideration; but I do not understand him either to affirm or deny the principle which is inferred he regarded as laid down in the case of The Maverick.

But on this principle, I do not think the doctrine now contended for can be sustained. There is no logical or legal connection between the failure of the Harris to obtain the renewal of her coasting license and the collision which resulted in her destruction. She was not absolutely prohibited from being on Long Island Sound and in the vicinity of the accident, nor is it necessary for her to justify her presence there by showing a license of any kind, although it might have been unlawful for her to have been engaged in the business covered by a coasting license. In the case of The Maverick, it must be remembered that, according to the facts there shown, the warp of the brig was rightfully in the place where it was struck by the steamboat, as against all but ferryboats, and in order to maintain the right to move forcibly against it, any vessel would have been required to justify under an authority resting on a ferry grant, and thus show a right superior to that of the brig. There was no right in common there. The warp of the steamboat must give way, and the latter could only claim the exclusive right by a justification under a special grant. That justification failed. But in the cases of the Harris and Metropolis, neither had or claimed any exclusive right to navigate Long Island Sound, in the exercise of which it became necessary for one to yield to the other. It was in the attempted exercise of no such right that the disaster occurred. When congress enacted the law requiring steamers to take out a coasting license, and have a certificate of proper equipment, before carrying passengers, fixing penalties for non-compliance, surely it was not intended that the penalty of outlawry should be superadded. This would vastly enhance the dangers of steamboat travel, which it was the object of the act to diminish, and invite collisions by exempting the colliding boat and its officers from the consequences of their carelessness or recklessness. It would have been equally unlawful for the Harris to have had on board gunpowder or other explosive substance, without a special license for that purpose, as provided by the seventh section of the act of 1852, and while a violation of that provision would have subjected her to a penalty, I apprehend that such an omission to comply with the law would hardly be urged as a ground upon which she should be deemed an outlaw on the waters, and her right to any redress for any injuries arising from the negligence of others wholly denied.

The case cited from 10 Metc. (Mass.) 363 (Bosworth v. Inhabitants of Swansey), evidently rested on the local laws of Massachusetts as expounded by her courts. It was a suit at law to recover damages received by the plaintiff while traveling on a defective public highway which the defendants were bound by law to keep in repair. The opinion of the court states the law of Massachusetts to be such, that in order to recover, the plaintiff must prove himself to have been wholly without fault, and that inasmuch as he was, when he received the injury complained of, traveling on the highway on Sunday, in violation of a statute of the state, he must be deemed to be in fault and therefore not entitled to recover. The application of the doctrine of that case to cases of collision would be a novelty in maritime law. The other cases cited by the claimants' counsel on the argument had their inception in contracts prohibited by law, and rest on the well-known principle that courts will lend no support to such contracts nor to any rights growing out of them, and therefore have no bearing on the present question. The preliminary objection to the right of the libellants to a standing in court must therefore be overruled.

We come now to the consideration of the merits of this case, and the only points which I regard as demanding any extended inquiry are those which charge the Harris with being in fault. I have carefully examined the

evidence and considered the able arguments which have been offered to exculpate the Metropolis; and though I am aware that in regard to the comparative degree of care and circumspection required of large passenger steamers when meeting propellers and sailing vessels, the law has been carried to the verge of rigor, still I am satisfied, that under its most liberal interpretation, there is no escape from the conclusion that the Metropolis was in fault on this occasion. She had no lookout. This was an inexcusable neglect in a vessel like her. The law in this respect is well settled, and so familiar that the citation of authorities would be superfluous. It is in vain to urge that the pilot was acting as a lookout. It is admitted that he was in the pilot-house, engaged in directing the navigation of the steamer. He could not, while thus employed, be such a lookout as prudence and safety required, nor such a one as the law, as settled by repeated decisions in both the circuit and supreme courts, requires. The duties of his position as pilot were of the most responsible and exacting character, and, if properly attended to, disqualified him from exercising that single eyed diligence which is demanded from a lookout. The latter should have no other duty to perform, no other employment to distract his attention. He should occupy the most favorable position for scanning the path of his vessel, should be isolated from everything that can divert his mind from the single duty before him, and be wholly relieved from all other anxieties or cares. That the pilot of an immense steamer, moving in the night in a great thoroughfare like Long Island Sound, in a track frequented by other vessels, and at a high rate of speed with all the duties and responsibilities of such a position resting on him, is not such a lookout as I have described, needs no argument to prove. That this collision, with all its disastrous consequences, resulted from the failure of those in charge of the Metropolis to discover the Harris, what she was, and the course she was steering, in season, there can be no doubt; and that the absence of a lookout contributed to the accident is equally clear. Indeed, in view of the clear proof that the weather was clear and the moon two hours high at the time, it is difficult to see why a lookout, if he was attending to his duty, would not have discovered the Harris in ample season to have cleared her, even if she had no light visible. Suppose she had been a sailing vessel in motion, and without lights. What justification would the Metropolis have to present for colliding with her under such circumstances, and when running at such great speed? That the night was sufficiently light to have discovered even a sailing vessel without lights, is evident from the speed of the Metropolis. No pilot would have risked such a boat and the lives of man, passengers by going at such a speed, unless it was light enough to have seen vessels far enough ahead to have cleared them. I therefore think the irresistible conclusion is, that the absence of a lookout on the Metropolis was not only a grave fault, but one which directly contributed to the disaster.

But it is insisted that the Harris was also in fault, in particulars which ought to bar her claim for damages altogether, or at least reduce the amount, under the familiar rule that where both vessels are in fault the damages must be apportioned. Among the faults charged on the Harris, and the only ones I deem it important to dwell upon, are—(1) Want of a good lookout. (2) Improper location of her stern or masthead light. (3) Want of colored side lights. (4) Total absence of a bow light, or at least of one sufficiently bright to have been discovered by the Metropolis in time. It is proper, in this place, to note the leading circumstances under which the steamers approached each other,—the state of the sea, the degree of darkness which prevailed, their rate of speed, and the movements made by each on the discovery of the other. There was nothing in the state of the weather or sea tending to embarrass either vessel, or in any degree to produce the disaster. The night was comparatively calm, and the water tranquil, and both boats were under the perfect control of their navigators. The night, if not very light, was certainly far from dark. The moon was nearly two hours high. There was no fog or mist, or obstruction of any kind to obscure their view of each other. When five miles apart they were approaching each other nearly head and head; the Harris moving through the water at the rate of six or seven, and the Metropolis at the rate of sixteen or seventeen miles an hour. The former was a small propeller of about two hundred tons; the latter, a side-wheel steamer of about 2,000 tons. The pilot of the Harris discovered the Metropolis not far from five miles off, about half a point on his port-bow, and as they were approaching each other nearly head and head, very properly ported his helm to pass to the right. The lights of the Metropolis were distinctly visible when she was first discovered by the pilot of the Harris. Precisely at what distance the pilot of the Metropolis discovered the stern or masthead light of the Harris, is not easy to determine. His testimony on this point is uncertain and very unsatisfactory. The first he saw was this stern light which was fastened to the stay at an elevation of forty or fifty feet from the deck. This light he mistook for a star, and it suddenly disappeared from his view. He is wholly unable, either by an estimate of time or distance, to furnish the court with any means of determining how far off the Harris was at this time, when he first caught a glimpse of her light; but as it was a globe lantern, and according to the evidence was burning brightly at the time, he must, unless his vision was very imperfect, have discovered it when several miles distant; and had he known what she was, and the course she was steering, he could have cleared her with-

out any difficulty. The light very soon re-appeared but how soon he is equally unable to give even an approximate idea. This light, both when it was first discovered and when it re-appeared, bore, the pilot says, about a point or a point and a half on the starboard bow of the Metropolis. When he saw it the second time, he concluded that it was the light of a propeller bound westward, and starboarded his wheel to pass to the left of her. He immediately discovered her sails, and for the first time attempted to check or stop the speed of his boat, and at the same time hove his wheel hard astarboard; but it was too late. She struck the Harris nearly at right angles, cutting far into her, and sinking her almost instantly. At the instant of collision the Harris must have been heading nearly south by east, and the Metropolis about southwest. The pilot of the Harris, when he discovered that the Metropolis had changed her course and was bearing down for the former, ported his wheel again and nearly stopped her before she was struck.

It will at once be seen, from this statement of the position and course of the two boats, from the time the pilot of the Harris discovered the Metropolis, and when, or nearly when, the former ought to have been seen by the pilot of the latter, that there was great negligence somewhere, or the accident would never have happened. That the speed of the Metropolis ought to have been checked at once when the stern light of the Harris was discovered is very certain, especially as the pilot of the former does not pretend he then saw her hull or sails, and therefore could have no knowledge of the direction in which she was moving. It may be said that the collision might still have happened if any effort had been made to stop her; but this is by no means certain. The great difficulty in finding any fact in this part of the case which can excuse the Metropolis, is that her pilot seems wholly oblivious as to time or distance at this fatal point of his voyage. To hold a steamer like her blameless in running without a lookout, and at such a rate of speed after she has discovered a vessel's light in her vicinity and ahead of her, and while her officers are wholly ignorant of the character and course of that vessel, would encourage recklessness and greatly enhance the dangers of navigation.

We now come to consider particularly the charges of fault made against the Harris; and 1. The want of a proper lookout. I think upon this charge the evidence wholly fails, and can come to no other conclusion than that she had a proper lookout and that he was on duty, and remained in his position at the expense of his life.

2. The improper location of the stern or mast-light of the Harris. This may be disposed of in few words. The light was at a proper elevation, was sufficiently bright, was seen by the pilot of the Metropolis, even when he discovered it the second time, far enough off to have enabled him to have cleared her, had he known what she was, and the course she was steering.

3. The third charge is that the Harris did not have the colored lights prescribed by the regulations of the supervising inspectors. This point was elaborately discussed on the argument, but from the view I take of the proofs, I do not feel called upon to dwell upon it here. I do not, however, assent to the position of the libellant's counsel, that if the regulations of the supervising inspectors, requiring propellers to carry side lights, was valid, the Harris was released from all obligation to conform to it by the act of the local inspectors. In my judgment, the local inspectors are clothed with no power to abrogate such a regulation, or to release any particular vessel from obligation to comply with it. For the purposes of this case, I assume the rule requiring these lights to have been valid and binding on the Harris, and I also assume, for the same purpose, as correct, the proposition of the claimants' counsel, that "the burden of proving that the collision was not caused or superinduced by their absence, and that the accident would equally have happened if she had had these lights," is on the libellants. I regard the evidence of the pilot of the Metropolis as conclusive, that if the Harris had had the regulation lights he would have failed to have seen them. He did not discover her bow light at all, and in the view in which I think that light is placed by the evidence, it is hardly possible, failing as he did to see it at any time, that he would have discovered one of these colored lights, if the Harris had had them set. There was no lookout, who with greater vigilance and keener vision, might have discovered both the side and bow lights. If this be a correct view of this point, then the absence of the regulation lights of the Harris had no connection with the causes of the disaster and no injurious consequences can attach to her owners in this suit for that omission.

4. That the Harris had no bow light or at least an insufficient one. From the testimony of Capt. Smith of the Harris and the passengers, Morning and Orr, it is evident that a light was trimmed and placed in the box on the bow, at the proper time. Nor can there be much doubt that this light when so placed there, and for some time after, was sufficient to have enabled the pilot of the Metropolis, or a sufficient lookout, to have discovered her in ample time, to have given her a wide berth. What the condition of that light was during the time the vessels were approaching each other for the last five miles preceding the collision is not so clearly proved, and it is on this point alone that I have felt some doubt as to the conclusion to be drawn from the evidence. The proofs show that the oil with which the lamp was supplied was of good quality, and the evidence of Graves and Flannagan, hands on board the Harris, warrants the conclusion that it was burning tol-

erably brightly at the time of the collision. I think the evidence of Johnson, the watchman on board the Metropolis, tends to confirm their testimony. It is quite evident that the light he discovered, and which he thought at first was light in a schooner's companionway or binnacle, and afterwards supposed it to be in the engine room of the Harris, was the bow light of the latter; and his error is accounted for by the resemblance of the sash in the light box to a window. The failure to sight this light in time to ascertain the course of the Harris must therefore be attributed, not to the feebleness of the light, but to the absence of a proper lookout who could have discovered it.

From this point of the evidence, it follows that the Harris is not chargeable with any fault which contributed to the accident, and for which her owners are to be held responsible in this suit. And in coming to this conclusion, I assume the light produced in court to be the one which the Harris had on her bow, and while I by no means intend to intimate that in my opinion such a light is a sufficient one for a propeller on all occasions, I think it was adequate on the night and under the circumstances of this disaster; and that had there been a proper lookout on board the Metropolis, the Harris would have been seen, and both her lights sighted in season to have cleared her. Indeed, as already remarked, it is difficult, considering that state of the weather and atmosphere which prevailed, to see why a good lookout could not have discovered her sails and hull soon enough to have enabled the Metropolis to have avoided her, and it is more difficult to discover anything in the testimony of the pilot of the Metropolis which would justify the inference that he would have discovered a bow light on the Harris, even if she had had one of the precise character which the claimants insist she should have had.

There were other points raised on the argument, and pressed with great learning and ability, but the conclusions to which I have arrived render our examination of them unnecessary in this place. A decree must be entered for the libellants with an order of reference to ascertain the damages.

During my examination of the voluminous evidence in the case, I have felt a never absent though unavailing regret that the case could not have been decided by the able and lamented judge who presided at the trial when the proofs were taken, and whose comprehensive, exact and luminous judgment would have shed light on every branch of the controversy. The most diligent perusal and comparison of the mass of evidence has doubtless failed to present the facts to my mind with that clearness with which they were revealed during the narrative of the witnesses; and if I have erred in the view which I have taken of the case, that error can be corrected by a higher and more competent tribunal.

Case No. 9,502.

The METROPOLIS.

[8 Ben. 19.][1]

District Court, S. D. New York. Feb., 1875.

MARITIME LIEN—SUPPLIES—CHARTERED VESSEL—CREDIT.

The steamboat Metropolis, belonging to the N. S. S. Co., a Rhode Island corporation, was chartered to the N. J. S. R. R. Co., a New Jersey corporation, the latter to victual and man her and pay all her bills. Supplies were furnished to her in New York by P. & V. W., who claimed a lien upon her therefor. It appeared, that the supplies were furnished on printed requisitions bearing the name of the N. J. S. R. R. Co., and signed by G., as the agent thereof; that G. was also the purchasing agent of the N. S. S. Co.; that supplies for steamboats belonging to and run by that company were also furnished by P. & V. W., on requisitions made out in the name of the N. S. S. Co., and signed by G., as agent thereof; that all bills for such supplies were promptly paid; that the N. S. S. Co. was in good credit; that the bills for the supplies in question were made out to the steamboat Metropolis and owners; and that P. & V. W. went to one place to obtain pay for bills of supplies obtained for the N. S. S. Co., and to another for those obtained for the N. J. S. R. R. Co., and some times took the notes of the respective companies for the respective bills. *Held*, that, on these facts, the supplies in question were not furnished on the credit of the steamboat Metropolis, and the libellants had no lien on her therefor.

[Cited in The Mary Morgan, 28 Fed. 200; The Aeronaut, 36 Fed. 499.]

In admiralty.

Salter & Cowing and E. H. Owen, for libellants.

William Allen Butler and T. B. Stillman, for claimant.

BLATCHFORD, District Judge. The libel in this case alleges that the engineer and master of the steamboat Metropolis obtained from the libellants certain articles of engineer supplies and ship chandlery for the use of said steamboat; that the same were for the use of and were delivered on board of said steamboat, in the port of New York, in June, July, August, September and October, 1873; that said articles were delivered on the credit of the vessel's bottom; that at the said times the said steamboat was a foreign vessel, and was owned by the Narragansett Steamship Company, a Rhode Island corporation; and that said articles were necessary and proper for the use of said steamboat. The libel prays for process against the vessel and that she may be condemned.

The Narragansett Steamship Company appears as claimant of the steamboat, and its answer avers that at and before the times mentioned in the libel, it being a Rhode Island corporation, was the owner of the said steamboat, and had chartered her to the New Jersey Southern Railroad Company, a New Jersey corporation; that, by the terms of said

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

charter, the latter company was to victual the vessel, furnish supplies, keep her in good order, and pay all her bills while navigating under said charter; that, in pursuance of said charter, the latter company took possession of the vessel and navigated her under said charter during all the time mentioned in said charter; that the latter company was also the charterer of other steamboats upon the same terms and conditions; that such facts were known to the libellants; that work and labor were performed, and materials were furnished, by the libellants upon and to all of said vessels, and were done, performed and furnished upon the credit of the latter company, and not upon the credit of the Metropolis, and in law constituted no lien upon said vessel; that the labor done and the materials furnished to the Metropolis were not done, performed or furnished upon the credit of said steamboat, and did not constitute any lien upon her; that the claimant, as owner, is not liable for said claim; and that, therefore, it cannot constitute any lien upon the vessel.

The case was tried entirely upon testimony brought out in the presentation of the case on the part of the libellants, the claimant not having called any witnesses. The libellants were furnishers of engineers' stores and ship chandlery, keeping a store in the city of New York, and the articles in question were furnished from such store and were supplied to and were used on board of the Metropolis. They were all of them ordered by requisitions, each of which was partly in writing and partly in print, being a printed blank filled up. The blank as printed, read thus:

"Be careful to obtain receipts for stores delivered. New Jersey Southern Railroad, Purchasing Agent's Office, Pier 28, North River.

No. New York, 1873.

M Please supply

with the following specified articles, viz.:

"Purchasing Agent.

"Note. Please render bills promptly and write therein the number and date of each requisition."

Each requisition had its number, and its date by month and day, and the names of the libellants, and the name of the steamboat Metropolis, and the description of the articles to be supplied, filled into the proper blanks; and each was signed "A. Gould" before the printed words "Purchasing Agent." The Narragansett Steamship Company was, at the same time, obtaining supplies from the libellants for steamboats owned by it, which it was running itself, and which were not run by the New Jersey Southern Railroad Company under charter; and the libellants, at the same time, were furnishing supplies to boats other than the Metropolis, which were run by the latter company. A. Gould, the same person who was purchasing agent for the one company, was purchasing agent for the other company. The two companies had a common office in the city of New York, where Gould transacted such business of each company as related to supplies for the boats run by the respective companies. The libellants furnished supplies to the boats run by the Narragansett Steamship Company on printed blank requisitions filled up, which were in printed form, like the printed forms of the requisitions for the supplies furnished to the Metropolis, except that they were headed in print "Narragansett Steamship Company." They were signed "A. Gould, Purchasing Agent." The libellants delivered their bills to Gould, at his said office, for the supplies furnished to the several boats run by the two companies respectively. The bills for the supplies in question were made out to "Steamer Metropolis and owners." When the bills were rendered to Gould, he sorted them out, and, in accordance with his directions, the libellants went to one place to get pay for the articles supplied to the boats run by the Narragansett Steamship Company and to another place to get pay for the articles supplied by the New Jersey Southern Railroad Company. In the course of such business the libellants took, for some of their bills for the former articles, promissory notes made by the former company, and for some of their bills for the latter articles promissory notes made by the latter company. All notes ever given to the libellants by the former company were paid, and all supplies ever furnished by the libellants to boats run by the former company have been paid for.

On the foregoing facts, this case presents a very different aspect from one where supplies are furnished to a vessel in a foreign port, on the order of her master. The libellants could have no claim against the Narragansett Steamship Company for the supplies furnished by them to the Metropolis, furnished under the circumstances and on the requisitions shown in evidence. It was clearly understood by the libellants that they were not supplying the Metropolis on requisitions made by or for the Narragansett Steamship Company. In receiving the requisitions for the supplies to the Metropolis, and in furnishing such supplies, the libellants recognized Gould as acting solely as purchasing agent for the New Jersey Southern Railroad Company, and in its behalf. They knew the distinction between the two companies, and they knew, from the requisitions made in the names of the two companies respectively, that the supplies to the Metropolis were not furnished by them on requisitions made by Gould as purchasing agent for the Narragansett Steamship Company, while supplies to other boats were furnished by them on requisitions made by Gould as purchasing agent for that company. On all the facts it must be held, that the supplies were not furnished to the Metropolis on her credit, or on the credit of herself and of the Narragansett Steamship Company, as her owners. It clearly appears that the Narragansett Steamship Company had credit, upon which supplies, if

to be obtained by or for them, for the Metropolis, could have been obtained, and that the libellants knew that. Within the principles laid down in the case of The Grapeshot, 9 Wall. [76 U. S.] 129; The Lulu, 10 Wall. [77 U. S.] 192; The Kalorama, Id. 204; and The Patapsco, 13 Wall. [80 U. S.] 329,—no lien was created on the vessel in favor of the libellants, and the libel must be dismissed, with costs.

Case No. 9,503.

The METROPOLIS.

[9 Ben. 83.][1]

District Court, E. D. New York. March, 1877.

MARITIME LIEN—PRESUMPTION OF CREDIT — BURDEN OF PROOF.

1. Where necessary supplies, furnished to a foreign vessel, were procured by a steward, authorized to get them but appointed by a railroad company then using the boat: *Held*, that the owners, by permitting the appointment of the steward with authority to procure supplies, must be considered to have consented that supplies be procured in the ordinary way, upon the credit of the vessel;

2. That on the question of fact whether the supplies were furnished upon the credit of the vessel, the burden is upon the claimants, the presumption being that necessary supplies are ordered upon such credit.

The Narragansett Steamship Company, owning several vessels, made an arrangement with the New Jersey Southern R. R. Co., for the use of their boats to run from Sandy Hook to New York, when required, and carry the railroad company's passengers at so much per day, the railroad company to furnish supplies, materials and crew. Thereupon the railroad company put a steward on the Metropolis, one of the Narragansett Co.'s steamboats, to keep and supply a restaurant on board, who bought supplies, the requisition being made out "The New Jersey Southern Railroad Company, to James M. Fuller, Dr.;" which were delivered on board and used on the boat, in the restaurant. Fuller and Derry, another contractor, furnished supplies, also, to four other steamboats under the same arrangement and circumstances; and the railroad company having become insolvent and passed into the hands of a receiver, actions were brought to enforce liens upon all the vessels, but only one set of proofs was taken, applicable to all the cases. Opinions were rendered and final decree made in all the cases; but the facts being the same, only this one and the case of The Long Branch [Case No. 8,484] are reported.

Beebe, Wilcox & Hobbs, for libellants.
Shearman & Sterling, for claimants.

BENEDICT, District Judge. This is an action to enforce a lien against the steamboat Metropolis for provisions supplied to that vessel during the months of July and August, 1873, at the city of New York. The libel avers that the provisions in question were necessary for the vessel in her employment, and were furnished upon the credit of the vessel, she being a foreign vessel.

The claimant of the vessel is the Narragansett Steamship Company, which sets forth by way of defence that the supplies in question were furnished to, on the order and solely on the credit of the New Jersey Southern Railroad Company, and no lien upon the vessel was created thereby.

The evidence shows that the work in question was ordered by the master of the vessel, whose authority to give the order has not been disputed. The vessel was a foreign vessel, being owned by the Narragansett Steamship Company, a foreign corporation. The president of this corporation was Jay Gould, who was also the president of the New Jersey Southern Railroad Company, at this time operating a railroad from Sandy Hook, Long Branch and Philadelphia, and running in connection with the railroad a line of steamboats from Sandy Hook to the city of New York, a distance by water of some twenty miles.

Between these two corporations the proofs show an arrangement to have existed, that the steamboats of the Narragansett Steamship Company should run for the New Jersey Southern Railroad Company, on their route from and to Sandy Hook, as they might be wanted by reason of accident to the boats of the railroad company, or other necessity. This arrangement was verbal, for no definite period of time and for no particular days or specified voyages. The railroad was to pay for the use of the boats by the day when they were used. The price for the Metropolis, when used, was $100 per day, the railroad company to furnish the supplies, materials, and crews.

By virtue of this agreement, the Metropolis made various irregular trips on the route between Sandy Hook and New York, making in all eighty-three days during the season of 1873.

It may perhaps be assumed—unless some evidence has escaped my attention, owing to the confused and improper method adopted in taking the testimony of five different cases all together—although the evidence hardly proves the fact, that the provisions in question were to enable the boat to make one or more of these trips between Sandy Hook and back. If so, according to the arrangement between the two companies, as between the railroad company and the Narragansett Steamship Company, the expense of these provisions was to have been borne by the railroad company. The provisions were ordered by the steward of the boat, appointed by, and acting under the authority of the railroad company, and were delivered on board of and used by the boat. The requisi-

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

tion for the articles was headed, "New Jersey Southern Railroad Company, Steamer Metropolis, received from James M. Fuller," &c., &c.

The authority of the steward to procure these supplies is not disputed, but it is contended that as he had authority to order for the New Jersey Southern Railroad Company alone, and not for the Narragansett Steamship Company, his acts created no lien upon the boat, but simply charged the railroad company. My opinion is otherwise.

If the arrangement between the two companies was such as to constitute the railroad company owners for the voyage and transfer to them the possession and control of the vessel, then the power to bind the vessel for necessary supplies became vested in the railroad company, and the vessel would be bound by their contract for necessary supplies, provided the same were furnished upon the credit of the vessel. If, on the other hand, the effect of the arrangement between the two corporations was not to transfer the possession and control of the vessel to the railroad company, and the agreement was simply on the part of the owners of the vessel to perform certain voyages, and on the part of the railroad to pay a certain compensation for that service so rendered by the ship owner, still the vessel would be liable for supplies used by her in the performance of that service, provided the same were furnished upon the credit of the vessel.

When the owners of the boat permitted the railroad to place on board this boat a steward, with authority to procure the provisions necessary for the boat, they permitted the boat to be charged by the steward so appointed and authorized for necessary supplies so procured.

It is well known that the duty of procuring supplies of the character in question for vessels of this description in many if not in most cases devolves upon a steward or manager, who, in this particular, is the representative of the owner. The owners of this vessel when they made this arrangement with the railroad company not only knew that supplies must be procured for the vessel to enable her to perform the service it was intended she should perform, but they must also be taken to know that the steward they permitted to be appointed to the vessel would, in the ordinary course of business, be authorized to procure such supplies of this character as the vessel might need.

The ordinary method of procuring supplies for a foreign vessel, is upon the credit of the vessel. The owners of this boat are to be considered as having contracted that the vessel's necessary supplies should be procured in the ordinary manner of procuring such supplies, and cannot be permitted to say that they did not suppose that the vessel would be charged with a lien. When, then, it is made to appear that the supplies were necessary, and were in fact used on board the vessel, and that they were procured by the officer whose ordinary duty it is to procure such articles, and that such officer was authorized to procure the same, a case is made where the vessel herself is charged with a lien, provided the supplies were procured upon the credit of the vessel. The liability of a foreign vessel for supplies, arises out of the fact that the supplies are used on board the vessel to enable her to make voyages and earn freight, and the further fact that the supplies are procured upon the credit of the vessel by a person duly authorized to procure the same. A vessel sailed on shares by her master is held bound for supplies procured by the master, notwithstanding the fact that as between the master and owners the master alone is to furnish the supplies.

So in the case of The City of New York [Case No. 2,758], where the vessel was chartered and coal was ordered by a purser employed by the chartered vessel, she was held liable when the fact was proved that the coal was furnished upon the credit of the boat.

In this view of the law the decision of this case must depend upon the question of fact, whether the provisions in question were furnished upon the credit of the boat. If they were so furnished, the boat and also the railroad company became bound therefor. If they were not so furnished the railroad company alone is bound.

Upon this question the burden is upon the claimant. When one authorized to procure supplies for a foreign vessel, orders supplies for the vessel, that are used by the vessel and necessary therefor, the presumption arises that they are furnished upon the credit of the vessel (Insurance Co. v. Baring, 20 Wall. [87 U. S.] 159), and the necessity for the credit of the vessel is shown by proof of the necessity of the supplies for the use of the vessel (The Grapeshot, 9 Wall. [76 U. S.] 138).

The present case is relieved of all difficulty upon the question to whom credit was given, by the circumstance that facts precisely similar to those here made to appear as bearing on the question whether credit was given to the vessel, were shown in an action brought by this same libellant against the steamboat Plymouth Rock, a vessel running on the same route, and were in that case found, not only by this court, but also by the circuit court upon appeal, to be insufficient to justify holding that the supplies were furnished solely upon the credit of the railroad. The two cases are alike except that in the case of The Plymouth Rock the railroad company was the actual owner of the vessel, while in this case they were using the boat of another under the arrangement which has been described. That fact, as has been shown, does not, in a case like this, affect the question of the liability of the vessel when once the credit of the vessel is found to have entered into the contract as an element thereof.

I have been referred by counsel to a case decided by the district court for the Southern district of New York, where in an action against this same boat by a different libellant upon similar facts, a different conclusion was arrived at. I presume the case alluded to was determined before the decision of the circuit court in the case of The Plymouth Rock [Case No. 11,237], had been promulgated. The decision of the appellate court in the case of The Plymouth Rock is decisive of the question of credit in this case, and compels a decision in favor of the libellant.

Case No. 9,504.

The METROPOLIS.

[See Case No. 962.]

METROPOLIS, The (BANKS v.). See Case No. 962.

Case No. 9,505.

METROPOLITAN LIFE INS. CO. v. HARPER.

[3 Hughes, 260; 5 Reporter, 490.][1]

Circuit Court, W. D. Virginia. March 20, 1878.

INSURANCE—LIFE—POLICY PAID—SUIT TO RECOVER—FRAUD—COURTS — FEDERAL JURISDICTION—FOREIGN INSURANCE COMPANY — STATE STATUTE.

1. Where the amount of a policy of life insurance has been paid by the insurer, and he afterwards brings suit to recover it back, he must be deemed by the payment to have settled and waived all questions of law and fact, as to the validity of the original contract, except fraud, which they had the means of raising when they paid the loss.

[Approved in Stache v. St. Paul F. & M. Ins. Co., 49 Wis. 96, 5 N. W. 36.]

2. A foreign insurance company may sue as plaintiff in a United States court, regardless of any state law forbidding such foreign companies from resorting to United States courts.

[In equity. Bill by the Metropolitan Life Insurance Company against George W. Harper, on a policy of insurance paid the defendant.]

RIVES, District Judge. This is a suit in chancery, brought for the amount of a life policy paid the defendant under the allegation of a fraudulent procurement thereof. The jurisdiction, therefore, of the court arises out of this alleged fraud. The application and medical examination of the insured took place on the 8th day of July, the policy issued on the 2d August, and the death occurred on the 18th October, all in the same year, 1875. The proofs of death were taken in the succeeding November. They bear on their face the marks of due care and just precaution. They consist of the statements of the claimant, the attending physician, the undertaker, and the company's resident agent. They display a searching scrutiny into all the facts affecting the liability of the complainant under its contract of insurance. The death was sudden. There had been no such complaint, or known disease beforehand, as would have led to the apprehension of such an instantaneous seizure and death. It was, therefore, well suited to challenge the attention and arouse the suspicions of the company. Could such a sudden death occur without some organic disease, or constitutional infirmity, concealed in violation of that stipulation of the policy, denouncing it null and void, "should any of the statements or declarations made in the application, on the faith of which this policy is issued, be found untrue as regards the age, health, habits, or family history of the insured?" The period of ninety days after due notice and satisfactory proof of death, is reserved to the company for a consideration of the question of its liability under the various warranties it exacts of the insured, of the absolute verity of his answers to their interrogatories. These questions are so numerous and cover such a variety of topics, and in some instances, of such apparent remoteness to the risk, that untrue answers, however immaterial or mistaken, must often be found in practice to furnish a loophole of escape to the insurer. Still the normal requirements of good faith and truth must prevail; and it is not for the insured, or the court that has to pass upon his contract, to shelter him under the plea of the immateriality of the falsehood. He has chosen to contract on the basis of the truth of his answers to all questions; and he has no right to discriminate between them as to their relative weight with his co-contractor. It is scarcely to be supposed that this company was idle in this interval, and failed to make diligent inquiry into all facts touching the payment of the policy. Had they chosen to be thus derelict, it is but just that they should be bound by the consequences of their negligence. But, in my opinion, they are not subject to such an imputation. Look to the questions, with which they ply their resident agent, D. H. Pannill, and his answers. He is asked to state all the facts and circumstances within his knowledge relating to the cause of death. His answer is: "I know nothing of the facts and circumstances attending this death, of my own knowledge. I heard that he died suddenly in Danville, some said of apoplexy, some of heart disease." Again, in answer to the seventh question, as to his knowledge, information, or belief, of any facts inconsistent with the statements made in the application of the insured, he concludes his answer with this significant disclaimer: "I know of no fact why the insured should not have been re-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 5 Reporter, 490, contains only a partial report.]

garded as insurable at the time he was insured, and have heard of nothing since, but quite the contrary from all who knew him." This information was given the company by their responsible resident agent under the date of the 16th November, 1875. Should they not have taken alarm at his report of "death from heart disease?" Did not the inquiry naturally arise whether such disease did not antedate the application, and if so, its existence be a breach of its warranties? It is hard to suppose that the four months intervening between these proofs, and the payment of the policy on the 29th March, 1876, passed unimproved by the company in a searching inquiry into all the breaches that are now marshalled in imposing array in the argument of this cause. Is there no legal effect to be attributed to this payment, under these circumstances of delay, and opportunity of inquiry? Notwithstanding this acknowledgment and ratification of the contract, is the case still open in equity for all the defences which the company could have made to an action of law by the defendant to recover of them the amount of this policy? I think not. Reason and authority alike declare that after this payment they are precluded from setting up the warranties, of which they might have availed in their resistance of this payment. The time has passed for such defences. Whether by design or neglect, they have allowed the time to pass within which they could have opened up and relied upon such defences. They have virtually waived them, and are now remitted to the sole defence of fraud. To this effect is the case cited by Mr. Bouldin, of the National Life Ins. Co. v. Minch, 53 N. Y. 144. It was an action brought to recover of the defendant as administrator, etc., of Anna C. Minch, $2500 and interest as damages suffered by the plaintiff by reason of a conspiracy and fraudulent representations, whereby the plaintiff was induced to insure the life of the deceased and to pay the loss after death. It is precisely like the case at bar with this exception, that it was a case at law and triable before a jury; whereas the present is in equity, and to be tried by the chancellor without a jury. The doctrine was there clearly and distinctly announced that a breach of any warranty in an application for a policy of life insurance, must be insisted upon by the insurer, when a claim is made for the execution of the contract, or it will be deemed to have been waived. Mere ignorance of a fact which would have enabled a company to defend on account of such breach is not such mistake of fact as will enable it to recover back money paid upon the policy. In the opinion of the court in this case, this pertinent and comprehensive remark of Judge Sutherland in 27 Barb. 354, is quoted and approved: "In this action they must be deemed by the payment to have settled or waived all questions of law or fact, as to the validity of the original contract, except fraud, which they had the means of raising when they paid the loss."

The doctrine thus clearly stated and commended by its reasonableness to our approval seems to me conclusive of many points raised and discussed by plaintiff's counsel. Such, for instance, is the objection to the appointment and disqualification of the medical examiner. It seems that regularly he is appointed by the general agent, who reports him to the company for confirmation, where I suppose he is duly registered. Whether this is the case where there is a new field for the introduction of this insurance business I am not informed; at any rate the act of the local agent in the appointment becomes known to the company on the issue of the policy, and any irregularity or impropriety therein is the act of the agent, and necessarily waived by the grant of the policy. On this occasion the agent enters on his canvass under the auspices of a resident attorney of the county, to whom the agency was transferred. The insured was a man of respectability and influence; and it was an object with these canvassers to secure him as a patron of their business; accordingly, a friend and neighbor is warmly solicited to aid them in prevailing on the decedent to take a policy in their company. He does so. Under such circumstances of importunity the agent would scarcely agree to be balked in his scheme by the want of a disinterested physician; on the contrary it would not have been surprising if he had improved a medecin malgre lui (a doctor in spite of himself) out of the materials nearest him rather than lose the prize he was in the act of clutching. Nor would it have mattered in law or reason, because his act or fraud would have to go before the company and be repudiated in the rejection, or ratified in the issue of the policy. So, the time for this objection has passed; and whatever irregularity or impropriety there may have been in this selection of the medical examiner, and his conduct of the examination, the company is estopped from availing of it at this time by their accepting the action of their agent in the premises. It is proven that Dr. Robertson did not wish to act; pleaded urgent professional calls upon him at the time, and that the insured also suggested to Dr. Smead, the agent, the impropriety of his acting, as he was a brother-in-law of his, but none of these considerations diverted Dr. Smead from the consummation of the proposals while his recruit was yet in the humor for the contract. Now would it not be a great injustice under these circumstances to allow the company to disavow the knowledge or plead ignorance of these facts; and after the execution of the contract by the issue of the policy to rake up from the past objections that were merged in that policy and obliterated by its grant? I can-

not escape the conclusion that it would be. In the same way, and for the same reason, it is not permissible for the plaintiff's counsel to range through the whole network of interrogatories and rely upon breaches unaffected by fraud. To constitute such fraud, the falsity of the answer is not sufficient of itself; it must be combined with the guilty knowledge of its falsity. Take for instance the answer to the eighteenth question, which has been arraigned by the concluding counsel of the plaintiff as the rankest fraud in the case; the assertion, namely, of the medical examiner that the life proposed was in all respects a first-class healthy risk. This is an opinion still avowed by Dr. Robertson, and I am at a loss to conceive how they should predicate of it, much less prove a knowledge on his part to the contrary, and a fraudulent concealment thereof. So with the answers to questions seven and eight, the truth of which is still averred by Dr. Robertson; and we have no testimony to the contrary at the time of insurance. So far as the testimony discloses, the rheumatic symptoms may have supervened upon the insurance; at the time of the medical report no ailment was spoken of save catarrhal and neuralgic affections; so that fraud cannot fairly be imputed to these answers. And, further, I take it that counsel for the plaintiff have fully conceded that they are restricted to allegations of fraud and cannot now rely on bare breaches of warranty, which were settled, adjusted, and closed forever by the voluntary payment of the loss, though the company were ignorant of the existence of the breaches at the time of such payment. In the same line of argument, much stress is laid on the discharge of the insured from the Confederate army at Norfolk, in 1863, some twelve years prior to the insurance; and although a witness attributes that discharge as well to incompetency as a colonel of militia as to low spirits and enfeebled health. But Dr. Robertson declares that that discharge was not on any grounds affecting longevity, but rather from apprehension of what disease might be developed by the life and exposure of the camp; and it is not just to predicate of his silence on that head, a fraudulent concealment on his part in the absence of all proof that his apprehension of consumption was ever fulfilled by the event, and his positive assertion that the insured was not consumptive.

The bill in this case is framed upon the idea that the plaintiffs would be restricted to the question of fraud. It does not contemplate or ask for relief on the score of breaches of warranty, free from such taint. I admit there is a general sweeping averment of fraud, but it is virtually narrowed to three special instances, which are confined to the answers to three questions, namely: Nos. 10, 11 and 12, and are said to consist in the fraudulent assertion: (1) "That William H. Harper had never had any illness or injury; (2) that he had never consulted any physician concerning himself; and (3) that he did not use alcoholic stimulants or malt liquors to any daily extent." To these specific charges the pleadings and proofs conform; not so, however, with the argument, which, as I have shown, has taken a wider range.

I must now turn my attention to this aspect of the case. First, however, we must ascertain the current of authorities by which I must steer my course to a decision in this cause. One class is where the applicant, by himself or another, prepares his declaration and solicits his policy. There the courts decide that he is bound by his answers and warrants their truth, so that it is not for him nor the court nor the jury to rely on their immateriality; they are stipulated for as a basis of the contract; the insurer had a right to call for them; and it is for him alone to determine the weight to be given them in his decision upon the grant or refusal of the policy. Nothing but truth in such answers can subserve the ends of morals or law, and uphold the bona fides and justify the execution of the contract. No question here arises as to the obligation of the warranties, for they are not challenged by any testimony dehors the written instrument affecting its purport or validity. Such are the cases of Jeffries v. Life Ins. Co., 22 Wall. [89 U. S.] 47, and Aetna Life Ins. Co. v. France, 91 U. S. 510. But a different rule is applied to the case of local agents who are engaged in the business of soliciting insurance. Where they are active and the insured passive; where they prepare the declarations and dictate the answers, and the respondent accepts them, the courts have refused to enforce against the insured the leading canon of evidence, namely, that a written instrument cannot be varied by parole testimony. But upon the ground that the insurer has, by the act of his agent, secured an advantage which operates as a fraud upon the insured, the latter will be allowed to prove the part of the agent in the framing of his answer, though it tends to invalidate the authenticity of the instrument. This is done under the doctrine of estoppels in pais; a doctrine, as Justice Miller observes, well established and understood, but its applicability not so well defined as could be wished. It has, however, been applied to insurance in numerous well-considered judgments by the courts of this country. Otherwise, the officiousness of insurance agents would defeat the ends of justice and often tend to the support of dishonest claims. To this class belong the cases of Insurance Co. v. Wilkinson, 13 Wall. [80 U. S.] 222; Insurance Co. v. Mahone, 21 Wall. [88 U. S.] 152; Continental Ins. Co. v. Kasey, 25 Grat. 268; Manhattan Fire Ins. Co. v. Weill [Case No. 9,022].

Being thus furnished with the law and the

discriminations made by it, we advance to the facts of this case. It is not my purpose to enter on a critical examination of the voluminous proofs in this cause. I shall indicate my conclusions rather than endeavor to support them by particular references to the testimony. The pleadings in this cause must be given their just weight. This forum allows the complainant to appeal to the conscience of the defendants, and when he has done so, the answers can only be overruled by two witnesses, or one witness with corroborating facts. What, then, briefly is the statement of Dr. Robertson's answer? That he was arrested in the midst of urgent professional calls by Dr. Smead, the agent of the plaintiff, and constrained by his importunity to undertake a task entirely new to him, that of a medical examiner of his brother-in-law, William H. Harper; that he had not time to read the paper or printed forms presented to him, but was directed in his task by the agent, to whom he readily yielded as to one authorized by the company to guide him in filling up the blanks in the printed form. "When in this way he reached question No. 10, respondent stopped, and was going on to mention the illness and injuries which the said W. H. Harper had had, without objection on the part of W. H. Harper, when said Smead said that that question must be answered 'No,' unless such illness or injury had impaired said Harper's constitution or general health; and respondent believing it had not, and believing also that said Smead knew how the said question should be answered so as to meet the requirements of his company, wrote the answer 'No.' When question No. 11 was reached, namely, 'Has the said life ever consulted any physician concerning himself?' respondent asked said Smead if he must answer whether he consulted him, or whether he had consulted any other physician besides himself, and said Smead replied that he must answer whether he had ever consulted any physician besides himself, and that he must answer said question 'No.' When question No. 12 was reached, namely, 'To what daily extent does the said life proposed use alcoholic stimulants or malt liquors?' respondent answered, 'Not at all,' and he claims now that answer was true." Now if this answer could be disproved there is one only living witness who could do so, and that is Dr. Smead. His deposition has been taken and filed by the plaintiff in this cause. I have read it attentively, and can find nothing substantial to contradict or discredit the answer. There are some trivial and circumstantial discrepancies, but a substantial agreement. Dr. Robertson is arraigned for not excluding Smead from the examination, and for not reading the caption of the paper; while Dr. Smead, acting at different times both as agent and medical examiner, pleads as his excuse for his forbidden presence, that he also had not read the caption and was ignorant of its prohibition. This disposition, then, is to be taken as sustaining the answer. Not a suspicion, therefore, is left as to the part of Dr. Smead in dictating the simple answer of "No" to the questions Nos. 10 and 11, and suppressing the explanatory remarks of Dr. Robertson as assented to by W. H. Harper. Can the company, therefore, take advantage of this answer dictated by their agent, and exclude the explanation made by Dr. Robertson? Certainly not, if the decisions of the supreme court that I have cited are to be respected and obeyed. But, say the plaintiff's counsel, give the defendant the benefit of Dr. Robertson's explanations, which were suppressed by Dr. Smead, and still there is a fraudulent concealment of the real state of the insured life. He is confronted by the fact of Harper's discharge from the Confederate army and his spell of sickness in February, 1875. This, of course, depends on the testimony, and the plaintiff assumes the onus of showing the former was due to a consumptive habit, and the latter to a serious organic derangement. It is easy enough with a suspicious turn of mind to conceive and charge such was the case; but with the court it is a question of proof. There has been a diligent search for testimony on this subject; a large number of witnesses have been examined upon it; no pains have been spared to establish it, if it existed; and yet after a careful sifting of the testimony it seems to me there is a plain defect of proof to maintain the issue on the part of the plaintiff. The sum of the testimony is that the discharge from the army was owing to low spirits and depressed health as well as military incapacity; and that the spell of sickness in the winter arose from a temporary derangement of the stomach, from both of which the insured recovered before the insurance in July, 1875. If these indispositions were more serious, I can only say the fact has not been shown to my satisfaction. No one of all these witnesses has been found to testify that the insured was consumptive, or that his health was impaired by organic disease. It is true that he was sick for some eight or ten days in February preceding his demise, but where is the proof that it was otherwise than as described by his physician; a transient affection of the stomach, from which he recovered without any lasting injury. All this diagnosis may be wrong, but where is the proof of it? Parties in interest and third persons may speculate to the contrary, as interest or suspicion may suggest; but the judgment of the court must repose on a surer foundation. It requires proof, and is forbidden to enter the field of conjecture, where fraud is never presumed, but is always to be proved. The same reasoning applies to the habits of the insured as to drink. No witness deposes that he ever saw him drunk or under the influence of liquor. Prior to his sickness he drank ardent spirits occasionally at home and abroad, but no one can be gotten to declare that the habit affected his health or constitution, or that he ever carried it to excess. His indulgences in this way might be exaggerated or lightened, according to the

fancy of the witness; but I infer from the general current of testimony he had been a moderate drinker, and had not in this respect abused or impaired his health or constitution. But after February, 1875, it is indisputably proven that he abjured ardent spirits and addicted himself to the occasional use of wine only. Under this state of proof was Dr. Robertson justified in answering question No. 12: "To what daily extent does the insured use alcoholic stimulants," "Not at all?" I think he was, and I discern in that answer no concealment whatsoever, much less a fraudulent concealment. Thus, then, stands the case with the defendant Dr. Robertson. The insured only acquiesced in these answers, and must be, at least, as free of fraud as he. Both these men stand fair and irreproachable in their communities. I see nothing in this testimony to blast their characters and convict them of fraud. There is no ground to fear that these insurance companies will fail of the protection of the courts and be left exposed by them to the machinations of the fraudulent. They are praiseworthy and beneficent enterprises and will, I doubt not, receive the full protection of the law in all cases of fraud. This is proven by the sequel of the case of Anna C. Minch, which I have quoted. The new trial resulted in the finding of the atrocious fraud alleged, and the recovery of the amount of the policy already paid, with interest and costs. Such, I am sure, would be my judgment in such a case. But it is solely because the fraud is not proved to my satisfaction that I feel constrained to deny the relief asked. Had it appeared to me that W. H. Harper had by himself, or in conspiracy with Dr. Robertson, fraudulently violated any of the warranties on which his policy rested, no such consideration of sympathy as has been hinted would, for a moment, withhold me from the retribution which it would be in my power and will to visit upon such a breach of faith. I am not able to fasten on the deceased the fraud alleged against him. He seems to me to have been the passive recipient of the policy he was solicited to take; and his tacit acceptance of the answers which Dr. Robertson gave for him, under the direction of the agent, are not tainted by falsehood or fraud. Nor does it seem to me that the company have any right to complain that either their agent or medical examiner betrayed their confidence or exceeded their authority. The whole transaction was as fair and honest as the infirmity of human nature admits of. An interested and jealous mind may doubtless discern flaws and lapses in it; but a generous and just construction of motives and acts will, it seems to me, exculpate the parties from the serious charges against them.

In casting around for the cause of this controversy, I can scarcely be mistaken in attributing it to the sudden and remarkable death of the insured. It was well calculated to provoke hostile speculations, and to impugn the accuracy or good faith of the medical report. In contemplating such a catastrophe, so instantaneous and unaccountable, rumors might well spread that it was due to heart disease, or some organic derangement which Dr. Robertson should have seen in its beginning and reported on his examination. Hence, medical experts have been examined as to this death, and have failed to detect or expose its immediate cause. All of certainty we have on the subject is the theory of his physician that it was the transfer of his neuralgic rheumatism to his heart. At any rate there is an entire absence of proof to show it was owing to a cause existing at the time of the medical examination, was then known to Dr. Robertson, and fraudulently suppressed by him. In Mrs. Minch's case, she was represented to have died of pneumonia, when it was proven she died of cancer, fraudulently concealed in her declaration. How unlike to this case! I have not adverted to the testimony of Dr. Hegeman, the vice-president of this company. It is so largely devoted to the offer and rejection of compromises, all of which is inadmissible as evidence, that it has no special weight in this case. So far as it seeks to impeach the evidence of Dr. Robertson through his conversations and letter exhibited with the deposition, I see nothing that may not be reconciled, and be consistent with the truth of both witnesses.

After a careful and deliberate consideration of the case, I am satisfied it was right to set aside the issue once directed in it. It is emphatically a case of equitable jurisdiction, where the verdict of a jury could scarcely aid the court. Where the credibility of conflicting witnesses is to be passed upon, it is perhaps proper to evoke the verdict of a jury; but in all other cases resting upon the original jurisdiction of a court of equity, it is rarely discreet to devolve the responsibility of a judgment, in whole or in part, upon the finding of a jury. It has been suggested that as this company has contracted, under the terms of the act of assembly, to be amenable to suits in the courts of this state, it forfeits its character of a foreign corporation and its right to sue in this court. This consequence does not seem to me legitimate. It may be bound to appear through its resident agent to suits against it; and when brought its agent may be precluded from removing the case to a federal court, as, I am told, has been decided by our court of appeals. But evidently this act does not pretend to deprive the foreign corporation of its resort, as plaintiff, to this court. Hence, I decline to yield to the claim of the defendant's counsel that I have not jurisdiction of this case.

I have thus hurriedly disposed of the questions raised and discussed in this case with rare ability. It only remains for me to announce my judgment that the bill must be dismissed with costs, and the injunction against the bankers dissolved, so that they may pay the deposits to the defendant, George W. Harper.

METROPOLITAN NAT. BANK (EVANSVILLE NAT. BANK v.). See Case No. 4,573.

Case No. 9,506.

METROPOLITAN R. CO. v. SLACK.

[Holmes, 375.][1]

Circuit Court, D. Massachusetts. May, 1874.

TAXATION—INCOME TAX — EARNINGS OF RAILWAY COMPANY.

1. Section 119 of the act of June 30, 1864 (13 Stat. 283), as amended by the act of July 13, 1866 (14 Stat. 138), providing that income taxes "shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June, in each year, until and including the year 1870, and no longer," does not apply to an internal-revenue tax on the dividends and earnings of a railway corporation for the first six months of the year 1870, which is not an income tax, but an excise.

2. Under section 15 of the act of July 14, 1870 (16 Stat. 260), providing for levy and collection of a tax "for and during the year 1871," on interest paid by corporations, "and on the amount of dividends of earnings hereafter declared by them," the dividends and earnings of a railway corporation for the last six months of the year 1870 are not taxable.

Assumpsit to recover the amount of certain taxes, paid under protest by the plaintiff, a street-railway corporation, to the defendant [Charles W. Slack], a collector of internal revenue. The action was originally brought in the state court, and was removed by the defendant to this court by certiorari. The case was heard on an agreed statement of facts, the material parts of which were as follows: On the 23d of June, 1870, the directors of the plaintiff corporation declared a dividend of its savings and income for the first six months of the year 1870, payable July 1, 1870. The savings and income for the first six months of 1870 not being sufficient to pay the dividend, a portion of the surplus earnings of the previous year (upon which tax had been paid) was added to the earnings of the first half of 1870, to make up the amount of the dividend. A tax of five per cent was assessed upon the dividend, from the amount of which tax was deducted the tax paid by the corporation on the surplus earnings of 1869, carried forward as above; the balance was paid by the plaintiff under protest. On the 22d of December, 1870, the corporation declared a dividend of its earnings and income for the last six months of 1870, payable Dec. 30, 1871. A tax of two and a half per cent was assessed on this last dividend, and a like tax on the surplus earnings of the corporation over and above the dividend for said six months; which tax was paid by the plaintiff under protest.

Jewell, Gaston & Field, for plaintiff.
George P. Sanger, for defendant.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

LOWELL, District Judge. The reasoning of the supreme court in Barnes v. Railroads, 17 Wall. [84 U. S.] 294, seems to me to govern the first part of this case, relating to the tax assessed upon the plaintiff for the dividend declared in June, 1870. In those cases it was laid down that the tax upon the earnings of such companies as the plaintiff is an excise imposed upon them directly, and not a part of the general income tax of their shareholders. It seems to follow, fairly, that the limitation of section 119 of the act of 1864, as amended by the act of 1866 (14 Stat. 138), which brought the income tax to a close with the end of the year 1869 (assessable in May and payable in June, 1870), does not apply to this excise. This part of the case I decide for the defendant.

The question concerning the tax on the earnings of the second half of the year 1870 is one of difficulty, because section 15 of the act of 14th July, 1870 (16 Stat. 260), appears to be self-contradictory. It provides that there shall be levied and collected "for and during the year 1871" a tax of two and a half per cent on the amount of all interest or coupons paid, &c., and on the amount of all dividends of earnings, income, or gains, "hereafter declared" by any bank, &c. I have taken pains to examine the records of congress, and find that the words "for and during the year 1871" were inserted upon the report of a committee of conference, and without a word of debate in either house.

As the section stood before those words were added, the meaning was, that, instead of the former tax of five per cent, there should be levied a lighter tax, but that this should not be retroactive so as to relieve dividends which had been or should be declared before the passage of the act, and thus become liable to the five per cent. When the words "for and during the year 1871" were added, the "hereafter declared" became almost meaningless, or else repugnant; and, if the latter, the question is, which is to control?

The commissioners of internal revenue decided, first, that dividends for the last half of 1870 were liable to be assessed (12 Int. Rev. Rec. 93, 117); then that they were not (13 Int. Rev. Rec. 17); and then again that they were (14 Int. Rev. Rec. 57); and it is not surprising that there should be this conflict of opinion. I cannot find any way of fully reconciling the apparent inconsistency. It is not, in my opinion, possible so to change the words "for and during the year 1871" as to hold that they authorize an assessment for 1870. I think "during" is intended to express the idea that after 1871 there shall be no further excise of this character; and not, as was argued by the defendant, that the levy must actually be made in that year of all the profits of that year, and also of those of the last half of 1870.

In my opinion, a levy made in 1872, for the earnings of 1871, would be valid, and was

intended to be made, if necessary; in other words, the tax was upon the whole profits of 1871, and could not be evaded by declaring out of those profits a dividend payable in 1872. And this I understand to be the decision under the act of 1866, in Barnes v. Railroads, 17 Wall. [84 U. S.] 294.

If this be so, what warrant have we for saying that a tax to be levied for the year 1871 means for eighteen months? If the latter half of 1871 is included in one year, how can the latter half of 1870 be included in the same year? There is no reason for any such provision; and it is contradicted by section 16, which requires a return to be made to the assessor within thirty days after the dividend is declared. The construction contended for by the defendant requires us to hold that a dividend payable in August is to be returned in September, though it is not taxable until the following January.

That congress understood full well the meaning of the words used in the opening clause of section 15, is shown by an amendment inserted, if I mistake not, at the same time and in the same way in section 6; namely, that the income tax should be levied and collected for the years 1870 and 1871, and no longer. The "during" of section 15 corresponds, as I have said, to the "no longer" of section 6; and the unmistakable meaning of the early part of section 15 is, that the tax on the dividends of railroad companies shall be levied for the year 1871, and no longer. So far I do not find difficulty: but this brings the two phrases into direct repugnancy; because "hereafter declared" seems to mean at any time after the passage of the act.

Upon the whole, I think the governing clause of this section is the opening clause; because, if that is rejected, there is no power left to levy any tax. It is equally improper to reject any part of that clause, because then there is no limitation of years at all. That part of the section must, therefore, be entirely changed by interpolating the words "for the remainder of the year 1870," or something equivalent; or else it is plain that congress has failed to authorize a levy for the last months of 1870, whatever it may have said about dividends in some other clause.

Now, I know of no authority which will authorize such an interpolation. It seems to me much more consistent with sound construction to reject the words "hereafter declared," or to make them yield a part of their meaning, and remain as surplusage, or nearly so; because all the dividends earned in 1871 would be declared after the passage of the act, while all the dividends thereafter declared can by no means be assessed for the year 1871. Indeed, to give to those words the force contended for, is to change and enlarge their sense into nearly the opposite of their original meaning. When written, they meant that the reduction of the tax should not be retrospective. As now proposed, they would mean that it shall not be too prospective. I cannot believe that it is permissible to supply a meaning for an act of congress upon any theory of what they probably might be expected to intend, which would so twist this section as to read that on all dividends hereafter declared until the end of 1871, including all earned in 1871, there should be levied the tax. I come back, therefore, to the point which is in reality the gist of the case,—that it is not the declaration of a dividend, but the earning of profits, that is the material thing, and that it is upon the profits earned in 1871 that the tax is imposed, and on none other. I have found my judgment enlightened and my opinion fortified by the decision and reasoning of McKennan, J., in Philadelphia & Reading R. Co. v. Kenney [Case No. 11,088], which sustains this construction of the statute.

Judgment for plaintiff for the amount of the second sum mentioned in the agreed facts, with interest at six per cent from July 31, 1871.

NOTE. Upon a similar case involving the interpretation of section 15 of the act of July 14, 1870, a majority of the United States supreme court, stating that "the ambiguous terms of the statute prevent the possibility of a satisfactory solution of the question presented," adopted "the construction practically placed upon it by the administrative department of the government"; and decided in favor of the tax. Blake v. National Banks, 23 Wall. [90 U. S.] 321.

METROPOLITAN R. R. CO. (RUBBER STEP MANUF'G CO. v.). See Case No. 12,101.

METROPOLITAN WASHING-MACH. CO. v. EARLE. See Case No. 17,219.

Case No. 9,507.

METROPOLITAN WASHING-MACH. CO. v. PROVIDENCE TOOL CO.

[Holmes, 161.][1]

Circuit Court, D. Rhode Island. June, 1872.[2]

PATENTS — REISSUE — COMPARISON — MATTERS OF FACT—DECISION OF COMMISSIONER—STATE OF THE ART—CLOTHES WRINGERS.

1. In a suit for infringement of a reissued patent, the question whether or not the reissue is for the same invention as the original patent, is one of construction for the court upon comparison of the two instruments. Questions as to matters of fact connected with the surrender and reissue are closed by the decision of the commissioner granting the reissue.

[Cited in Spaeth v. Barney, 22 Fed. 829.]

2. In view of the prior state of the art, the reissued patent, No. 2829, dated Dec. 31, 1867, granted Sylvanus Walker, for an improvement in clothes-wringers, originally patented to Isaac A. Sergeant, July 27, 1858, must be construed as a patent for a wringer consisting of a new U-shaped yoke frame, with uprights or their equivalents, in which a wringing mechanism is supported in position on one side of a wash-tub, in combination with an adjustable clamping device for fastening the wringer to the tub.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Affirmed in 20 Wall. (87 U. S.) 342.]

3. So construed, the patent is not infringed by the manufacture and sale of a clothes-wringer consisting of an old adjustable clamping device for holding the wringer to one side of a wash-tub, and two upright standards connected at the bottom by a cross-bar; the standards supporting the journals of the pressure-rollers of an old wringing mechanism.

In equity.

Thomas A. Jenckes and James H. Parsons, for complainant.

B. F. Thurston, for defendant.

SHEPLEY, Circuit Judge. This is a bill in equity brought by the complainant, as assignee of Isaac A. Sergeant, for infringement of division 2, No. 2829, of letters-patent for an improvement in clothes-wringers. Said letters-patent [No. 21,029], were originally granted to Isaac A. Sergeant July 27, 1858, and were reissued in two divisions, one dated June 18, 1867, and the other being one upon which this bill is brought, dated Dec. 31, 1867.

The machine described in the original patent belongs to that class of clothes-wringers generally known as "twist-wringers," in the use of which clothes are wrung and the water expelled by twisting the clothes into a rope, in the same manner as clothes are wrung by hand.

The original Sergeant machine had a yoke frame of U form, which yoke frame had a pair of jaws and a clamp wedge for securing the frame to the side of a common wash-tub. This portion of the original machine constituted that part of the invention which is embraced in the division of the reissued patent, No. 2829. To the yoke frame a hinged frame was attached, which, when in position, is at right angles with the yoke frame. A cross-bar unites the two sides of the hinged frame. In the centre of the cross-bar is set a "hitching pin," around which the clothes to be wrung are partially wound and held fast by the left hand of the operator, while the right hand turns a rotary clamp which is set in the yoke frame, and which gives the clothes the twist necessary to expel the water. More minute description of this rotary clamp is unnecessary, as it has little if any connection with any questions at issue in this case, the peculiarities of the wringing mechanism not forming any part of the mechanism recited in the claims of the reissued patent No. 2829.

After the death of Isaac A. Sergeant, his administratrix, on account of a defective specification, surrendered the original patent; and on two corrected specifications two new patents were reissued to one Walker, to whom the administratrix and the heirs-at-law had assigned the patent. Walker duly assigned to complainant all his interest in the patent, and in any divisions to reissues thereof.

The claims in the reissued patent, No. 2829, are for: First, the employment or use of a portable frame or yoke, B, with uprights, S S, or their equivalents, for supporting a clothes-wringing mechanism in position on one side of a common wash-tub, for the purposes set forth. Second, the application of an adjustable clamping device, when employed to attach a clothes-wringer to one side only of a wash-tub, in the manner described and for the purposes set forth.

In the reissued patent, division 2, No. 2829, by a separation of the inventions of the patentee, the yoke frame, in combination with its device for being clamped to one side of a common wash-tub, is claimed as a separate structure, without regard to the structure of the wringing mechanism used with such "supporting and connecting apparatus."

The answer of the defendant alleges in defence, that the reissued letters-patent are fraudulent and void, because they were sought to be procured for the purpose of embracing therein more than was the invention of the said Isaac A. Sergeant; that they were obtained for the purpose of endeavoring to embarrass the defendant and other parties manufacturing wringing-machines, by the assertion of a colorable claim to a subject of invention, which, if construed by the court as broadly as the complainants by their assertions claim that it should be, would prevent the manufacture of any wringing-machine that was detachable from a tub.

If it appears upon the face of the reissued patent that it is not for the same invention as that embraced or secured in the original patent, then it would be the duty of the court, as a matter of law, to declare the reissued patent invalid; for such a state of facts, apparent upon a comparison of the two instruments as construed by the court, would show that the commissioner of patents, in granting the reissue, had exceeded his authority, and that there was such a repugnancy between the old and the new patent that it must be held as a matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original patent. Matters of construction arising upon the face of the patent are open questions to be decided by the court; but all matters of fact connected with the surrender and reissue are now held to be closed by the decision of the commissioner in granting the reissued patent. Seymour v. Osborne, 11 Wall. [78 U. S.] 516.

This disposes of the first objection in the answer to the validity of the reissued patent; for there does not appear to be any ground upon which it could with reason be contended that the invention claimed in the reissued patent was not described or substantially indicated in the original patent; and the other questions of fact are closed by the decision of the commissioner.

The defendant also sets up in its answer the anticipation and prior knowledge of the alleged invention of the complainant by various parties, patentees and rejected applicants for patents, whose names and the dates of whose applications and inventions

appear in the answer and the amendments thereto.

In view of this defence, it becomes necessary to consider the state of the art prior to the date of the alleged invention by Sergeant, and to define the construction and the limitations of the claims in the reissued patent under which complainant claims. Without going into a detailed description of wringing-machines existing anterior to the date of Sergeant's invention, it will be sufficient for the purposes of this case to observe that wringing-machines were in use in many different forms of more or less practical utility. Clamping devices, also, were old and well-known means of attaching machines of various descriptions to benches, tables, or other articles with which they were used. Reels for thread, vises, eyeletting-machines, fluting-machines, egg-beaters, and small mills, had been attached to benches and tables by clamping devices similar in principle to the one described in the Sergeant patent. A clamping device identical with the one used by defendants, and comprehended in the reissued patent No. 2829, was applied to a wringing-machine before the Sergeant invention.

Letters-patent for a washing-machine issued to H. W. Sabin, Aug. 16, 1845. In his machine a common twist-wringer was supported by a standard furnished with jaws and a clamp screw, the two forming a clamping device such as is in common use on all wringers at the present time; but the standard was not a U-formed yoke frame, but simply a support for the journal of a shaft, although the standard had jaws and a clamping instrument adapted to secure the standard to the side of a wash-tub. Unless the U form of the yoke frame in the Sergeant mechanism is to be considered as an essential part of the Sergeant invention, as distinguished from the standard in Sabin's machine, which is simply a support for a journal, it is difficult to perceive the novelty of the Sergeant invention. The experts examined in behalf of the complainant testify, that, in their opinion, "The said (Sabin) standard is simply a support for the journal of a shaft, and is not a yoke frame such as is described in the reissued patent, nor the equivalent of one, by reason of the differences above referred to." But when they compare the yoke frame in the reissued patent with the apparatus for supporting the wringing mechanism in the defendant's machines, which have two upright standards supporting journals for the pressure-rollers, the two upright standards being connected by a cross-bar at the bottom, they testify that not only the two upright standards connected by a cross-bar at the bottom form the yoke described in the patent, as seen from the inside of the tub, but that all the parts are duplicated; and the face of the machine presented to the outside of the tub has also two uprights, and a connection which corresponds to the yoke in the patent. Applying the same reasoning, it is not easy to see why each standard which supports the journals, as viewed from the sides, is not to be considered also as a separate yoke frame with two uprights and a cross-piece, so that it would be as correct to say that the yoke frame of the complainant is quadruplicated, as to say that it was duplicated. This would seem to be the necessary result of making the U-shaped yoke frame include any form of a journal-supporting standard, and it would seem to prove, if correct, that the Sabin patent anticipated the Sergeant invention.

The U-form of the yoke frame of the Sergeant machine was necessary as a device for supporting a clothes-wringing mechanism, in the manner and for the purposes set forth. The manner of support was the semicircular shape at the bottom of the U-formed yoke frame, which constituted of itself a journal-box; and the peculiar form of that standard, which was new, when combined with any wringing mechanism which was old and well-known, and a wedge, screw, or other well-known and equivalent clamping device, which was old, constituted the only invention which, in the state of the art at the date of the Sergeant invention, could be embraced and protected in that division of the reissued patent. This combination of such a yoke frame, with uprights or their equivalents for supporting a wringing mechanism in position on one side of a common wash-tub with an adjustable clamping device, all substantially in the manner and for the purposes set forth in the patent, is all that can be sustained as new in this division of the reissued patent. To attempt to make the claims in this division of the reissued patent sufficiently broad to cover any form of portable standard for supporting a journal of any form of wringer in combination with a wedge, or helical wedge or screw, or other clamping device for securing the frame to the side of a tub, would be fatal to the patent, as it would clearly embrace what was old, both in the separate parts and in the parts in combination. The two upright standards in the defendant's machine connected with a cross-bar may in one sense be said to be the equivalent of the U-shaped yoke frame of Sergeant. But the upright standards each support, independently of the other, their respective journal-boxes, in the same manner substantially that Sabin's standard supported a journal for clothes-wringing mechanism. There is no significance in any similarity, or supposed similarity, to a U-shaped yoke frame constituting a journal-box of itself, and requiring that exact semicircular or substantially semicircular form to form of itself the journal-box. The reissued patent in controversy in this case is, as construed by the court, only for a combination. Upon no other construction could it be sustained. The first claim refers

to peculiarities in the construction of the U-shaped yoke frame for the support of the wringing mechanism; the second, to the combination of this peculiarly constructed yoke frame with reference to the purposes of the peculiar form of construction with an adjustable clamping device, when employed to attach a clothes-wringer to one side only of a wash-tub.

The standards or uprights in the defendant's machine can with no more propriety be considered as the equivalents of the U-shaped yoke frame in the complainant's, than can Sabin's standard be considered as a yoke frame, because it supported a journal-box. If the two standards in defendant's machine, with their connecting cross-bar, are to be claimed as the equivalent of complainant's yoke frame, then any frame of any kind supporting any wringing mechanism must be considered an equivalent; for there cannot be any form of frame constructed supporting a journal which could not be dissected in a yoke frame, or a U-shaped yoke frame, by an elimination of parts not indispensable. The defendant does not use a U-shaped yoke frame with any such peculiarity of form in the construction of the frame for the same purpose, or to be used in the same manner in which it is used in the complainant's combination. If the defendant's frame and standards, either separately or in combination, are the equivalent of complainant's yoke frame, then complainant's yoke frame, when combined with a clamping device and a wringing mechanism, is the equivalent of Sabin's journal-supporting standard in similar combination.

As the defendant, in the view taken by the court of Sergeant's invention, does not use all the elements of his combination, when Sergeant is confined within the exact limits of his invention and is allowed the full benefit of his invention so far as it was novel, it is not liable as an infringer. Bill dismissed, with costs.

[Upon appeal by the complainants to the supreme court the decree of the circuit court was affirmed, Mr. Justice Strong delivering the opinion. 20 Wall. (87 U. S.) 342.]

Case No. 9,508.

METROPOLITAN WRINGING MACH. CO. v. YOUNG et al.

[14 Blatchf. 46; 2 Ban. & A. 460.][1]

Circuit Court, N. D. New York. Nov. 18, 1876.

PATENTS—REISSUE—CLOTHES WRINGERS — COMBINATION.

The first claim of the reissued letters-patent, division A, granted to the Metropolitan Washing Machine Company, January 7th, 1873, for an "improvement in clothes wringers" (the original letters patent having been granted on the invention of Alby H. Page, January 29th, 1867), namely: "In a wringer having a pair of squeezing rollers, and an operating crank, and two uprights or standards, the employment of clamping means arranged to take hold of the tub at or near the base of each standard," is limited to a combination in which a swivel or its equivalent, is employed as one of the parts of a clamping device, and must be read with reference to the specification, and as though the words "substantially as described," were inserted.

[Cited in Brinkenhoff v. Aloe, 37 Fed. 96, 13 Sup. Ct. 224.]

[This was a bill by the Metropolitan Wringing Machine Company against James Young and others to restrain the infringement of certain letters patent.]

Charles L. Woodbury, Benjamin F. Thurston, and Livingston Scott, for plaintiffs.

John F. Seymour and Edmund Wetmore, for defendants.

WALLACE, District Judge. The complainants are the owners of letters patent [No. 61,680] originally issued, on the invention of Alby H. Page, January 29th, 1867, for an "improvement in clothes wringers," and reissued [No. 5,223] to the Metropolitan Washing Machine Company, January 7th, 1873, in three divisions. The improvement relates to a device for fastening the wringers to tubs of various sizes. Infringement is predicated upon the first claim only in the reissued patent, division A, the other claims having been abandoned on the argument. That claim reads as follows: "In a wringer having a pair of squeezing rollers, and an operating crank, and two uprights or standards, the employment of clamping means arranged to take hold of the tub at or near the base of each standard." The defendants rely upon three defences to the action, insisting, first, that Page, the inventor of the alleged improvement, had abandoned it to the public; second, that, if the claim is construed to cover all clamping devices for such machines, it is void for want of novelty; and, third, that, if the claim is limited to clamping devices of the particular character described in the specification and shown in the drawings, the defendants do not infringe. I do not deem it necessary to pass upon any but the last of these defences. In my view, the true construction of the patent limits the claim to a combination of the machine with a clamping device of a specific construction, which the defendants have not adopted. Construing the claim as favorably as its language, the state of the art, and the extent and character of the actual invention will permit, it must be limited to a combination in which a swivel, or its equivalent, is employed as one of the parts of a clamping device. It cannot be sustained as a broad claim for any kind of "clamping means arranged to take hold of the tub at or near the base of each standard" of the wringing apparatus. It is to be read with reference to the specification, and as though the words "substantially as described" were inserted. It is conceded, that all that Page contemplated

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 460; and here republished by permission.]

was to effect a new organization of the clothes wringers in use, by combining wringing apparatus similar to that in the Allendar machine with a device for clamping it to tubs and vessels, so that the wringing apparatus could be adjusted, without further adaptation, to tubs and vessels of different forms and sizes, and detached at pleasure. Prior to his first application for a patent, the most popular wringing machines were a part of the vessel itself, or were made part of a bench or frame. Wringers of various construction had been made to be attached to a tub or other vessel, but none like the Allendar machine had been made which could be adjusted in a satisfactory way to tubs and vessels differing in size and form. It was the aim of Page to supply this want. Clamping devices were a well known means of fastening machines to chairs, benches, platforms, tables and other articles. The combination of a well known wringing apparatus with a tub or vessel, by means of a well known clamping device, would not be patentable, unless some new and useful result due to the combination would ensue. It is difficult to see how any new result, in a patentable sense, could follow from combining the wringing apparatus with a device for fastening it upon a tub, unless there should be something in the device peculiarly adapted to co-operate with the wringing apparatus. Such a result would not follow from the employment of an ordinary clamp, or of two, one at or near the base of each standard of a wringer with two standards. Nor would it necessarily follow because the clamping device might be such as to adapt the wringing apparatus to tubs of different sizes; because, the aggregation of devices, each of which is old, so that each may work out its own effect, without the production of something novel arising from the co-operation of the devices, is not a new result. Clamps are usually placed at the point which will give the greatest stability to the machine. This may be near the base of the support of the machine. If there are two supports, it is quite possible that a clamp on one may suffice to attach the machine sufficiently. If it does not, and two are used, the result is but an aggregation of the results due to each. These considerations lead, in ascertaining the extent of the actual invention of Page, to search for it in some distinctive feature of his clamping device, which, from its peculiar co-operation with the wringing apparatus, produces the new result which renders his invention patentable. The description in the patent and the drawing both exhibit a clamping device which consists of two curved bars having three vertical fingers, two of which proceed from each end of the bar, on one side of it, and one from the centre, but on the opposite side of the bar. The latter finger has a set screw passing through it, with a small button on its end. Each bar is pivoted to a small bracket by a stud, and the brackets are fastened to the upright, near its base, on the side or front. When the bars are clamped to the tub by adjusting the bar by means of the pivot, four of the six fingers are placed on the outside of the tub, and two, those having the set screw, on the inside. The set screw is then adjusted, and thereby the uprights are rigidly attached to the tub. The specification proceeds as follows: "This construction presents a swivel or joint, which allows each clamping device to turn, and thus adapt itself perfectly to tubs and washing machines of different sizes and forms. The employment of two sets of clamping devices, and the taking firm hold on the edge of the tub at points so far removed from each other, provides for very effectually resisting the tortional strain" (caused by operating the crank.) Language could hardly be plainer to indicate that the swivel is deemed an important part of the contrivance. It is also obvious, from the whole mechanism of the clamping device, that the pivot is the controlling factor in the construction; and I am unable to see what equivalent could be employed in its place, without requiring a radical change in the entire device. Without the pivot there could be no swivel, and the vertical fingers could not be placed in the required position.

Turning to the application for the original patent, it is clear that Page considered the swivel as the important feature of his invention; for, he concludes his description by stating that "the advantage of this arrangement consists in the employment of a swivel or joint, which allows the clamping device to turn, and thus adapt itself perfectly to tubs of different sizes and forms." This terse statement of his idea is quite ingeniously diluted in the language of the reissue. In the original he summarizes his invention as one wherein "the advantage of his arrangement consists in the employment of a swivel," while, in the reissue he says: "This construction presents a swivel." In the first, the employment of the swivel is stated as the gist of the improvement. In the reissue the attempt is to present it as a secondary or cumulative advantage. I cannot resist the belief, in view of the decided difference between the claims in the original and the reissue, and of the changes in the description, that it was intended to import vagueness and generality into the reissue, to obscure somewhat the cardinal idea of the inventor. Enough, however, remains to show that the reissue describes the same invention as did the original, and that the swivel cannot be discarded, but must be regarded as one of the controlling elements in the combination.

Assuming that the patent covers a combination which is the proper subject of a patent, either because a new result is produced, or because the clamping device is new, the claim in question has not been infringed by the defendants' structure. In their structure, the wringer is clamped to the tub by two jaws attached by a spring connection, one to either standard, having a thumb-screw passing

through either jaw and screwing into a piece of metal imbedded in either standard. The wringer may be set upon the edge of the tub, the jaws at the base of each standard being placed outside of the tub, and the standards upon the inside and opposite the jaws, and, by means of the thumb-screw, the jaws are moved towards the standard, thus firmly clamping the wringer upon the tub between the jaws and the standard. Quite evidently, this is a simpler and more convenient and less expensive device than the complainants'. The swivel is discarded, the curved bars which are useless without the pivot are discarded, and the standards are utilized to supply the place of four of the vertical fingers on the bars. The contrivance of the defendants is so far different from that of the complainants that it amounts to a substantive invention. This is quite conclusive against the theory of infringement. Indeed, it was substantially conceded, upon the argument, that, if the swivel should be held to be an essential part of the combination covered by the claim, the defendants' structure is not an infringement.

A decree is ordered for the defendants, dismissing the bill, with costs.

Case No. 9,509.

In re METZ et al.

[6 Ben. 571.] [1]

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

BANKRUPTCY—RENT OF PREMISES AFTER ADJUDICATION—INJUNCTION—DISPOSSESSION.

The firm of M., B. & C. hired premises in New York City, at a rent of $7,500 per annum, payable monthly. On the 1st of May, 1872, they owed $1,875 for the rent, and the landlord commenced proceedings to dispossess them. On the 6th of May a petition in involuntary bankruptcy against M., B. & C. was filed, and an injunction was issued restraining the debtors and all other persons from interfering with the debtors' property, which was served on the landlord. A warrant of dispossession was issued in those proceedings, but was not executed, and on the 20th of May a formal injunction was served on the landlord, ordering him to refrain from any interference with the property of the bankrupts, except to preserve the same. The marshal, on May 6th, took possession, under the warrant, of the bankrupts' stock of goods, on the premises in question. On May 22d, 1872, the landlord applied to the bankruptcy court for a modification of the injunction, so as to allow of the execution of the warrant of dispossession. The application was denied. No application was made to the court to order the removal of the goods from the premises, but the marshal was applied to to give up the premises, and also to pay rent, but he refused to do either. He remained in possession of the premises till December 13th, 1872. The landlord now applied to be paid rent of the premises at the rate of $7,500 for the whole period, stating that he had had an offer of that sum for the premises, for the unexpired term of the lease, and that the premises were worth that sum: *Held*, that the landlord was not entitled to claim rent at the rate of $7,500 for the period, but was entitled to a reasonable compensation for the use and occupation of the premises.

[Cited in Re Hamburger, Case No. 5,975; Re Lucius Hart Manuf'g Co., Id. 8,592; Re Ives, Id. 7,116.]

[In the matter of Joseph Metz and others, bankrupts.]

J. J. Marrin, for applicants.

W. F. Scott, for assignee.

BLATCHFORD, District Judge. On the 26th of December, 1871, the firm of Bailey & Debevoise leased to the bankrupts, who composed the firm of Metz, Brothers & Cleve, for the term of three years and one month from the 1st of January, 1872, for the yearly rent of $7,500, payable monthly, not in advance, the store and basement of the building numbers 353 and 355 Canal street, in the city of New York. Metz, Brothers & Cleve made only one of the monthly payments, and, on the 1st of May, 1872, owed the lessors, for rent, $1,875, which remains unpaid. Prior to May 6th, 1872, Bailey & Debevoise instituted proceedings, in a local court, to dispossess the bankrupts for the non-payment of such rent. On the 6th of May, 1872, a petition in involuntary bankruptcy was filed in this court against the bankrupts, and an order to show cause was on the same day issued thereon, returnable May 18th, 1872. This order contained a clause of injunction restraining the debtors and all other persons from disposing of the debtors' property and interfering therewith until the further order of the court. A copy of this order was served on Bailey & Debevoise, on the 17th of May, 1872. Prior to the 20th of May, 1872, a warrant had been issued, in the dispossession proceedings, to the proper officer, directing him to remove the bankrupts from the premises in question, but such warrant was not executed. On the 20th of May a formal injunction, issued by this court, and bearing date the 18th of May, and addressed to the debtors and to Bailey & Debevoise, and commanding them to refrain, until the further order of the court, from making any transfer or disposition of any of the property of the debtors, and from any interference therewith, except to preserve the same, was served on Bailey & Debevoise. The debtors had appeared on the return day of the order to show cause, and the matter was adjourned for a week.

Simultaneously with the issuing of the order to show cause, a provisional warrant was issued by the court to the marshal, under section 40, under which he, on the 6th of May, 1872, took possession of the stock of goods of the debtors, which was in and on the premises in question. He did not remove such stock of goods, but left it there.

On the 22d of May, 1872, Bailey & Debevoise presented a petition to this court, setting forth the lease and its terms, the indebtedness of $1,875 for rent, the institution of the dispossession proceedings, the issuing of

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

the warrant therein for the removal of the debtors from the premises, the institution of the bankruptcy proceedings, the issuing and the service, on Bailey & Debevoise, of the order of May 6th, 1872, containing the injunction clause before mentioned, and the service of the formal injunction, on the 20th of May. The prayer of such petition was, that the injunctions might be so modified or altered, that Bailey & Debevoise might be allowed to execute and enforce such warrant of removal. On this petition an order was asked that the petitioning creditor show cause why the prayer of the petition should not be granted.

Such petition of Bailey & Debevoise did not set forth that it was possible to remove the stock of goods from the premises, so as to give the enjoyment of the possession of the premises to Bailey & Debevoise, without injury to the stock of goods, nor did it ask this court to direct the marshal to remove the goods from the premises, with a view to allowing Bailey & Debevoise to obtain possession of the premises under the dispossession proceedings. The order and the injunction of this court in no manner restrained Bailey & Debevoise from executing the warrant of removal, except in so far as it restrained them from interfering with the property of the debtors. The removal of the goods, then in the custody of the marshal, on the premises, was necessary to the full enjoyment of the possession and use of the premises by Bailey & Debevoise. The occupation of the premises by the marshal was the occupation of them by this court. The debtors were not in the actual occupation of the premises, although, as between them and the lessors, having the technical legal possession of the premises. The prayer of the petition of Bailey & Debevoise was, that the injunction, which did not, in this regard, affect Bailey & Debevoise, except as it restrained them from interfering with the property of the debtors, might be so modified that they might execute such warrant of removal. This was, in effect, asking that they might interfere with the property of the debtors, in executing such warrant of removal, and might themselves, by means of such warrant, remove such goods from the premises. So far as a formal, technical removal of the debtors from the premises, personally, and as tenants in actual occupation under the lease, was to be effected by the execution of such warrant of removal, the injunction did not need to be modified. It needed to be modified only for the purpose of dispossessing the marshal and removing the stock of goods from the premises, so as to give back the actual use and occupation of the premises to Bailey & Debevoise. In this view, no sufficient reason was shown for modifying the injunction, as no sufficient reason was shown for directing the marshal to remove the goods and vacate the premises. Therefore, this court declined even to grant the order requiring the petitioning creditor to show cause, that was asked for on the petition of Bailey & Debevoise.

A landlord who lets premises to a tenant to be occupied for purposes of trade, must be held to do so with the full understanding that the tenant may be proceeded against in bankruptcy, and that the bankrupt court may be called upon to take possession of the goods of the tenant on the premises. In many cases, it will be impossible to remove the goods before a sale of them, without great loss and injury. In other cases, it will be impossible, because unjust to the debtor, to sell them before adjudication, and the adjudication may be delayed. Therefore, merely setting forth such facts as Bailey & Debevoise set forth in their petition, furnished no ground for directing the marshal to remove the goods and leave the premises.

The debtors were adjudicated bankrupts on the 7th of August, 1872. An assignee of their estate was appointed on the 23d of December, 1872. The goods remained on the premises, in the custody of the marshal, and the marshal remained in occupation of the premises, in custody of the goods, until the 13th of December, 1872, at which time Bailey & Debevoise obtained possession of the premises. Prior to that time they made to this court only the one application before mentioned. They now apply to be paid, out of the assets of the estate, the sum of $4,520.81, as rent of the premises from the 6th of May, 1872, to the 13th of December, 1872, at the rate specified in the lease, $7,500 per annum.

Bailey & Debevoise show that while the marshal was in possession they applied to him to give up the possession to them, and also applied to him for rent, but that he did not comply with either request. But they made no application to this court after the adjudication. They also now state that while the marshal was in occupation they received an offer for the hiring of the premises for the remainder of the term under the lease to the bankrupts, at the rent of $7,500 per annum, and that that was a fair and proper rent for the premises. But they never made known to the court their ability to rent the premises for that sum, or laid before the court such a state of facts as would have enabled the court to determine with propriety, in advance, that rent at that rate ought to be paid in preference to removing the goods elsewhere. Nor do they now show that it was necessary for the goods to remain on the premises, at such an expensive rent. Certainly, there is nothing to warrant the presumption that the court would have sanctioned, in advance, so large a rent.

Before adjudication, the debtors were entitled to be heard on the question of removing their goods from the premises, or of selling them on the premises, with a view to giving up the premises. And it may very well be that an application made to this court in May, 1872, to direct the marshal to remove the goods from the premises, or to sell them

on the premises, made on notice to the debtors, as well as to the petitioning creditor, would have been granted, if it had appeared that the alternative would have been the rent now asked, or, if denied, would have been denied on the full understanding that the sum to be paid for the occupation of the premises by the marshal, was to be at the rate of $7,500 per annum. Bailey & Debevoise were themselves general creditors for their $1,875 of unpaid rent, and in a position to make such an application.

But, most clearly, after the adjudication, it was the duty of Bailey & Debevoise to have asked the court to sanction the rate of rent they now ask, or to give up the premises. It was not enough for them to ask possession or rent from the marshal. He was the officer of the court, acting under the warrant. It cannot be presumed, and there is nothing to show, that, if a proper application had been made to the court, the court would not, at an earlier day, have ordered the marshal to remove the goods and leave the premises. The application that was made, was made four days after the return day of the order to show cause, the hearing on such order having been making out a case for the action of the court adjourned for a week, and fell far short of to remove the marshal and the goods; and the making of such application can carry with it no implication of any right in the applicants thereafter to receive rent at the rate of $7,500 per annum, so long as the marshal should remain on the premises.

But, the applicants are entitled to receive a reasonable compensation for the use and occupation of the premises, based upon the considerations hereinbefore set forth, and any others properly bearing on the question. The assignee is directed to make a formal answer to the petition, setting forth such facts and positions as he may deem proper for the protection of the estate, and the matter may then be brought before the court, on notice, for further action.

Case No. 9,510.

In re METZGER.

[2 N. B. R. 355 (Quarto, 114); 1 Chi. Leg. News, 163; 2 Am. Law T. Rep. Bankr. 53.] [1]

District Court, N. D. New York. 1868.

BANKRUPTCY—ASSIGNEE—RIGHTS AND DUTIES—PREFERRED MORTGAGEE.

The assignee in bankruptcy represents the whole body of creditors, and it is his right and duty to contest the validity of any mortgage by which one creditor has obtained a preference over another.

[Cited in Potter v. Coggeshall, Case No. 11,322.]

[Approved in Southard v. Benner, 72 N. Y. 428.]

In this case [Jacob] Metzger had been adjudicated a bankrupt upon the petition of his creditors. The assignee, upon his appointment, took possession of a stock of goods upon which Abernethy & Co. claimed to hold a chattel mortgage, executed prior to the filing of the petition. An order was granted that the sale of the goods by the assignee should not prejudice the right of these mortgagees; but that they should have the same lien upon the fund as upon the goods themselves. Subsequently Abernethy & Co. filed their petition, setting forth their mortgage, and praying that the assignee might be ordered to satisfy the same out of the funds in his hands. The assignee filed his answer to this petition, setting up that the mortgage was fraudulent and void as to the creditors. The case was tried, and the invalidity of the mortgage as to creditors, under the decisions of the court of appeals of this state, was fully proven. Upon the argument of the case, however, the counsel for Abernethy & Co. claimed that this defence could not be set up by the assignee in bankruptcy, as he succeeded only to the rights which the bankrupt had, and that, as between the bankrupt and Abernethy & Co., the mortgage was valid. Further, that none but judgment creditors could contest the validity of the mortgage, and that the assignee did not stand in that position. The counsel for the assignee argued that in bankruptcy the assignee succeeded as well to the rights of the creditors as the bankrupt: that he was entitled to maintain the void character of this mortgage; that if this were not so bankrupts might prefer creditors with impunity, and dispose of their property to pretended creditors; that the rule "regarding judgment creditors only being entitled to contest the mortgage" did not apply to bankruptcy proceedings, for they took the place of judgments, and creditors were prohibited from prosecuting to judgment their claims.

HALL, District Judge. The position assumed by the assignee was the proper one; he represented the whole body of creditors, and it was his right and duty to contest the validity of any mortgage by which one creditor had obtained a preference over the others, the whole object of the bankrupt law [of 1867 (14 Stat. 517)] being to compel an equal distribution of the failing debtor's property among all his creditors.

[1] [Reported from 2 N. B. R. 355 (Quarto, 114), by permission. 2 Am. Law T. Rep. Bankr. 53, and 1 Chi. Leg. News, 163, contain only partial reports.]

Case No. 9,511.

In re METZGER.

[5 N. Y. Leg. Obs. 83.]

District Court, S. D. New York. Jan. 16, 1847.

EXTRADITION—HOW EFFECTUATED — EVIDENCE — SUFFICIENT TO JUSTIFY TRIAL—FEDERAL JURISDICTION—EXTRATERRITORIAL OFFENSES — TREATIES—BASIS OF EXAMINATION OF FUGITIVE.

[1. The extradition of a fugitive from justice of a foreign country can only be effectuated through the agency of the tribunals of justice, whose province it is to determine the existence of reasonable cause for the charge of crime, and, if there be sufficient evidence, to justify putting the accused upon his trial.]

[2. All federal courts inferior to the supreme court receive their creation and allotment of jurisdiction from congress, and can exercise only such as is confided by law; but, after jurisdiction is designated, the court will take cognizance of all matters which fall within the scope of its powers, without special appointment of law.]

[3. Transactions declared by law to be offenses occurring in foreign territories, on the high seas or elsewhere, are within the jurisdiction of the circuit and district courts under the judiciary act of 1789 (1 Stat. 73) and its kindred statutes, and such courts must receive complaints, take evidence, issue warrants, and apprehend and commit a person accused of such offenses, without further authorization for so doing than their general capacity to take cognizance of crimes.]

[4. The provisions in a treaty addressed to the judicial power become a rule of law of themselves, and are carried into execution by the courts, without other direction or authority.]

[5. A treaty, when addressed to the judicial power, being of equal force with an act of congress, the provisions of the treaty with France of November 9, 1843, for extradition of fugitives from justice requiring the investigation of charges of crime, and the arrest and imprisonment of the accused as for trial, are binding on the courts.]

[6. Testimony of a vice consul that he has received official information from his government that an alleged fugitive from justice stands charged with the crime of forgery, and also of a person that he was defrauded by the accused, whom he pursued through several countries to the United States, together with verified depositions on regular proceedings before the judge of instruction regularly certified by the inferior officers, and also under the great seal of the minister of foreign relations, are sufficient to support a charge of crime, and justify apprehending the accused and detaining him for trial.]

[7. The questions whether the United States government is bound by a treaty compact to deliver up an alleged fugitive from justice apprehended and detained by a federal court for trial, for offenses committed by him in the foreign country, not crimes by our laws, whether he is within the description of persons named in the treaty as subject to extradition, when the treaty went into operation and became obligatory, and whether the obligations assumed by the treaty will be fulfilled, are addressed to the political, and not the judicial, department.]

[8. The laws of France, and not those of the United States, form the basis for the inquiry as to whether an extraditable offense has been committed under the treaty of November 9, 1843, providing that the laws of the place of refuge are to be applied to the investigation as "if the crimes had been committed" where the arrest was made.]

[9. A person against whom a complaint has been made and accepted before a judge of instruction in France is a person accused, within the meaning of the treaty of extradition, although no indictment has been found against him.]

[10. A treaty will take effect from its date, irrespective of its ratification, unless a different period is fixed by the contracting parties, or must be adopted in order to fulfill their manifest intention.]

[On warrant for the apprehension of Nicholas Lucien Metzger, an alleged fugitive from justice.]

BETTS, District Judge. The United States attorney for this district, under instructions from the secretary of state, and by direction of the president, appeared before me, and prayed judicial action on a requisition made on the president, through the medium of the diplomatic agents of the French government. The requisition demands, pursuant to the treaty of November 9, 1843, between the two governments, that Nicholas Lucien Metzger be delivered up to justice, he being charged with having committed the crime of forgery in France, and having since sought an asylum in the United States, and being now found within the Southern district of New York. The same application had been previously made to a magistrate of the state of New York, and his order directing the apprehension and commitment of Metzger was subsequently set aside by the circuit judge, and the prisoner was discharged from the arrest, on habeas corpus, upon the ground that the judicial authorities of the state of New York have no jurisdiction in the case. I granted a warrant for his apprehension, and he was brought before me by the marshal, accompanied by Messrs. Hoffman & Blunt, his counsel. Mr. Butler, the United States attorney, appeared in behalf of the United States, and Messrs. Cutting & Tillou in support of the requisition on the part of the French government. The counsel for Metzger took exception to the competency of a judge of the United States to grant a warrant of arrest, and also to the adequacy of the evidence produced, to justify the commitment of the accused. The discussions of the various topics brought in review have been marked with great learning and ability, and were prolonged, several adjournments intervening from the 10th to the 28th of December. The counsel on both sides supported their arguments by numerous citations of treatises on international law; treaty compacts between the United States and foreign powers, and those between foreign powers alone; diplomatic correspondences; executive and legislative documents and debates; the municipal laws of France and their explications; the laws of the United States and of the state of New York; and the decisions of the United States courts, and courts of

the respective states, and of England. It being admitted on both sides that Metzger is now in confinement in this district on civil process, and must remain in detention for a considerable period, irrespective of the disposition to be made of this application, I have not deemed it expedient to defer other public business pressing urgently on my time, in order to give this case more immediate dispatch. Having examined carefully the authorities referred to by counsel, and weighed the reasonings submitted to me, I avail myself of the earliest opportunity to state the result of my reflections upon the subject.

The question lying at the foundation of all others, and naturally first to be considered, touches the jurisdiction of the United States judiciary over the subject-matter. A treaty under the constitution of the United States may have a double aspect and operation: First, that accompanying it as a compact between sovereign powers and governed by the law of nations; and, secondly, one equivalent to an act of the legislature, our constitution declaring a treaty to be the law of the land. Article 6. In the latter case it operates of itself, without the aid of any legislative provision; but in the former the legislature must execute the contract before it can become a rule for the courts. Foster v. Neilson, 2 Pet. [27 U. S.] 314. To determine the operation of this convention, it must be ascertained whether it imports the necessity of judicial aid to carry it into execution, and whether it communicates that degree of authority which enables the judges of the United States, as individual magistrates, to take cognizance of it. Without inquiring into the polity of France, and the probable operation of the treaty in this respect within her dominions, it is manifest that the provision demanding the apprehension and commitment of persons charged with crimes cannot be carried into effect in this country, but by aid of judicial authority. Not only in the distribution of the powers of our government does it appertain to that branch to receive evidence and determine upon its sufficiency to arrest and commit for criminal offences, but the prohibition in the constitution against issuing a warrant to seize any person except on probable cause first proved necessarily imports that issuing such warrant is a judicial act. [Ex parte Burford] 3 Cranch [7 U. S.] 448; Amend. Const. art. 3. It is believed this doctrine is firmly established in the jurisprudence of this country and England, in respect to the surrender of fugitives from justice, whether the obligation to surrender is deduced from the law of nations, or is recognized only when expressly stipulated by treaty. In every authority I have consulted, it seems to be regarded as an elementary principle that the extradition is to be effectuated through the agency of the tribunals of justice whose province it is to determine the existence of reasonable cause for the charge of crime, and if there be sufficient evidence to justify putting the accused upon his trial. 1 Kent, Comm. 37; Story, Confl. Law, 627, and note; 1 Am. Jur. 297; 4 Johns. Ch. 106; [Holmes v. Jennison] 14 Pet. [39 U. S.] 540; U. S. v. Davis [Case No. 14,932]; Ex parte Dos Santos [Id. 4,016]; Basset's Case, 1 New Sess. Cas. (Eng.) 33.

"Jay's Treaty," as it is usually termed, the treaty with England of Nov. 19, 1794, introduced the same stipulation in regard to the surrender of fugitives from justice, that is adopted in the treaty. The attention of the executive, judicial and legislative departments of government were early aroused to a most excited attention to the effect and operation of the provision, and to the appropriate method of carrying it into execution. The British authorities demanded the surrender of a seaman, Robbins, on a charge of murder, committed by him at sea, on board an English man-of-war. The president invoked the interposition of the United States judge of South Carolina, to examine the evidence and to take order for the arrest of the accused. He was apprehended and committed upon the warrant of the judge, and thereupon delivered over by the president to the English government. Soult v. L'Africaine [Case No. 13,179]; 1 Hall, Jour. Jur. 13–27. The subject was brought before congress the succeeding session, and the functions of the executive and judicial departments were most thoroughly examined and discussed, by men of the highest name in the juridical annals of the country. 5 Wheat. [18 U. S.] Append. 19; U. S. Gaz. 1800. In looking over the report of the proceedings before the United States judge, and the debates in congress, so far as they are preserved in the papers of the day, I do not find the suggestion made, that the apprehension and commitment by the judge, were not by competent authority. The great struggle by counsel before the court, and in the debates in congress, was to maintain that the offence charged in that case was triable under our laws, and in this country, and if not, that it belonged to the judiciary and not to the executive, to decide whether the casus foederis existed, and if the accused was subject to extradition. These views were maintained by Mr. Nicholas, Mr. Gallatin, Mr. Livingston and others, and combatted by Mr. Marshall, Mr. Dana, Mr. Otis, Mr. Harper, Mr. Bayard and others. The house, after a prolonged discussion, by a vote of 65 to 39, affirmed the correctness of the procedure in the case, and I do not meet with an instance since that period in which the justness of the decision has been called in question. I am satisfied that such also is the sound exposition of the corresponding provision in this treaty, and that the government can only fulfil its engagement in this respect, by the instrumentality of the judicial tribunals.

Whether the judiciary can act in the mat-

ter without direction, or express authorization by act of congress, is the next question in order, and that on which there would seem to be more difficulty and more ground for doubt. But I am persuaded the question is susceptible of a satisfactory solution. The judicial power of the United States extends to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made under its authority. Const. art. 3, § 2; [Chisholm v. Georgia] 2 Dall. [2 U. S.] 475. A case arises under the constitution or a treaty, when the subject-matter in contestation is controlled by either, or the correct decision of it depends on their construction. 3 Story, Const. Law, 1640, 1642; [Osborne v. Bank of U. S.] 9 Wheat. [22 U. S.] 819; [Holmes v. Jennison] 14 Pet. [39 U. S.] 540. But although a subject comes within the scope of the powers of the judiciary, and is properly referable to their authority, still it is cardinal principle of our jurisprudence that no subordinate court or magistrate can take cognizance of it, without express authorization by law. The supreme court, being created by the constitution, may derive jurisdiction directly from its authority, and may probably, without the aid of legislation, supply the law of procedure necessary to the exercise of such jurisdiction. [Chisholm v. Georgia] 2 Dall. [2 U. S.] 419; [Rhode Island v. Massachusetts] 12 Pet. [37 U. S.] 657. But all tribunals inferior to the supreme court receive their creation and allotment of jurisdiction from congress, and can exercise no other than such as is confided to them by law. The constitution and law must accordingly concur in conferring jurisdiction, in order to put in action in those courts the powers imparted to the judicial department. Ex parte Cabrera [Case No. 2,278]; U. S. v. Nine Packages of Linen [Id. 15,884]; Livingston v. Jefferson [Id. 8,411]; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 336; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76; [American & Ocean Ins. Co. v. 356 Bales of Cotton] 1 Pet. [26 U. S.] 545; [U. S. v. Coombs] 12 Pet. [37 U. S.] 72. The further general principle is equally settled, that after a court is established and its jurisdiction designated, it takes cognizance of all matters then existing, or afterwards arising, which fall within the scope of its powers, without those particulars being assigned to it by special appointment of law. This is so in respect to cases of common-law and admiralty jurisdiction. Burke v. Trevitt [Case No. 2,163]; The Abby [Id. 14]; Picquet v. Swan [Id. 11,134]; Davis v. New Brig [Id. 3,643]; [Glass v. The Betsey] 3 Dall. [3 U. S.] 6; [Penhallow v. Doane] Id. 54; [Bank of U. S. v. Planters' Bank] 9 Wheat. [22 U. S.] 931; [Postmaster General v. Early] 12 Wheat. [25 U. S.] 136; [Kendall v. U. S.] Id. 527. And the like doctrine is applicable to cases of criminal jurisdiction. U. S. v. Coolidge [Case No. 14,857]; [U. S. v. Hudson] 7 Cranch [11 U. S.] 32; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 336; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76; [Jones v. Shore] 1 Wheat. [14 U. S. 467. The judiciary act of September 24, 1789, and subsequent statutes organizing the courts of the United States, and distributing amongst them, the subjects over which their jurisdiction may be exercised, allot to the circuit and district courts cognizance of all crimes and offences cognizable under the authority of the United States; and accordingly, transactions declared by law to be offences occurring in foreign territories, on the high seas, or elsewhere, fall necessarily within the criminal jurisdiction of those courts. They must receive complaints, take evidence, issue warrants, apprehend and commit persons accused of such offences, without further authorization for so doing, than their general capacity to take cognizance of crimes.

The inquiry to be answered, then, is whether the provisions of this convention create a case upon which that criminal jurisdiction attaches. The authorities quoted have relation generally to legislative enactments as necessary to enable the tribunals to exercise their jurisdiction; yet it is manifest that the aim of the courts in these cases was to determine the extent of the inherent powers of the judicial department,—how far they can exercise powers derived directly from the constitution, without other authorization by law, and reference was had to laws enacted by congress, because in the cases under adjudication there was no other source from which the law required could emanate. Treaties are placed by the constitution in the same rank with acts of congress, and even with the constitution itself, for by the sixth article it is declared that "this constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." It has been repeatedly decided by the supreme court that under this provision of the constitution, a treaty becomes equivalent to a law of congress, and where its stipulations apply, they must be observed and enforced by the court, in adjudging as well upon individual rights as those of the nation. [U. S. v. The Peggy] 1 Cranch [5 U. S.] 109, 110; [Foster v. Neilson] 2 Pet. [27 U. S.] 314. A great distinction exists between the effect and operation of treaties under our constitution, and that given them in England. 3 Story, Const. Law, 1515. In that country a treaty is regarded only as a contract addressed to the political power and an act of parliament is required to give it effect infra-territorially. 1 New Sess. Cas. [Eng.] 33. But in the United States the provisions in a treaty addressed to the judicial power become a rule of law of themselves, and are carried into execution by that department without other direction or authority. [Foster v. Neilson] 2 Pet. [27 U. S.] 314. The engagements of this treaty are accordingly to be accepted by the courts the same as if they were incorporated in a statute, and it is not

supposed that a reasonable doubt could be entertained, if a law of congress had directed the president to deliver up fugitives from justice, provided the fact of the commission of the crimes charged against them shall be so established as that the laws of the court would justify their apprehension and commitment for trial "if the crimes had been here committed," but that it must appertain to the judicial tribunals to ascertain such fact, not but that the authority so to do resulted from their organization and appointment to take jurisdiction of all crimes and offences cognizable under the authority of the United States. It by no means is a necessary ingredient to the jurisdiction that the court or magistrate should have power to punish as well as arrest for the crime. Under the general authority, judges and magistrates take cognizance of offences charged upon a person; and if it appears that the crime was committed, or is properly triable in a different district, they remit the prisoner out of the jurisdiction of the arresting tribunals, to that within which the offence was committed. 1 Story's Laws, p. 66, § 33. Those compacts in the treaty so much dwelt upon in the arguments, as being in their nature merely executive acts, or engagements to perform future acts, are within the ordinary acceptation of the national contracts, and operate only upon the political power of the country. Contracts of that description cannot be always performed without the aid of legislation, either in this country or France. But the treaty also embraces the further provision, requiring the investigation of charges of crime, and the arrest and imprisonment of the accused as for trial; and in that respect, in this country, it drops the character of a contract merely, and assumes that of a municipal law addressed to the civil magistrates. The like provision in Jay's treaty was so accepted and acted upon. A judge of the United States took cognizance of the matter under authority of the treaty law alone. Soult v. L'Africaine [Case No. 13,179]; 1 Hall, Jour. Jur. 13; 5 Wheat. [18 U. S.] Append. 19. And no where, in the severe scrutiny the subject underwent, does it appear an objection was raised to the competency of the judge to arrest and commit by virtue of that law. Review of Proceedings by Marshall (afterwards Chief Justice), 1 Hall, Jour. Jur. 27. So other eminent judges have recognized a treaty as supplying all the law necessary to compel them to interfere and cause the apprehension of fugitives from justice. U. S. v. Davis and Ex parte Dos Santos [supra]. Without pursuing the argument further, I feel prepared upon these principles and authorities to declare that the duty devolves on me, under the authority of this treaty as a law of the land, to take cognizance of the requisition and charge laid before me.

The only remaining topic involved in the case of a strictly judicial character relates to the sufficiency of the evidence produced against the accused to authorize his apprehension and commitment. The evidence relied upon in support of the requisition consists in official documents transmitted from the keeper of the seal, minister of justice, in France, through the minister for foreign affairs, to the French minister in the United States, and by him delivered to the vice consul of France in this city, to be produced before the proper tribunal here. The oral testimony of two or three witnesses was also taken before me, auxiliary or supplementary to the documentary proofs. The counsel for the accused ground themselves, with strong assurances, upon objections to the competency of the documentary proofs, for the want of proper authentication, and because not originally taken in due form of law; and to the inadequacy of the oral evidence to justify his apprehension. It would prolong this opinion to an unusual extent to take up and consider consecutively the positions maintained upon these topics. I shall limit myself to stating general results, with the leading considerations tending to support them, and not attempt to discuss the particular points with fullness.

It will be proper first to notice the rules which in our law describe or fix the character or kind of evidence necessary on such preliminary proceeding, and the degree or amount of evidence required to support a charge of crime, and justify the apprehension of the accused and his detention for trial. Under our system of jurisprudence, no testimony is received on the trial of a criminal charge, unless delivered on oath, in presence of the accused; but a complaint or charge of crime may be made ex parte on affidavit, and one magistrate may act on depositions made before another, within or out of the jurisdiction of the examining magistrate, to issue his warrant of arrest, and commit the accused for trial. [Ex parte Bollman] 4 Cranch [8 U. S.] 129; 1 Chit. Cr. Law, 36, 37, note; 1 Burr's Trial, 12, 16. Nor need the evidence approach that full proof necessary to justify a conviction. The constitution requires no more than that probable cause be shown, to authorize an arrest (Amend. 6); and probable cause is deduced from a state of facts and circumstances, which afford reasonable grounds of suspicion of guilt (1 Burr's Trial, 11, 14, 16; [Ex parte Bollman] 4 Cranch [8 U. S.] 129; Barb. Cr. Law, 455, 492, 496; 4 Blau [by Chitty] 235). Dalton holds that a magistrate must commit when there is good ground for suspicion. Dalt. Ch. 166. Whether further proof must not be given to justify an indictment may be an unsettled question (Whart. Cr. Law, 125); but that does not arise for investigation in this state of the case. The testimony of the witnesses on deposition or orally before me might well authorize detaining the accused to give opportunity for additional proof, if not deemed sufficient to justify his absolute commitment for trial. 1 Burr's Trial, 16. The vice consul of France, Mr.

Borg, testifies that he has received official information from his government, that the accused stands charged with the crime of forgery of authentic deeds and instruments, committed by him in France in numerous cases in his capacity of royal notary, and also with forging of commercial and bank paper since November 9, 1843, and that he fled from justice of that country, and has taken refuge in this; and the witness has reason to believe and does believe such to be the facts. Mr. Karst proves his personal acquaintance with the accused at Sarreguemines in France, for many years, where the witness knew him, acting in the official character of a royal notary. Witness was defrauded by him in a transaction as notary of 20,000 francs. The accused absconded from France in February, 1844; and witness pursued him through Belgium, Prussia, and England to the United States. The accused traveled under a feigned name. He left a wife and child residing in France, and was charged with various crimes at the time he privately left there. Evidence creating a strong suspicion that a felony has been committed, and that it was perpetrated by a particular person, will warrant his apprehension without direct proof of the corpus delicti. 1 Burr's Trial. The report of the trial of Col. Burr, before Chief Justice Marshall, is referred to the more frequently for principles governing incipient proceedings in commercial cases because the questions were discussed by eminent counsel, and that distinguished judge gave every point a careful consideration, delivering his opinion upon them in writing.

Admitting the proofs of this class to be inadequate to justify the detention of the accused, I think the documentary evidence furnished by the French government is legally admissible. The counsel for the accused have reasoned this point on the assumption that the statute law of the state of New York supplies the rule of decision which the court must observe in this respect, under the direction of the judiciary act (section 34), and that these proofs are not authenticated conformably to the requirements of that law. Chief Justice Marshall decided that the section has no relation to criminal cases (1 Burr's Trial); and indeed it is a settled doctrine that the state laws do not ex proprio vigore affect the procedure of the United States courts, in any description of actions. [Wayman v. Southard] 10 Wheat. [23 U. S.] 1; [Bank of U. S. v. Halstead] Id. 51; [Beers v. Haughton] 9 Pet. [34 U. S.] 329; [Duncan v. Darst] 1 How. [42 U. S.] 304; [Bronson v. Kinzie] Id. 323. It is not controverted but that the evidence might be so taken in France, pursuant to the laws of that country, as to be admissible in our judicatories to support charges of crime preferred under the treaty. Nor do I understand the objection raises any question touching the regularity of the proceedings, in the present case, before the juge d'instruction. His authority is clearly stated in the Code, and the method of procedure there indicated appears to have been carefully observed. Code D'Inst. Cr. arts. 70, 71, 76, par Rogron. The depositions were signed by the witness, the judge, and clerk at the same time, and the most commendable caution was exercised in making their contents clearly known to each witness, before they were completed. These documents are furnished pursuant to instructions of the secretary of state of the United States, to the French minister, on the 4th of December, 1844; and, unless the rule of law is imperatively so, they ought not to be subjected to a complete conformity with our usages, or those familiar to the common law, in all the formalities of authentication. All that can be reasonably exacted is that the documents offered as evidence on this preliminary inquiry shall be clothed with all substantial proof of verity. It is proper first to notice the method of verification adopted, and then consider its legal effect. The documents consist of the original mandat d'arret, issued against the accused by the judge of instruction, under the seal of the "cour civil d'instruction of Sarreguemines," and subscribed by him; and of copies of the depositions heard "dans la procédure instruite." The Procureur du Roi, for the department of Sarreguemines, made a requisition under his hand and official seal on the Greffier of the tribunal, to deliver a copy of the depositions taken in the matter, "certifiée conforme par lui." Dupin, the Greffier, adds to the depositions "pour copie conforme" delivered at the request of the Procureur du Roi, to which he subscribes his name, and affixes the seal of the tribunal. The chief of the bureau of the minister of justice and keeper of the seals, Laudy, certifies to the act of the Procureur du Roi, and of the Greffier "vu pour legalisation," of their respective signatures, and subscribes his name and affixes the seal of the bureau. The chief of the Chancellerié, De Lamarre, under the seal of the ministry of foreign affairs, and by authorization of the minister, certifies in the same form, to the signature of Laudy. Mr. Borg and Mr. Bartholemy (formerly an advocate in France), both examined before me, testify that the seals and certificates attached to these papers are the regular and accustomed methods of authenticating like documents in France, and that the seal of the ministry of foreign relations is the highest seal employed in France for these purposes. The French law books also speak of it as the great seal, and that it verifies public acts, &c., but distinguishes as le petit scel that which is affixed to judicial acts emanating from the royal jurisdictions. Dict. du Droit; Doinisart, Merl. Repert, voce, sceau, scel.

A procédure instruite before a tribunal in France has more the character and formalities of a trial than the proceedings under our laws before a magistrate on a charge of crime. The proceedings before a judge of instruction are to be enregistered, which is copying or

transcribing them on the minutes of the court. 10 Merl. Repert, 347, et suie. Whenever an expedition or copy is required by the proper authority (Code, par Baequar, p. 707, art. 7), une copie conforme is a copy collated or compared with the original, by the Greffier, and has all the characteristics of an exemplification from the record under our laws (Dict. de Droit; 4 Merl. Repert, 442, 443, arts. 1, 2; 6 Merl. Repert, 440, 443, Acts, v. 1, 4), and the certificate of the Greffier to that effect imports all that is demanded here to authenticate an exemplification of a record. So also the concise certificate of the keeper of the seals is equivalent to our expanded formulas. "Vu pour legalisation" signifies that the high functionary charged with that service has inspected the certificates, and found them legal in form and substance, containing every requisite to give them full credit and validity. Legalisation, c'est l'attestation que donne un officier public de la verité des signatures apposées à un acte, ainsi que des qualités des ceux qui l'ont fait et recu, afin qu'on y ajoute foi dans un autre pays. 16 Merl. Repert, p. 403; 3 Denisart, Coll. Jur. p. 85. A greater amplitude of phrascology would not have expressed with more distinctness, and certainly all the essential parts demanded of our law in such verification, and I am not aware that any set form of words is necessary in any system of jurisprudence. The fixed meaning of the phrase "vu pour legalisation" in the French jurisprudence gives to an authentication so made by the keeper of the seals all the weight of verification which can be attached to the acts of that high functionary. I hold then that these documents exhibit satisfactory evidence that the depositions were taken by the judge named therein in due form of law, and that he had competent authority to take them, and that exact and full copies are furnished from the appropriate court or minutes by a proper officer. And upon the strict rules of evidence obtaining in our courts, they are sufficiently authenticated to be received as evidence here. [Church v. Hubbart] 2 Cranch [6 U. S.] 187, 238; Wood v. Pleasants [Case No. 17,961]; 3 Cowen & Hill's Notes to Philips' Ev. 1123.

These facts are clearly proved by this evidence: That the accused was charged or "inculpé" with commission of forgery in France, in the exercise of his functions as notary, and in drawing up and executing acts or instruments appertaining to his ministry or official trust, and with forgery of commercial and bank paper, and with having made use of forged acts or instruments. The facts proved against the accused in support of these charges are that in repeated instances after the 9th of November, 1843, he prepared and had completed in his capacity of notary authentic deeds, by which various individuals pledged and hypothecated their property to secure alleged loans of money, and that the deeds declared the sums loaned and secured were at the time of making the deeds actually paid over in specie to the borrowers, and that two witnesses were then present, and signed the instruments or authentic deed, and that those declarations are false. It appears that by the laws of France these notarial acts become entitled to registry, and have similar force and effect with records of common law courts. Their verity cannot be impeached except for forgery. Baeque, Codes des Officiers Ministerials, p. 864, art. 19. Accordingly, the Code Penal denounces a falsification of these acts by notaries a forgery or faux, and subjects the guilty officer to infamous punishment (Code Penal, arts. 145–147), and also for making use of the forged acts or deed (article 148). The court of cassation, in exposition of the law, decided that a false declaration of the presence of two witnesses, on the execution of such notarial acts, is a forgery within the terms of article 146, as "constatant comme viais des faits faux." Explication de Code Penal, par Rojeor, p. 57. Official, notarial acts, being by the French system, the common mode of authenticating conveyances, devises and contracts of every description, the conduct of French officers would appropriately be brought under the severest supervision of the law. Notaries are officers of high dignity and confidence, appointed for life, and charged with the most delicate and important functions in respect to individuals and the public. They have always been as well antecedent to the compilation of the Codes, as since, subject to criminal prosecution for malversation in office. 3 Denisart, Coll. Jur. 434, 457; 21 Merl. Repert, 320-367. And it is therefore no way surprising that the transactions which under our Code might be only a misdemeanor, or malfeasance, rendering the officer liable to a civil action, should in France be visited with all the consequences of an infamous crime. I have accordingly no hesitation in declaring that the evidence before me amounts to probable proof that Metzger committed in France the crime de faux named in the treaty, and would justify his apprehension and commitment for trial therefor, if under our laws these acts had been crimes if committed here.

The topics already disposed of embrace all those legitimately belonging to the judicial authorities, to investigate and determine. The other points debated on this hearing are of a diplomatic character, and it is the province of the president, at least in the first instance, to decide them at his discretion. Whether the government is bound by the treaty compact to deliver up the accused, for offences committed by him in France which are not crimes by our laws, whether he is within the description of persons named in the treaty as subject to extradition, whether the treaty went into operation and became obligatory from its date or only from its ratification,

by assent of the senate or other period posterior to the date, and finally whether the obligations assumed by the treaty will be fulfilled or not, are considerations addressed to the political department of the government. Over these questions the judiciary has no immediate control or jurisdiction. The casus foederis of the treaty may be ever so manifest; yet, under the polity of our government, it in no way appertains to the judiciary to direct or contravene the action of the executive department in respect to it. The judicial authority can only be invoked incidentally and indirectly, to pass upon such provisions of a treaty; and it is only in that manner that acts of the president in execution of a treaty contract can be reviewed and adjudicated upon in courts of justice.

It seemed to be conceded in the Robins Case [Case No. 16,175] that a person under arrest for the purpose of being delivered up under the treaty with England, November 19, 1794, was entitled to the writ of habeas corpus, and the judgment of the proper tribunal whether the arrest was justified by law. That inquiry would probably also invoke the consideration of the competency of the executive authority to hold him in arrest, or deliver him over to be transported out of the United States. The English courts grant the writ in like cases (1 New Sess. Cas. 337); but, as already noticed, they proceed upon the principle that the extradition can only be made when authorized by act of parliament passed in execution of the treaty. If a writ of habeas corpus should be applied for in this case, the application must in the first instance, as the United States courts in this district are now constituted, be addressed to me; and, as the counsel on both sides have thoroughly examined every question connected with the subject, I deem it advisable now to pronounce my opinion, upon the entire case, that no other procedure may be taken with a view to any further action in the matter. I shall limit my attention to three propositions contended for in behalf of the accused by his counsel to be, if not clearly in his favor, yet that they place the authority of the executive over him, under the treaty, in so doubtful a light, as to entitle him to a discharge.

The first position is, that the true construction of the treaty in connection with the proviso to the first article is that a person is not subject to extradition unless the facts proved against him constitute in the country where he is arrested, one of the crimes in the treaty. In the present case I do not think sufficient evidence has been produced, to establish probable cause of suspicion that the crime of forgery defined by our laws has been committed by the accused. The exemption of the accused for this cause was urged with great confidence by his counsel, but the point does not impress my mind as resting upon a just exposition of the treaty, or demanding of me more than a brief statement of the reasons which prevent my acceding to that interpretation. The preamble expounds clearly the motives upon which the convention was founded. Each nation was desirous that malefactors should find no shelter in the territories of one, against punishment for crimes committed within the dominions of the other, and the high contracting parties manifest most unequivocally their intention to remove fugitives from their place of refuge in order to bring them within the operation of the laws they have violated. The purpose of each was to maintain the justice of their own country, and secure the sanctions of their laws within their respective dominions. To attain this object, the commission of the privilege is made mutual and reciprocal, each engaging to deliver to the justice of the other, persons who being accused of the crimes enumerated, committed within the jurisdiction of the requiring party, should seek an asylum or be found within the territories of the other. The terms employed in the treaty appear to me to carry out this purpose with a clearness and precision which scarcely admit of misconstruction. I should also infer that the proviso which is claimed to include the qualification urged in behalf of the prisoner was framed ex industria to avoid the construction sought to rest upon it. As in the body of it the observance of the laws of the place of refuge is exacted, in pursuing the apprehension and detention of the fugitive, it appears to have been thought expedient to mark by definite directions, that those laws were to furnish the method of procedure only, for it is declared that they shall be applied to the investigation abroad, as "if the crimes had been committed" where the arrest was made. The matter to be inquired into and adjudged obviously is, therefore, the fact of the commission of the crime charged, within the dominions of the party requiring the surrender of the fugitive; and accordingly the laws of France afford the basis of the inquiry in this case, and not those of the United States. If an ambiguity should be detected in the language used in these engagements, the fundamental doctrine applicable to all contracts would have its effect here, and the compact would be expounded according to the understanding and intent of the parties gathered from the whole convention; and their concurrent and subsequent acts in execution of it would be received as forcible presumptions of its true meaning. As already intimated, I am satisfied that the crime de faux, named in the treaty, was committed by Metzger in France; and he accordingly, in this respect, comes within the provisions of the treaty.

The further position taken for the prisoner that he does not come within the description of persons whose surrender the French government is entitled to claim under the treaty

rests upon questions strictly technical, artificial, and verbal, and involves no principles of general jurisprudence. It is, in effect, a question of procedure or practice properly referable to the special laws or usages of the French tribunals and authorities. The terms of the treaty are "les individus accusés," "les individus qui accusés," "les individus qui seront accusés," etc., and shall be delivered up to justice; and the point raised upon these expressions is that, by the French law, only a party "en accüsation" is "accusée" in the acceptation of the term in the Penal Code, and in the usages of the tribunals: and that accordingly his surrender cannot be demanded by the French government, or made by ours, until proceedings in justice inculpating or criminating him have been so far pursued that he is "mis en accusation,"—equivalent in our law to indicted or arraigned. Such, it is proved by Mr. Bartholemy, is the understanding of the term by the bar and courts in France; that "inculpé" and "prévenu" designate persons against whom criminal charges or proceedings are instituted up to the period they are acted upon by the Chambre de Conseil, and an accusation is decreed by it, and then, and not before, they become "accusée." Code d'Inst. Cr. acts, 127, 128, 241, 465. There may exist in France, from positive appointment of law, or usage, in respect to the term "accusée," an import in the idiom of the tribunals, different from what it bears in the literature of the language, and which it may be difficult for a foreigner to apprehend. It is a fact of common occurrence in the arts and professions for words to be diverted from their signification recognized by the literature of the language and familiar to the ear, and to acquire one entirely arbitrary in that relation; and, with my limited means of knowing the technicalities of a foreign forum, I shall carefully abstain from pronouncing upon the just force of this term in that application. It may not, however, be improper to notice, that Rojrou (article 91, Code d'Inst. Cr. notes) remarks on the subject, that usually (en général) a person is said to be inculpé when under a charge which may compel him to appear before the juge d'instruction; and prévenu, when he has been already subject to like orders; and accusée when remitted to the court of assizes by a decree of accusation. It would thus seem that the distinction in the dialect of the courts amounts to little more than a convenient distribution of phrases, and it is not an appellation fixed determinably by law. The French jurists note a difference in the use of the word "accusée" as a participle and a substantive; and, previous to the compilation of the Codes, it was only in the latter application, l'accusée, that it imported the party was decreed en accusation, whilst in the former sense it embraced both inculpé and prévenu, and denoted an individual complained or informed against for, or charged with, the commission of a crime. 1 Denisart, 38, 41, Dict. de Droit. The distionaries de Trevoux, (en avorat), Descenieres (Avocat), Mand of Chamband, Boyer, and the Academy, all note the same distinction. Since the adoption of the Codes, the usage has been more uniform to limit the term "accusée" to persons in accusation or indicted. 1 Merl. Repert Jur. Dist. de Droit. These verbal disquisitions are, however, a most unsatisfactory method of determining the import of language employed in a treaty designed to adjust international interests of high importance and gravity. The meaning of words not necessarily technical or professional (like the description of crimes) will be sought for in the general scope of the instrument, and the intention of the high contracting parties directly expressed or evinced by concomitant and subsequent acts. It is most manifest that the controlling purpose of the engagements was to render the advantages of the great principle fixed by the contracting parties, mutual and reciprocal to the fullest extent. Whatever privilege one acquired, he yielded the same in return to the other. There can be no doubt upon the contract with us, that the United States has the right to demand of France the surrender of persons charged or complained against, according to the provisions of the treaty, without regard to the state of prosecution in this country, or whether any has been instituted or not. Presenting a complaint with evidence to support it is a charge or accusation according to our laws, and it may be as well made in the first instance, before the French tribunals, as our own. The words "charged," used in the preamble, and "accused," in articles 1 and 2, are of the same import in that connection. The word "accusée" is in both instances adopted by the contracting parties as the concurrent and equivalent expression in the French language, and the meaning intended to be applied to the language at the time, must prevail in the construction of treaties equally with other agreements. The French government now formally demands the surrender of Metzger as being within the purview of the treaty, although he is not technically en accusation before the courts of that country, and the president of the United States avows his readiness to fulfill the engagement in that sense; and both the high contracting parties in this solemn manner signifying this construction and acceptation of the undertaking, I should not hesitate, even if an ambiguity attached to the language employed, to give it that force and effect. But having no doubt in my own mind, I should, independent of that solemn corroboration, of the exposition I give the treaty, declare that Metzger is a person accused of the crime of forgery committed in France, and in this view subject to the operation of the treaty.

The remaining consideration relates to the period at which the treaty took effect. The crimes proved against the accused were com-

mitted by him subsequent to the date of the treaty, but prior to its ratification by the president, with the advice and consent of the senate. It would be an useless labor to quote the opinions of foreign publicists on the question; or to spread upon this opinion in extenso the reasonings of American jurists, or the judgments of our judicatories, upon the subject. All that has been written abroad has been examined and discussed with great care and sagacity by our courts and jurists; and, in my opinion, the principle is conclusively settled, that a treaty is to be regarded as taking effect from its date, unless a different period is fixed by the contracting parties, or must be adopted in order to fulfill their manifest intention. It must necessarily be, in effect, a question of intention, and the public law, the same as municipal, implies the intention of the parties to be, when not defined by themselves, that these contracts shall have effect from the time of their execution. 1 Kent, Comm. 169; Whart. Int. Law, 306; 2 Elliot, Dip. Code, 409, 410; Beale v. Pettit [Case No. 1,158]; [U. S. v. Arredondo] 6 Pet. [31 U. S.] 757. The principle is the same when the contract is entered into through the intermediation of agents, and their acts are to await confirmation or ratification by their principal before becoming complete, for it is a maxim of the law that "omnis ratihabitro retrotrahitum," and the obligation goes into force as if perfected at its formation. Moreover, this, like other arrangements between the parties, is to be interpreted and carried into effect, conformably to the purpose disclosed in the terms of the contract, or derived from other evidence. The 5th article by prohibiting the operation of the treaty anterior to the date affords a violent presumption that the parties contracted with the understanding and intent that it should take effect at its date, and this interpretation is furthermore assented to and acquiesced in by their proceedings on this application. Both parties insist that the treaty is obligatory from the time it was signed; and although such act of the parties cannot avail to the prejudice of others, whose rights are affected by the treaty, yet it is a circumstance entitled to be regarded on an inquiry with the motives which governed the creation of the compact.

The result of my reflection upon the entire subject is that if the president in his discretion determines the casus foederis of the treaty exists, and that Metzger ought to be delivered up to the French government, there is nothing shown in this case which entitles him to the interference of the judiciary, to prevent the decision of the president being carried into execution.

[NOTE. Metzger then moved in the supreme court for a writ of habeas corpus. The motion was overruled, Mr. Justice McLean delivering the opinion of the court. He held that the court had no jurisdiction to issue the writ for the purpose of reviewing the decision of the district judge. 5 How. (46 U. S.) 176.]

Case No. 9,512.

In re METZLER et al.

[1 Ben. 356; [1] N. B. R. 38; Bankr. Reg. Supp. 9; 6 Int. Rev. Rec. 74; 9 Leg. & Ins. Rep. 292.]

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

BANKRUPTCY—INVOLUNTARY—INJUNCTION—PERISHABLE PROPERTY.

1. Where petitions were filed in involuntary bankruptcy, and injunctions were issued to prevent the sale of the debtors' property on execution, the facts on which the injunctions were issued being the very acts of bankruptcy alleged, and the bankrupts had taken issue and demanded a jury, and motions were made to set aside the injunctions on the merits: *Held*, that the court would not, on a motion, on affidavit, dispose of the issues which were involved in the proceedings.

[Cited in Re Moses, Case No. 9,869.]

2. If the property was perishable, that was no ground for dissolving the injunctions.

3. The court had no power to sell the property, as perishable, at this stage of the proceedings, unless it was in the possession of the messenger.

[Cited in Re Moses, Case No. 9,869.]

This was a motion to dissolve injunctions. On July 18th, 1867, a petition was filed by Willson, Watrous & Co., as creditors of Metzler & Cowperthwaite, to have them adjudged bankrupts, and on July 22d an injunction was issued against the debtors and one Hervey C. Calkin, and the sheriff of New York, enjoining them from selling any goods of the debtors not excepted by the bankruptcy act [of 1867 (14 Stat. 517)]. On July 23d a similar petition was filed by C. Cowles & Co., and on July 24th a similar injunction was issued against the same parties, and also against George E. Cowperthwaite and John N. Blasi. The act of bankruptcy alleged in the first petition was an assignment of property made by the debtors to Calkin on June 26th, 1867, in trust to pay certain preferred creditors. The assignment was shown to be in writing, and Calkin was alleged to have accepted it and taken possession of the property. The injunction in the first case, was issued on a petition of the creditors, which alleged the entry of a judgment on July 16th, in the supreme court of the state of New York, in favor of Calkin against the debtors, for $3,531.60, and that it was entered in pursuance of an offer by the debtors to allow it, and that execution was on the same day issued to the sheriff of New York, who levied on the property included in the assignment, and had advertised it for sale under the execution. The act of bankruptcy alleged in the second petition was the same assignment to Calkin, and that the debtors had suffered their property to be taken under the judgment in his favor, and under a judgment in favor of George E. Cowperthwaite, entered on an offer of judgment, for $2,519.94, and under a judgment in favor of John N.

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

Blasi, entered on a like offer, for $1,885.30. On the return of the orders to show cause, the debtors appeared and denied that they had committed the acts of bankruptcy alleged, and demanded a jury, which was ordered. The motion to set aside the injunctions was made in behalf of Calkin and George E. Cowperthwaite, and was founded on affidavits, which set forth a written agreement made between them and the debtors, in March, 1866, by which they agreed to advance notes to the debtors, to secure which the debtors transferred to them the property which they then had or might afterwards have in their business, with a covenant to return the notes if demanded, and, in case they failed to return them, they agreed to execute such bill of sale, or confession of judgment, or other security, as should be demanded. The affidavits further showed the advance of the notes to the debtors, and a further advance of $1,000 by Calkin, and a demand by him of repayment of this $1,000, and that the debtors were unable to repay it, but offered to make an assignment and prefer Calkin and George E. Cowperthwaite. They further set up the assignment to Calkin, and that George E. Cowperthwaite was absent when it was made; that, when he returned, he refused to assent to it; that, thereupon, on July 10th, Calkin and George E. Cowperthwaite served written notice on the debtors, demanding a return of the securities, as provided in the agreement of March, 1866; that the debtors refused to return them; and that, thereupon, the suits were commenced in favor of Calkin and George E. Cowperthwaite, and the judgments entered and executions issued. The affidavits in opposition showed that the debts of the creditors were for materials furnished the debtors since January 1st, 1867, to be used in their business, and that the creditors had no knowledge of the agreement of March, 1866, till after the judgments were entered.

N. Cross, for the motion.

H. Sheldon and W. E. Curtis, in opposition.

BLATCHFORD, District Judge. It is urged, as a ground for dissolving the injunctions, that the assignment to Calkin, and the obtaining of the judgments against the firm, were valid transactions, and not void under the bankruptcy act, and that they were merely in fulfilment of a previous agreement, and were the effect of measures taken by the creditors. These transactions are the very acts of bankruptcy alleged in the original petitions of the creditors, and the very acts, the commission of which is denied by the debtors, and in respect to which they have demanded, and the court has ordered, trials by jury. The injunctions were granted under the fortieth section of the act. The intent of the provisions of that section manifestly is, to give the court authority, in a case of involuntary bankruptcy, when an order is issued requiring the debtor to show cause why he should not be declared a bankrupt, to prevent, by injunction, any interference with the debtor's property, until a decision shall be arrived at, whether the debtor is or is not to be adjudged a bankrupt. In the present case no such decision has been arrived at. The decision is suspended by the act of the debtors, in denying that they have committed the act of bankruptcy alleged, and in demanding a trial by jury. The same facts which constituted sufficient ground for issuing the order to show cause, also furnish sufficient reasons for issuing the injunction. The court will not, on a motion of this kind, on affidavits, dispose of what are really all the issues involved in the proceeding. If the injunctions should be dissolved, and the debtors should afterwards be adjudged bankrupts, and an assignee of their estate be appointed, the court would have dissolved the injunctions on the same state of facts on which the debtors were adjudged bankrupts. Substantially, the whole of the property of the debtors would have passed to the three preferred creditors, leaving to the assignee only an inheritance of litigation, and the very object of the remedy by injunction, given by the fortieth section, would have been defeated. Without deciding, therefore, definitely, whether the transactions set forth are or are not void, under the bankruptcy act, it is sufficient to say, that there is a probable cause for continuing the injunctions, until it shall be decided whether the debtors are or are not to be adjudged bankrupts. Indeed, independently of anything contained in the agreement of March, 1866, the including in the judgment, in favor of Calkin, of the $1,000, not provided for by that agreement, would be a good ground for continuing the injunction, as respects that judgment; and the giving of the judgment to Blasi would be a sufficient ground for granting an injunction, as respects any property levied upon under an execution on that judgment.

It is represented that the property levied on under the executions on the judgments and about to be sold, is perishable, and that it is for the interest of all parties that it should be sold and preserved for whoever may be entitled to the proceeds. But it is not proper to dissolve these injunctions, and thus allow the proceeds of the property to pass to the judgment creditors, to the exclusion of an assignee in bankruptcy, who may in the end be entitled to claim it. This court has no power to order the sale of the property as perishable, at the present stage of the proceedings, unless it is in the possession of the messenger (rule 22 of the general orders in bankruptcy), and it cannot come into the possession of the messenger until a warrant is issued under section forty-two, unless a warrant be issued, under section forty, to the marshal, to take possession of it provisionally. Such warrant cannot issue unless it appears that there is probable cause

for believing that the debtor is about to remove or conceal his goods and chattels, or his evidence of property, or make a fraudulent conveyance or disposition thereof. But the fact that this court has no power to order the sale of this property at the present time, is no reason why it should not exercise the power, which is expressly given to it, of interposing, by injunction, to prevent any interference with the property until it shall be decided whether the debtors are or are not to be adjudged bankrupts. The motion to dissolve the injunctions is denied.

Case No. 9,513.

MEWSTER v SPALDING.

[6 McLean, 24.] [1]

Circuit Court, D. Michigan. June Term, 1853.

JUDGMENT—AUTHENTICATION OF RECORD—COURTS—PRESUMPTION OF KNOWLEDGE OF STATE LAW—IMPRISONMENT FOR DEBT—FRAUD.

1. Where a record of a judgment of a state court is offered in evidence, in the circuit court, sitting within the same state, the certificate of the clerk and seal of the court is a sufficient authentication. Such an authentication, it is supposed, would be good in the state courts of the same state; and if so, it is good in this court.

[Cited in Bennett v. Bennett, Case No. 1,318; Turnbull v. Payson, 95 U. S. 422.]

[Approved in Bradford v. Russell, 79 Ind. 74.]

2. The judges of the supreme court are presumed to know the laws of the respective states, as their jurisdiction extends throughout the United States.

3. In Michigan, although imprisonment for debt is abolished, yet where a debtor acts fraudulently, or is about so to act, he may be arrested. And after such an arrest, the sheriff, if he permit him to escape, is liable to an action for an escape. And such an action may be brought in this court.

At law.

Frazer & Davidson, for plaintiff.
Hawkins & Jocelin, for defendant.

OPINION OF THE COURT. This is an action against the sheriff of Washtenaw county, for an escape. A record was offered in evidence of a judgment obtained in that county, before a state court, against the defendant, who, it is alleged, was in the legal custody of the sheriff, and from whose custody he was permitted to escape; for which this action was brought. The record was objected to, because it was only certified under the seal of the court, by the clerk, but had not the certificate of the presiding judge, that the record, etc., "was in due form." By the act of congress, of the 26th of May, 1790 [1 Stat. 122], it is provided: "That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto; that the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court of the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form."

It is supposed that judgments of the state courts as well as its legislative action, are required to have the above authentication, when used as evidence in another state. When used within the state, the published statutes are evidence, and so, it would seem, are the judgments regularly certified by the clerk under the seal of the court. It can hardly be necessary for a state judge to certify to another state judge, when each knows officially what is "the due form" required. And if such a certificate of the presiding or chief justice be not necessary to make the record evidence in a court of the state where rendered, the same rule is applicable in this court. It has been held by the supreme court, that as its jurisdiction extends throughout the United States, the judges of that court are presumed to know the laws of the respective states. They require no authentication of the laws of the states, as above provided, but act on them from their own knowledge, or from the published statutes. And on the same principle, they take cognizance of the courts of each state organized under its laws, and of the jurisdictions they exercise. This being the case, the necessity of the certificate of the judge, as to the "due form" of a state court record, is not very apparent. It would be objectionable, to those of the profession who look more to form than substance. But however this may be, we admit the record objected to without the certificate of the judge, as it is the record of a court of the state of Michigan.

It is also objected that the arrest in this case was made under a special statute of the state, partaking to some extent, of a criminal procedure, of which this court cannot take jurisdiction. The procedure took place under the Revised Statutes of 1846, entitled "An act for the punishment of fraudulent debtors." The 1st section declares that no person shall be imprisoned for debt, except as follows. The plaintiff may apply for a warrant to arrest the defendant, and the warrant may be issued on the affidavit of the plaintiff or some other person, that the debt is due, and that the defendant is "about to remove to defraud his creditors, or that he has property which he refuses to apply to the payment, or that he has disposed, or is about to do so, of his property to defraud his creditors, or that defendant fraudulently incurred the obligation sued on; and upon proof to the satisfaction of the officer called on to issue the warrant, he shall issue it."

On the warrant, the defendant being arrested is brought before the officer, where

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

the defendant may controvert the facts alleged, on which the warrant was issued. On this examination, if the officer finds the allegation true, he may commit the defendant, unless he shall pay the debt, give security, or enter into bond to assign in thirty days his property for the benefit of his creditors, and if committed, the defendant remains in custody until final judgment shall be rendered in his favor, or until he has assigned his property or obtained his discharge under the insolvent laws. The commitment having been made under the above statute, it is charged the sheriff suffered him to escape.

No objection is perceived to the jurisdiction of this court. The proceeding, under the statute, is not criminal. It gives a remedy against a fraudulent debtor, and in the action now before us, we have to inquire whether the defendant in the action before the state court, was legally in custody. To prove this the warrant must be produced, or its loss must be shown, to authorize secondary proof of its contents. The warrant is not produced, and some evidence has been offered of its loss. The warrant was issued by Judge Lane, who, on examination, committed the defendant. Shortly after this, Judge Lane died. A copy of the warrant appears to be contained in the recognizance entered into by the defendant, to appear and answer the allegations of fraud; but to make this evidence the original must be shown to have been lost. A file of the judge's papers, found in his office, has been examined, but the original warrant was not found in it. The other papers of the judge have not been examined, and this is essential to the reception of secondary proof.

A non suit was suffered by the plaintiff, which the court, on motion, set aside, on payment of costs.

Case No. 9,514.

MEXICO SOUTH. BANK v. REED.

[8 Reporter, 7; 25 Int. Rev. Rec. 161; 4 Cin. Law Bul. 391; 7 Am. Law Rec. 650; 26 Pittsb. Leg. J. 191.] [1]

Circuit Court, S. D. Ohio. 1879.

FEDERAL COURTS — FACTS CONFERRING JURISDICTION—CORPORATIONS.

Where a corporation is a party to an action, the allegations conferring jurisdiction on the federal courts need not appear in the caption of the petition. It is sufficient if the facts conferring jurisdiction are in some form affirmatively shown by the record.

Action on a promissory note, the caption of the petition being "The Mexico Southern Bank, a Corporation, Plaintiff, v. Townsend Reed, Defendant," and it comes before the court on a motion made by defendant to dismiss the petition for the following reasons: First. "Because the statement and designation in the caption of the petition of the alleged plaintiff is not in conformity to law." Second. "Because by law jurisdiction of the court in a case like this must be shown by a full statement and designation in the title or caption of the petition of the kind, character, and location of the corporation as entitling it to sue therein, as well as in the body of the petition." Third. "Because the name and designation of the plaintiff as a corporation in the said caption, without assuming therein its location, character, and kind, are not the same as is averred in the body thereof; the averment is, referring to the said caption, 'said plaintiff,' when, in fact, in said caption naming the plaintiff, it is not named or described as in the body of the petition."

H. C. Whitman, for the motion.
G. T. Harrison, contra.

SWING, District Judge. The vital point in the motion to dismiss the petition, and the only point necessary to be decided by the court, is, whether the caption of the petition is sufficient to give the court jurisdiction in this case. "It is a settled doctrine of this court, that, in cases where jurisdiction of the federal courts depend upon the citizenship of the parties, the facts essential to support that jurisdiction must appear somewhere in the record," says Mr. Justice Harlan, in the opinion given by him, October term, 1878, in the supreme court of the United States, in Robertson v. Cease [97 U. S. 646]. In Railway Co. v. Ramsay, 22 Wall. [89 U. S.] 326, the present chief justice said: "They need not necessarily, however, be averred in the pleadings. It is sufficient if they are in some form affirmatively shown by the record." That view was approved by the subsequent case of Briges v. Sperry, 95 U. S. 403. In the present case, the only record is the petition, therefore the necessary allegations must be contained somewhere in the petition, and must be distinctly and positively averred, but not necessarily in the caption, and it is not sufficient that the facts of jurisdiction may be inferred argumentatively from the averments. Now, though in this case the statements of the location, character, and nature of the corporation, the plaintiff herein, are not set forth in the caption of this petition, yet allegations essential to support the jurisdiction of the court, so far as pertains to the plaintiff, appear in the body of the petition, namely, that the plaintiff "is a corporation organized under the laws of the state of Missouri, and is engaged in the business of banking in the city of Mexico, in said state," and in cases where the jurisdiction of the federal courts depends upon the citizenship of the parties, the decisions hold that for the purposes of suit a corporation is a citizen of the state under whose laws it has its existence and being. Motion overruled.

[1] [Reported from 8 Reporter 7, by permission. 4 Cin. Law Bul. 391, contains only a partial report.]

Case No. 9,515.

In re MEYER.

[2 N. B. R. 422 (Quarto, 137);[1] 1 Chi. Leg. News, 210.]

District Court, S. D. New York. Feb. 22, 1869.

BANKRUPTCY—FRAUDULENT ASSIGNMENT—PAYMENTS MADE—ACCOUNTING THEREFOR.

Bankrupt made a fraudulent assignment to S. The attorney of S. was attorney for the bankrupt, and also for one P., a creditor. Payments were made to S. and to P. by said attorney, out of proceeds of assigned property. *Held*, that the assignment was void, and that S., P., and the attorney should account to the assignee for the property and proceeds thereof.

[Cited in Curran v. Munger, Case No. 3,487.]

[Cited in Mathews v. Riggs, 80 Me. 107, 13 Atl. 49; Washburn v. Huntington, 78 Cal. 576, 21 Pac. 306.]

[In the matter of Edward Meyer, a bankrupt.]

F. C. Bowman, assignee in bankruptcy, in person.

Stevens & Reymert, for defendants.

BLATCHFORD, District Judge. The assignment from the bankrupt to Salmons was made in fraud of the bankrupt act [of 1867, 14 Stat. 517]; it was not made in the usual and ordinary course of business of the bankrupt, and that fact is made, by the thirty-fifth section of the act, prima facie evidence of fraud. Besides, it clearly appears from the evidence that the bankrupt was insolvent when he made the assignment, and that Salmons then had reasonable cause to believe him to be insolvent, and that he was contemplating going into bankruptcy, and that a fraud on the act was intended by the transaction. All the consideration Salmons has paid for the assigned property has been paid out of the collections of the debts assigned. The attorney for Pretorius knew the mala fides of the whole transaction before he paid any money over to Pretorius, and the latter is chargeable with all the knowledge which his attorney had. The same person was also attorney for Salmons and for the bankrupt. Any money which Salmons or his attorney has paid to the bankrupt or Pretorius, and any money which Salmons himself has received, and any money which the attorney has retained out of the collections or proceeds of the assigned property, must be paid over to the assignee in bankruptcy by Salmons. The bankrupt and Pretorius and the attorney must further be held liable to account to the assignee in bankruptcy for what they severally have received or retained out of such proceeds. The assignment to Salmons must be set aside as void, and he and his attorney must transfer and deliver to the assignee in bankruptcy all the assigned property which has not been realized or collected, or which still remains unconverted into money, and all evidences thereof and the temporary injunction heretofore granted must be made perpetual. Salmons must also pay the costs of this suit.

[1] [Reprinted from 2 N. B. R. 422 (Quarto 137), by permission.]

Case No. 9,516.

MEYER et al. v. BAILEY et al.

[2 Ban. & A. 73;[1] 8 O. G. 437.]

Circuit Court, W. D. Pennsylvania. May, 1875.

PATENTS—REISSUE—ASSIGNMENT OF TERRITORY—SURRENDER—CONCURRENCE OF OWNERS—RATIFICATION.

1. The bill in this case was brought to restrain the infringement of a reissued patent, the title to which the complainants claimed to own within a specified territory; the defendants demurred to the bill upon three grounds, the second and third of which were: (2) That the infringement complained of was not averred to have been committed within the territory covered by the assignment to the complainants; and (3) that it was not averred that the infringement was committed after the date at which the interest of the complainants in the patent accrued. The bill, after setting out the date of the reissue and the grant of a defined and exclusive territorial interest in it to the complainants, averred, "that the said defendants are now constructing, using, and vending to others to be used and sold, large numbers of hydrants and street washers, in some parts thereof substantially the same in construction and operation as in the said reissued letters patent mentioned, the exclusive right and privilege to make and use which, and vend to others to be used, is thus by law vested in your orators." And further, that the defendants have "made and used, and intend still to continue to make and use, the said improvements in the Western district of Pennsylvania, all of which acts and doings are in violation of the exclusive rights and privileges so as aforesaid vested in your orators, under and by virtue of the said recited reissued letters patent: *Held*, (1) That the averments taken in connection with the statement of the complainants' title, to which they refer, import, necessarily, a charge of infringement after the date of the reissue, and of the grant to the complainants, and within the territory covered by the grant. (2) That they allege infringement at and before the date of the bill, and after the date of the reissue, and the grant within the territory in which the complainants had the exclusive right to make, use, and vend the invention.

2. M., the patentee, assigned to B. his interest in the patent for the state of Pennsylvania, and afterwards reissued the patent. Subsequently to the reissue, B. assigned his title to a certain territory in the state of Pennsylvania, under the reissued patent, to the complainants, who filed a bill against the defendants. The defendants demurred to the bill on the ground that B.'s interest was outstanding at the time of the surrender by the patentee, and that he did not appear to have been a party or to have assented to or approved of the surrender, and that therefore the reissue was void: *Held*, that B. was not an assignee within the meaning of the statute, and it was not therefore necessary for him to join in the surrender in order to give validity to the reissued patent.

3. The concurrence in the surrender of a patent by a transferee of an interest in it who is not an assignee within the meaning of the stat-

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

ute, is not essential to the validity of a reissue of the patent.

4. Under the patent act of 1836 [5 Stat. 117], the thirteenth section of which provides for the surrender and reissue of a patent, if a part of the whole patent has been assigned by the patentee, an efficacious surrender can be made only by the concurrence of both the owners of the patent; but this may be manifested, by the assignee, by his direct co-operation in the surrender or his subsequent ratification of it.

5. If an assignee of a part of the whole of a patent does not join with the patentee in surrendering and obtaining a reissue of the patent, but afterwards accepts the reissue and transfers a part of the interest in it which was originally vested in him by the patentee, this is an expressed ratification by him of the act of the patentee in obtaining the reissue.

[This was a bill in equity by Henry C. Meyer and others against George C. Bailey and others to restrain the alleged infringement of letters patent No. 38,694, granted to J. G. Murdock, May 26, 1863, and reissued May 11, 1869 (No. 3,434).]

W. Bakewell and T. B. Kerr, for complainants.

G. H. Christy, for defendants.

McKENNAN, Circuit Judge. One of the defendants demurs to the bill on three grounds: (1) That the reissue upon which the suit is founded was granted upon a surrender of the original patent by the patentee after he had made an assignment of "the full and exclusive right, title, and interest in and to the said" (original) "letters patent and invention, in and to the state of Pennsylvania," while said assigned interest was outstanding, and it does not appear that the assignee was a party to, or assented to, or approved of said surrender. (2) That the infringement complained of is not averred to have been committed within the territory covered by the assignment to the complainants. (3) That it is not averred that the infringement was committed after the date at which the interest of the complainants in the patent accrued.

Of the last two clauses of demurrer it is sufficient to say that they rest upon too narrow an interpretation of the averment of the bill, and are, therefore, unfounded in point of fact. The bill sets out the date of the reissue and the grant of a defined and exclusive territorial interest in it to the complainants, and then avers "that the said defendants are now constructing, using, and vending to others to be used and sold, large numbers of hydrants and street washers, in some parts thereof substantially the same in construction and operation as in the said reissued letters patent mentioned, the exclusive right and privilege to make and use which, and vend to others to be used, is thus by law vested in your orators." And further, that the defendants have "made and used, and still continue to make and use, the said improvements in the Western district of Pennsylvania, all of which acts and doings are in violation of the exclusive rights and privileges so as aforesaid vested in your orators, under and by virtue of the said recited reissued letters patent."

Taking these averments in connection with the statement of the complainants' title to which they refer, they import necessarily a charge of infringement after the date of the reissue and of the grant of the complainants, and within the territory covered by the grant. They allege infringement, at and before the date of the bill, and, therefore, after the date of the reissue and the grant, within the Western district of Pennsylvania, "in violation of the exclusive rights and privileges so as aforesaid vested in" the complainants, and, therefore, within the territory in which, as before stated, they were granted the exclusive right to make, use, and vend the invention. This is too clear for contention, and the demurrer, therefore, cannot be sustained on either of these grounds.

The bill avers that the patentee, on the 18th day of September, 1867, "by an assignment in writing, sold, assigned, and transferred unto Augustus Buerkle the full and exclusive right, title, and interest in and to said letters patent, in and to the state of Pennsylvania." The interest thus granted was outstanding at the time of the surrender by the patentee of the patent, and this constitutes the gravamen of the first clause of the demurrer. The 13th section of the patent act of 1836 provides for the surrender of a patent by a patentee, if he is at the time sole owner of the patent, by his personal representative after his death, and by an assignee, when there has been an assignment of the original patent. If a part of the whole patent has been vested in another so as to constitute such an assignee within the meaning of the act, an efficacious surrender can be made only by the concurrence of both the owners of the patent; but this may be manifested by the assignee by his direct co-operation in the surrender, or his subsequent ratification of it. The bill does not aver that Buerkle, the assignee, joined in the surrender of the original patent; but it does aver a fact from which his adoption and ratification of the act of the patentee, in making the surrender, is conclusively deducible. He accepted the reissued patent, and transferred to the complainants a part of the interest in it which was originally vested in him by the patentee. There could be no more expressive form of ratification by him of the act of the patentee. This is set out in the bill and is sufficient, in any aspect, to avert the objection to the validity of the reissue. But if this were not so, he was not an assignee within the contemplation of the act, whose concurrence in the surrender of the original patent is required to give validity to the reissued patent.

What is meant by an assignee seems now to be settled by repeated adjudication, and by the explicit definition of the act of 1836. In Tyler v. Tuel, 6 Cranch [10 U. S. 324], it was held, under the act of 1793 [1 Stat. 318], that one to whom was transferred all the rights

secured by a patent, excepting certain counties in the state of Vermont, was not an assignee within the meaning of the law, but a mere grantee of a sectional interest in the patent; and in Whittemore v. Cutter [Case No. 17,600], it was held that the transferee of an undivided part of an entire patent was an assignee. From these decisions it results that only a person who is invested with the entire ownership of a patent or an undivided part of the whole is to be regarded as an assignee. Such, also, is the import of the act of 1836, in the 11th section of which it is provided that "every patent shall be assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing," and this assignment, "and also every grant and conveyance of the exclusive right under any patent to make and use the thing patented within and throughout any specified portion of the United States, shall be recorded," etc. The distinction established by previous judicial decisions between an assignee and the grantee of a sectional interest in a patent is evidently contemplated by this section, as it is also by the 14th section, which authorizes the bringing of suits by "patentee, assignee, or grantee of the exclusive right within and throughout some specified part of the United States." It is, therefore, properly determined, in Potter v. Holland [Case No. 11,329], that: "An assignee is one who has transferred to him in writing the whole interest of the original patent, or an undivided part of such whole interest in every portion of the United States. And no one, unless he has such an interest transferred to him, is an assignee. A grantee is one who has transferred to him in writing the exclusive right, under the patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout some specified part or portion of the United States."

Now it has been seen that besides the patentee and his personal representatives, an assignee only is authorized to surrender a patent and obtain a reissue. It is a plain sequence from this that the concurrence in the surrender of a patent by a transferee of an interest in it, who is not an assignee within the meaning of the statute, is not essential to the validity of a reissued patent.

Was Buerkle, then, such an assignee as the statute contemplated? Evidently he was not. The transfer to him embraced only the state of Pennsylvania, and within its limits his interest was exclusive. He was therefore not an assignee within the statutory definition, but merely a grantee of an exclusive right under the patent to make and use the thing patented within and throughout a specified part or portion of the United States, and it was not necessary to aver that he united with the patentee in the surrender of the original patent. The demurrer must, then, be overruled, and the defendant ordered to answer.

MEYER (BRAGG v.). See Case No. 1,801.

MEYER (GRAHAM v.). See Case No. 5,673.

MEYER (McNALLY v.). See Case No. 8,909.

MEYER v. The NEWPORT. See Case No. 10,185.

Case No. 9,517.

MEYER et al. v. PRITCHARD.

[12 Blatchf. 101; 1 Ban. & A. 261; 7 O. G. 1012.] [1]

Circuit Court, S. D. New York. May 25, 1874.

PATENTS—RUBBER OVERSHOES—PATENTABLE NOVELTY—INFRINGEMENT.

1. The invention covered by the claim of the letters patent granted to Christopher Meyer and John Evans, July 16th, 1872, for an "improvement in rubber overshoes," namely, "As a new article of manufacture, India rubber shoes, with strengthening or other ribs homogeneous with the substance of the body, formed by thickening up the said substance in the forming of the sheet, substantially as specified," is, to thicken up the plastic India rubber in desired places, in the sheet, as the sheet is being formed between two rolls, by means of grooves and ribs on one of the rolls, the other roll being plain, so as to leave the sheet thicker where the India rubber has entered the grooves than it is in the other parts of it, and thus make a sheet which is a flat plane on one side, and has raised ribs or projections on the other side, and to make such ribs or projections on that part of the sheet which is to be used to form the upper part of the shoe.

[Explained in Meyer v. Goodyear India-Rubber Glove Manuf'g Co., 11 Fed. 894, 895.]

2. There is no patentable novelty in such invention, beyond what is shown in the patent granted to Elias C. Hyatt and Christopher Meyer, January 17th, 1854, for an "improvement in the manufacture of boot and shoe soles of gutta percha or India rubber."

[Followed in Meyer v. Goodyear India-Rubber Glove Manuf'g Co., 11 Fed. 892, 896.]

3. A sheet made according to the patent to Meyer and Evans. is made strictly in accordance with the directions of the earlier patent, without any addition. The sheet of the earlier patent was used to cut therefrom the sole of an India rubber shoe, the sheet and the sole having a variety of thickness in different parts, and being formed in one piece, at a single operation, by the use of rollers, one of which had a surface the reverse of the form to be produced. The sheet of the later patent is used to cut therefrom the upper part of an India rubber shoe, such sheet and such upper part having a variety of thickness in different parts, and being formed in the manner above described. The two manufactures are analogous, the sole, in the one case, and the upper part, in the other, being cut and made from the sheet in the same manner; and the shoe with the upper part so thickened up is not a new article of manufacture, in view of the prior shoe with the sole so thickened up.

[Explained in Meyer v. Goodyear India-Rubber Glove Manuf'g Co., 11 Fed. 895.]

[This was a bill by Christopher Meyer and John Evans against Stephen Pritchard on certain letters patent for an improvement in rubber overshoes.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 1 Ban. & A. 261, and here compiled and reprinted by permission.]

Stephen D. Law, for plaintiffs.

George Harding and James H. Ackerman, for defendant.

BLATCHFORD, District Judge. This suit is brought on reissued letters patent [No. 4,977] granted to the plaintiffs, July 16th, 1872, for an "improvement in rubber overshoes," the original letters patent [No. 111,962] having been granted to them, as inventors, February 21st, 1871. The specification says: "Our invention relates to the strengthening ribs employed upon the uppers of India rubber shoes, and consists in an improvement which will be hereinafter described, and subsequently specified in claim. Figures 1 and 3 represent plain views of two modifications of these ribs, and Fig. 2 a sectional view of forming rolls, with the plastic substance passing therethrough. Fig. 4 is a section of Fig. 1. A A, in Fig. 1, represent plain ribs, enclosing a space, in configuration similar to the openings in the uppers of ordinary rubbers. B represents a rib around the top or mouth of the shoe. b is an imitation thread passing around each rib. A' A', in Fig. 3, represent the ribs arranged in the form of a single ornamental buckle. B', in Fig. 2, represents rolls, of which the lower is plain, and the upper ribbed or pointed at d, and grooved at c, to make the strengthening ribs A A' or B, and the rows of imitation stitches b, which said ribs and grooves will be in any form or shape and location on the roller, according to the form or location of the rib or other device it is desired to produce. The imitation stitches may consist either of indentations formed in the surface of the sheet, or points projecting above the surface—the one will be formed by projections on the rollers, and the other by indentations. a a represent the ribs formed from plastic rubber as it is carried through the rolls, and it will be observed that they are not corrugations, like the strengthening ribs used upon metal, but a thickening up of the substance in certain lines or directions. a', in this figure, represents the indentations to imitate thread stitches. The process through which the material passes, to bring it into the form required, is as follows: The mass of plastic rubber is forced into the opening between the moulding or shaping rolls, and drawn out into a sheet, with the ribs and points or indentations completely shaped. It is then made up into the shoe or sandal, and vulcanized. We thus produce these ribs or figures in homogeneous connection with the other part of the sheet. They are, therefore, better than when of separate strips, pasted on in the gummy state after the sheet is formed, and secured to it in the vulcanizing process, as in the common way; and, being formed at the same time the sheet is rolled, and by the same operation, it is done without expense other than the preparing of the grooves, indentations and points in the rollers. Moreover, the said ribs or figures will be much more perfect and uniform than when done by hand. The same is true in regard to the imitation stitching, also, which has heretofore been made by a pointed wheel rolled alongside of the ribs by hand." The claim is in these words: "As a new article of manufacture, India rubber shoes, with strengthening or other ribs homogeneous with the substance of the body, formed by thickening up the said substance in the forming of the sheet, substantially as specified."

The invention set forth in this specification, as shown by the description and the claim, is to thicken up the plastic India rubber, in desired places, in the sheet, as the sheet is being formed between two rolls, by means of grooves and ribs on one of the rolls, the other roll being plain, so as to leave the sheet thicker where the India rubber has entered the grooves than it is in the other parts of it, and thus make a sheet which is a flat plane on one side, and has raised ribs or projections on the other side. The application of this idea, developed in the specification, is, to make these ribs or projections on that part of the sheet which is to be used to form the upper part of the shoe—that part which covers the top of the foot, and that part which surrounds the opening through which the foot enters the shoe. The advantage set forth is, that the ribs or projections thus made are of one substance with the rest of the material, and in homogeneous connection with it, and, therefore, better and more cheaply, uniformly, and perfectly made, than when made by pasting on strips by hand to form the ribs or projections. The patented invention is really complete when the sheet is made by the means described, ready to be made up into a shoe, and to be vulcanized. The process of making the sheet into the shoe and vulcanizing the shoe is no different from the process used to make a sheet into a shoe and vulcanize the shoe, when the ribs or projections are formed by pasting strips on the sheet by hand.

With this view of the invention, it is impossible to say that there is anything of patentable novelty or patentable invention in it, beyond what is fully shown in the patent [No. 10,429] granted to Elias C. Hyatt and Christopher Meyer, January 17th, 1854, for an "improvement in the manufacture of boot and shoe soles of gutta percha or India rubber." The specification of this patent describes the use of two rollers. One of them is a smooth roller. The other roller, called the "soleing roller," has three distinct circumferences, which produce three different thicknesses of the sole. The material, in a soft state, is passed between the rollers in a continuous sheet. The smooth roller produces a smooth surface on one side of the soleing. The other roller produces, of different thicknesses, the fore part, the shank and the heel of the sole. Thus, in one operation is performed what had previously been done in three distinct processes, and the soleing is

formed in one continuous sheet. The specification goes on to say: "Heretofore, India rubber soleing has been made one strip of equal thickness throughout, or by several strips of different thicknesses for heel, shank and forepart, cemented together at their ends, or of one strip having the length and breadth of the sole, with separate pieces cemented thereon to give proper thickness to the heel and forepart of the sole. It is at once evident that the first is an inferior sole, and requires more material than the others; and that the second and third require additional labor in the manufacture, and that the parts are liable to become separated in the process of manufacture, or afterwards, causing loss to the manufacturer or consumer. It is equally obvious that all these inconveniencies and imperfections are avoided by making the sole in one piece, as above described, by one process, and that such sole is thus produced at once, better and cheaper than heretofore. We are aware that India rubber has long since been reduced to sheets by rolling, and that the rollers used for this purpose have sometimes been engraved to produce a figured surface, analogous to that often cemented to the heels and foreparts of shoes; but these sheets have been of substantially uniform thickness, varying only in the slight indentations, &c., required to produce an ornamental or figured surface. This we do not claim. But we are not aware that India rubber has ever been rolled into sheets having a substantial variety of thickness in its different parts. Nor are we aware that shoe soles, having the proper variety of thickness, have ever been rolled out or made in one solid piece before our invention. Nor was it known that such forms could be produced as we have produced them in India rubber, until our experiments practically illustrated the fact." The claims of this patent, three in number, are in these words: "1st. Producing a shoe sole, or other analogous manufacture, in India rubber or gutta percha, in one piece, having variety of thickness in its different parts, by the use of rollers, whose surfaces present the reverse of the forms to be produced, at a single operation, substantially as herein described; 2d. Forming soleing of India rubber or gutta percha, with shanks, foreparts and heels of appropriate differences of thickness, in one solid piece, and at one operation, as described, thus producing a useful, economical and novel manufacture; 3d. We also claim such soleing or analogous manufacture in continuous sheets, at one operation, by rolling, as described."

The specification of this patent to Hyatt and Meyer fully instructs those engaged in the manufacture of India rubber shoes how to roll unvulcanized India rubber into a sheet having a substantial variety of thickness in its different parts, the sheet being made in one solid piece, the variety of thickness being produced by a thickening up of the material in any desired place, one face of the sheet being smooth and the other face having projections upon it, the projections having a homogeneous connection with the other parts of the sheet, with the advantage of cheapness and durability, as contra-distinguished from giving the increased thickness by pasting on, or cementing on, separate strips or pieces of the material, and the result being produced by the use of rollers, one of which is smooth and the other is of such configuration on its surface as to admit of more material in thickness being left at one place than at another. A person who makes a sheet according to the patent sued on, makes it strictly in accordance with the directions of the earlier patent, without any addition. A sheet out of which to cut the upper part of an India rubber shoe, such sheet and such upper part having a variety of thickness in different parts, and being formed in one piece, at a single operation, by the use of rollers, one of which has a surface the reverse of the form to be produced, is an analogous manufacture, in all respects, to a sheet out of which to cut the sole of an India rubber shoe, the sheet and the sole having a variety of thickness in different parts, and being formed in the manner above described. When the sheet is prepared from which to make the upper part of the shoe, such upper part is cut and made from it in the same manner in which the sole is cut and made from the prepared sheet from which to make the sole. The shoe having the substance or material of the upper part so thickened up is not a new article of manufacture, in view of the prior shoe having the substance or material of the sole so thickened up. It is a mere double use of the same invention. The fabric not being new, the application of it to make the upper part of a shoe is not invention, nothing novel being required to adapt it to make such upper part. The fabric which is described in the plaintiffs' patent is directly within the first and third claims of the earlier patent. The fabric of the earlier patent includes the whole of the invention set forth in the plaintiffs' patent. Smith v. Elliott [Case No. 13,041].

The bill must be dismissed, with costs.

[For another case involving this patent see Meyer v. Goodyear Rubber Co., 11 Fed. 891.]

[NOTE. From the decree entered in this case the complainant appealed to the supreme court. Pending appeal the complainants surrendered their patent, and obtained a reissue. The supreme court, Mr. Chief Justice Waite delivering the opinion, remanded the case upon the ground that the surrender extinguished the patent, and therefore no action could be maintained thereon. Meyer v. Pritchard, 23 U. S. (Lawy. Ed.) 961.]

MEYER (UNITED STATES v.). See Case No. 15,761.

Case No. 9,518.

In re MEYERS.

[2 Ben. 424; [1] 1 N. B. R. 581 (Quarto, 162).]

District Court, S. D. New York. May, 1868.

BANKRUPTCY — STAYING PROCEEDINGS — FRAUDULENT CONVEYANCE—RESULTING TRUST.

1. Where after a bankrupt had filed his petition and been adjudged a bankrupt, creditors who held judgments against him, and had proved their debts in the bankruptcy proceedings, commenced a suit in a state court against him and others, charging that certain real estate which stood in the name of the bankrupt's wife, had been bought by him and paid for with his money in fraud of his creditors, and that a trust had resulted in their favor from such purchases, and praying that their judgments might be satsified out of such property: *Held*, that, by proving their debts in the bankruptcy proceedings, the creditors waived all right of action against the bankrupts, on either the judgments or the original indebtedness; and that proceedings in such suit must be stayed, under the 21st section of the bankruptcy act [of 1867 (14 Stat. 526)].

[Distinguished in Hill v. Phillips, 14 R. I. 95.]

2. If the allegations of the creditors were true, the money used by the bankrupt in the purchase of the real estate was "property conveyed by the bankrupt in fraud of his creditors," under the 14th section of the act, and passed to the assignee in bankruptcy under that section.

[Cited in Re Rainsford, Case No. 11,537.]

On the 8th of June, 1865, Martin Maas recovered a judgment, in the supreme court of New York, against the bankrupt, Louis Meyers, and one Sondheim, as joint debtors, for $1,130.70. It was duly docketed and execution was issued on it and returned unsatisfied. It was now wholly due, with interest from January 8th, 1866. It was founded on two promissory notes of the debtors, one made July 18th, 1860, at eight months, for $679.01, and one made August 25th, 1860, at eight months, for $322.48, and an account for $9.62, for goods sold. The consideration for the notes and account was goods sold to the debtors by Maas, in July, August, and September, 1860. On the 9th of April, 1866, Bache, Ulman & Bach recovered a judgment in the supreme court of New York, against the bankrupt and Sondheim, as joint debtors, for $1,167.08. It was duly docketed and execution was issued on it and returned unsatisfied, and it was now wholly due, with interest from its recovery. It was founded on a promissory note of the debtors, made August 10th, 1860, at eight months, for $781.56. The consideration for the note was goods sold to the debtors by Bache, Ulman & Bach, in July, August and September, 1860. On the 27th of March, 1868, Maas and Bache, Ulman & Bach commenced an action, in the supreme court of New York, against the bankrupt and his wife, the complaint in which, after setting forth the foregoing facts, averred that, while the bankrupt was so indebted to them, and while he was insolvent, and on or about the 14th of April, 1864, he purchased, with his own money and his own means, certain land in the city of New York, with the dwelling house thereon, particularly described in the complaint; that, on such purchase, the said house and lot of land were conveyed, by the direction of the bankrupt and at his request, to his wife, by the vendors, by a deed of conveyance recorded July 5th, 1864; that the bankrupt paid the whole or the greater part of the consideration or purchase money of the conveyance, and more than sufficient thereof to pay the amount of the said two judgments and interest; that the consideration or purchase money was $7,400; that the house and lot were now worth over $20,000; that the conveyance was voluntary and without consideration, as between the bankrupt and his wife, and was founded upon no other consideration, as between grantor and grantee, than the purchase money, so paid by the bankrupt, and was fraudulent, as against the plaintiffs in the suit, as his creditors; that, on such conveyance, the legal title, in fee simple, to the house and lot, vested in the wife of the bankrupt and was still in her, and a trust resulted in favor of said plaintiffs, as creditors of her husband, to an extent sufficient to satisfy their demands, being the amount of the said two judgments and interest; and that Sondheim was insolvent and had been so since prior to the purchase of the house and lot. The prayer of the complaint was for judgment that the trust might be established and declared, that the plaintiffs might be entitled in equity to enforce the trust, that the wife of the bankrupt might be declared to be the trustee thereof, and that, unless she should pay to the plaintiffs the amount upon their judgments, with interest, the house and lot might be sold by a receiver to be appointed by the court, and that out of the proceeds the judgments and interest might be paid. On the 13th of February, 1868, and before the said suit was commenced, the bankrupt filed his voluntary petition in bankruptcy. The creditors above named proved their said debts in the bankruptcy proceedings. On the 10th of April, 1868, this court made an order staying all proceedings in the said action until the question of the discharge of the petitioner in bankruptcy should be determined by this court. The creditors now applied to the court for an order vacating and setting aside such order of stay.

A. R. Dyett, for the creditors.

Benedict & Boardman, for the bankrupt.

BLATCHFORD, District Judge. The order of stay was made under that part of section twenty-one of the bankruptcy act which provides that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or

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

unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; * * * and any such suit or proceeding shall, upon the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy on the question of the discharge." The action in question, so far as it concerns the bankrupt as a defendant in it, is a suit for the debts set forth in the complaint, a suit to collect such debts, and the creditors, by proving such debts in the bankruptcy, waived all right of action thereon against the bankrupt, and the judgments, so far as they were judgments against the bankrupt, were thereby discharged and surrendered. This view applies, whether the action be regarded as founded on the original indebtedness of on the judgments. The order of stay was, therefore, proper, as respects the bankrupt. It is urged, however, that the suit ought to be allowed to proceed against the wife, as a suit to have the debts paid out of real estate of which the legal title is in the wife, and to enforce a trust created by the statute law of New York, in favor of the creditors, it being provided thereby (1 Rev. St. 728, §§ 51, 52), that "where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance," subject only to the provision, that "every such conveyance shall be presumed fraudulent as against the creditors at the time of the person paying the consideration, and, where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands." It is claimed, that the real estate in question was, therefore, never the property of the bankrupt, and could not pass to his assignee in bankruptcy; and that it does not pass to such assignee under section fourteen of the act, as being "property conveyed by the bankrupt in fraud of his creditors," because it never was conveyed by the bankrupt. This view overlooks the true character of the suit brought by the creditors in the state court. Their complaint shows that the bankrupt took his own money and made the purchase of the house and lot; that, on such purchase, it was conveyed by the vendors to the bankrupt's wife; that the purchase money so paid by the bankrupt was more than enough to pay the judgments; that the transaction was fraudulent as against the creditors; and that a trust resulted in favor of the creditors, to an extent sufficient to satisfy their demands. This trust they seek to have enforced against the house and lot, as representing the money so fraudulently applied by the bankrupt. The fraud, and the only fraud, committed by the bankrupt was in taking his own money and using it in this way. Therefore, on the case set up by the creditors in their complaint, the money so used and applied by the bankrupt, as now represented by the house and lot, is "property conveyed by the bankrupt in fraud of his creditors." As such, it passed, by virtue of section fourteen of the act, to his assignee in bankruptcy, and he can sue for and recover such property. Any equitable right which the creditors had to enforce any trust created by the law of New York in their favor, in respect to such money or its representative, and any equitable right conferred on them by the bringing of their suit, is subordinate to the right and title of the assignee in bankruptcy. His title relates back to the 13th of February, 1868. The suit of the creditors was brought afterwards. The equitable right to enforce the statutory trust is not such a lien or pledge as is saved or protected, as against the assignee, by the provisions of the fourteenth or twentieth or any other section of the act. The motion to vacate the order of stay is denied.

MEYERS (ADAMS v.). See Case No. 62.

Case No. 9,519.

MEYERS v. VALLEY NAT. BANK.

[18 N. B. R. 34; [1] 2 Nat. Bank Cas. (Browne) 156.]

District Court, E. D. Missouri. 1879.

BANKRUPTCY — ILLEGAL PREFERENCE — BANK SHARES—LIEN THEREON CLAIMED—FORM OF ACTION BY ASSIGNEE—TITLE TO STOCK.

1. The bankrupt B. held certain shares of stock of the defendant, a national bank. The bank claimed a lien on such stock, under its by-laws to secure an indebtedness due it from the bankrupts. This by-law the assignee claimed was void under the national banking law, and upon refusal of the bank to give him, as assignee, a certificate for these shares, brought action for their value. *Held*, that as judgment for conversion vests the title to the converted property in the wrong-doer, and the wrong-doer in this case cannot hold the title, the assignee cannot maintain the action in this form.

2. The bank purchased a quantity of its stock on the market and not having the right to hold it in its own name, divided it among some of the directors. The bankrupt B. who was one of the directors, took some of this stock and gave his note therefor, the bank retaining the certificate for him, although the stock was transferred to him on the books, and he received dividends thereon. On his failure the bank caused him to transfer the stock to its teller, but retained the note as an asset. In an action by the assignee to set aside the transfer as a preference, *held*, that the bank had lawfully no stock to convey, and that B. was not the lawful owner.

Peter Behr, of Goodwin, Behr & Co., had owned for some years ten shares of Valley National Bank stock, on which the bank claimed a lien, under its by-laws to secure the large sum due it from Goodwin, Behr & Co. Mr. Meyers claimed that this by-law

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was void, as in contravention of the national banking law. The bank refused to give him, in his own name as assignee, a certificate for these ten shares, and he sued for their value. It also appeared that the bank had bought in a lot of its own stock on the market, and not having the right to carry it in its own name, arranged to parcel it among some of the directors. Behr, one of its directors, took twenty-five shares under this arrangement, and gave the bank his note for the amount, which was entered as a discount, the bank retaining the certificate for the sharer, although the stock was transferred to Behr on its books, and he received the dividends thereon. This note was given in 1876, and was several times renewed, Behr never being called on for payment. When he failed last September, the bank had him transfer the twenty-five shares to E. G. Moses, its teller, to secure itself. It kept Behr's note, however, and claimed it as an asset. The assignee claimed that this transfer was a preference. This was the second count in the petition.

TREAT, District Judge. At the trial of this case the first impression was that the defendant must be held estopped from disputing that Behr was the owner of the shares mentioned in the second cause of action. Further reflection upon an examination of the national bank act (sections 5201 and 5210, with the cognate sections in the Revised Statutes) has induced a different conclusion. The bank was prohibited from becoming the purchaser or holder of the shares in dispute. How, then, could it acquire any title thereto which it could transfer to Behr? The irregular and unlawful contrivances adopted cannot change the legal results. The bank had lawfully no stock to convey, and though Behr may have appeared on the stock ledger as the owner of these shares, and the bank have paid him a cash dividend thereon, still he was not the lawful owner. A list of the stockholders, as required by section 5210, and the report thereof to the comptroller of the currency, is necessary for the protection of all interests, especially with reference to the double liability. Hence, as to the second cause of action, the finding is for the defendant. As to the first cause of action—conversion of the ten shares—the parties consent to a judgment for the value thereof, five hundred and fifty dollars. But the court is here met by the legal difficulty that the bank cannot purchase or hold those shares. As judgment for conversion vests the title to the converted property in the wrong-doer, and the wrong-doer in this case cannot hold the title, how can the court give a judgment which will contravene the law? To carry out the agreement between the parties as to the said ten shares they should consent to an amendment of the petition, so that damages may be had for failure to transfer as demanded by plaintiff. The court can then assess nominal damages and costs, with the understanding that the transfer will be at once made to the plaintiff.

[For another action between the same parties in which The Valley National Bank claimed $6,000 upon a note given by the bankrupts endorsed by one Gustavus Hoeber see Case No. 5,549.]

MEYERS (UNITED STATES v.). See Case No. 15,762.

Case No. 9,520.

MEZES v. GREER et al.

[1 McAll. 401.]

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

GRANTS—CONFLICTING CLAIMS—THIRD PARTIES—KIND OF RELIEF—LAND PATENTS—EJECTMENT.

1. Where parties set up conflicting claims to property, with which a special tribunal may deal, as between one of the parties and the government, regardless of the rights of third parties, the latter may come into the ordinary courts of justice and litigate their claims.

2. Such party can only litigate in the tribunal which can afford the relief asked. If his right be legal, he must seek it in a court of law; if an equity, in a court of chancery.

3. The proviso in the act of congress approved March 3, 1851 (9 Stat. 301), in relation to patents, does not destroy the distinction between equity and law which obtains in the federal courts.

4. The plaintiff holds a legal title. The title of defendants, in this case, is inchoate, and not such as can be used in bar of an ejectment, where a legal title is counted on.

At law.

Johnson & Rose, for plaintiff.

Jeremiah Clarke and Crockett & Crittenden, for defendants.

McALLISTER, Circuit Judge. This is an action of ejectment, brought for the recovery of certain lands situated within this district. The plaintiff introduced and relied on a patent which had been issued to him from the government of the United States. The defendants then offered a Mexican grant, and a confirmation of the claim under it by the board of land commissioners created by the act of congress of March 3, 1851 (9 Stat. 631), with an affirmance by the district court of the United States for the Northern district of California, on appeal from the said decision of the land commissioners. The plaintiff presents a perfect, legal title. To that of the defendants we shall hereafter allude. There is no doubt that where parties set up conflicting claims to property, with which a special tribunal may deal, as between one of the parties and the government, regardless of the rights of third parties, the latter may come into the ordinary courts of justice for relief, and litigate their claims. Thus, a party may go into a court of equity, to set aside the decision of the register and receiver, confirmed by the com-

missioner, and which was obtained by fraud. Garland v. Wynn, 20 How. [61 U. S.] 6. But the party seeking relief can only obtain it in the tribunal which has the power to afford it. If his right be a legal one, he may vindicate it in a court of law; if equitable, he must enforce that equity in another forum. "An equitable claim," says Mr. Justice McLean, "however strong it may be, cannot be set up at law to defeat the legal title." Baird v. Wolfe [Case No. 760].

The provision in the act of congress of March 3, 1851, which enacts that the patent to be issued under it "shall not affect the interests of third parties," does not alter or change the jurisdiction of the courts of the United States, nor destroy the distinction which by their law separates legal from equitable rights; prescribing, as they do, as rules of action in administering the former, the principles of the common law, and in the administration of the latter, the rules and proceedings of chancery. Now, as, prior to that enactment, the party to vindicate a legal right must be in a court of law,—to enforce an equity he must be in a court of equity. In Willot v. Sandford, 19 How. [60 U. S.] 79, 82, it is said: "In the next place, the United States reserved the power to survey and grant claims to lands, &c. . . . nor have the courts of justice any authority to disregard surveys and patents, when dealing with them in actions of ejectment." It does not seem to be denied, that the foregoing principles must control the action of the court; but it is contended, that defendants have a perfect, legal title. Being in a court of law, if both parties had legal titles, the question would arise how far this court would follow some of the state courts who, in a court of law, in a conflict between two legal titles, permit the parties to go behind them into the prior equities. It is admitted that the Mexican grant offered in evidence had never received the approval of the departmental assembly of California; that no judicial possession of the land was ever given, and that no survey of the land, or severance of it from the public domain, by a functionary of Mexico, was made before the cession of California to the United States. It is contended, however, that the approval by the departmental assembly was unnecessary to make it a legal title; and the fact that there was no judicial possession given does not affect the title, because the boundaries of the land are given so precisely in the grant, there was no necessity for a survey and delivery of judicial possession. If the court could dispense with the action of one of the political departments of Mexico, in the exercise of the granting power, and consider the title as legal and complete, it is still strange that—if the boundaries are so precisely described as to dispense with any necessity for a survey—the surveyor to whom the duty was confided of making a survey correctly, has not only failed in finding the boundaries, but erred so egregiously as to cause great alleged injustice to the defendants.

The grounds relied on to establish a perfect legal title in the defendants are, first, the Mexican laws; second, the confirmation of the claim under the title derived from those laws, made by the district court; and third, the clause in the act of March 3, 1851, which declares the patent when issued shall not affect the rights of third parties.

As to the first ground, a Mexican title, precisely similar to the one under consideration, save there had been no confirmation of it, was fully considered by this court in the case of Tobin v. Walkinshaw [Case No. 14,068], at its September term, 1855; where it was decided that a Mexican grant which had not received the sanction of the departmental assembly, and where there had been no judicial possession given nor any severance of the land from the public domain prior to the cession of California to the United States, was not such legal title as would sustain an action of ejectment, and defeat a legal title. This court gave in that case the reasons, in detail, on which it rested its decision. Until the action of the appellate tribunal shall ascertain the error of this court in that case, the reasons which then governed must control in this. The court cannot, therefore, consider that defendants hold a perfect title under the Mexican laws.

The next inquiry is, if a legal title is not held under the Mexican laws, did the confirmation of the claim by the district court, under that title, give defendants a legal title? The court knows of only three modes by which a legal title to real estate can pass from the United States,—to wit, by patent; by legislative confirmation, followed by a survey in the terms prescribed by it; or by a legislative confirmation describing the boundaries of the land with such precision as, in the absence of anything to the contrary, raises the fair inference that all the land within the prescribed limits was intended to be granted, thus dispensing with the necessity of a survey by an officer of the United States. In each of these modes, the granting or political power is exerted. The court is aware of no case in which the decree of a judicial tribunal has operated per se as the conveyance of the legal title to real estate. In Hickey's Lessee v. Stewart, 3 How. [44 U. S.] 750, it was held, that the decree of a court of equity, declaring the complainant the equitable owner of land, and directing the defendant to convey it,—though in part executed by a writ of habere facias, putting the party in possession of part of the premises,—does not confer a legal title, and is not a bar to an action of ejectment. In that case the court say: "The defendant in ejectment can never defend his possession against the plaintiff upon a title in himself by which he could not recover the possession if he were out, and the plaintiff in, possession. Reversing the

position of the parties in this case, could the defendants, if plaintiffs recover the land in controversy upon this decree, and evidence of possession under it, prevail against the title of the plaintiff? We have no hesitation in saying they could not; and, therefore, the decree, if founded upon a valid, equitable title, would be no legal bar to the action of the plaintiffs."

In Baird v. Wolfe [supra], the plaintiff gave in evidence a patent. The land had been located by survey by one Baird, and sold to one Dunbar. The claim had been reported on favorably by the land-officer, whose report was made to congress, and by them examined and confirmed; and a certificate was issued, which authorized the person to whom it issued to locate the land within the time and place limited. It was contended that the act of congress, confirming the right to the tract of land to the original claimant upon the report of the register and receiver vested in the claimant the legal title. But the court say: "This was not the effect of the confirmation. It was the right to the four hundred acres of land which was confirmed, and not to any particular tract of land. The certificate which the claimant received as evidence of his right, authorized his location of the four hundred acres. A legislative act, confirming a title which was in its terms final, and required no further action of the government, would be considered a grant. But the right before us is not of this character." In that case congress itself had directly transferred the title to the right; but as something else was to be done for the segregation of the land, until that was accomplished the title was deemed inchoate.

In West v. Cochran, 17 How. [58 U. S.] 415, the court say: "It was competent for congress to take up these titles or rights, and act on them, either by legislating directly that each claimant should be confirmed, and have a perfect title to his actual possession," &c., "without ascertaining, in the act of confirmation, or by any special means provided therein, the bounds of claims confirmed. But it was also competent for congress to provide that before a title should be given to any possessor, the exact limits of his possession and the title which the United States was to give should be defined, and that this should be done by such agencies and in such manner as might be fixed by congress. This is in entire accordance with the provisions of the treaty, which guarantees to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced; these being left to the nation, to whose powers they were confided; so that the question is, What has congress deemed expedient? Now, the policy which is so obvious, and which has been acted on by the United States ever since they began to exercise power over the public lands, namely to give defined limits to grants, may well be supposed to have actuated congress in 1807. The provisions of that act clearly show that although congress intended that the commissioners should adjudge the existence of good titles to lands held under French and Spanish possessors, yet they did not intend that a final legal title, as against the United States, should be made to vague grants, until their bounds had been ascertained by the means there designated, and the particular tract defined by survey."

Now, congress have by the act of March 3, 1851, designated the means by which to ascertain the limits of lands the claims to which had been confirmed, namely, by a survey made by the appropriate officer of the government, the evidence of which survey and the alienation of the title was the patent to be issued. It is evident that congress did not intend any more in this than in the case just cited,—to part with the legal title until the exact limits of the land had been defined by previous survey. When such patent shall have issued, the presumption would arise that the patent was valid, and it would be prima facie evidence that all incipient steps had been regularly taken before the title was perfected by the patent. Minter v. Crommelin, 18 How. [59 U. S.] 88. In Bagnell v. Broderick, 13 Pet. [38 U. S.] 450, the court say: "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; and until its issuance the fee is in the government, which by the patent passes to the grantee, and he is entitled to recover the possession in ejectment."

The conclusion to which the court has come is, that the title of the defendants in this case cannot be set up in this court against the legal title of the plaintiff. The same is therefore excluded as evidence in this cause.

[This case was taken upon error to the supreme court, which affirmed the judgment of the circuit court. Mr. Justice Grier delivering the opinion. 24 How. (65 U. S.) 268.]

M. F. WINCH, The. See Case No. 4,485.

MIAMI COUNTY (PECK v.). See Case No. 10,891.

Case No. 9,521.

The MIANTINOMI.

[3 Wall. Jr. 46; 3 Pittsb. Leg. J. 20; 3 Liv. Law Mag. 598.] [1]

Circuit Court, W. D. Pennsylvania. April Term, 1855.

CONSTITUTIONAL LAW—FEDERAL AND STATE LEGISLATION—WEIGHTS AND MEASURES.

1. The regulation of weights and measures having been given by the constitution to congress, it is doubtful whether the enactments of any state on that subject are of any validity whatever: even though congress have wholly neglected to attend to this regulation.

2. When parties contract for any material by weight, using terms that have come to us from times past, with a definite meaning, such as "tons,"—which have been commonly regarded as meaning 2,240 lbs.,—the mere fact that a state has undertaken to regulate weights and measures, and, in discharge of such an office, has fixed the ton at 2,000 lbs., will not dispense with an obligation to furnish the old measure.

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

The constitution of the United States (article 1, § 8, par. 5) gives to congress the power "to fix the standard of weights," a power which, however, it has never exercised except by an act of May 19th, 1828 [4 Stat. 277], in which it declares that a certain "brass troy pound weight," then in the custody of the director of the mint of the United States, shall be the standard troy pound of the mint. In this state of federal inaction, the legislature of Pennsylvania by an "Act to fix the standards and denominations of measures and weights" in that commonwealth, enacted (section 13) on the 15th April, 1834, that the standard of weight shall be a pound, to be computed upon the troy pound of the mint of the United States, referred to in the act of congress of May 19th, 1828, to wit: "the troy pound of this commonwealth shall be equal to the troy pound of the mint aforesaid, and the avoirdupois pound of this commonwealth shall be greater than the troy pound aforesaid in the proportion of 7,000 to 5,760:" and enacted further (section 17) that "the denominations of weight of this commonwealth, whereof the pound avoirdupois as heretofore provided is the standard unit, shall be, 16 drams, make one ounce; 16 ounces, make one pound; 25 pounds, make one quarter; 4 quarters, make one hundred; 20 hundreds, make one ton." Notwithstanding this law, the ton of coal (the ton weight being the unit by which coal is always bought in Philadelphia), as perhaps of other things, was popularly regarded as being 2,240 pounds. To the great majority of people the existence of the Pennsylvania act was unknown. But towards the close of the year 1853,—coal having been then lately very much, as it continued afterwards, on the rise in price,—almost all the vendors of coal of Philadelphia, met together in a public way, and having made agreement with one another to this effect, publicly, and in a body, "Resolved, that on and after December 1st, 1853, the weight for a ton of coal shall be 2,000 pounds; and that the price be reduced in proportion to the weight." These proceedings of the coal dealers were matters of great publicity, and known to most persons who burn coal and read the city newspapers. From that time the coal dealers, when furnishing coal in the city, furnished but 2,000 lbs. as a ton.

In this state of facts, one Holt had contracted, previously to these resolutions, to furnish the steamer Miantinomi with several hundred "tons" of coal at the market prices, and furnished that part of his "tons" which he delivered after the resolutions at the rate of 2,000 lbs. He had given no notice to the parties with whom he had contracted, that he was, after the resolutions, furnishing 2,000 lbs. as a ton, and it did not appear that they knew of the resolutions. As a fact, they discovered the change in the kind of "tons" only by observing that the new tons did not burn so long, nor propel the boat so far, as the old ones: in other words, that 2.000 lbs. would not have the effect of 2,240 lbs. In regard to price, while there was nothing to show that compared with the subsequent still rising rates, the libellants had not reduced the price of the short tons in proportion to the reduction of the unit, it was clear that with the still rising prices, the defendants were charged more for one of the short tons, than under the old prices they had been for the large ones. And there was nothing which showed that they knew about rising prices at all. Holt having libelled the steamer for his claim, the owners of the vessel alleged in defence that he "had rendered false weights to the amount of many hundred of pounds," and claimed a deduction to be made for these "tons" of 2,000 lbs.

GRIER, Circuit Justice. [This case was very summarily decided; being submitted without argument by the respondent's counsel. As the subject is of some interest the decision seems to have attracted public attention. In order to avoid the misapprehension so frequently attending off-hand reports of parol opinions, I have concluded to state more particularly the case and the reasons of my decision. The libel in this case is in a cause of contract. Holt, the libelant, claims a balance of account on his contract to supply coal to the steamboat Miantinomi, owned by the New Jersey, Delaware and Pennsylvania Steamboat Company. The respondents, the owners, in their answer, admit the contract with Holt to supply the boat with coal, and "that he pretended to furnish and deliver the amount of coal as stated in his account set forth in this libel, but did not in truth deliver said amounts nor to the value as stated, but

[1] [Reported by John William Wallace, Esq., and here reprinted by permission. 3 Liv. Law Mag. 598, contains only a partial report.]

rendered false weights to the amount of several hundred of pounds.

[It appears from the evidence, that after the libelant had continued for some time to deliver coal according to his contract, the agents of defendant's began to observe a deficiency in weight, and that the same nominal amount of tons as then delivered, did not propel the boat so long as at first. That this deficiency was found on weighing to amount to some two or three hundred pounds in every ton. In answer to this charge and by way of justification of his delivery of short measure, the libelant gave in evidence an agreement between himself and some other coal dealers, in December, 1855, to reduce the weight of the ton of coal from 2,240 pounds to 2,000 lbs., and to deliver to their customers thereafter that amount for a ton. How far the laborers, miners and carriers of coal, partook in the benefits of this resolution, does not appear, nor is it important to the decision of this case. It is true, that resolution contemplated a reduction of price in proportion to the reduction of weight. But whether from a mistake in their arithmetic, or for what other reason does not appear, the price was varied in the inverse ratio of the quantity. An inspection of the libelant's account shows that while he delivered 2,240 lbs. to the ton, the charge varied from four dollars up to $4.90 and $5 per ton; but when he commenced to deliver at the short weight, the price varied from five up to $5.80.

[The case, then, is this, a contract is made for the coal at so much, (say the market price) per ton. Anthracite coal being a heavy article, and used in large quantities, the unit by which it is valued and sold is by the ton weight, and not by the measure or by the bushel, as is the custom with dealers in bituminous coal west of the Allegheny mountains. This unit has from time immemorial been the representation, or supposed to be the synonym, for 2,240 lbs. avoirdupois. In the contract before us both parties used the term in that signification. No notice is given to the respondents that thereafter the unit quantity in the sale of coal was to be changed from the ton to the pound, and that the vendor, instead of the ton which he had contracted to deliver, intended thereafter to deliver by the pound, and call 2,000 lbs. a ton, for convenience or calculation; and that while the price for a nominal ton was increasing from twenty to fifty per cent., the quantity was decreased by ten or eleven per cent. The defendants are left to discover this fact by the failure of the 2,000 lbs. to do the duty of 2,400 lbs.] [2]

It is almost superfluous to remark that as it requires the assent of both parties to make a contract, it also requires the same consent to change it. It may be said, that as two multiplied by three will have the same product as three multiplied by two, the result will be the same either way, provided the price be diminished in proportion to the quantity. This is undoubtedly true; but it is not the case before us. The defendants finding the price increasing every few days, continue to pay the apparent market value under the supposition that they are receiving their coal according to the unit of quantity and valuation, when they made the contract. If notice had been given them that eleven per cent. was to be added secretly to the price by this contrivance of diminishing the quantity, they might not have assented to it. And until they can be shown to have assented to it, they cannot be made its victim.

If the grocers in a particular street finding that it would add much to their profit in times of scarcity and high prices, to deliver flour and other provisions at the pound troy instead of the pound avoirdupois, as heretofore, and should conspire together to deliver thereafter but twelve ounces to the pound instead of sixteen, such conduct would receive no countenance from the public. thus imposed upon, and in courts of justice would be treated as a fraud, and receive that appellation without seeking for a milder synonym.

Coal is a necessary of life in this climate, and unfortunately for the consumers, the demand has increased to such an extent as to put it in the power of those who supply it to extort their own price. When its price was moderate, and the profits of the vendor merely remunerative, there were no schemes to reduce the quantity by changing the meaning of words to suit the rapacity of speculators. This scheme of reducing the quantity by ten per cent. was not concocted till after prices had increased twenty-five per cent. and were proceeding up to fifty. When it was discovered that competition could not check speculation on a necessary of life, the public were made the victims of this agreement, contrivance, conspiracy, or whatsoever it may be called.

My attention has been turned to an act of the Pennsylvania assembly passed in April, 1834, on the subject of "weights and measures." [By this act it is stated that the "pound troy as kept at the mint of the United States should be the standard of weight—that the pound avoirdupois should exceed the pound troy in weight in the proportion of 7,000 to 5,760—that 25 pounds should make a quarter and 2,000 pounds a ton."] [2] For the purpose of the present case it may not be necessary to decide upon the power of any state legislature to make such an enactment. It was probably intended for the convenience of the officers on their public works. As approximating decimal divisions it is much more convenient for calculation when the pound is made the unit on which to compute price or value. In very many cases the pound and its decimal multiples have been adopted almost entirely instead of the old quarters, hundred weights and tons; just as

[2] [From 3 Pittsb. Leg. J. 20.]

[2] [From 3 Pittsb. Leg. J. 20.]

25 feet has been adopted by engineers as the cubic yard instead of 27. But in all those cases a change of language is made to suit this convenient change of multiple. Thus the engineer would state on a contract for excavation the price at so much "per cubic yard of 25 feet." So the terms "per 100 lbs.," or "hundred neat," are substituted for "cwt.," which represents 112 lbs. And when the ton is used to represent, for convenience of calculation, 2,000 lbs., the contract should and usually does so state it as "per ton of 2,000 lbs.," or "per ton neat." But as coal and other cheap and heavy articles have never been sold by the pound as a unit for calculating its price, but by the ton, convenience of calculation has never required, nor has custom sanctioned any reform (so called) or change in the amount so represented by this unit. Accordingly, notwithstanding, that this act of the legislature was passed more than twenty years ago, it has never been adopted in practice in the sale of coal and other heavy articles whose unit of calculation is usually by the ton and not by the pound.

The congress of the United States having the power to regulate commerce between the several states, it was of great importance that the value of money and the standard of weights and measures should be uniform. Accordingly their regulation is intrusted to congress. Every change or innovation by the several states would tend only to increase confusion and difficulty. This duty intrusted to congress, seems apparently to have been much neglected. I find no legislation on the subject by congress, except in the act of May 19th, 1828, c. 67, where it is enacted that "the brass troy pound weight, procured by the minister of the United States at London, in the year 1827, for the use of the mint, and now in the custody of the director thereof, shall be the standard troy pound of the mint of the United States." As the English standard of weights and measures had been adopted by long custom in every state, it was, perhaps, unnecessary for congress to interfere further than it has done. For as the standard of the London tower weights, and the English terms or denominations used to represent their fractions and multiples, were universally adopted in the United States, and of course uniform, nothing was required of congress, unless it entirely changed its standard and introduced decimal fractions and multiples for greater facility of calculation, as it has done in our coin. Whether this uniformity of weights and measures has been established by custom or congressional legislation, it is evident that any interference of state legislation to change either the standard of weights or the meaning of the terms used to represent its multiples or fractions, is not only useless but injurious. Accordingly, the provisions of this act of assembly have remained a dead letter, and it is practically obsolete so far as concerns the standard ton. It compels no one, nor could it do so, to adopt its use of language. Men may contract either with or without its sanction to make the pound their unit, and to sell at so much per 100 lbs.—or so much for 2,000 lbs., and they may call it, or any other multiple of a pound, a ton, if the parties to the contract agree to do so. But this act, if it have any efficacy whatever, (which, as I have intimated, is doubtful,) cannot be invoked to change the terms of a contract contrary to the consent of one of the parties, or to authorize vendors who buy coal at one standard of weight to sell it at another, and thus extort from purchasers an increased price for a diminished quantity.

A deduction must be made as claimed by the defendants on their theory that 2,240 lbs., and not 2,000 lbs., are a ton.

Case No. 9,522.

The MICHAEL GROH.

[1 Brown's Adm. 419.] [1]

District Court, E. D. Michigan. May, 1872.

TOWAGE—NEGLIGENCE—DAMAGES—EXPENSES OF GETTING OFF—PROTEST.

1. Where a vessel is aground amidships, and in danger of springing a leak, and wetting a valuable cargo, courts will not, as against the party by whose negligence she was grounded, scrutinize very closely the expense of getting her off, provided the master has acted in good faith.

2. The expense of a protest made before unloading, will be allowed, though it proves to be unnecessary.

On the libel of James Cooper and Robert Meginnity, owners of the schooner Columbian, for negligent towing and grounding of the schooner on a reef above Belle Isle, in Detroit river, June 9th, 1871. Libellants claimed damages for lightering, services of tugs and services of men in getting the schooner off, for damage to cargo, repairs, demurrage, etc., to the amount of $2,500. The answer admitted the towing and grounding of the schooner, but denied that the grounding was caused by negligence, or any fault on the part of the Michael Groh, or that the latter was liable for any part of the damages claimed.

W. A. Moore, for libellant.
H. B. Brown, for claimant.

LONGYEAR, District Judge. On the hearing, it was conceded that the Michael Groh was in fault, and that she is liable for all proper damages in consequence of the grounding of the schooner, including all necessary expenses in getting her off. The only contest there is relates to certain items of expenses and damages claimed by libellants. The items objected to, and the objections raised, will be taken up and considered in their order:

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

First. As to the services of the tug U. S. Grant, eleven hours, at $20 per hour, $220. The objections to this item are, first, that by an agreement between the master of the schooner, and the master of the Michael Groh, the latter was to get the schooner off at the expense of the Groh, and it is claimed that by virtue of this agreement, the master of the Groh had the right to select the means, and that the U. S. Grant was employed by the master of the schooner against the consent of the master of the Groh, and in violation of the tenor and effect of the said agreement; second, that the U. S. Grant was retained longer than was necessary, and after it clearly appeared that the vessel could not be got off by her; third, that it was poor judgment to attempt to pull her off without first lightering. Soon after the grounding of the schooner, there was some conversation between the two masters about getting the schooner off; but the evidence fails to satisfy me that it amounted to anything more than a recognition by the master of the Michael Groh of his liability for the grounding, saying at the same time that he would get her off. The future conduct of the two masters would seem to indicate that this was all there was of it, and that they in fact worked in concert, each doing all he could, according to his best judgment, to accomplish the result. About the only difference between them, so far as I can discover from the evidence, was in what appeared to be the controlling motive of each in what he did or refrained from doing. On the part of the master of the schooner it seemed to be expedition—to get his vessel off in the shortest possible time, regardless of expense. On the part of the master of the Michael Groh it seemed to be economy in the expenses—to get her off, but to do it with the least possible expense, even if it involved more or less delay.

The evidence shows that the schooner got aground about nine o'clock in the afternoon of June 10th, 1871. After the Michael Groh had pulled upon her for some time, and long enough to satisfy them that she could not pull the schooner off without aid, the two masters went to Detroit in quest of aid. Early the next morning they applied to the owner of the tug U. S. Grant, but the master of the Michael Groh objecting to his terms, they left in quest of cheaper aid. After spending an hour and a half or two hours in a vain search, the master of the schooner returned to the owner of the U. S. Grant and engaged her at twenty dollars per hour, and one hundred dollars for use of hawser. This was done without any further consultation with the master of the Michael Groh, and without his having withdrawn the objection made by him in the morning. This illustrates the controlling motives of the two masters as before suggested —the one being all for expedition, and the other all for economy. But let us see what justification there was for the master of the schooner to do as he did. His vessel was heavily laden with wheat. She was aground nearly amidships, both ends being clear of the bottom. She was in great danger of straining and springing a leak, and thus not only damaging her hull, but causing great damage to the cargo by wetting. Every hour's delay tended to precipitate these results. And in addition to these facts, the agent of the insurers of the cargo was urging expedition. It was under these circumstances that the master of the schooner engaged the services of the tug U. S. Grant as he did. I think he was fully justified in doing so. He had, in my opinion, been even liberal with the master of the Michael Groh in waiting for him as long as he did, and aiding him to find cheaper aid. He could hardly have been justified to his owners and the underwriters in waiting longer.

After the U. S. Grant had been employed and had commenced operations, the master of the Michael Groh succeeded in obtaining the gratuitous services of the United States revenue cutter Fessenden to aid in pulling the schooner off. The united forces of the Fessenden, the U. S. Grant and the Michael Groh, however, proved unavailing. It was then determined to lighten the schooner, and the U. S. Grant was retained to pull upon her from time to time while the lightening was going on, so as to diminish the necessity for lightening as much as possible. It was this retention of the Grant that constitutes the second objection to the allowance for the services, in part. I think her retention was for a proper and legitimate purpose, and that the objection is therefore untenable.

The third objection to the allowance for the services of the U. S. Grant is, that good judgment required that the schooner should have been first lightened before attempting to pull her off. The necessity of lightening was not so evident before an attempt to pull her off had been made as to make such attempt unjustifiable. It was, in fact, mere matter of speculation, whether she could or whether she could not be got off without lightening. If she could be got off without it, then it was the duty of those in charge to do so, and they could ascertain only by trying. But beyond all this, if there was any mistake of judgment here, it was a mutual mistake, and the respondents are estopped from claiming any advantage on account of it. The item for services of the tug U. S. Grant is allowed at the amount claimed by libellants, $220.

Third. As to the item for services of the schooner Nettie Howard, lightening, $480. The proof shows that the employment was by the hour, at $8 per hour. The objections are, first, that the rate per hour is extravagant; that a vessel could by reasonable diligence have been obtained for $3 per hour, which would have answered the purpose; second, that the proof fails to show a sufficient length of time to come to the amount charged, even at the rate paid. The first objection is not sustained by the proofs. There

was some proof that there was an open scow somewhere within reach, which might have been obtained at $3 per hour. In the first place there is no proof that the master of the schooner knew that fact. If it was his duty to ascertain it, it was equally the duty of the master of the Michael Groh not only to ascertain it, but to inform the other of it. It is true the master of the schooner seems to have employed the first vessel he could find; but, under the circumstances, respondents have no right to be very nice in their requirements of diligence on the part of the vessel in peril, in order to save a few dollars to the vessel by whose fault the peril accrued, when such diligence involved loss of time and consequent added peril to the vessel. And, in the second place, I do not think it would have been prudent to employ an open scow as a lighter, in view of the nature of the cargo.

The second objection to this item is sustained. The length of time the Nettie Howard was employed, as shown by the proofs, and as conceded in the argument, was 47½ hours, which, at $8 per hour, amounts to $380. The Nettie Howard was a Canadian vessel, and the difference in the two currencies was made up, being twelve per cent. at that time; this must therefore be added to the above amounts, making a total of $425 60, at which amount the item for services of the Nettie Howard for lightening is allowed, in lieu of $480, as claimed.

Sixth. As to the item for expenses of protest, $7 75. The objection to this item is that protest was unnecessary. On arriving at Buffalo, the destination of the schooner, the master, not knowing how badly the cargo might be injured, as a prudential step with reference to the insurance on the cargo, got out protest papers before unloading. Now, while protest was unnecessary to charge the Michael Groh, yet it was, to say the least, prudent under the circumstances, for the purpose above stated, and I think it ought to be allowed. The item for expenses of protest is, therefore, allowed at the amount actually paid, $7 75.

The remaining exceptions involved simply questions of fact. Exceptions overruled.

Case No. 9,523.

MICHAELSON v. DENISON et al.

[Brun. Col. Cas. 63; [1] 3 Day, 294.]

Circuit Court, D. Connecticut. Sept., 1808.

COURTS—FEDERAL JURISDICTION — ALIENS — SEAMEN—CORPORAL PUNISHMENT—DISOBEDIENCE.

1. Federal courts do not acquire jurisdiction of a case because one of the parties is a subject of a foreign power; such subject may still be a naturalized citizen. The party must be stated to be an alien in express terms.

[Cited in Berlin v. Jones, Case No. 1,343.]

2. The master of a vessel has a right during the voyage to punish mariners by corporal chastisement for disobedience to his reasonable commands for insolence and other offenses.

[Cited in Fuller v. Colby, Case No. 5,149.]

This was an action of assault and battery [by Charles Michaelson, of Bass End, in the Island of St. Croix, a foreign subject, viz., a subject of the King of Sweden." By the constitution of the United States the judicial power may extend to cases between citizens of a state and foreign subjects; but congress, in the provision of the judiciary act [1 Stat. 73] under that clause, have restricted it to cases in which "an alien is a party." He must be stated to be an alien, in express terms. It is not sufficient that the description be such as to imply it. This court will take nothing by implication. Besides, it is a non sequitur that because a man is a subject of a foreign power he is an alien; he may be at the same time a naturalized citizen of this state.

Mr. Staples, for plaintiff, moved for leave to amend.

Mr. Staples and Mr. Wales, for plaintiff.

Mr. Ingersoll and N. Smith, for defendants.

LIVINGSTON, Circuit Justice, at first said he did not see how a court not having jurisdiction could make any order in the cause. But upon its being stated that an amendment had been allowed, at the last term, under similar circumstances, he remarked that the court had not committed itself on the point; and after a short consultation between the judges, the motion was granted upon payment of costs. On the trial it appeared that Denison, one of the defendants, was the master of a vessel, and the plaintiff his mariner; and that the beating complained of consisted in the punishment inflicted by the former upon the latter, for disobedience of orders, insolent language and personal violence. The plaintiff's counsel contended that the master has no right to inflict corporal punishment for insolent language, nor for disobedience to orders, not relating immediately to the management of the vessel, nor, indeed, for past offenses of any kind.

LIVINGSTON, Circuit Justice, in summing up, after taking notice of the weapon, which was not dangerous, the mode of punishment, which was not unusual, and the degree which, however severe, was less that sufficient to reduce the plaintiff to submission, recognized the right of the master, during the voyage, to correct a mariner for disobedience to any reasonable commands, and for insolence and other offenses. The punishment, in its nature, is not limited to confinement, corporal chastise-

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

ment being often necessary and proper; and as to its extent, depends upon the circumstances of the case, the aggravation of the offense, or the continuance of the disobedience. This is a salutary authority and ought to be maintained. Without it, it would be impossible to navigate our vessels.

Verdict for the defendants.

NOTE. Jurisdictional Facts—How Set Forth.—Jurisdiction depending on character of parties must be positively averred on the record. See Berlin v. Jones [Case No. 1,343], citing case in text. Jurisdictional facts may be permitted to be shown by amendment. Woolridge v. McKenna, 8 Fed. 679, citing case in text.

Chastisement for Disobedience—Right of Master of Vessel to Administer.—See Fuller v. Colby [Case No. 5,149]; Buddington v. Smith, 13 Conn. 336; citing approvingly the case in text.

MICHELS v. JAMES. See Case No. 15,464.

Case No. 9,524.

MICHENER v. PAYSON.

[13 N. B. R. 49; 5 Ins. Law J. 116; 1 N. Y. Wkly. Dig. 272; 2 Wkly. Notes Cas. 339; 8 Chi. Leg. News, 17; 32 Leg. Int. 362; 23 Pittsb. Leg. J. 38; 1 Law & Eq. Rep. 338; 2 N. Y. Wkly. Dig. 193; [1] 7 Leg. Gaz. 332.]

Circuit Court, E. D. Pennsylvania. Oct. 4, 1875.

BANKRUPTCY—ACTION BY ASSIGNEE—PRACTICE—RECORDS—CORPORATIONS—UNPAID SUBSCRIPTION—COLLATERAL ACTION.

1. A copy of the record containing the assignment is admissible in evidence to prove the assignment, although it does not purport to be a copy of the whole record.

2. The proceedings in bankruptcy are not deemed to constitute an integral record, but a copy of each proceeding may be authenticated as a separate record, and is competent presumptive evidence of the facts therein stated.

[Cited in Turnbull v. Payson, 95 U. S. 424.]

3. In an action by an assignee to collect an assessment on the unpaid subscription of a stockholder, evidence of misrepresentations made at the time of the subscription to the stockholder by an agent of the corporation is not admissible.

4. An assessment upon the unpaid subscriptions of the stockholders made by the district court having jurisdiction over a bankrupt corporation, is conclusive, and cannot be impeached in a collateral action.

[In error to the district court of the United States for the Eastern district of Pennsylvania.]

Geo. Junkin, for plaintiff.

J. Cooke Longstreth, for defendant.

[2] [Assumpsit by Payson, assignee in bankruptcy of the Republic Insurance Co. of Chicago, against Michener, a resident of Philadelphia. The following cause of action was set forth in the declaration: The Republic Insurance Co. issued shares of stock at the par value of $100, upon certain terms, viz.: The real and personal property of each stockholder was to be held liable for losses of the company in the amount of stock held by him, and not actually paid in; twenty per cent. of the par value was to be paid in upon delivery of the certificates, and the remaining eighty per cent. was to be assessed only in the event of the twenty per cent. cash fund of the company becoming exhausted by losses. In 1871, the defendant became the owner of twenty shares of stock, having agreed to the above terms, and having paid $400, or twenty per cent. of the par value of the same, to the company upon receipt of the certificates. Later in the same year the company met with severe losses by reason of the Chicago fire, whereby the whole of the twenty per cent. cash fund, and all other funds possessed by them were exhausted, and in 1872 the company was adjudicated bankrupt, and Payson was duly appointed assignee. In 1873, the bankruptcy court in Chicago decreed that a call and assessment should be made upon the stockholders of sixty per cent. upon each share of unpaid stock, and if default in payment should be made after March 1st, 1873, after proper notice and publication, the assignee should be empowered to bring suit for its recovery. The defendant had refused to pay the sixty per cent. assessment, and the amount claimed was $1,200, with interest. Plea non-assumpsit.

[Upon the trial, after proof of the conditions above mentioned, and of the defendant's ownership of the stock, the plaintiff offered in evidence an exemplification of the record of the bankruptcy court of Chicago to prove (1) the assignment to the assignees in bankruptcy, and (2) that an assessment had been decreed by the court, and authority given to the assignee to collect it. Admitted under objection by the defendant (1) that the papers were not properly bound together; (2) because it was not a copy of the whole record; and (3) it did not appear by them that the defendant had notice of the proceedings referred to therein.

[The defendant offered to prove by his own testimony that he was induced to purchase the stock by the representations of the agent of the company in Philadelphia, to the effect that all Philadelphia subscriptions were to be the capital stock of a Philadelphia branch of the company, to be securely held and invested in Philadelphia under the management of a local board of directors, elected by the Philadelphia stockholders; that this arrangement was in fact, carried out for about twenty months when the company abolished the local branch at Philadelphia and the local board of management without the consent of the Philadelphia stockholders. Objected to; objection sustained. The defendant then offered to prove, by the testi-

[1] [Reprinted from 13 N. B. R. 49, by permission. 1 Law & Eq. Rep. 338, and 2 N. Y. Wkly. Dig. 193, contain only partial reports.]

[2] [From 2 Wkly. Notes Cas. 339.]

mony of the assignee, Payson, (1) that the company before bankruptcy had abolished a similar branch office in New York, and had bought back from the local stockholders there the stock they had subscribed for, and had released them from all liability for any further assessment on the stock; (2) that after the Chicago fire the insured received a payment of twenty-five per cent. of their losses; and in consideration of immediate payment released the company from further liability, which releases the company afterwards surrendered without consideration, and allowed them to prove their claims in full, on account of which the assessment became necessary; and (3) that losses to a large amount were adjusted by the company, and policy holders and stockholders were permitted by the company to pay their assessment by certificates of indebtedness issued for adjusted losses after insolvency. Objections to these offers were sustained. The defendant then testified that he paid $500 when he received his certificate of stock, $400 on the stock and $100 premium.

[THE COURT charged the jury, that the plaintiff was entitled to recover the amount claimed by him, unless the defendant was entitled to a credit of $100.

[Verdict for plaintiff for $1,232.

[Defendant assigned as error: The admission in evidence of the exemplification of the bankruptcy record, the rejection of his offers, and the charge of the court as given above.] [2]

McKENNAN, Circuit Judge. The first assignment of error relates to the admission in evidence of a record of proceedings in bankruptcy in the district court for the Northern district of Illinois, against the Republic Insurance Company of Chicago, as assignee of which the defendant in error brought this suit. It was objected to on the ground that it does not purport to be a copy of the whole record, but it was admitted to show, 1st, an assignment to the plaintiff below, and 2d, an assessment by the authority of the bankrupt court upon the stock of the bankrupt company to pay losses. There can be no doubt of the admissibility of this record to show the assignment, because the 14th section of the bankrupt act [of 1867 (14 Stat. 522)] expressly provides, that a copy thereof, duly certified by the clerk of the court, under the seal thereof, shall be conclusive evidence of the assignee's title to sue for the bankrupt's property. But was it properly admitted for the additional purpose for which it was offered? The bankrupt act, while it enacts that the proceedings in all cases in bankruptcy shall be deemed matter of record does not treat these proceedings as constituting an integral record, for it declares that they shall not be recorded at large, but shall be filed, kept, and numbered, in the office of the clerk of the court, and copies of such record, duly certified by that office, under the seal of the court, are made presumptive evidence of all the facts therein stated. It would therefore, seem to be the intent of the act, that in so far as any of these proceedings might be used as evidence, copies of them are to be authenticated as separate records, and so are competent presumptive evidence of the facts stated in them. The certificate of the clerk of the court authenticates the copies of the papers and proceedings contained in the record "as true copies of all the papers filed, proceedings had, and record and docket entries made in said case, and of the whole thereof, in any way relating to an assessment upon the stockholders of said company," etc. It is an exemplification of all "matters of record" touching the assessment, and, as such, was properly admitted to show that fact.

The second assignment is founded upon the rejection of the offer to prove, by the plaintiff in error, certain representations made by the agent of the insurance company to him, when he made his subscription of stock, touching the establishment of a branch in Philadelphia, of which the subscriptions made there were to be the capital which was to be under the control of a local board of directors, and was to be set apart for losses in Philadelphia risks, accompanied by further proof that this local office had been withdrawn, and the assurances given had not been fulfilled. While it did not appear that any loss or injury whatever could result to the plaintiff in error from the partial non-fulfillment of these representations, it is at least questionable whether such evidence could have the effect of relieving the plaintiff in error from the payment of any part of his subscription. But in this suit it is altogether unavailable to him. Like a creditor's bill in equity, this suit is a proceeding by the constituted representative of a bankrupt corporation to collect its assets, that they may be applied to the payment of its debts. The plaintiff in error is a subscriber to its stock, of which subscription he has paid only twenty per cent. The remaining eighty per cent. is part of the assets of the corporation, indispensably required for the payment of its debts, and its creditors may lawfully insist that it shall be so appropriated. Now, it is plain that the plaintiff in error cannot gainsay this right of the creditors, unless he can show such an equity as would entitle him to a preference over them, if he had paid up his stock subscription in full. But he took and held a certificate for the full amount of the stock subscribed for by him, and received dividends upon it, and upon the basis of his subscription and that of others, the company was enabled to create its indebtedness. Surely, as against those who became creditors of the corporation upon the faith and security of its stock subscriptions,

[2] [From 2 Wkly. Notes Cas. 339.]

his equity is subordinate and unavailing, and was rightly so treated by the court below.

The only remaining question which requires notice, relates to the legal sufficiency of the assessment upon the stockholders, which this suit was brought to recover. By virtue of the adjudication of bankruptcy and the appointment of an assignee, not only was the control of the bankrupt corporation over its assets, of every kind, superseded, but complete domain over them was conferred upon the assignee. He alone can sue for and recover them, and whatever rights the bankrupt had in reference to their collection, he can claim and enforce. He is also the representative of the creditors, for they can make the assets of their debtor available only through his agency. As Mr. Justice Dillon has well said: "However it might have been before, creditors cannot, since the supervention of bankruptcy, bring bills in equity or other actions in their own names directly against the stockholders, to enforce their liability with respect to their unpaid stock." It was one of the unquestionable faculties of the bankrupt corporation to assess ratably upon its unpaid stock a sum sufficient to pay its debts, and the exercise of this power the creditors might have compelled. But by the proceedings in bankruptcy, the power of the directors and the direct remedies of the creditors, in reference to the assets of the corporation, were superseded, and the assignee was constituted the representative of both these interests. In the exercise of all his functions in this twofold character, he is subject to the control and direction of the court in which the bankruptcy proceedings were instituted. It has exclusive jurisdiction of the administration of the bankrupt's assets, and of their distribution among creditors. Any adjudication which it may make in the exercise of this jurisdiction is unquestionable in a collateral proceeding in another forum. The assessment in question was directed and sanctioned by the court, which has authority so to adjudge, and for any excess in it redress must be sought in that tribunal. The record then shows a valid assessment upon the stockholders of the bankrupt, and the instruction given to the jury, in reference to it and to the right of the plaintiff below to recover, was correct.

The judgment is therefore affirmed.

Case No. 9,525.

MICHENER v. PAYSON.

[See Case No. 9,524.]

MICHENOR v. PAYSON. See Case No. 9,524.

MICHIGAN AIR LINE R. CO. (OSBORN v.). See Case No. 10,594.

Case No. 9,526.

MICHIGAN CENTRAL R. CO. v. ANDES INS. CO.

[9 Chi. Leg. News, 34; 22 Int. Rev. Rec. 369.]

Circuit Court, S. D. Ohio. 1876.

REMOVAL OF CAUSES — TERM AT WHICH CAUSE COULD HAVE BEEN TRIED—PLEA IN BAR —ISSUE COMPLETE.

Where, in an action upon a policy of fire insurance, the defendant pleads the condition thereof, limiting the time within which suit must be brought, in bar, a reply becomes necessary to render the issue complete and the case ready for trial, and until the issue be thus completed, no term can be held to have passed at which the cause could have been tried, within the meaning of the 3d section of the act of congress, approved March 3, 1875 [18 Stat. 470], where the application for the removal is made by the party not in default for the completion of the issue, and such application is in time, and the cause removed under the act referred to.

[Approved in Whitehouse v. Continental Fire Ins. Co., 2 Fed. 499.]

At law.

Mathews, Ramsey & Mathews, for the motion.

Moulton, Johnson & Levy, opposed.

SWING, District Judge. The plaintiff is a corporation existing under the laws of Michigan, and on the 4th day of October, 1873, filed its petition in the superior court of Cincinnati, to recover the sum of $13,513.41 from defendant—an Ohio corporation—for certain losses by fire insured against under the latter's policies. The petition is in the ordinary form, and contains the usual averments of compliance with all conditions of the policies, following, in this particular, the requirements of the Ohio Code. The defendant in due time answered, pleading the limitation, or year clause, so called, of the policy, which provides, in substance, that suit shall be commenced within twelve months from the occurrence of the loss, otherwise that the claim would be barred. No reply was filed to this answer, or action of any kind taken by plaintiff in regard to it, and on the 10th day of February, 1876, the defendant petitioned the state court in due form, accompanied by a proper bond, for the removal of the cause to this court, under the act of congress, approved March 3, 1875, and the transcript was regularly filed herein at the April, 1876, term, as required by that act. The plaintiff now moves to dismiss the cause for want of jurisdiction, and to remand it to the state court. No question is made or raised as to the citizenship of parties, the amount involved, the nature of the controversy or suit, or to the formalities necessary to remove the cause. All these are considered to be sufficient and regular. But it is claimed that the application for removal was not made in time to the state court; in other words, that it was not made at or before the term at which the cause could have been first tried after the passage of the act above mentioned, plaintiff

contending that the case was at issue and ready for trial at, and long before, such passage, while the defendant maintains that the issue was, and is, incomplete for want of a reply to its answer, and that no trial could or can properly occur until such reply be filed, and that the general averment in the petition of performance of all conditions of the policy relates—as expressly provided by the Ohio Code—only to conditions precedent, and does not apply to or cover conditions subsequent, or such as are required to be pleaded specially in order to be made available as a defense, and that the plea of the year clause or limitation, set up in defendant's answer, is of this character. The pleadings under the Ohio Code, other than motions and demurrers, are limited to a petition, answer, and reply.

The question, therefore, for the determination of the court is: Was the application for removal of the cause made in time? It was not made at the first term after the passage of the law of March 3d, 1875, and if at that term the cause could have been tried, the application for removal was too late, and whether the cause could have been tried at that term depends upon the answer to the question whether it was then at issue. Without entering into an extended discussion of the general doctrine of pleading, we are of the opinion that the answer of the defendant setting up the limitation as provided in the policy, required of the plaintiff a reply. That reply not having been filed, the cause was not at issue, and could not have been tried at any term before the passage of the law in question, and before the term at which the application for removal was made. Scott v. Clinton & S. R. Co. [Case No. 12,527]. The motion to remand is therefore overruled.

MICHIGAN CENT. R. CO. (KUTER v.). See Case No. 7,955.

MICHIGAN CENT. R. CO. (MYRICK v.). See Case No. 10,001.

MICHIGAN CENT. R. CO. (NORTHERN INDIANA R. CO. v.). See Case No. 10,321.

Case No. 9,527.

MICHIGAN CENT. R. CO. v. SLACK.

[Holmes, 231.] [1]

Circuit Court, D. Massachusetts. Aug., 1873.

INTERNAL REVENUE — PENALTY — FRAUDULENT OMISSION—SUM NOT LEGALLY TAXED—BY WHOM PENALTY DETERMINED.

1. The penalty of one hundred per cent on re-assessment of an internal revenue tax, under the act of March 2, 1867 (13 Stat. 480), for false and fraudulent omission of taxable property from the return to the assessor, cannot be lawfully collected, if the re-assessment includes a sum not legally taxed.

2. Under the act of March 2, 1867, it is a prerequisite to the lawful collection of the penalty of one hundred per cent in addition to the internal revenue tax as re-assessed according to that act, for false and fraudulent omission from the return of taxable property, that the assessor should determine that the omission was false and fraudulent, and adjudge the penalty to have been incurred. A penalty added by the assessor only on the order of his superior officer, and not as the result of his own finding upon the facts, is not legally added, and cannot lawfully be collected.

Action [against Charles W. Slack] to recover an internal revenue tax, and penalty, assessed upon the plaintiff corporation, and paid under protest.

S. Bartlett and F. W. Palfrey, for plaintiff.
F. W. Hurd, for defendant.

SHEPLEY, Circuit Judge. The assessor of internal revenue for the third district in Massachusetts, in accordance with the provisions of the act of March 2, 1867 (13 Stat. 480), after a return had been made by the treasurer of the Michigan Central Railroad Company, re-assessed the company on sundry items not returned by them for assessment, and which, under advice of counsel, the treasurer had, in good faith apparently, supposed were not subject to the tax. There was no concealment on the part of the company or the treasurer, as the facts upon which the assessor made his re-assessment were obtained by him from the reports of the company, which were publicly printed and widely distributed.

After examining the items on which the re-assessment was made, I see no reason to doubt the legality of any of the items except the one of $1,722.93, assessed as tax on the surplus fund of the company for the year, after deducting operating expenses and interest account, and dividends, and contributions to the sinking fund, and other items properly to be deducted from the gross earnings, before determining the amount on hand as surplus earnings for the year. But, in arriving at the result, the assessor omitted to deduct the tax already paid by the company on passengers and mails. Deducting this amount, there would be no surplus beyond that on which the company had already paid the tax. The re-assessment was for $12,772.09, which included the sum of $1,722.93 on surplus, for which the company was not legally liable on the re-assessment; and, by direction of the commissioner of internal revenue, an additional sum of $12,772.09 was assessed and collected, as a penalty for a false and fraudulent return. This penalty was illegally collected, for two reasons: First, the penalty is for the gross sum of $12,772.09, being one hundred per cent on $12,772.09, when $1,722.93 should be deducted, leaving only $11,049.16 to be re-assessed, and a like sum to be added as penalty; namely, a penalty of $11,049.16, instead of a penalty of $12,772.09. The penalty being in one sum, and bad in part, is bad in the whole.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Second, the evidence shows that the assessor did not determine that the omission was false and fraudulent, and therefore adjudge the penalty to have been incurred. He added the penalty only on the order of his superior officer, and not as the result of his own finding upon the facts of the case. He appears to have arrived at the conclusion that the omission was not false and fraudulent; and I see no reason to doubt the correctness of his conclusion. The act of adjudging the omission to have been false and fraudulent was a quasi judicial act, to be performed by the assessor himself; and as he never so adjudged it, but only added the penalty under orders from his superior officer, the penalty was not legally added, and was not collected by authority of law. Judgment for the plaintiff for the two sums of $12,772.09 and $1,722.93, with interest from the date of payment.

[For a similar case between the same parties, see Case No. 9,527a.]

Case No. 9,527a.

MICHIGAN CENT. R. CO. v. SLACK.

[22 Int. Rev. Rec. 337.]

Circuit Court, D. Massachusetts. May Term, 1876. [1]

INTERNAL REVENUE—ACT OF CONGRESS—CONSTITUTIONALITY—LAWS IMPAIRING OBLIGATION OF DEBTS.

1. Constitutionality of the internal revenue law of 1866 considered and affirmed.

2. The restriction upon the passage by the states of laws impairing the obligations of contracts not applicable to the federal government.

[3. Cited and disapproved in U. S. v. Erie R. Co., Case No. 15,056, in respect to the point that under the statute the interest payable by a corporation upon its bonds, is either the property of the corporation, and thus rightfully taxable, or the property of the bondholder, and thus taxable because in the shape of funds within the jurisdiction of the taxing power, the tax attaching to the interest, as funds of the bondholder in the hands of the corporation.]

This suit was brought August 16, 1871, in the state court, after appeal duly made to the commissioner of internal revenue, to recover the amount of an internal revenue tax of eight hundred and sixty dollars and thirty-three cents, paid to the defendant [Charles W. Slack] as collector of internal revenue for the Third Massachusetts internal revenue district, on the 28th February, 1870. It was duly removed to this court by certiorari, and was here heard upon agreed facts. The tax was assessed on or about the 19th day of February, 1870, on sterling bond interest paid by said company in London in gold, in the previous month of January, by cashing certain coupons which then fell due. The coupons taxed as aforesaid were attached to certain sterling bonds issued by said railroad company, to the amount of 95,700, and negotiated by their agents in London in the year 1852, or early in 1853; many years before the passage of the first internal revenue law of the United States. These bonds were due in July, 1872, and were paid at maturity in gold in London. So far as the company knows, not one of these bonds was ever held by any person in the United States, or by other than non-resident aliens, and the interest accruing was regularly paid in gold in full in London, without rebate, or reservation of the United States internal revenue tax.

F. W. Palfrey, for plaintiff.

P. Cummings, Asst. U. S. Atty., for defendant.

The case was argued at the October term, 1875, of this court, before CLARK, District Judge, sitting as circuit judge. Judge Clark held the case under advisement until October 3, 1876, when he delivered the following opinion:

The case is well presented in the agreed statement of facts, and the sole question before the court is, whether congress had power to impose the tax. The statute of the United States provides: "That any railroad, canal, turnpike, canal navigation, or slack water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, including non-residents, whether citizens or aliens, and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, or dividends due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend or interest, or coupon on the bonds or other evidence of their indebtedness so held by any person or party whatever, except where said company have contracted otherwise." 14 Stat. 138, 139. In considering this statute in the case of U. S. v. Railroad Co., 17 Wall. [84 U. S.] 322, the supreme court held that the tax imposed was upon the creditor and not upon the corporation; and the corporation is made use of as a convenient means of collecting the tax. But it is difficult to see how that decision can be made applicable in this case; because the corpora-

[1] [Affirmed in 100 U. S. 595.]

tion here paid the interest in full, for the reason as stated in the brief of the plaintiff that they had "otherwise contracted." If this be so, the case falls within the exception of the statute "except when said company have otherwise contracted," and the tax falls on the corporation and not on the bondholders. But whether the tax authorized and imposed be upon the corporation or upon the bondholders, who in this case appear to be foreigners, we think the tax can be supported. The language of the statute is broad enough and explicit enough for that purpose. The language is "any railroad" indebted by bonds stipulating for interest, "shall be subject to and pay a tax of five per centum on the amount of all such interest, whenever and wherever the same shall be payable, and to whatsoever party or person the same shall be payable, including non-residents, whether citizens or aliens," and may deduct the tax paid from the interest due the bondholder, "except when said companies have otherwise contracted." Speaking of this statute in Railroad Co. v. Jackson, 7 Wall. [74 U. S.] 269, Mr. Justice Nelson, who delivered the opinion of the court in that case, said "the question hereafter will be not whether the law embraced the alien non-resident holder, but whether it is competent for congress to impose it." Id. Could congress then impose this tax?

The constitution of the United States says (article 1, § 8) "the congress shall have power to lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defence, and general welfare of the United States; but all duties, imports, and excises, shall be uniform throughout the United States," that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken," and that "no tax or duty shall be laid on articles exported from any state." These are the only express provisions in the constitution in regard to taxation, and they contain the only express restrictions upon congress on that subject. There is nothing further as to the persons to be taxed, nor as to the objects or manner of taxation. But it is very obvious, that taxation cannot extend beyond the jurisdiction of the taxing power; and that the objects of taxation must be within its territorial limits. So it was decided in Railroad Co. v. Pennsylvania, 15 Wall [82 U. S.] 300. In that case, it was held that "bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state, in which the company was incorporated, they are property beyond the jurisdiction of the state." But the decision in that case was upon a taxation by the state of Pennsylvania, under a statute of that state very different from the statute of the United States, now under consideration; and the decision was upon a ground, as the principal one, so entirely wanting in this case, that I have not found that case a satisfactory guide in this; though some of the reasons there presented are of weight here. "Persons, property and business," it is said, "are proper subjects of taxation." "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations." "It may touch business in its almost infinite forms, in which it is conducted, in professions, in commerce, in manufactures, and in transportation." "Unless restrained by the provisions of the federal constitution, the power of congress as to the mode, form, objects, and extent of taxation is unlimited." Railroad Co. v. Pennsylvania, 15 Wall. [82 U. S.] 319.

Now, applying these principles to the case under consideration, I think the tax must be sustained. The statute provides "that any railroad, canal, turnpike, canal navigation, or slack water company indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, shall be subject to pay a tax of five per centum on the amount of all such interest, or coupons, dividend or profits, whenever and wherever the same shall be payable, including non-residents, whether citizens or aliens." Now when this interest became due and payable, whose property was it? If it was the railroad's, then the railroad was rightfully taxed for it. If it was not the railroad's, then it was the bondholders' and was equally the subject of taxation, as it was within the jurisdiction of the taxing power, and the tax could be collected out of the funds under its control. The tax attached to this interest, as soon as it became due in the hands of the railroad, and if, as the supreme court says, the railroad is only a convenient mode of collecting the tax, they are so because they have funds of the bondholders in their hands. The case is analogous to what is known in some of the states as the trustee process, by which the property rights or credits of one person are attached in the hands of another. As if A. owes B. a creditor of B. may attach a debt due by A. to B. in the hands of A. The same thing is done in other states by the process of garnishment.

There is another consideration of much force. Congress is the taxing power, at liberty to choose the objects of taxation, the methods and the amount, under the restrictions of the constitution. It may make its own laws for effectuating its purpose. In the internal revenue law of 1866, in the section just quoted, it has laid a tax on interest due from railroads on their bonds eo nomine; and in this case have collected it. If there were nothing to collect the tax out of, then the tax must fail. But in this case, they have

reached the fund, and have collected the tax, out of the interest, mentioned in the statute. What is there in the constitution of the United States to forbid this? and if there be nothing, what power has this court, or any other court to say it shall not be done? If it be said this interest is not the fund of the bondholder, then it must follow that the bondholder is not taxed, because the tax is laid upon the interest. "Shall be subject to and pay a tax of five per centum on the amount of all such interest," are the words of the statute.

In the case of Railroad Co. v. Pennsylvania, 15 Wall. [82 U. S.] 320, Mr. Justice Field said that bonds issued by the railroad in that case were property undoubtedly, but property in the hands of the holders, and not the property of the obligors. That is undoubtedly true, when you speak of the bonds as such; the bonds are the property of the owners, but the fund out of which they are to be paid is in the hands of the obligors, and it is precisely the interest accruing from this fund that congress has taxed in the hands of the obligors. The remark made by Justice Field, that this is not a legitimate exercise of the taxing power, must be held to apply to the case then before the court, which was a taxation by the state of Pennsylvania, which the court held impaired the obligation of a contract. But no such consideration arises here, and if a taxation by congress be within the limits of the federal constitution, no contract between persons, natural or artificial, or states and persons, can be set up to defeat it. States cannot pass laws impairing the obligation of contracts, but there is no such restriction in the federal constitution upon the congress as to the power of taxation. It is a question for their wisdom and discretion, and not a constitutional prohibition.

Objection is made that such a taxation was in violation of the constitutional provisions, that all taxation should be uniform throughout the United States, "and that private property shall not be taken for public uses without just compensation," and "that it was an attempt to tax subjects over which the sovereign power of the state did not extend." But it is difficult to see, and the court does not see any particular in which the tax is not uniform throughout the United States. It is laid upon all railroads indebted by bond, in the same amount, and collected in the same manner. The extent and operation are the same for all within the United States. If it operates indirectly otherwise upon the non-resident, it is a sufficient answer to say that he is without the constitutional limit of the taxation, and the tax cannot be defeated on that account. The tax must be uniform throughout the United States, not beyond them. The provision of the statute, that the payment of the tax should discharge the company from so much of the interest except where the companies have contracted otherwise extends to all railroads throughout the United States, and if any company has contracted otherwise, it is an undertaking of their own, with which congress wisely does not seek to interfere, but it cannot be set up to defeat the tax. That exception is uniform throughout the United States.

The objection that the tax takes private property for public use without just compensation is equally untenable. We do not think that provision of the constitution is applicable to taxation. "A tax," says Mr. Justice Hunt, in the case of U. S. v. Railroad Co., 17 Wall. [84 U. S.] 326, "is understood to be a charge, a pecuniary burden, for the support of the government." It might be laid by an oppressive or very badly administered government, and no benefit received from the payment of the tax by the taxpayer, and yet the tax might be legal. Taking property for public use is where the land or other property of an individual is taken from him, and for the use of the government, or public, and where if the property were not paid for, the burden would fall chiefly upon the person whose property is taken, and not upon the public generally. In such case payment must be made to prevent inequality. Nor is it sufficient to defeat this taxation to allege that it was an attempt to tax subjects over which the sovereign power of the state did not extend. If by the word "subjects" persons be meant, the answer is, that no attempt is made to tax persons; if by it property be meant, the answer is, that property found within the jurisdiction is a proper subject of taxation.

Judgment must be for the defendant.

[The case was taken, on a writ of error, to the supreme court, where the judgment of the court below was affirmed. 100 U. S. 595.]

Case No. 9,528.

MICHIGAN INS. BANK v. ELDRED.

[6 Biss. 370;[1] 7 Chi. Leg. News, 411; 21 Int. Rev. Rec. 315.]

Circuit Court, E. D. Wisconsin. July, 1875.

ESTOPPEL—PLEA IN BAR—RECORD OF ANOTHER ACTION.

1. In assumpsit upon a promissory note, the bar of a judgment in another state upon the same note is not avoided by the record of an action upon that judgment to which the defendant pleaded nul tiel record, and in which action plaintiff took a nonsuit. The plea of the judgment is good, there is no estoppel, and the second record is not admissible in evidence.

2. Doctrine of estoppels considered.

This was an action upon a promissory note for $4,000, dated June 12, 1861, made by F. E. Eldred, payable in sixty days, to order of and indorsed by Eldred & Balcom. At the trial, the plaintiff introduced in evidence the note sued on, and after presenting some other testimony not necessary to mention, rested. To bar a recovery, the defendant, Anson Eldred, introduced in evidence the record of a judg-

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

ment recovered May 13, 1862, upon this note by the above-named plaintiff against the defendant, in the circuit court of Wayne county, in the state of Michigan. Other testimony not important to notice was then introduced and the defendant rested. To avoid the effect of the Michigan judgment, the plaintiff offered in evidence the record of an action commenced March 2, 1863, upon that judgment by this plaintiff, against these defendants, in the circuit court of the United States for the district of Wisconsin, the record of which action showed that the defendant, Anson Eldred, interposed as a defense therein the plea of nul tiel record, to which there was a replication. It appeared also by that record, that on the 18th of April, 1864, a judgment of non-suit was entered in that action. This record, or, to speak more accurately, the defendant's plea of nul tiel record, it was claimed by counsel for plaintiff, must operate to estop the defendant from now pleading in the present cause the Michigan judgment as a bar to a recovery. The defendant objected to the introduction in evidence of the record thus offered, insisting that it was immaterial and created no estoppel. The court sustained the objection, excluded the record, held the Michigan judgment a bar to a recovery on the note, and directed a verdict for defendant; which ruling, was claimed on this motion for a new trial, to be erroneous.

Finches, Lynde & Miller, for plaintiff.
Cottrill & Cary, for defendant.

DYER, District Judge. I have re-examined the question involved in this cause and the authorities cited by counsel. Upon the single issue presented by the note and the Michigan judgment, the defendant would of necessity be entitled to a verdict, as that judgment would bar a recovery on the note. Eldred v. Michigan Ins. Bank, 17 Wall. [84 U. S.] 545. Could the plea of nul tiel record interposed by the defendant, Anson Eldred, in the suit brought in Wisconsin upon the Michigan judgment, operate as an estoppel so as to preclude him from setting up that judgment in the present action as a bar to the plaintiff's recovery upon the note? An estoppel has been well defined as "an obstruction or bar to one's alleging or denying a fact contrary to his own previous action, allegation or denial, upon the faith of which another has acted."

To give to a judgment the effect of an estoppel, it must appear that the matter in question was or might have been directly involved in the former action as a necessary issue, and was passed upon by the court or jury at the former trial. Kerr v. Hays, 35 N. Y. 331. The point or question in controversy must have been determined and adjudicated to make the record of the former proceedings conclusive. Where an action has been dismissed or a judgment given for the defendant upon a preliminary point before reaching the merits, it is no bar to another action. New England Bank v. Lewis, 8 Pick. 113; Hughes v. Blake [Case No. 6,845]; McDonald v. Rainor, 8 Johns. 442. "It is the judgment upon the findings that makes the estoppel. If the judgment be one of non-suit or in the nature of non-suit, and the action be dismissed, nothing whatever is adjudged in respect to a subsequent suit. It is no bar to anything." Sheldon v. Edwards, 35 N. Y. 279. "The rule that estoppels must be certain to every intent, is peculiarly applicable to estoppels by record and judicial proceedings, and for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled and is not available either as an estoppel or anything else, but merely evidence of its own existence. * * * When the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive per se, it must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined." Herm. Estop. § 86. A party cannot plead a former judgment as an estoppel to a present action unless the same point is put in issue on the record and directly found by the court or jury. Eastman v. Cooper, 15 Pick. 276; Gilbert v. Thompson, 9 Cush. 348. "The effect of what occurs in one judicial proceeding upon another, is sometimes due to the principles of estoppel in pais, rather than by record. A man who obtains or defeats a judgment by pleading or representing an act of adjudication in one aspect, is estopped from giving it a different and inconsistent character in another suit founded upon the same subject-matter." Herm. Estop. § 100. But it must appear that the judgment was obtained or defeated because of the pleading interposed or representation made.

An estoppel in pais happens when a party makes a statement or admission, either expressly or by implication, with the intention of influencing the conduct of another, and that other acts upon the faith of such statement or admission, and will suffer injury if such party is permitted to deny it. Norton v. Kearney, 10 Wis. 443; Brown v. Bowen, 30 N. Y. 519. "The doctrine of equitable estoppel is founded upon the principle that a party has by his own voluntary act, placed himself in such a situation in regard to some fact, that he is precluded from denying it." Herm. Estop. § 328. And it must appear that the declarations or acts claimed to create the estoppel were relied and acted upon by the person in whose favor the estoppel is invoked.

Applying these principles, what is the state of case here presented? Clearly, not an es-

toppel by judgment, because it does not appear that the judgment of the circuit court in Wisconsin was upon the plea of nul tiel record, or resulted from that plea. The form of that judgment is as follows: "This day this cause was called for trial, and came the parties by their counsel, when the plaintiff by its counsel took a non-suit." Then follows a judgment for costs. Nothing was found or determined by the court, as far as the record shows, upon the plea. It was merely a judgment of voluntary non-suit. It is true that the plea of nul tiel record was the only plea that could have been interposed in that action, except the plea of payment, or satisfaction, or the like. But it does not appear from the record that the act or pleading of the defendant produced the action of the plaintiff in taking a non-suit. It does not appear that the judgment of non-suit was necessitated, or that a judgment for the plaintiff was defeated by the plea of nul tiel record. There may have been numerous reasons why the non-suit was taken other than the interposition of this plea. The case of Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. [65 U. S.] 333, is here in point. It was there held that the record of a former suit between the parties, in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, cannot be given in evidence as an estoppel in a second suit founded on the special count; for the verdict may have been rendered on the common counts. Since it does not appear that the plaintiff relied and acted upon the plea which the defendant interposed, I think the case is not within the principles of an estoppel in pais. Moreover, whether or not there was a valid record and judgment, must have been as well known to the plaintiff in the suit on the Michigan judgment in the circuit court in Wisconsin, as to the defendant in that action.

In the cases cited by the learned counsel for plaintiff, I think it clearly appears that the action of the courts and of the parties was based upon the pleading, which was held to operate as an estoppel. Kelly v. Eichman, 3 Whart. 419; Campbell v. Stephens, 66 Pa. St. 314; Presbyterian Congregation v. Williams, 9 Wend. 148. Especially is this true of Philadelphia, W. & B. R. Co. v. Howard, 13 How. [54 U. S.] 308, where the plaintiff brought an action of assumpsit upon an instrument which the defendant insisted was a sealed instrument; and upon this plea the defendant obtained a judgment, to the effect that the action of assumpsit would not lie. The plaintiff bringing a second action of covenant, it was held that the defendant was estopped to deny in that action that the instrument was a sealed instrument, because, in the first action, the claim of the defendant not only induced the plaintiff to bring the second action, but defeated the first, by asserting and maintaining the paper in controversy to be the deed of the company. This was clearly a case of estoppel in pais.

The case of Sheppard v. Hamilton, 29 Barb. 156, was strongly urged by plaintiff's counsel at the trial, and again in argument of this motion. The facts were these: Whittlesey held a note of $1,000, made by Emery and Peter Thayer. The defendant, Hamilton, became legally bound to Emery Thayer to pay this note. Subsequently, Hamilton negotiated with Whittlesey an extension of time for the payment of the $1,000, and consummated the same by delivery to Whittlesey of a note for $1,000, made by himself and J. A. Hamilton, to the order of Henry Decker, and indorsed by Decker; and Whittlesey thereupon gave up the Thayer note to the defendant, who delivered it to Thayer. The substituted note not being paid when due, the plaintiff, having become possessed by assignment of all the interest of Whittlesey in both notes, commenced an action on the last note against the makers and indorser. The defendants put in a verified answer, alleging a usurious agreement between Whittlesey and the defendant, Hamilton. The plaintiff, on the coming in of this answer, discontinued his action and began another action on the first note. Held, that in the action on the first note, the defendant should not be permitted to deny that what he alleged under his oath in the previous action was true. Here it seems apparent that, relying upon the allegation of usury made by the defendants in the first action, the plaintiff acted upon it, discontinued and abandoned his action, and brought a new action on the original note to avoid the alleged usury, and solely because of the plea of usury. Here was a clear ground for application of the principle of equitable estoppel. Moreover, in that case, the plaintiff was the transferee of Whittlesey. He was not a party to the alleged usurious agreement. The usury sprang from the contract between Whittlesey and Hamilton, and the plaintiff was a stranger to it, and when the defendants plead it, the plaintiff could rightfully rely upon the plea as cause for withdrawal of his suit. But in the case at bar, the plaintiff and defendant were the identical parties to the record of the Michigan judgment, and the plaintiff must be presumed to have had equal knowledge with the defendant of the validity of that record and judgment. If it appeared here that the plea of nul tiel record occasioned and was the cause of the non-suit taken by the plaintiff in the action on the Michigan judgment, if the record showed that the plaintiff relied and acted upon that plea, the principle would be applicable that "when the ground taken by either party to a suit is prejudicial to the other by cutting him off from a good defense, or precluding a recovery on a valid cause of action, it will bind the party who adopts it by an equitable estoppel."

In any view I can take of this question, I am unable to reach a different conclusion

from that arrived at on the trial. Motion for new trial denied.

[See Michigan Ins. Bank v. Eldred (decided in 1870) 9 Wall. (76 U. S.) 544; Eldred v. Michigan Ins. Bank (decided in 1873) 17 Wall (84 U. S.) 545; Michigan Ins. Bank v. Eldred (decided in 1889) 130 U. S. 693, 9 Sup. Ct. 690; and Michigan Ins. Bank v. Eldred (decided in 1892) 143 U. S. 293, 12 Sup. Ct. 450.]

MICHIGAN, L. S. R. CO. (KERP v.). See Case No. 7,727.

MICHIGAN MUT. LIFE INS. CO. (PRATHER v.). See Case No. 11,368.

MICHIGAN SOUTHERN & NORTHERN INDIANA R. CO. (WOOD v.). See Case No. 17,957.

MICHIGAN SOUTHERN R. CO. v. The HENDRIK HUDSON. See Case No. 6,358.

MICHIGAN STOVE CO. (DETROIT STOVE WORKS v.). See Case No. 3,834.

Case No. 9,529.

In re MICKEL.

[See 6 Fed. 706.]

Case No. 9,530.

MICKEY v. STRATTON.

[5 Sawy. 475; 11 Chi. Leg. News, 314.] [1]

Circuit Court, D. Oregon. May 5, 1879.

DEED OF CORPORATION—POSSESSION—TITLE—JUDGMENT—ATTACHMENT—SERVICE—CONSPICUOUS PLACE.

1. The signatures of the proper officers appearing to an instrument purporting to be the deed of a corporation, the presumption is that such instrument was signed by them by authority of the corporation; and if the seal of the corporation is upon such instrument, that itself is prima facie evidence of their authority to sign.

2. Possession is prima facie evidence of title, and proof of prior possession is sufficient to maintain ejectment against a mere trespasser.

3. When both parties in ejectment claim title from the same person, neither is at liberty to deny that such person had title.

[Approved in McDonald v. Hannah, 8 C. C. A. 426, 59 Fed. 978.]

[Cited in Smith v. Laatsch, 114 Ill. 273, 2 N. E. 59.]

4. A personal judgment for money or damages in a state court against an absent defendant who did not appear in the action, is so far a nullity.

5. By a valid attachment of property within its jurisdiction a state court acquires jurisdiction to give judgment that an absent defendant not otherwise served with process in the proceeding is indebted to the plaintiff therein, and to enforce the payment of the same by the sale of such property.

6. Where the statute authorizes a writ of attachment to be served upon real property by leaving a copy of the same with the occupant thereof, "or if there be no occupant," then "in a conspicuous place" thereon, and it appears from the return that the writ was served by posting a copy on the premises without stating whether they were occupied or not: *Held*, that the service upon the premises was unauthorized and invalid, and that the judgment thereon was a nullity and the sale of the property attached void.

7. Semble, that a service of a writ of attachment by leaving a copy of the writ upon the premises is not good unless it appears that it was posted thereon "in a conspicuous place."

[S. Cited in Rickards v. Ladd, Case No. 11,804, to the point that an amendment to a return can in no way affect the rights of persons not parties to the suit, which rights were acquired in good faith before the amendment was made.]

Action [by Robert Mickey against Julius A. Stratton] to recover possession of real property.

Addison C. Gibbs, W. Scott Beebee, and J. Quinn Thornton, for plaintiff.

Rufus Mallory and W. W. Thayer, for defendant.

DEADY, District Judge. This action is brought to recover the possession of the east half of lots 1 and 2 in block 20, and the whole of block 15, in the town of Salem, and damages for the detention of the same.

The complaint alleges that the plaintiff is a citizen of the state of Pennsylvania and the defendant of the state of Oregon; that the plaintiff is the owner in fee of the premises, and entitled to the possession of the same, which the defendant wrongfully withholds from him to his damage five hundred dollars; and that the premises are of the value of four thousand dollars.

The defendant by his answer denies the allegations of the complaint except as to the value of the property, and pleads title and right to the possession of the premises in Parrish L. Willis, which plea the plaintiff by his replication denies. The case was heard by the court without the intervention of a jury.

The premises are situated in township 7 south, of range 3 west, of the Wallamet meridian, and within the husband's half of the donation claim of William H. Willson and Chloe his wife. The "claim" was occupied by them in 1844, and claimed by Willson as a settler under the donation act in February, 1852, as appears by his notification, number forty-seven. On February 4, 1862, in pursuance of the surveyor-general's certificate, number twenty, a patent to the donation issued to Willson and wife—the south half to the husband and the north one to the wife.

On July 30, 1855, Willson and wife, in consideration of the sum of one hundred dollars, duly conveyed the east half of lots 1 and 2 aforesaid to George Lesley, who upon December 4, 1857, in consideration of the sum of two hundred dollars, duly conveyed the same to George K. Shiel.

On December 2, 1854, said Willson and wife duly conveyed sundry blocks and parcels of

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 11 Chi. Leg. News, 314, contains only a partial report.]

land situate within said Willson's half of said donation claim, including block 15 aforesaid, to "the trustees of the Wallamet University," for the "endowment and support" of the same, with the right "to sell or otherwise dispose" of the same for such purpose; and on June 11, 1857, David Leslie, as "president" of said "board of trustees," and Francis S. Hoyt, as "secretary" of the same, in consideration of the sum of seven hundred dollars, and in the name of "the trustees of Wallamet University," executed a deed to George K. Shiel for the block 15 aforesaid, the same being described therein by metes and bounds, and alleged to contain two and six hundred and twenty-five thousandths acres, "more or less."

This deed purports to be signed and sealed, and there is a scrawl or private seal at the end and right of the names of the president and secretary respectively. There is also what appears to be a corporation seal, but the same does not otherwise purport to have been affixed by the secretary. On the same day that it was signed this deed was duly acknowledged by said Leslie and Hoyt as president and secretary, as aforesaid, before J. G. Wilson, clerk of the supreme court.

The trustees of the Wallamet University were incorporated by an act of the territorial legislature, passed January 12, 1853. By section two of the same they were authorized to have and use a common seal, "impressed with such devices and inscriptions as they shall deem proper, by which said seal all deeds * * * of said corporation shall pass and be authenticated." By section four it was further provided: "That all deeds and other instruments of conveyance shall be made by the order of the board of trustees, sealed with the seal of the corporation, signed by the president, and by him acknowledged, in his official capacity, in order to insure their validity."

From the date of the incorporation of the trustees until after the date of this deed they used as their common seal the eagle face or reverse side of a twenty-dollar piece of gold, of the size and general similitude of the gold coin of the United States of that value, and inscribed around the margin—"San Francisco, California, twenty D."—and the seal upon this deed, although the impression is very indistinct and somewhat effaced, appears to have been made with this piece of gold; but it does not appear that there ever was any formal vote of said trustees adopting said piece of gold as the seal of the corporation.

On January 21, 1873, John Hughes commenced an action in the state circuit court for the county of Marion against said George K. Shiel, upon two promissory notes and an open account, wherein on March 11, 1873, he appears to have "recovered judgment," whatever that means, "against the defendant," by default, for the sum of three hundred and fifty-eight dollars and forty cents, with costs and disbursements; that by virtue of an execution issued thereon, the sheriff of said county, on March 17, levied upon said premises, and on April 11, 1873, sold the same to said Parrish L. Willis, the east half of said lots 1 and 2, for two hundred dollars and said block 15 for two hundred and fifty dollars; and after due proceedings in the premises, including a confirmation of such sale, on August 11, 1873, made and delivered a deed of the premises to said Willis as said purchaser.

On March 20, 1878, George K. Shiel, for the consideration of one thousand and ninety-five dollars, bargained, sold and quitclaimed the premises to the plaintiff.

It is claimed by the defendant that the alleged deed of June 11, 1857, from the university to Shiel, is ineffectual as a conveyance of said block 15, because it does not appear that the same was made "by the order of the trustees," as provided in section 4 of the act of incorporation, or that it is sealed with the seal of the corporation, and therefore the grantor of the plaintiff never acquired the title to such block.

But I find that the seal upon this deed is that of the corporation at that date. This being so, and the signatures of the proper officers appearing signed thereto, the presumption is that these officers did not exceed their authority in this respect; and the seal itself is prima facie evidence of their authority. Ang. & A. Corp. § 224; Koehler v. Black River F. I. Co., 2 Black [67 U. S.] 716.

But it appears from the evidence that Shiel was in possession of the premises under this deed until the conveyance by the sheriff to Parrish, under which the defendant entered. Possession is always prima facie evidence of title and proof of prior possession is sufficient to maintain ejectment against a mere trespasser. Tyler, Ej. 73; Day v. Alverson, 9 Wend. 233; Hutchinson v. Perley, 4 Cal. 34; Hicks v. Davis, Id. 69; Winans v. Christy, Id. 78; Bequette v. Caulfield, Id. 278; Marshall v. Shafter, 32 Cal. 194; Turner v. Aldridge [Case No. 14,249]; Christy v. Scott, 14 How. [55 U. S.] 290; Jones v. Easley, 53 Ga. 455; Oregon Cascades R. Co. v. Oregon Steam Nav. Co., 3 Or. 178; Eagle Woolen Mills Co. v. Monteith, 2 Or. 282.

The deed from the sheriff to Willis is claimed to be invalid, and unless it is found to be sufficient the defendant is in as a mere trespasser and the plaintiff must prevail in this action upon the prior possession of his grantor, Shiel, without reference to the validity of the deed from the university to the latter.

But there is another and conclusive answer to this objection. The plaintiff and defendant both claim under Shiel, and it is not necessary for either to prove title farther back than him. The defendant sets up an estate in fee in Willis in the premises, to defeat a recovery by the plaintiff in this action, and if he has any interest therein upon the evidence, it is derived from Shiel by means of the sheriff's sale and deed. The plaintiff claims under Shiel also, by a conveyance subsequent to that of the sheriff. Neither is

therefore at liberty to deny Shiel's title at the time of the sheriff's sale. In Gaines v. New Orleans, 6 Wall. [73 U. S.] 715, the supreme court says: "The defendants, equally with the complainant, claim title from the same common source. This is clear from the pleadings and the proof. If, therefore, both parties claim title from the same person, neither is at liberty to deny that such person had title."

This rule is also maintained in Eagle Woolen Mills Co. v. Monteith, 2 Or. 282; Brown v. Brown, 45 Mo. 414; Fellows v Wise, 49 Mo. 352; Butcher v. Bogers, 60 Mo. 140; Ames v. Beckley, 48 Vt. 395; 2 Greenl. Ev. § 397. Greenleaf, supra, says: "Where both parties claim under the same third person, it is sufficient to prove the derivation of title from him, without proving his title."

The plaintiff, therefore, in effect admits that at the date of the sheriff's sale Shiel had a good title to the premises, which passed to the purchaser, unless the sale was void. But the plaintiff contends that this sale was void and inoperative because the court in Hughes v. Shiel did not acquire jurisdiction of either the person of the defendant or his property.

In that action service of the summons was ordered to be made by publication for six consecutive weeks in a weekly newspaper, upon the affidavit of Hughes to the effect that Shiel was then a non-resident of the state but had property therein; and upon the same day and upon a like affidavit a writ of attachment was issued against the property of Shiel in Marion county. The summons was published in the paper directed, six times, between January 24 and February 28, 1873, both days inclusive; and on January 23, 1873, the sheriff returned the attachment, indorsed, that on January 21 he levied upon and attached the premises in controversy "by posting copies of the within writ, certified to by me, on said block 15, and also on the building standing on the east half of lots 1 and 2."

Many objections are taken by the plaintiff to the regularity and effect of these proceedings by publication and attachment which it will not be necessary to consider. The action of Hughes v. Shiel was begun and terminated before the decision of Pennoyer v. Neff, 95 U. S. 719. By the ruling in that case, the service of the summons by publication, even if made as by the statute provided, did not give the court jurisdiction of the person of Shiel, and the judgment in the action, so far as it depends upon such service, is a nullity. The doctrine of the case is succinctly stated in the second syllabus: "A personal judgment is without any validity if it be rendered by a state court in an action upon a money-demand against a non-resident of the state who was served by a publication of summons, but upon whom no personal service of process within the state was made and who did not appear; and no title to property passes by a sale under an execution issued upon such judgment."

In Hughes v. Shiel it was "adjudged" that the plaintiff "recover judgment against the defendant," and not some certain sum or thing of or from him. But taking this for a judgment rather than for an order for one, it is in form only a personal judgment given without service upon the defendant or his personal appearance, and is therefore so far a nullity.

But conceding this point, the defendant contends that the court acquired jurisdiction of the premises by means of the levy thereon of the attachment, and that the judgment, though personal in form, is sufficient to support the execution as to the sale of the property attached, citing Cooper v. Reynolds, 10 Wall. [77 U. S.] 315, in which it was held that a proceeding may be maintained by the attachment of an absent defendant's property to enforce the collection of a debt due by him, and that in such case where there is a valid writ and levy, a judgment of the court, an order of sale and a sale and sheriff's deed, the proceeding cannot be held void when questioned collaterally. Tried by this rule, if there was a valid levy in Hughes v. Shiel, so as to give the court jurisdiction, the subsequent proceedings, in my judgment, were sufficient. For although the judgment was personal in form and did not limit the relief to be obtained thereon to the sale of the property attached, yet such was the only use made of it. And although it is true that it did not directly authorize the sale of the premises to satisfy the sum found due Hughes, and that instead of a venditioni exponas or order of sale issuing to enforce the judgment by the sale of the property attached, an execution was issued against the property of the defendant generally, as upon a personal judgment for money, yet only the property actually attached was sold thereon; and notwithstanding the return of the sheriff shows that he levied the execution upon the property sold as if the same was not attached, yet that was merely an unauthorized and useless act, because the law provides that an execution against property, as to such as is already attached, is to be executed without any further levy or seizure, by simply selling the same (Civ. Code Or. § 280, subd. 2), which practically makes an execution in such case merely a venditioni exponas —an order of sale.

But was there a valid service or levy of the attachment upon these premises? In the case of real property the law provides that a writ of attachment shall be executed "by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ, certified by the sheriff." Civ. Code Or. § 147, subd. 1.

In Settlemier v. Sullivan, 97 U. S. 444, it was held that under subdivision 5, § 54, Civ. Code Or., which requires a summons to be served upon "the defendant personally, or if

he be not found," then upon some member of the family of a certain age, at his usual place of abode, a valid substituted service could not be made unless the officer, using at least ordinary diligence, is unable to find the defendant in the county, and that fact must affirmatively appear from his return. Says Mr. Justice Field, who delivered the opinion of the court: "If it be admitted that substituted service of this kind upon some other member of the family is sufficient to give the court jurisdiction to render a personal judgment against its head, binding him to the payment of money or damages, it can only be where the condition upon which such service is permissible is shown to exist. The inability of the officer to find the defendant was not a fact to be inferred, but a fact to be affirmatively stated in the return."

In Trullinger v. Todd, 5 Or. 39, the court held a judgment entered in vacation void, for want of due service, where there was a return of substituted service of the summons, without an affirmative statement that the defendant could not be found, saying: "The statute * * * evidently implies that when a summons is placed in the hands of an officer for service, that he will use ordinary diligence, at least, to find the party against whom the summons is issued, in order that he may make personal service upon him; but after using ordinary diligence, if he should fail to find such party, constructive service may be made; and when such service is made, the certificate should contain the fact that the party could not be found."

Now, the analogy between these cases and the one at bar is complete. The service of an attachment, in case of real property, is required to be made by leaving a copy of the writ, "with the occupant thereof," but "if there be no occupant," then, and in that case only, by leaving such copy "in a conspicuous place thereon." The law is framed upon the reasonable assumption that the occupant represents the absent owner, and therefore it requires the service to be made upon him; and no substituted service, by leaving a copy of the writ on the premises, is permissible unless there is no one in the occupation of the premises upon whom service can be made, and that fact must appear from the return, or else the service upon its face is unauthorized and invalid.

The Civ. Code Or. § 160, provides that when the writ of attachment shall be fully executed or discharged, "the sheriff shall return the same with his proceedings indorsed thereon."

The return must state what was done, and the presumption that an officer has done his duty is not sufficient to supply a material fact or circumstance which does not appear in his return. For the law having made "it his duty to indorse his proceedings under the writ, thereon, the presumption that he did his duty applies as well to the making of the return as the service of the writ, and therefore there is no room to presume that he did his duty in making the service more fully or otherwise than he has stated in his return.

In Hughes v. Shiel the attachment was not alone a collateral proceeding to obtain a lien upon property as a security for the judgment which might be obtained therein, but it was also the very process upon the due service of which depended the jurisdiction of the court. In Cooper v. Reynolds, 10 Wall. [77 U. S.] 319, Mr. Justice Miller says: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to attachment, when such a writ is returned into court, the power of the court over the res is established."

Neither does it appear from the return that the copy left upon the premises was posted in a conspicuous place. As to the east half of lots 1 and 2 the return states that the copy was posted "on the building" thereon, but whether on the front or back, or the upper or lower story, or whether either was "a conspicuous place" on the premises does not appear, while as to block 15, it simply states that the copy was posted "on said block."

But it is not necessary to consider the effect of this omission. The return is radically defective because it does not appear therefrom that the premises were unoccupied at the time of this alleged service by leaving a copy of the writ upon the premises, and unless they were the sheriff had no authority to make such service. The writ of attachment being the only process by which the court could acquire jurisdiction, and there being no valid service of the same it follows necessarily that its judgment was a nullity and the sale upon the execution thereon is void. There must be a finding that the plaintiff is the owner of the premises and entitled to the possession of the same with nominal damages for the detention.

MICKEY v. WILLIS. See Case No. 9,530.

MICKLE (UNITED STATES v.). See Case No. 15,763.

Case No. 9,531.

MICKUM v. PAUL.

MICKUM v. EDDS.

[2 Cranch, C. C. 568.] [1]

Circuit Court, District of Columbia. May Term, 1825.

JUSTICE OF PEACE—JURISDICTION—CAPIAS—TRESPASS—PROPER REMEDY.

A justice of the peace has jurisdiction in a case of a small debt, and his judgment is not absolutely void; and the officer who serves a ca. sa. upon that judgment is not a trespasser; although the plaintiff's proper remedy was upon the defendant's administration-bond, the penalty of which was $500, and so beyond the jurisdiction of the justices.

Trespass and false imprisonment.

William Mickum was a constable, and S. Mickum was his surety in his official bond. W. Mickum, the constable, had received money for Charles Paul, and had failed to pay it over. Paul, supposing S. Mickum to be liable to him for the money received by William Mickum, the constable, brought suit in his own name against S. Mickum, before a justice of the peace. S. Mickum appeared before the justice and denied his jurisdiction, contending that if liable for the money received by William Mickum, it was only upon the bond, the penalty of which was $500, and upon which no suit could be brought before the justice. But the justice overruled the objection to his jurisdiction, and rendered judgment against S. Mickum for $2.50, upon which Paul issued a ca. sa. which was served by [John] Edds, who was a constable, and who arrested and imprisoned the defendant, S. Mickum; for which arrest and imprisonment, this action of trespass is now brought.

J. Dunlop, for plaintiff, contended that the justice had no jurisdiction in the case; and that, therefore, both the constable who served, and the party who procured the ca. sa. were guilty of trespass and false imprisonment. S. Mickum could be made liable only by a suit upon the bond, of which the justice clearly had no jurisdiction.

C. Cox, for defendant Edds, the constable, prayed the court to instruct the jury, that the constable was justified by the ca. sa. The suit before the justice was not upon the bond, for then the suit would have been in the name of the United States, the obligee. But it was a simple action of debt by Charles Paul against S. Mickum. The justice might have been mistaken as to the liability of S. Mickum for the money received by William Mickum; but that was only an error of judgment, upon which the defendant might have appealed, if the judgment had been for more than five dollars. So, if the justice admitted improper evidence, it would be matter for appeal, but would not deprive him of jurisdiction.

J. Dunlop, contrà. The averment in the warrant, that it was for debt, within the jurisdiction of the justice, did not give him jurisdiction. The question depends upon the nature of the case; as if, upon a warrant for debt, he should give judgment for a trespass. Yates v. Lansing, 5 Johns. 282; Esp. N. P. (Am. Ed.) 195; Ritchie v. Stone [Case No. 11,864], in this court, at October term, 1821; Wells v. Hubbard [Id. 17,397], at April term, 1822; Brown v. Compton, 8 Term R. 424; 1 Salk. 273, pl. 5; Orby v. Hales, 1 Ld. Raym. 3; Crump v. Halford, 4 Mod. 353; The Marshalsea, 10 Coke, 76 (a); Nichols v. Walker, Cro. Car. 395; Hill v. Bateman, 2 Strange, 710; Shergold v. Holloway, Id. 1002; Smith v. Bouchier, Id. 993; Perkin v. Proctor, 2 Wils. 385.

P. Dunlop, in reply, cited Selw. N. P. 923, and the case of Shergold v. Holloway, 2 Strange, 1002.

THE COURT (nem. con.) was of opinion that inasmuch as the warrant in this case was for a debt under five dollars, and the justice professed to act in a case of debt within his jurisdiction, his having received the bond in evidence did not deprive him of jurisdiction in the case. Paul claimed of S. Mickum two and one half dollars as a debt; for this the justice issued his warrant. The question, whether Mickum was indebted to Paul in that sum, was a question within the jurisdiction of the justice. It might have been supported by proper evidence; and the admission of improper evidence could only be ground of reversal upon appeal, if an appeal were given, but did not oust the justice of his jurisdiction.

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

Case No. 9,532.

The MIDAS.

[6 Ben. 173.] [1]

District Court, E. D. New York. July, 1872.

COLLISION — VESSEL AT ANCHOR—ICE—FOUL ANCHOR.

The brig N., while lying at anchor in the port of New York, was run into by the bark M., which drifted down upon her with the tide in the night. The defence set up by the bark was, that she was forced from her own anchor by an irresistible field of ice brought down on her by the tide. As to the presence of any such field of ice, there was a conflict of evidence; but the evidence showed that the port anchor of the bark had no stock, and that the chain of the starboard anchor was fouled when it was got up on the morning after the collision. *Held*, that, on the evidence, the bark had failed to show that the drifting was an inevitable accident.

In admiralty.

J. K. Hill, for libellant.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. This is an action to recover of the bark Midas the damages caused by that vessel drifting afoul of the

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brig Napier, at night, while the latter lay at anchor in this harbor. The defence is that the Midas was carried from her moorings by a large field of ice, which caused her to drag her anchor. The presence of any such field of ice, as is sworn to by the claimant's witnesses, or of any ice that should cause a vessel to break away, is wholly denied by several witnesses. The occurrence, as described by the claimant's witnesses, appears to my mind somewhat improbable, but, of course, not impossible. The drifting of the vessel may, however, be accounted for by the fact that the chain of the bark had become wound around the stock and fluke of her anchor, so as to render it unable to bite the ground sufficiently to hold her, when the tide ran ebb. It is proved, and not disputed, that her starboard anchor was found in this condition when it came up next morning, and that this would account for her dragging, and it is also proved and not disputed that her port anchor had no stock at all, and was not therefore an anchor calculated to hold when dropped. In the presence of such proofs, as to the condition of the ground tackle of the bark, and of the evidence in the case casting doubt upon the statement that a large field of ice caused the bark to drift, I must hold that the bark has failed to show that the accident was caused by the overwhelming power of ice, which could not be successfully resisted.

There will accordingly be a decree for the libellant, with an order of reference to ascertain the amount.

MIDDLEBORO SHOVEL CO., In re. See Case No. 14,168.

Case No. 9,533.

The MIDDLESEX.

[Brun. Col. Cas. 605; [1] 21 Law Rep. 14.]

Circuit Court, D. Massachusetts. 1857.

CARRIERS—DELIVERY ON WHARF—USAGE AS TO DELIVERY.

1. To constitute a good delivery of goods from a ship upon a wharf, there must be a reasonable notice to the consignee that the goods will be so unladen; a knowledge casually acquired by the consignee that the vessel has arrived and will discharge at a certain wharf will not dispense with such notice.

[Cited in Mordecai v. Lindsay, 5 Wall. (72 U. S.) 495; One Thousand, Two Hundred and Sixty-Five Pipes, etc., Case No. 10,536; The Boskenna Bay, 40 Fed. 93; Constable v. National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1076.]

2. A usage for wharfingers to act as agents in accepting, in behalf of consignees, goods arriving at their several wharves, would not be valid.

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

In admiralty.

J. P. Healey, for libelants.

R. H. Dana, Jr., and H. A. Scudder, contra.

CURTIS, Circuit Justice. This is a libel founded on a bill of lading in the usual form, signed by the master of the ship Middlesex at New Orleans on the 19th day of March, 1855, agreeing to deliver sixty barrels of lard at the port of Boston unto the libelants or their assigns, dangers of navigation only excepted. The ship arrived in the port of Boston on Saturday, the 21st day of April, 1855, and commenced discharging cargo on Tuesday, the 24th. On Thursday, about five o'clock p. m., a small part of the libelants' merchandise was discharged; and in the course of Friday, before half past two o'clock, thirty-one barrels thereof had been landed on the wharf. They came out promiscuously with other merchandise, and were so stowed on the wharf. It does not appear that at any time any considerable quantity was accessible, so that it could have been taken away by the libelants. No notice of the arrival of the vessel, and that her cargo was about to be discharged, was given by the master to the libelants. But Wilde, a clerk of the libelants, without any direction to that effect from his employers, went to the vessel, on Wednesday or Thursday, and inquired of the mate if the merchandise was ready for delivery; he replied, it was not, and he could not tell when it would be. He then asked the mate if he would notify the libelants when the merchandise should be ready, and the mate said he would. He thereupon gave the mate the libelants' business card, and asked him if he knew where the libelants' place of business was; the mate took the card, and said he did, or ought to, for he was a "North End boy." The fact that the vessel was at Battery wharf, and the result of this interview with the mate, was made known to the libelants by Wilde on the day when it occurred. The mate denies that he made an absolute promise to give notice; but I do not deem this material, because the libelants were informed that he did. So much of this merchandise as had been landed on Friday was destroyed by an accidental fire which broke out on the wharf about half past two o'clock on that day.

Upon this state of facts I do not think the notice of readiness to deliver, required by law, was given. When the master, or the owners, or consignees of the vessel give notice to consignees of cargo that the vessel is about to discharge at a particular wharf, it is deemed equivalent to a declaration by him or them that the master will be in readiness to deliver the cargo there at some proper time, as soon as, by the use of due diligence, he can get it out of the vessel in a state to be delivered. But mere knowledge that the vessel has arrived, and is discharging at a particular wharf, gained in some casual manner by the consignee, without any act on the part

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

of the master to indicate a readiness to deliver, is not within the usage, which is for the master, or some agent for the vessel, to give notice to the consignees. And I do not think such casual knowledge is sufficient to impose on the consignee the duty of attending to the discharge of the vessel, and being in readiness to receive his goods as soon as they are ready for delivery. I think a consignee of cargo may well say: "I knew it was usual for some agent of the vessel to give express notice to consignees. No such notice was given. I inferred that for some cause the master would not be ready within a reasonable time to deliver my cargo, and I consequently made no preparation to receive it." It must be remembered that it is not knowledge of the arrival of the vessel and that she is discharging, but notice of the readiness of the master to deliver, which is the operative fact. And to convey this notice the master, or some one acting for the vessel, should give such notice, or some notice, which by custom is equivalent to it. In this case the libelants, at the same time when they were informed by their clerk, that the vessel was discharging at Battery wharf, were also informed that the mate could not tell when their merchandise would be ready for delivery, and had engaged to give them notice when it should be ready. I do not think the mate had authority to bind the vessel by this engagement. But I consider that these circumstances are material when coupled with the want of notice by any one representing the vessel; and that the libelants were not bound to make preparations to receive their consignment until they had some further notice.

But there is another ground on which, in my opinion, this case must be decided in favor of the libelants. Their consignment was but a very small part of the entire cargo of the vessel. The part of it which was landed was stowed on the wharf promiscuously with the residue of the cargo. I do not think the consignee of a parcel of merchandise is required to overhaul the residue of the cargo on the wharf to find his goods. For the convenience of the vessel a particular consignment may be stowed in any proper place in the vessel, and even mingled with goods belonging to others, and it must come out as it is reached in the process of unlading. But each consignee has a right to have his goods delivered to him separated from all others; and the duty of separating them from all others is part of the duty of delivery. No doubt there must be, as in practice I believe there is, a reasonable cooperation between the master and the consignees of cargo in the process of delivering it, and especially in cases of general ships, of large tonnage, such as are now employed. The consignee cannot justly expect, and cannot lawfully require, that upon a crowded wharf, where a large cargo is being delivered to numerous owners, each consignment should be set apart by itself, and so placed as to be most easily accessible. That should be done which may be done reasonably and is usually done in similar circumstances. But there is no evidence in this case to show, and it is not to be presumed that all that is usually done by the master in a case like this, is to pile thirty-six barrels belonging to a particular consignee promiscuously with other cargo discharged on four different days. I cannot say that, when so placed, the libelants' goods were ready for delivery, and therefore I hold that their contract for delivery had not been performed when the fire took place.

It was urged in the case, that, as it appears to be the usage for consignees to pay wharfage on their goods, the wharfinger is the agent of the consignees to accept a delivery of the goods, and consequently, as soon as landed on wharf, the goods are delivered to the consignee. I suppose the usage mentioned is for consignees who accept goods to pay their wharfage, and for consignees who do not accept goods not to pay it. I do not believe there is any usage which makes wharfingers the agents of the consignees to accept consignments for them; and if such a usage were proved, I could not admit that it was a reasonable or lawful usage. It would be inconsistent with the nature of the employment, and would lead to too much confusion of rights to be tolerated. The acceptance of the goods by the consignee, independent of any usage, may be sufficient to raise an implied promise to pay their wharfage; and the usage spoken of is probably nothing more than a practical conformity to those rights and duties of the parties which grow out of the rules of law. That, in my opinion, landing is not delivery, I have already stated in the Case of the Salmon Falls Company.

It was also insisted that the consignees could not maintain a libel founded on the bill of lading alone, without some further evidence of their ownership of the goods. I consider this question to have been settled in the case of Lawrence v. Minturn, 17 How. [58 U. S.] 100. The same was held at common law in Tronson v. Dent, 8 Moore, P. C. 419.

The decree of the district court must be affirmed, with six per cent. damages and costs.

Delivery on the wharf of goods from a ship is sufficient if notice thereof be duly given to the consignee, and consignments are properly separated so as to be conveniently open to inspection. See The Eddy, 5 Wall. [72 U. S.] 459, citing above case.

MIDDLESEX CO. (WHIPPLE v.). See Cases Nos. 17,519 and 17,520.

MIDDLETON (SHIELDS v.). See Case No. 12,786.

Case No. 9,534.

MIDDLETON v. SINCLAIR.

[5 Cranch, C. C. 409.] [1]

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

DEEDS — ACKNOWLEDGMENT — FRAUDULENT CONVEYANCE—CONTINUING IN POSSESSION—EVIDENCE—VARIANCE IN DESCRIPTIONS.

1. In 1823, the commissioner of the public buildings in Washington had authority to take the acknowledgment of deeds of land in Washington county.

2. A purchaser under an execution against the grantor has a right to show the deed to be fraudulent as to the creditor under whose execution he purchased. Although there is a variance, in some respects, in the description of the land in the two deeds, they may be given in evidence to the jury, who may decide the question of identity.

3. A conveyance to his son, by a father, of all his estate and effects, while indebted, and continuing in possession after the conveyance, is evidence of intent to hinder, delay, and defraud his creditors.

[Cited in Merriman v. Hyde, 9 Neb. 119, 2 N. W. 218.]

Ejectment for land in the county of Washington, D. C. The plaintiff [Middleton's lessee] offered in evidence a deed from Smallwood C. Middleton to his son Samuel Middleton, under whom the lessors of the plaintiff claimed title. This deed was dated February 24th, 1823, and acknowledged before Mr. Elgar, the commissioner of the public buildings, who succeeded to the office of superintendent, who succeeded to the office of the commissioners appointed under the act of congress of the 16th of July, 1790 (1 Stat. 130), who were severally authorized to take such acknowledgments, by the Maryland act of 1791, c. 45, §§ 7, 8. When the board of commissioners was dissolved by the act of congress of 1st of May, 1802 (2 Stat. 175), entitled "An act to abolish the board of commissioners in the city of Washington, and for other purposes," the office of superintendent was created, to whom was transferred all the powers of the commissioners, and by the act of the 29th of April, 1816, c. 150, §§ 2, 5 (3 Stat. 324), the office of superintendent was abolished and that of commissioner was established, to whom was transferred all the duties of the old board of commissioners, and of the superintendent.

Mr. Morfit and Mr. Key, for defendant [Rezin Sinclair], objected to the admission of the deed in evidence, and contended that the commissioner for the public buildings had no authority to take the acknowledgment; that he succeeded only to the powers of the commissioners as a board, and not to any powers given to the commissioners severally. The Maryland act of 1791, c. 45, § 8, says, "that acknowledgments of deeds" "made before and certified by either of the commissioners, shall be effectual." The act of congress of the 1st of May, 1802, § 2 (2 Stat. 175), says, "And the said superintendent is hereby invested with all powers, and shall hereafter perform all duties which the said commissioners are now vested with, or are required to perform, by, or in virtue of any act of congress or any act of the general assembly of Maryland, or any deed or deeds of trust from the original proprietors of the lots in the said city, or in any other manner whatsoever." And by the second section of the act of congress of the 29th of April, 1816, c. 150 (3 Stat. 324), it is enacted that the commissioner of the public buildings "shall perform all the duties with which the said three commissioners" (appointed under the act of 16th of July, 1790) "were charged;" and by the 5th section of the same act of 29th April, 1816, it is enacted that the duties of the office of superintendent thereby abolished "shall be performed by the commissioner to be appointed by virtue of this act." The commissioner, therefore, had only the powers given to the first commissioners as a board.

THE COURT, however (THRUSTON, Circuit Judge, absent), overruled the objection, and said that the point was settled in the case of Peltz v. Clarke [Case No. 10,914], in this court at May term, 1826, and they were not disposed to disturb that decision.

Mr. Bradley, for plaintiff, then contended, that the defendant, being neither a creditor of Smallwood C. Middleton, the grantor, nor a subsequent purchaser from him, was not competent to object to the validity of the deed as being fraudulent; for, if fraudulent, it is so only as to creditors and subsequent purchasers.

But THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection; because the defendant does not claim in the character of a subsequent purchaser; but claims under a judgment and execution in favor of a creditor who had furnished materials for a building erected upon the land in dispute before the date of the deed; and if the deed was void as to that creditor the sale under the execution was valid, and the defendant, who claims under that sale has a good title.

The defendant, in order to show his right as a creditor, or as claiming under a creditor, offered in evidence a judgment, fieri facias, and sale in 1827, in an action by King and Langley against the grantor, Smallwood C. Middleton, and that the cause of action originated before the date of the deed. That the land was sold under the fieri facias to one C. King, who conveyed to a Mrs. Bryan, under whom the defendant claims title. The description of the land in the deed from the marshal differs, in some respects, from that in the deed from S. C. Middleton to his son in 1823; the beginning, however, is the same.

Mr. Bradley objected to that evidence on account of this difference in the description of the land.

But THE COURT (nem. con.) permitted the evidence to go to the jury.

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

Mr. Key, for defendant, then prayed the court to instruct the jury, that if they should believe from the evidence that the said S. C. Middleton at the date of the said deed to his son was indebted to the said King and Langley, and that after the said deed he continued in possession of all the property mentioned in the said deed until the said sale under the said execution of King and Langley, and the said purchase by Mrs. Bryan as aforesaid, and that he had no other property; then such indebtedness, and such continuing in possession, is evidence of the said deed's being made by the said S. C. Middleton to his son, with intent to hinder, delay, and defraud his creditors; and that upon the said evidence of such intent, if believed by the jury, the plaintiff is not entitled to recover in this action.

And THE COURT (nem. con.) so instructed them; and also at the prayer of Mr. Bradley, for plaintiff, further instructed them, that if from the evidence they should be of opinion that the said deed was made bonâ fide, and without any intent to defeat or defraud the creditors of the said S. C. Middleton, and for a valuable consideration; and the said Samuel Middleton (the son) was jointly in possession of the said land, with the said Smallwood C. Middleton after the making of the said deed, then the plaintiffs are entitled to recover.

Verdict for the defendant.

MIDDLETON (SMITH v.). See Case No. 13,079.

MIDDLETON, The HENRY. See Case No. 6,378.

Case No. 9,535.

MIDDLETOWN TOOL CO. v. FITCH.

[Nowhere reported; opinion not now accessible.]

Case No. 9,536.

MIDDLETOWN TOOL CO. v. JUDD et al.

[3 Fish. Pat. Cas. 141.][1]

Circuit Court, D. Connecticut. Feb., 1867.

PATENTS—REISSUE—VARIANCE — NEW ARTICLE — COMBINATION — DEFECT — HOW OCCURRING — STATE OF ART—UTILITY—ASSIGNMENT — PRIMA FACIE TITLE.

1. The recital, in a reissue, of a prior assignment, and the action of the commissioner in granting the patent to the assignees, make a prima facie case of title.

2. The only mode of impeaching the reissue upon the ground that it is for a different invention from the original, where there is no allegation or proof of fraud, is by showing, upon the face of the instrument, that one is so different from and repugnant to the other that the court can see that the invention described in the original is another and different one from that set forth in the reissue.

[Cited in Andrews v. Wright, Case No. 382.]

3. The claim in the original was for a new article of manufacture; in the reissue, it was for a combination and arrangement of the parts. The former claim was unfortunate, as changes could be made to evade the patent, while retaining the principle of the invention. The defect was curable by reissue.

4. Whether the defect occurred through inadvertence or mistake, is a question for the commissioner to decide.

5. Proof introduced to show the state of the art can have no effect on the case beyond the aid it may give the court in construing the patent. It can not be permitted to defeat the suit by antedating the invention, when that issue is not raised by the pleadings.

6. The very struggle of the parties in the suit—the complainant for the exclusive, and the defendant for the unrestrained right to manufacture the patented article—is ample evidence that it is of some utility.

7. Whenever a change or device is new and accomplishes beneficial results, courts look with favor upon it. The law in such cases has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device.

[Cited in Hoe v. Cottrell, 1 Fed. 603; Celluloid Manuf'g Co. v. Comstock & Cheney Co., 27 Fed. 360.]

8. Letters patent for an "improved self-mousing hook," granted to John R. Henshaw, October 26, 1858, and reissued February 6, 1866, are valid.

This was a bill in equity filed to restrain the defendants [Oliver Judd and others] from infringing letters patent [No. 21,879,] for an "improved self-mousing hook," granted to John R. Henshaw, October 26, 1858, assigned to complainants, and reissued to them February 6, 1866 [No. 2,166]. The claim of the original patent was as follows: "An improved article of manufacture, a self-mousing hook, having a socket e, and ear f, and a horizontal spring k; the whole made as shown and described." The claim of the reissued patent was as follows: "Locating the spring of a snap-hook, substantially as shown and described, so as to act upon points intermediate between the hinge and hook proper in combination with forming recesses for holding the spring, as set forth."

Hubbard & McFarland, for complainants.
Horace Cornwall, for defendants.

SHIPMAN, District Judge. This suit is founded on a patent for an alleged improvement in self-mousing or snap-hooks. The original patent was granted to J. R. Henshaw, and bears date October 26, 1858. This was subsequently surrendered by, and reissued to, the present complainants. The reissue is dated February 6, 1866. The bill counts upon this reissue, and charges the respondents with infringing the right which it purports to grant to the complainants. The usual relief of an injunction and account is prayed for.

The answer admits the granting of the original patent to Henshaw, but qualifiedly denies that he was the original inventor, and that the same had not been in use before his application for letters patent. It denies that the complainants were the assignees of Henshaw

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

and therefore entitled to a reissue. It denies that the surrender was made for the purpose of correcting any error or inadvertence, and avers that the same was done for the purpose of enlarging the right of the complainants under the patent. It also denies that the reissue is for the same invention as the original.

The answer then sets up two patents issued to Judd, one of the respondents, one dated August 25, 1863, the other December 13, 1864, and avers that all the articles in question, the manufacture of which is charged by the bill as an infringement of the complainants' rights, have been made under and in conformity to these patents. There is also a general denial of infringement as charged in the bill.

So far as the validity of the patent is questioned on the ground that it was reissued to the complainants, there is no real doubt in the case. The reissue counts upon a prior assignment of the original patent to the complainants, and this makes, with the act of the commissioner granting the reissue to them, a prima facie case on this point.

There is no proof in the case tending to overcome this, and the court must therefore presume that the reissue was properly granted to these complainants. The reissued patent is also prima facie evidence that it is for the same invention as the original, and as there is no allegation or proof of fraud, the only mode of impeaching the reissue on this ground is, by showing upon the face of the instruments that one is so different from and repugnant to the other, that the court can see that the invention described in the reissue is another and different one than that set forth in the original. Upon a careful comparison of the two I find no such difference or repugnance. The change in the last specification from the original is descriptive and formal rather than essential, so far as the scope of the invention is concerned.

The claim in the original was for an improved article of manufacture, while in the reissue it is for a combination and arrangement of the parts. The elements of the combination, in connection with the arrangements in the reissue, are precisely the features which made the article new in the original. But claiming it as an article of manufacture was unfortunate, as changes could be made so as to evade the patent, though the principle of the invention might be retained. This was a curable defect, provided it occurred through inadvertence and mistake, and whether it did so occur was a question of fact for the commissioner to decide. The invention thus described in the reissued patent must be deemed to have been made as early as October 26, 1858, the date of Henshaw's patent. Upon the recital in the reissue and the act of the commissioner granting the latter to these complainants, in the absence of any countervailing proofs they are to be deemed, in judgments of law, its rightful owners and entitled to whatever right it confers.

As this invention, on the face of the papers, antedates those described in the patents set up by the respondents, and there being no proof of a prior invention of the kind by any one else, there can be no struggle between the parties here as to who was first in this field of discovery. The remaining inquiries are, is the improvement novel? is it useful? did Henshaw invent it? and have the respondents infringed?

On the first three inquiries the patent itself is prima facie evidence in the affirmative, and one of the witnesses, well qualified to speak on the subject, testified that it was new. There is no evidence to counteract this proof. Whatever was introduced to show the state of the art can have no effect on the case beyond the aid it may give the court in construing the patent. It can not be permitted to defeat the suit by antedating the invention, as that issue is not raised by the pleadings. But in the judgment of the court no article or device presented by the evidence, or specimen of hooks introduced on the trial, antedates this invention. The truss hook with a spring enclosed in a tumbler, and the one with a spring in the socket, are both differently arranged. The springs are both behind the joint-pin, and are not held by recesses sunk into the arm of the hook, and it will be seen when we come to the question of utility, that this difference, though apparently slight, is in reality not merely formal but substantial. I have no doubt on the question of novelty. On the proofs as they stand, the improvement must be declared new. Its utility is equally clear, at least in one aspect, and that is sufficient to support the patent on this point. The very struggle of the parties in this suit, the complainants for the exclusive, and the respondents for the unrestrained, right to manufacture this kind of hook is ample evidence that it is of some utility. I agree with the counsel for the respondents that the truss hooks, with springs in the rear of the joint pins, especially the one in a vertical tumbler, appear to be much more substantial and perfect articles. But the demand for the patented article involved in this suit is evidence that it is preferred over the truss hooks. Doubtless, the reason is that they can be manufactured and sold at a cheaper rate. Cheapness generally commends an article to the American public.

Did Henshaw invent the article in the sense of the patent law? The point on which this question is open to inquiry in this suit, is that which relates to the fact whether or not it required invention. In disposing of this branch of the case, it will be necessary to examine the specification and see what device it covers. This can be done by giving a construction to the claim, for it evidently aimed to state the invention in brief terms, though it must be confessed that it is done in an obscure way. It is often the misfortune of inventors to have their specifications drawn with very imperfect skill, but courts have long exercised great liberality in giving construc-

tion to these instruments. It may well be doubted whether their indulgence has not gone too far in this direction, and their efforts to save the rights of inventors in particular cases been perverted into an assumed license to indulge in loose descriptions. The present specification requires the application of the liberal rules of construction in order to an intelligible understanding of the claim, and I see no reason why they should not be applied, especially in view of the settled practice of the courts. The claim is: "What is claimed as the invention of the said Henshaw is, locating the spring of a snap hook, substantially as shown and described, so as to act upon points intermediate between the hinge and hook proper, in combination with forming recesses for holding the spring, as set forth." Read literally and apart from the body of the specification, this would be both unintelligible and obscure. The first part of the sentence refers to the arrangement of the spring. It is placed in front of the hinge pin instead of the rear. When so arranged, it is combined with the recesses for holding it, which are new. This is a new organization of the hook and spring, combined with a new element or device for holding the spring in place. The statement in the claim, that locating the spring in the manner described is combined with forming the recesses, is mere absurdity. But a glance at the specification and drawings shows at once what really was meant.

It is urged that this transposition of the spring, in connection with the simple device of sockets for holding it in place so that it can perform the desired function, is a merely colorable change of the old snap hook, requiring no invention, and therefore not patentable. But the change effects palpable and useful results, else why is there a struggle for its use or application to articles of this character? Whenever a change or device is new, and accomplishes beneficial results, courts look with favor upon it. The law, in such cases, has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device.

A lucky casual thought involving a comparatively trifling change, often produces decided and useful results, and though it be the fruit of a very small amount of inventive skill, the patent law extends to it the same protection as if it had been brought forth after a lifetime devoted to the profoundest thought and the most ingenious experiment to attain it. In the present case the degree of ingenuity employed in producing this improvement was undoubtedly small but I have no doubt that it is entitled to the protection of the law. The remaining question is, whether the respondents have infringed. The hook which they manufacture has a spring, the main coil of which is so placed that the hinge pin passes through it, but though only part of the coil is thus brought in front of the hinge pin yet the bearing points or feet of the spring are so located as to act on points intermediate between the hinge and hook proper, in substantially the same manner as the ends of the coil in Henshaw's invention.

These feet are held in and by recesses or sockets in the same manner as in Henshaw's. In other words, the spring as located and operating in combination with the recesses, the respondents' hook, embody the whole of Henshaw's invention, and accomplish the same result in the same way. It may be an improved form of Henshaw's invention, and if so, the new part or improvement is patentable; but this fact gives no right to use what was invented and patented by another.

A decree for an account and injunction must, therefore, be entered against the respondents. The decree for an account may be entered at once, and the accounting should be proceeded with, without delay, and completed on or before the first day of the next regular term of this court, at which time a final decree and injunction will be entered.

MIDLAND, The. See Cases Nos. 12,067 and 12,068.

Case No. 9,537.

Ex parte MIFFLIN.

[1 Pa. Law J. 146.]

District Court, E. D. Pennsylvania. May 17, 1842.

ARREST—PROTECTION FROM—SUITORS — FACTS TO MAKE OUT CASE—HOW PROVED.

The protection from arrest given to suitors, extends to petitioners for the bankrupt act. The privilege is regarded liberally; but the facts necessary to make out a case for protection, must be proved otherwise than by the oath of the party who claims it.

Mifflin, a petitioner for the benefit, &c., had made an appointment to be at a commissioner's office, on a certain Monday at eleven o'clock a. m., on business connected with the petition. The appointment was proved by the commissioner. Not long after making this appointment with the commissioner, he promised one Freeman to call at his (Freeman's) store, on this same Monday, some time before eleven. The commissioner's office was one square south of the court house (S. E. corner 6th and Chestnut streets,) and Freeman's store two squares north of the court house. He did not call at Freeman's as he had promised to do, and on this same Monday, a few minutes before eleven, when close to the court house, and walking in a course which might have been to either Freeman's or the commissioner's, he was taken on a ca. sa. at Freeman's suit. He now applied to be discharged from arrest. Mifflin himself swore, that he left his residence, (some seven or eight squares from the commissioner's office,) at about half past ten o'clock, a. m., and wishing to see his counsel, Mr. Ingraham, about his visit to the com-

missioner, he stopped at Mr. Ingraham's office, (which was in course to the commissioner's,) but learning there that Mr. Ingraham had gone to court, he went first to the court house, and thence to the Athenaeum, (about a square east of the court house,) to find Mr. T. who had been there, and that returning from the Athenaeum, and on his way to the commissioner's, he was taken by the sheriff. The whole deviation was about two squares, or about 300 yards.

It was alleged against the application, 1. That the deviation was extravagant; 2. That the process was final.

RANDALL, District Judge (declining to hear the argument on the other side,) said, that it was a simple question of intention. Was Mifflin intending to go to the commissioner's? The appointment had been duly proved. It was near to eleven o'clock, and Mifflin was just one square north of the commissioner's office, and in the course to it. The appointment with Freeman was not material. Mifflin might have designed to go there before going to the commissioner's, or afterwards; nor was it important that he had deviated a square or two in going to the commissioner's. This privilege of suitors was regarded liberally. In point of time a party had been allowed a delay of three or four days, when the business which protected him called him away from his residence. No rule required a party to move to the spot in a straight line, and in the same line home again. It was important, however, that the appointment with the commissioner had been shown otherwise, than by Mifflin's oath, as the oath of a party, alone, would be insufficient. There was nothing in the objection that the process was final, as Freeman might issue an alias ca. sa. The petitioner was, accordingly, without hesitation, discharged from arrest.

MIFFLIN (VASSE v.). See Case No. 16,895.

Case No. 9,538.

In re MIGEL.

[2 N. B. R. 481 (Quarto, 153).] [1]

District Court, S. D. New York. March 23, 1869.

BANKRUPTCY—ARREST ON STATE PROCESS—DEBT FRAUDULENTLY CONTRACTED—MOTION TO VACATE—INJUNCTION.

The bankrupt having been arrested by order of a state court at the suit of creditors whose debt appeared by the order to have been fraudulently contracted, applied to have said order of arrest vacated by the bankruptcy court, and the said creditors, who had subsequently proved the debt in bankruptcy, enjoined from further proceedings thereon. *Held*, that such debt was one not dischargeable in bankruptcy, and the order of the state court could not be vacated or its proceedings set aside. But that the debt being provable in bankruptcy, proceedings of the creditors in their suit in the state court would be stayed until the determination of the bankruptcy court on the question of discharge.

[Cited in Re Merchants' Ins. Co., Case No. 9,441. Distinguished in Re Alsberg, Id. 261.]

[Cited in brief in Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 53 N. Y. 124.]

In bankruptcy.

BLATCHFORD, District Judge. The bankrupt's voluntary petition in bankruptcy was filed December 11th, 1867. He was adjudicated a bankrupt on the 13th of December, 1867. On the 17th of December, 1867, an order was made by one of the justices of the supreme court of the state of New York, in a suit commenced against the bankrupt on the 14th of December, 1867, by Leopold Wise and Morris Wise, reciting that it had been made to appear to the said justice by affidavit that the plaintiffs in said suit had a sufficient cause of action against said bankrupt on a money demand on contract, and that the debt was contracted by false and fraudulent representations of the bankrupt, and requiring the sheriff of the city and county of New York forthwith to arrest the bankrupt and hold him to bail in the sum of three thousand dollars. The affidavit on which the order of arrest was made, shows a case of a debt created by the fraud of the bankrupt, and such a debt as under section thirty-three of the act would not be discharged by a discharge in bankruptcy. The bankrupt now, on a petition setting forth that the affidavit on which the order of arrest was granted was wholly false, and that the creditors have proved their debt in the bankruptcy proceedings, and that he has been arrested under the order, and given bonds to abide the order of the state court, applies to this court to vacate the order of arrest, and set aside the proceedings of the creditors, and enjoin them from further prosecuting their suit, and from proceeding further on the order of arrest.

It is urged on the part of the bankrupt, first, that the creditors, by proving their debt, have, under section twenty-one of the act [of 1867 (14 Stat. 526)] waived all right of action and suit against him; second, that this court must enquire into and determine, on this application, the question as to whether the debt in question was, in fact, created by the fraud of the bankrupt.

First. It was held by this court in the Case of Rosenberg [Case No. 12,054], that so much of section twenty-one of the act as imposes a penalty for proving a debt, cannot be construed as applying to a debt which, by section thirty-three, is not dischargeable. This view was upheld by Mr. Justice Nelson, in the circuit court for this district, in the Case of Robinson [Id. 11,939], where he holds that the thirty-third section must be regarded as taking a debt created by fraud

[1] [Reprinted by permission.]

out of the operation of the first clause of the twenty-first section, that is, the clause imposing, as a penalty for proving a debt, the destruction of all right of action and suit upon it. The proceedings in the supreme court in this case, so far as they have been placed before this court, consisting of the order of arrest and the affidavit on which it was made, although such order was, as is the practice, made ex parte, must, for the purposes of this application, be considered as an adjudication by the state court that this debt was created by the fraud of the bankrupt. It was open to the bankrupt to show a different state of facts to the state court, on a motion there to discharge the order of arrest. Instead of doing so, he comes into this court, on that state of facts, and claims the benefit of the last clause of section twenty-six of the act, which provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." As the order of arrest states, on its face, that it has been made to appear by affidavit, to the justice issuing it, that the debt was contracted by false and fraudulent representations of the bankrupt, the debt must be regarded as being taken out of the operation of the first clause of the twenty-first section.

Second. The order of arrest must be regarded, at least for the purposes of this application, as an adjudication by the state court between the parties to the suit in which the order is entitled; that the arrest was founded on a debt from which a discharge in bankruptcy would not release the bankrupt. In re Robinson, before cited. In Re Kimball [Id. 7,768], it was held by this court that where it appears, by inspection of the proceedings in the state court in which the arrest was made, that the arrest was founded by the state court on a debt which appears, on the face of such proceedings, to be one created by the fraud of the bankrupt, this court will not enquire any further into the question of fraud or no fraud, on an application to discharge from the arrest. The decision of this court in that case was affirmed by Mr. Justice Nelson, in the circuit court for this district, In re Kimball [Id. 7,769], who says, in his opinion, that the question whether the federal court will, under the twenty-sixth section, discharge the bankrupt from arrest during the pendency of the bankruptcy proceedings, "must depend upon the case presented upon which the arrest was made in the action in the state court." In this case, therefore, this court cannot go behind the order of arrest, and the adjudication which is found on its face.

It results that the order of arrest cannot be vacated, nor can the proceedings of the creditors in arresting the bankrupt be set aside. But as the debt sued on in the state court by the creditors is a provable debt, the suit must be stayed until a determination is had as to the discharge, whether the debt be one that will be discharged or one that will not be discharged. In re Rosenberg, before cited. The further proceedings of the creditors in the suit, must, therefore, be stayed, in accordance with the provision of section twenty-one, to await the determination of this court in bankruptcy on the question of the discharge.

Case No. 9,539.

MILAN DISTILLING CO. v. TILLSON.

[26 Int. Rev. Rec. 5.]

Circuit Court, N. D. Illinois. Jan. 5, 1880.

INTERNAL REVENUE—SALE OF LEASED DISTILLERY FOR TAXES — RIGHTS OF PURCHASER FROM LESSOR—EVIDENCE.

[One purchasing property which has been used as a distillery under a lease containing covenants that the premises should be subject to a lien for taxes and penalties, in accordance with Rev. St. § 3262, must be regarded as taking the same with notice of such use, and the property is therefore subject in his hands to the lien of any assessment which may subsequently be made against the lessee for such taxes or penalty. Such purchaser stands in the shoes of his grantor, and, through him, has the same right of appeal that the lessee would have, from the assessment. Therefore, if he permits the premises to be sold without taking an appeal, he has no right, on subsequently suing the collector for the value of the property, to introduce evidence that no tax or penalty was in fact due the government at the time the assessment was made.]

[This was an action at law by the Milan Distilling Company against John Tillson to recover the value of certain distillery property sold by defendant, as collector of internal revenue.]

Beardsley, Wilkinson & Osborne, for plaintiff.

Joseph B. Leake, U. S. Atty., for defendant.

BLODGETT, District Judge. This is an action on the case, brought by the plaintiff against the defendant, to recover the value of a distillery and appurtenances sold by the defendant under a distress warrant issued by him for the collection of a tax on spirits assessed against one George P. Freysinger; and the question raised is whether the plaintiff shall be allowed to give proof showing, or tending to show, that no tax was in fact due from George P. Freysinger to the government at the time the assessment was made. The admitted facts in the case are that in the year 1869 Jacob Freysinger was the owner in fee of the property in question, and leased the same to George P. Freysinger, to be used as a distillery. At the same time he consented in writing that the premises should be used as a distillery, and that the taxes and penalties should be a first lien on the premises, in accordance with section 3262, tit. 34, Rev. St.; and George P. Freysinger

continued from the time of such lease up to the latter part of February, 1873, to occupy the premises, and carry on the business of a distiller thereon with the consent of Jacob Freysinger as aforesaid. In July, 1873, Jacob Freysinger having resumed possession, conveyed the premises by deed, in fee, to the plaintiff, and the plaintiff took possession and carried on business as a distiller thereon till about January 24, 1876. On the 31st of December, 1875, the commissioner of internal revenue made an assessment of $226,200 against George P. Freysinger, for taxes on spirits produced at the distillery mentioned during the years 1869, 1870, 1871, 1872, and 1873, and not deposited in a bonded warehouse as required by law. This assessment was transmitted for collection to the defendant, who was then collector of internal revenue for the Fourth district of this state; and the defendant having duly demanded of George P. Freysinger the payment of the tax, and the same not having been paid, the defendant issued his distress warrant, and on the 24th of January, 1876, levied upon and took possession of the distillery premises and appurtenances, and afterwards sold and conveyed the same, by virtue of the said assessment, warrant, and levy. It is admitted that the assessment, warrant, levy and sale were in all respects regular in form.

In order to sustain the issue on its part, and show that the property was wrongfully sold by the defendant, the plaintiff offers proof tending to show that no taxes were in fact due from George P. Freysinger to the government, for spirits produced at the distillery mentioned, as stated in the assessment; to which proof the defendant objects, and insists that he is fully protected by the assessment, and that it cannot be collaterally attacked, or inquired into in this action. There can be no doubt that if the assessment, levy, and sale had been made during the tenancy of George P. Freysinger, the assessment would have been an ample protection to the officer who was charged with its collection; but the plaintiff claims that, it having become seized of the property by deed after the tenancy terminated, this proof is admissible. I do not think the title relieved the property of the lien created upon it by the plaintiff's grantor. The plaintiff is, I think, so far in privity with the title as to be bound by the acts of its grantor or his lessee. The facts showing that the premises had been, for several years before the plaintiff's acquirement of title, used as a distillery, the plaintiff must be charged with notice that they were, under the law (sections 3251, 3262), liable for all taxes and penalties incurred by Jacob Freysinger or George P. Freysinger, his tenant, in respect of spirits produced thereon. If the property in the hands of the plaintiff, as grantee of Jacob Freysinger, is subject to this tax, then the assessment must be as complete a shield to the collector as if the assessment had been made while Freysinger remained the owner. And if I am right in assuming that the property, after conveyance to the plaintiff, remained liable to an assessment for taxes and penalties incurred under its former owner, then there is an end to the question, for the plaintiff has no better right to contradict the assessment than the Freysingers have. The plaintiff took the property subject to the burdens which the plaintiff's grantor had put upon it,—that is, if the plaintiff was bound, as I think it was, to take notice of the uses to which the premises had been applied before it acquired title. It is manifest that the only remedy George P. Freysinger and Jacob Freysinger, his landlord, could have had against his assessment, was by appeal; but it is urged that the plaintiff could not appeal, because the assessment was not against the plaintiff, but against George P. Freysinger, and therefore it is argued that this suit is the plaintiff's only remedy. I think, however, that the plaintiff, or Jacob Freysinger, could have appealed, because the assessment was a lien on the property. Jacob Freysinger, as owner of the fee, stood, so far as this property is concerned, in the position of surety for his tenant. He had pledged this property to the government for the payment of all taxes and penalties incurred during the time his tenant carried on the business of distilling there, and, if an attempt was made to charge the property with such taxes and penalties, he would certainly have the right to be heard on appeal. If not, then such right could only be denied because he was concluded by the acts of his tenant, and had no right to a hearing before any tribunal, but must submit to whatever dilemma the property had been brought to by his tenant's act,—which would not help the plaintiff in this case.

I am of opinion that the plaintiff is so far in privity with the acts of the Freysingers, in regard to the lien of this assessment, that it is bound to pursue all the remedies which the Freysingers would have been bound to pursue. The plaintiff stands in the tracks of the Freysingers. If Jacob Freysinger could appeal, the plaintiff, as his successor, could do so. Numerous authorities are cited in support of the defendant's position that the assessment is a complete protection to the defendant in this case. Those most directly in point are Murray v. Hoboken Land Co., 18 How. [59 U. S.] 284, Nichols v. U. S., 7 Wall. [74 U. S.] 122; and Erskine v. Hohenbach, 14 Wall. [81 U. S.] 614. The last was a case from the Eastern district of Wisconsin, where the collector was sued in trespass for having levied upon the property of a manufacturer of tobacco for the collection of an assessment regularly made; and the collector justified the seizure and sale under the assessment and his warrant for the sale of the property. Trial was had, and judgment rendered against the collector, the court allowing the plaintiff to go behind

the assessment, and show, as is here proposed, that nothing was actually due from the plaintiff on the assessment under which the collector acted. The case went to the supreme court; and in the opinion reversing the judgment of the circuit court it is said: "The collector could not revise or refuse to enforce the assessment regularly made by the assessor in the exercise of the latter's jurisdiction. The duties of the collector, in the enforcement of the tax, were purely ministerial. The assessment, duly certified to him, was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constituted his protection. Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of the protection afforded to ministerial officers acting in obedience to process of orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now that if an officer or tribunal possess jurisdiction over the subject-matter upon which the judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to a ministerial officer is regular on its face, showing no departure from the law or defect of jurisdiction over the person or property affected, then and in such case the order or process will give full and entire protection to the ministerial officer in its regular enforcement, in any prosecution which the party aggrieved thereby may institute, against him, though serious errors may have been commited by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued." So, too, in Clinkenbeard v. U. S., 21 Wall. [88 U. S.] 65, the court said: "It is undoubtedly true that the decisions of an assessor, or board of assessors, like those of all other administrative commissions, are of a quasi judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal, and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor."

If the tax assessed against George P. Freysinger is not a lien upon the premises in question under the law, and the written consent of Jacob Freysinger, from whom the plaintiff derived title, then it is in the power of any distiller, by the alienation of his distillery property, to deprive the government of its most efficient guaranty for the payment of the taxes and a due observance of the law.

I am therefore of opinion that the plaintiff took this property subject to any assessment to which George P. Freysinger was liable, in respect of spirits produced on the premises during his tenancy, and that the plaintiff cannot in this action, be allowed to show that the taxes mentioned in the assessment were not in fact due, and thereby charge the defendant with a wrongful sale of the premises under the assessment and warrant; that the plaintiff's remedy against the assessment, if it was aggrieved thereby, was by an appeal, and payment of the money, and suit against the officer, in case the assessment was not remitted on appeal; in short, that the plaintiff's remedy was the same as that of Freysinger, and it was not authorized to lie by and allow its property to be sold under the assessment, and then sue the collector for the value of the property sold, and on the trial of such suit attack the assessment collaterally. The testimony offered is therefore excluded.

Case No. 9,540.

MILBOURNE et al. v. The DANIEL AUGUSTA.

VICKERS et al. v. SAME.

[3 Hughes (1880) 464.] [1]

Circuit Court, D. Maryland.

MARITIME LIENS—STATUTORY—DOMESTIC VESSEL—MATERIAL AND SUPPLIES.

The work, material, and supplies are, and what are not, liens upon a domestic vessel under the law of Maryland and the decision of the United States supreme court in the Lottawanna Case.

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

[These were libels by Charles D. Milbourne and William McGee against the schooner Daniel Augusta, and by William H. Vickers and William J. Carrol against the same, for supplies furnished the respondent.]

BOND, Circuit Judge. These are two libels, filed by citizens of Maryland, to enforce a statutory lien, given by section 44 of article 61 of the Maryland Code of Public Laws, against a domestic vessel in a home port. The section is as follows: "All boats or vessels of any kind whatsoever used or intended to be used on the waters of the Chesapeake Bay and its tributaries, the Chesapeake and Ohio canal, and other waters of this state as carriers of freight or passengers, and all other boats or vessels belonging in this state, shall be subject to a lien and bound for the payment thereof as preferred debt for all debts due to boatbuilders, mechanics, merchants, farmers, or other persons, from the owners, masters or captains, or other agents of such boats or vessels for materials furnished or work done in the building, repairing, or equipping the same."

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

The first libel claims to have a lien under this section of the Code for repairing and furnishing the materials to repair a new topsail, mainsail, foresail, and jib, and for a large amount of rope and tackle furnished for the schooner's use and repair. The requirements of the Code of Maryland relating to the manner of acquiring a lien of this kind have all been complied with. There was a mortgage on the schooner properly recorded, amounting to one thousand dollars without interest.

We can see no reason why the decree of the district court which held the schooner responsible for the repairs and materials furnished by the libellants, should not be affirmed. The materials furnished went into and became a part of the schooner. The work and labor charged for were done in working the new material into the schooner. Since the case of The Lottawanna, 21 Wall. [88 U. S.] 558, there can be no doubt of the power of the court of admiralty to enforce a lien given by a state statute upon a domestic vessel in a home port. The debt set out in the libel is within the words of the Maryland statute. It is due to a "mechanic" and "merchant," and is for "materials furnished" and "work done," in "repairing" and "equipping" the schooner.

The second libel is for groceries furnished to the schooner. There is no dispute about the account. The only question is whether or not there can be a lien under the Maryland statute for supplies furnished to a domestic ship in her home port. In the Code of Maryland this lien is found under the title "Mechanic's Lien." Originally mechanics alone were protected under it, but from time to time its scope has been widened until now its terms, as we see from its recital above, embrace boatbuilders, mechanics, merchants, farmers, or other persons. Still the idea of the law that the lien should be for something which tended to increase or create the rem upon which the lien attached has been preserved. For though the lien is given not only to mechanics and material men, but to other persons, it is only so given for materials furnished or work done in building, repairing or equipping the vessel. The lien will cut out a mortgage, though prior in date, if unrecorded, and justly, for the theory of the law is that the mechanic or material man, has added something by goods furnished or work done on the vessel, which the mortgage did not embrace, for they were not there when it was executed. The articles mentioned in the libel in this case are not materials furnished in repairing or building the ship. They are supplies furnished her crew. They never became a part of the rem upon which the libel is laid. They are no part of the equipments of the ship, for the word "equipment" refers only to something in her which goes to make her a complete ship qua ship, and not to that which is necessary to the comfort and support of the crew. A ship is fully equipped when she floats complete as a ship without a crew, to say nothing of what they are to eat. A soldier is fully equipped as a soldier when he has his clothing and arms. His haversack, which is part of his equipment, may have no rations in it. The water cask of this schooner was a part of her equipment. It was part of her. The water in it was part of her supplies, not her equipment. For these reasons we think the decree of the district court in this case should be reversed.

Decrees will be signed in accordance with this opinion.

Case No. 9,541.

MILBURN v. BURTON.

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

Circuit Court, District of Columbia. April Term, 1826.

JUSTICE OF PEACE—JURISDICTIONAL AMOUNT—INTEREST.

A debt of $50, upon which interest is due, cannot be recovered before a justice of the peace.

This was an appeal from a judgment rendered by a justice of the peace, upon a bond for $100 penalty, with condition to pay $50 on the first of February, 1820. The judgment was for $50, to carry interest from the 1st of February, 1820, till paid, there being then more than five years' interest due.

Mr. Peyton, for appellant.

Mr. Taylor, for appellee.

THE COURT (THRUSTON, Circuit Judge, absent) said that it had been uniformly decided by this court that the interest, as well as the principal, is part of "the matter in dispute;" and that if the principal and interest amount to more than $50, a justice of the peace has no jurisdiction of the case.

MILBURN (CANNELL v.). See Case No. 2,384.

MILBURN (THECKER v.). See Case No. 13,876.

MILBURN (UNITED STATES v.). See Cases Nos. 15,764–15,768.

Case No. 9,542.

MILBURNE v. BYRNE.

[1 Cranch, C. C. 239.] [1]

Circuit Court, District of Columbia. June Term, 1805.

MASTER AND SERVANT—ACTION FOR ENTICING—EVIDENCE — DECLARATIONS OF SERVANT — CONSIDERATION—PRIMA FACIE CASE.

1. An averment that John Leonard, "for a certain price," agreed to serve the plaintiff, is supported by evidence that John Leonard, in consideration of eight guineas paid by the plaintiff to a third person, agreed to serve the plaintiff.

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

2. In an action for enticing a servant, the declarations of the servant cannot be given in evidence.

3. A contract made in this country does not create such a relation of master and servant as will authorize a justice of the peace to compel a specific service, and to inflict stripes for disobedience, under the law of the 26th of December, 1792, c. 132; but may give the master such a right to the service as will enable him to recover damages for enticing away the servant; and employment is prima facie evidence of enticement.

[Cited in Duckett v. Pool, 33 S. C. 238, 11 S. E. 690.]

Case for enticing a servant. The plaintiff's declaration stated that John Leonard, (the servant,) for a certain price agreed to serve the plaintiff for eight months. The plaintiff produced an indenture by which, in consideration of eight guineas paid by the plaintiff to Alexander Smith, Leonard agreed to serve the plaintiff for eight months.

Mr. Taylor, for defendant, objected that the proof varied from the declaration. The declaration means a certain price to be paid, and not a price paid; it means paid to Leonard and not to Smith.

But THE COURT (KILTY, Chief Judge, absent) overruled the objection, and said there was no variance. The court refused to admit the declarations of the servant to be given in evidence.

E. J. Lee, for plaintiff, moved the court to instruct the jury that the indenture constitutes the relation of master and servant, so as to make it actionable to entice away the servant; and also so as to come within the act of assembly of Virginia, which authorizes a justice of the peace to compel a specific service, and to whip the servant for running away. It is a contract to serve, made in a foreign country. He came into the country "under contract to serve another," as expressed in the act of assembly of Virginia (chapter 132, p. 247).

Mr. Swan, contrà. If there was a contract in Ireland, it is not the contract on which this action is brought. The contract with the plaintiff was made in this country.

THE COURT (FITZHUGH, Circuit Judge, absent) was of opinion that the indenture being executed here, the servant was not such a servant as is described in the Virginia Laws (chapter 132), and therefore the whipping by the order of the justice was illegal; but still it was such a contract for service as would maintain this action if Leonard was enticed away by the defendant.

Mr. Lee then prayed the court to instruct the jury, that if Leonard had deserted the service of Milburne, and if the defendant, knowing that fact, employed and harbored Leonard, it is sufficient evidence to the jury that the defendant enticed Leonard away. Esp. N. P. 646; Fawcet v. Beavres, 2 Lev. 63.

Mr. Taylor, contrà, cited Blake v. Lanyon, 6 Term R. 221, and contended that the employment of the servant, by the defendant, was not evidence of enticing, although the defendant knew that the servant had left his master.

THE COURT was of opinion that it was presumptive evidence against the defendant, from which the jury might infer that he enticed the servant away.

Case No. 9,543.

MILBURNE v. KEARNES.

[1 Cranch, C. C. 77.] [1]

Circuit Court, District of Columbia. March Term, 1802.

PLEADING AT LAW—AMENDMENT TO PLEA — CONDITIONS UPON WHICH GRANTED.

Leave to defendant to amend on payment of costs of the term or a continuance at the plaintiff's option.

Trespass. Assault and battery. Leave was given to the defendant to strike out his plea of son assault demesne, and plead molliter manus imposuit, on payment of the costs of the term to this time, or a continuance at the option of the plaintiff.

KILTY, Chief Judge, absent.

MILES (BLAGGE v.). See Case No. 1,479.

Case No. 9,543a.

MILES v. JAMES.

[Hempst. 98.] [2]

Superior Court, Territory of Arkansas. Jan., 1831.

APPEAL—JUSTICE OF PEACE—JURY DENIED—ERROR.

If a jury is required, and denied by the justice, when the sum exceeds ten dollars, it is an error for which his judgment should be set aside.

Error to Chicot circuit court.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

CROSS, Judge. This cause is brought here upon a writ of error to the Chicot circuit court. The record shows that a suit was commenced before a justice of the peace, by the defendant in error, against [Benjamin L.] Miles, the plaintiff, for the sum of $17.95 cts. On the day of trial, Miles produced an account against [Thomas] James, of $15.37½ cts. Whereupon James asked the justice to discharge the jury, which, on the application of Miles, had been summoned without his consent, on the ground that the sum in controversy was not sufficient in amount to entitle the parties, or either of them, to a trial by jury. The justice went on to try the cause himself, and gave judgment against Miles for $9.52½ cts. Subsequently, and within the time prescribed by law, a writ of certiorari was sued out by Miles, and the proceedings

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

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

certified up to the circuit court, and at the November term were there confirmed. This confirmation of the proceedings of the justice, is the only error assigned. Our statutes point out the methods by which a judgment rendered before a justice of the peace may be brought up before the circuit court. One by appeal, the other by certiorari. The former it will be necessary to examine. When the certiorari is used, the statute provides, "that if the court shall set aside the proceedings of the justice for irregularity or informality appearing upon the face of them, the court shall examine into the merits of the case, and give judgment as in other cases." Geyer, Dig. § 18, p. 391. The power of the circuit court to set aside the proceedings of the justice, is made to depend upon the irregularity or informality appearing upon their face, as certified up under the command of the certiorari. If either exist, they are to be taken for naught, and an examination of the merits permitted. On the other hand, if they be regular and formal, their confirmation must follow. Was it regular in the justice to deprive Miles of the right of trial by jury? A quotation from the statute will afford a sufficient answer to the question. It declares that "if the sum demanded exceeds ten dollars, either party shall have a right, upon application therefor, to a trial by jury." Geyer, Dig. § 12, p. 387. Here the sum demanded exceeded ten dollars, application was made for trial by jury, and that mode of trial refused. This refusal of the justice, we think, was sufficiently irregular for setting aside his proceedings. It was, consequently, error in the circuit court to confirm them. Judgment reversed.

Case No. 9,544.

MILES v. RECEIVERS.

[4 Hughes (1883) 172.]

Circuit Court, E. D. Virginia.

EQUITY PRACTICE—SENDING ISSUES TO JURY — RAILROAD COMPANIES — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

[1. On a motion to send to a jury the issues arising under a petition against railroad receivers to recover damages for an alleged wrongful death, it is competent for the court to determine, on the evidence submitted, whether or not the case is one for damages, and if of opinion that it is not, then to dismiss the petition finally.]

[2. The rule applicable to the case of a boy killed by jumping upon an engine slowly moving through a street, is that if he was himself guilty of any negligence or act which caused the accident there can be no recovery unless defendant could have avoided it by the exercise of ordinary care and diligence.]

[3. A boy of eight years jumped upon the front of a locomotive moving slowly through a street, and the fireman, who saw him, immediately called to him to hold on, then notified the engineer, and ran to the boy's rescue. The engineer immediately reversed, and the boy either voluntarily loosened his hold or was jarred off by the shock and sustained injuries causing his death. *Held*, that even if the engineer committed a mistake in reversing, yet, having acted on the ordinary rule in such cases, it did not render the company liable, for its duty was to use only ordinary care and diligence.]

[4. A boy of eight years whose mother permits him to play upon the street is presumably of sufficient intelligence to know the danger of attempting to jump upon the front of a moving locomotive, and is therefore capable of contributory negligence barring a recovery for his death.]

The petitioner is the mother, the administratrix and the sole heir of the intestate [William Miles], who was killed by being run over by a locomotive engine of the defendants [the receivers of the Atlantic, Mississippi & Ohio Railroad Company] in the city of Norfolk on the 3rd day of January, 1878. The petitioner sues under the provisions of the Code of Virginia (chapter 145, §§ 5, 8) authorizing the personal representative of a deceased person to sue when that person if alive could have recovered damages for the wrongful act or neglect of the person or corporation sued. The claim is for $10,000 damages. All the evidence is in the form of depositions, and consists exclusively of that of the witnesses summoned by the petitioner. Its substance is as follows: The city of Norfolk allows freight trains and locomotives of the defendants to be run on the railroad track on Wide-Water street at a rate of speed not exceeding five miles an hour. A freight train of eight or ten cars was, on the 3rd January, 1878, running slowly along this street at the rate of 2½ to 3 miles an hour, pushed from the rear by a locomotive engine. There was a lookout on the forward car, and one on the rear car; and an engineer and a fireman on the locomotive. As the engine passed a group of men a lame boy in his eighth year of age, who had been frequently on the street unattended, got upon the fore-part of the engine. The fireman who was looking out on that side (while the engineer was doing so on the other) saw the boy's act, realized the danger he was in, and at once motioned and called to him to hold on. He also gave immediate notice to the engineer of the boy's situation and jumped down immediately and went to the boy's rescue. The engineer, obeying a rule prescribed when danger threatens, stopped and reversed his engine, causing a slacking of the cars, and a jerk such as would be produced with a train running thus slowly. Before the fireman who had jumped down could reach the boy, the latter had let go his hold to drop to the ground; or else the jar of reversing the engine had jostled loose his hold. In falling, the boy was caught by the machinery of the cylinder, dragged down upon the track, and his legs were run over by the engine, receiving injuries causing a nervous shock from which he died in a few hours. The mother of the boy lived on the same street in an upstairs room. She had gone out more than an hour before the accident, and was at an acquaintance's on another street of the town, sewing, at the time. In going out,

the boy had followed her down stairs to the door of the ground floor, and had promised her there, not to go out upon the street. The evidence does not show, as counsel for petitioner asserts, that the fireman was attempting to put the boy off the engine. On the contrary, it shows that the effort of the fireman was to induce the boy to hold on, until he could rescue him. The evidence does not prove that the reversing of the engine jarred the boy off, as the same counsel assumes. The evidence leaves that matter in doubt. Wood, the fireman, who was the witness nearest the boy, testifies that he could not tell whether the boy dropped off of his own accord, or was jostled off by the jar of the engine in reversing. On the other hand, Brown, who was a little way off, says, the boy "let go his hold;" and expresses the opinion that the cause of the accident was "the jar of the box-car which must have been caused by reversing the engine;" and adds, that but for the boy's being lame "he might have saved himself;" intimating by the last remark, that he thought the accident was not due directly or exclusively to what was happening to the train. This witness testifies that the fireman did all that it was proper for him to do in the emergency; and the fireman and engineer testify that there was nothing which they could have done to save the boy, that they did not try to do. These three men were all witnesses of the petitioner, but employés of the defendants. There is nothing in the evidence to impeach or contradict their testimony. The foregoing is but the gist of the evidence, which may be seen at large in the depositions filed in the cause.

HUGHES, District Judge. If, on a review of the evidence, and on the law arising upon it, it shall appear to the court that this is a case for damages, then it must be sent to a jury for an assessment of the amount to be accorded to the petitioner. It has been argued and submitted on the question whether or not it is a case for damages and for a jury, and this is the first question upon which I am to pass. It is not pretended that any evidence in addition to that now before the court can be had in the case. Indeed the case has been closed as to the taking of evidence. So that, all the evidence being in, and the case submitted upon the question whether or not it is a case for an enquiry as to the amount of damages, it is not only competent for the court to determine whether or not it is a case for damages; but also, if concluding that it is not, to dismiss the petition finally.

The law of negligence applicable to such a case as that at bar may be stated as follows: The plaintiff in an action for negligence cannot succeed if it is found that he has himself been guilty of any negligence or act which caused the accident, unless the defendant could, by the exercise of ordinary care and diligence, have avoided the mischief which happened. Radley v. London & N. W. Ry. Co., L. R. 9 Exch. 71. The present case turns upon the latter enquiry; for whether it be a grown person or a child who wantonly gets upon a running engine, the managers of the engine and train are bound to use ordinary care and diligence to avoid accident to him. And, if that ordinary care and diligence appears, there can be no recovery; whether the sufferer by the accident be a grown person, or a youth capable of knowing whether or not his act was wrongful and dangerous, or a child too young to conceive the nature of his act. The testimony shows that the engineer acted upon the rule which the experience of railroad men has taught to be the wisest, safest and best one; namely, when danger threatens, to stop the engine and reverse it. The testimony shows that the fireman acted upon the belief (evidently proper) that it was best for that boy to hold on, and for himself to go to his rescue and to lift him clear of entanglement with the machinery. The testimony thus proves that these men used more than ordinary care and diligence in these respects and brings the case within the rule which exonerates defendants from liability to damages.

The testimony indicates that the boy was killed, not from want of ordinary care and diligence in the engineer and fireman, but from a jarring of the engine necessarily incident to the position in which he had placed himself, and from a lameness which disabled him from keeping clear of the machinery when he dropped from the engine. Even if it were true, which I by no means concede, that the engineer committed a mistake in stopping and reversing the engine, yet this would not subject the defendants to liability. He was bound only to use "ordinary care and diligence;" he was not bound to avoid mistakes, committed with bona fide intention to carry out reasonable rules and orders prescribed for such emergencies. If he innocently committed such a mistake, then the case falls within that most excellent rule of law laid down by Dr. Wharton (Whart. Neg. § 314): "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." And another writer says (Bigelow, Torts, p. 312): "The defendant can never be liable when anything out of the natural and usual course of events transpires in such a way as to make the defendant's negligence, otherwise harmless, productive of injury."

Some of the more general principles of law governing a case like that at bar are the following: "When a man does everything in his power to avoid doing the mischief, then the liability ceases, and the event is to be regarded as a casualty." Whart. Neg. § 781. "A person is expected to anticipate and guard against all reasonable consequences of his act, but not to anticipate and guard against

that which no reasonable man would expect to occur. Greenland v. Chaplin, 5 Exch. 248; Add. Torts, 29. "The standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man." "The mere fact of an injury having been suffered is not enough to establish a charge of negligence. No one is responsible for an injury caused purely by inevitable accident, while he is engaged in a lawful business, even though the injury was the direct consequence of his own act, and the injured party was at the time lawfully employed, and in all respects free from fault." Shear. & R. Neg. § 5. "There are many cases in which it might be desirable that a greater degree of care should be used than the law requires; but it is only the lack of such care or diligence as the law demands which constitutes culpable negligence. And the law makes no unreasonable demands. * * * * If one uses all the skill and diligence which can be attained by reasonable means, he is not responsible for failure." Id. § 6.

I think these extracts contain the law of the present case. These men did, not only what prudent men usually do in such an emergency as that which happened, but they did what the experience of railroad men, and rules of prudence usually governing the running of railroads required them to do. I have considered the case without any reference to the doctrines of contributory negligence. If a grown and responsible man had got upon that engine while in motion, and suffered the injuries sustained by the boy Miles, there would have been no semblance of blame attaching to the railroad officers. The fireman might have ordered him off peremptorily; and the engineer might have stopped the train as abruptly as he had chosen; all without incurring liability for fault, if they acted in good faith; and there could have been no recovery. But there are cases in which children and persons of unsound mind are considered incapable of responsibility for their acts and are not held to the consequences of them, however reckless or tortious. If the boy in the present case had been too young to know that he was doing wrong and incurring risk of danger in getting on a running engine, then the conduct of the men on the engine could be judged wholly without reference to the boy's act, and if they were guilty of fault, liability for damages would have been incurred. In what has been said, I have treated the case in that point of view. But, is a boy in his eighth year incapable of discerning that such an act as that of young Miles, was wrong and perilous? This boy, it seems, was frequently on the street. His being often upon the street alone, implies that his mother thought him capable of knowing how to keep out of danger; for they lived on the very street on which the freight trains and locomotives of the defendants habitually ran. It is not the case of a child two or three years old being run over by a train on the track of a railroad in the country, at a point distant from a depot, where trains pass at full speed and afford but short notice of their approach,—as in Ex parte Stell [Case No. 13,358], decided by me. Nor is it the case of a child being injured while on a street traversed by a railroad track in consequence of the train moving faster than is allowed by law, or of a car becoming detached in consequence of some omission or careless act of an employe, as in Norfolk & P. R. Co. v. Ormsby, 27 Grat. 455. Here there was no surprise; no unusual speed; no act of carelessness. There was a look-out at each end of the train. The engine was properly manned and managed. The engine bell was ringing the alarm. The child was not a helpless, thoughtless, listless infant. He was not run over while unconsciously at his play. It was the case of a boy nearly eight years of age, frequently on the street, who himself got on an engine in wantonness, and who dropped off, probably of his own accord in fright; or possibly from inability to stay on a place not arranged to secure a safe footing for any one. I think it is a fair, if not a necessary inference from the acts of this boy and his mother, that he was intelligent enough to know the nature and danger of what he was doing. In all the cases of injuries to children which I have seen in the Reports, they were the passive subjects of injury. Here, however, is the unusual, if not the unprecedented case of the child being the actor on the occasion, and the originating author of the misfortune which befell him. I think this child was capable of intelligent choice between what was wrong and dangerous on one hand; and what was right and safe on the other; and that he intelligently chose the wrong and dangerous course. If this be so, the law is plain. The supreme court of the United States, in Railroad Co. v. Gladman, 15 Wall. [82 U. S.] 408, say: "The rule of law in regard to the negligence of an adult and the rule in regard to an infant, is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required; and the degree depends upon his age and knowledge. Of a child three years of age, less caution would be required than of one of seven; and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child; and this is to be determined in each case by the circumstances of that case." The same proposition is repeated by the same court in Railroad Co. v. Stout, 17 Wall. [84 U. S.] 660. In Lynch v. Smith, 104 Mass. 52, the court say, passim: "If the child has not acted as reasonable care adapted to the circumstances of the case would

dictate, and the parent has also negligently suffered him to be there, both these facts concurring contribute to the injury, for which the defendant ought not to be required to make compensation." The child there was 4 years and 7 months old. Plaintiff recovered. In Dowd v. Chicopee, 116 Mass. 93, it was held by the court that the plaintiff (an infant) was bound to prove that he exercised that degree of care and attention which may fairly and reasonably be expected from boys of his age and capacity. Wharton says (sections 310, 322), that from a child diligence and care are only to be exacted in proportion to his age or capacity; and Bigelow says (page 320), that if a child be guilty of contributory negligence (supposing him capable of negligence) there can be no recovery; and that a child must exercise such care as he reasonably can, or as children of the same capacity ordinarily exercise. Irrespectively, however, of the law of contributory negligence as applicable to children competent to know when they are incurring danger, there can be no recovery here.

On the whole evidence and the law arising upon it, as laid down recently in the cases of Richmond & D. R. Co. v. Anderson, 31 Grat. 812, and Railroad Co. v. Jones [95 U. S.] 443, and in my own decision in the case of Ex parte Stell [supra], filed in the papers of that cause, I hold that the defendants in this case are not liable in damages to any amount; that an issue of chancery for a jury must be denied; and that the petition must be dismissed, but without costs against the petitioner,—and I will so order.

A copy.
Teste.
[Seal.] M. F. Pleasants, Clerk.

Case No. 9,544a.

MILES v. ROSE.

[Hempst. 37.] [1]

Superior Court, Territory of Arkansas. April, 1826.

PLEADING AT LAW—NON-ASSUMPSIT—PAYMENT—REPLICATION—ISSUE MADE—APPEAL—ERROR.

1. A judgment in assumpsit will be reversed if the cause is tried without replication to good pleas in bar, such as non-assumpsit and payment.

2. Until replication, the jury could not be sworn to try the issue, for in fact there is no issue between the parties to be tried.

Appeal from Chicot circuit court.
Before JOHNSON and SCOTT, JJ.

OPINION OF THE COURT. This was an action of trespass on the case, on promises, brought by [Enoch] Rose against [Benjamin L.] Miles, to which the latter pleaded non-assumpsit and payment. Without making an issue, or replying, or noticing these pleas, Rose proceeded, a jury was sworn, the cause tried, and a judgment rendered in his favor, from which Miles has appealed to this court. The pleas of Miles were a good bar to the action until avoided, traversed, or denied by replications; and without which a jury could not be sworn to try the issue, for in fact there was no issue made up between the parties. This error is too manifest to require reasoning from the court, and was doubtless the result of inattention on the part of Rose. Reversed.

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

MILES (SNOW v.). See Case No. 13,146.

MILES (WILLINK v.). See Case No. 17,768.

Case No. 9,545.

The MILETUS.

[5 Blatchf. 335.] [1]

Circuit Court, S. D. New York. July 14, 1866.[2]

CARRIERS—PERIL OF SEA—VERMIN—BILL OF LADING—STEVEDORES—COSTS.

1. Damages occasioned by vermin, on board of a ship, to a cargo, in the course of a voyage, are not the result of a peril of the sea, or of any of the dangers or accidents of navigation, within an exception to that effect in a bill of lading, but are damages for which the ship and its owner are liable, as insurers of the safe conveyance of the cargo.

[Cited in The Isabella, Case No. 7,099; The Carlotta, Id. 2,413.]

2. Where, under a special clause in a charter party, stevedores selected as agents of the shippers of a cargo, discharge it, the vessel is not liable for damages done to the cargo by such stevedores in discharging it.

[Cited in The T. A. Goddard, 12 Fed. 184; The Boskenna Bay, 22 Fed. 666; Guerard, v. The Lovspring, 42 Fed. 860.]

3. Where both parties appealed, in admiralty, and the decree below was affirmed, no costs of this court were awarded to either party.

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

This was a libel in rem, filed in the district court, against the ship Miletus, by Fletcher Westray and others, owners of a cargo of tea, shipped by that vessel from Amoy, China, to New York, to recover damages to such cargo. Both parties appealed to this court from the decree of the district court. [Case No. 17,461.]

Joseph H. Choate, for libellants.
George T. Curtis, for claimant.

NELSON, Circuit Justice. I concur with the court below, that the damages caused by the destruction of the labels on the coverings of the chest of tea were occasioned by cockroaches. These vermin eat off and deface the paper labels pasted on the outside of the mats which enclose the boxes, which injury embarrasses the assortment and delivery of

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]
[2] [Affirming Case No. 17,461.]

the article to the consignees, and depreciates the market value of the same.

I also concur in the opinion, that the rule must be regarded as settled, in this court, that damages occasioned by vermin, on board of a ship, to a cargo, in the course of a voyage, are not the result of a peril of the sea, or of any of the dangers or accidents of navigation, within an exception to that effect in a bill of lading, but are damages for which the ship and its owner are liable, as insurers of the safe conveyance of the cargo. Hazard's Adm'r v. New England Marine Ins. Co., 8 Pet. [33 U. S.] 557.

I also agree, that the stevedores who discharged the ship at New York, under the special clause in the charter party, were the agents of the shippers, and that the vessel was not liable for the damages done to the packages by those parties. They were selected by the agent of the shippers, in pursuance of the authority contained in the charter party. As both parties have appealed, the decree below is affirmed, without costs to either party in this court.

MILETUS, The (WESTRAY v.). See Case No. 17,461.

MILFORD (VARNUM v.). See Cases Nos. 16,890 and 16,891.

Case No. 9,546.

MILLAR et al. v. MILLAR.

[2 Curt. 256.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

CUSTOMS DUTIES—DUTIABLE CHARGES—FREIGHT—ACTION TO RECOVER DUTY PAID.

Where merchandise was shipped from Canton to the United States, via Manilla, where it was to be, and was transhipped, and a separate freight paid to Manilla, the charge for freight could not be added to the market value at Canton, as one of the dutiable charges; but all charges incurred at Manilla should be added as dutiable charges.

[Cited in Forman v. Peaslee, Case No. 4,941.]

[This was a suit by Daniel L. Millar and others against Ephraim Millar to recover a certain sum illegally paid for duties.]

A. W. Griswold, for plaintiffs.

Mr. Hallett, Dist. Atty., contra.

CURTIS, Circuit Justice. This is an action to recover of the collector of the port of Salem, moneys alleged to have been illegally exacted in payment of duties. In July, 1848, Messrs. Wetmore & Co., at Canton, shipped to the plaintiffs, for their account, four hundred cases of camphor, the product of China. On account of difficulty in procuring a tea vessel to take camphor, because of its effect on a cargo of tea, it was shipped to Manilla, consigned to Messrs. Peale, Hubbell & Co., with directions to forward it to the United States. This was done. Expenses were paid at Manilla for freight from China to Manilla, porterage and coolie hire, duties paid at the custom-house, and commissions of Peale, Hubbell & Co., for their services in receiving and forwarding the property. A separate freight was paid for carrying the camphor from Manilla to the United States. The collector added the freight to Manilla and all the charges there, to the invoice cost of the merchandise, as dutiable charges. The plaintiffs protested against paying a duty on these charges and this freight.

This case comes under the sixteenth section of the tariff act of 1842 (5 Stat. 563). So far as respects the freight from China to Manilla, it is identical with the case of Grinnell v. Lawrence [Case No. 5,831]. Though the Case of Gant, just decided, arose under the act of 1851 (9 Stat. 629), and consequently involved some different considerations, yet many of the views expressed in that case, are applicable to this. My opinion is, that the freight to Manilla was not a dutiable charge. In respect to the other expenses at Manilla, there is much more difficulty. The sixteenth section of the act of 1842, required the collector to add to the value of these goods, estimated according to their market value in Canton, "all costs and charges." It has been argued that this means all costs and charges to get the property on shipboard at the port of exportation, which, in this case, was Canton. I have no doubt it means this, but does it include only these costs and charges? Ordinarily, no others would exist, save marine freight, which, as we have seen, has been excluded according to an early practical interpretation deemed to have been adopted by congress. But when other charges, besides marine freight, and costs and charges incurred to get the property on shipboard, at the port of exportation, have been incurred, as in this case, why are they not to be added? Certainly the language of the act, "all costs and charges," is broad enough to include them, and what is to take those charges out of those explicit and comprehensive words? It is not sufficient that these charges were incurred in order that the property might reach its destination, and so may be fairly considered as expenses of transit. So are all expenses of getting the property to the ship at the port of exportation. These expenses bear the same relation to a part of the voyage from the country of production, to the United States, that the cost of getting the merchandise on shipboard at the point of exportation ordinarily bears to the whole voyage. Unless, therefore, something can be found, in some act of congress, showing that "all costs and charges," means only those incurred at the port whence the merchandise first departs for the United States, and nothing of the kind has been produced, I can see no sound reason why these charges were not dutiable. The same result would follow, if Manilla were

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

considered the port whence this merchandise was imported into the United States; for then, these expenses were incurred at the port of shipment; and, in accordance with the usual rule, would be properly included. But, for the reasons given in Gant's Case, I consider, that as the camphor was purchased by the plaintiffs in Canton for importation into the United States, and went to Manilla, into the hands of the plaintiffs' agents there, merely to be forwarded to the United States, that Canton, and not Manilla, was the place whence it was imported into the United States.

A verdict must be directed, in conformity with the agreement of the parties, to recover so much as was paid by reason of the addition of the freight as a dutiable charge.

MILLARD (BABCOCK v.). See Case No. 699.

Case No. 9,547.

MILLARD v. CRAIG.

[8 Leg. Int. 22.]

District Court, S. D. New York. Jan. 30, 1851.

PRACTICE IN ADMIRALTY—CONDITIONS TO DEFENDING—COSTS—STIPULATION.

[This was a libel in personam by Walter Millard and others against James E. Craig and others, owners of the scow Globe.]

THE COURT decided that, in giving a bond to relieve property taken by a clause of foreign attachment, that the defendant must pay the taxed costs on said motion, as a condition to be permitted to defend the cause on its merits. Order accordingly.

On another motion in the same cause, THE COURT held that the supreme court, by rule 4, has changed the character and scope of stipulations in cases of personal arrest. [Case No. 9,548.] In suits in personam, in whatever way the defendant is brought into court, he is required to give a stipulation to satisfy the decree before he can be admitted to defend the case, instead of giving stipulations for costs only.

Case No. 9,548.

MILLARD et al. v. CRAIG et al.

[18 Betts, D. C. MS. 4.]

District Court, S. D New York. January 27, 1851.

PRACTICE IN ADMIRALTY—COSTS OF ATTACHMENT.

[Respondent in an admiralty suit in personam, after an attachment has been levied upon a return "Not found," before being permitted to defend the cause on its merits, should pay the costs of the attachment.]

[This was a libel by Millard and Mills against James E. Craig and others, owners of the scow Globe. The scow was taken on foreign attachment, and the question is now as to costs thereon.]

BETTS, District Judge. The warrant of arrest in this cause was accompanied by a clause of foreign attachment. The marshal returned the defendants "Not found," and that he had attached the scow Globe, as their property. Sometime subsequent to this return, and after the default of the defendants had been taken, they were allowed by the court, on their motion, to come in and defend the case, on giving the stipulation or bond required by rule 6 of the supreme court. That bond has been given, and the question now is, which party is to pay the costs accrued on the foreign attachment? The property arrested should now be given up, the end for which it was attached having been secured. Sup. Ct. Rule 101. But it rests in the discretion of the court to adjudge, in matters of costs, according to the equity of the parties. Prima facie, the party relieved from a default, or to whom a favor in forwarding his defence is accorded, will be chargeable with the costs created by the proceeding from which he is relieved. Sup. Ct. Rules 10, 40. Here there is no open motion by the defendants to discharge the scow. Their interpretation of the rule is that it becomes released by virtue of the appearance of the parties personally affected pursuant to the rules. This may be so, but it does not therefore dispose of the question whether they are exonerated from costs thereby, or are chargeable with them. In my opinion, it is an equity on the part of the libellant, incident to the appearance of a defendant so pronounced against, that the defendant should satisfy the costs incurred in bringing him into court. If any facts exist on his part tending to counterbalance that general equity, they should be made to appear by him. In observance of all particulars other than what are presented by these papers, I think the defendants come within the rule, and that they must pay the taxable costs on the foreign attachment, as a condition to being permitted to defend the cause on its merits. Order accordingly.

MILLARD (UNITED STATES v.). See Case No. 15,769.

Case No. 9,549.

MILLEDOLLAR v. BELL.

[2 Wall. Jr. 334.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1852.

PRACTICE—JUDICIARY ACT—CITIZENSHIP—ASSIGNMENT OF CHOSE IN ACTION.

In suing on a chose in action, if the plaintiff be not a citizen of the same state as the defendant, his right to sue is not taken away by the fact that the chose may have passed to him through the hands of persons who were citizens of that state, and so unable to prosecute a suit in this court, provided the party to whom the chose was originally given was not such a citi-

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

zen, and could himself have therefore prosecuted such a suit.

[Cited in Hampton v. Truckee Canal Co., 19 Fed. 4.]

The judiciary act (Act 1789, c. 20, § 11 [1 Stat. 78]), giving jurisdiction to the circuit court of suits between citizens of different states, says that this court shall not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made." In this case, which was a bill in equity to compel the sale of mortgaged premises, the bill set forth that the complainant, the mortgagee, one Milledollar, was a citizen of New York, and that the mortgagor, the defendant, Bell, was a citizen of New Jersey. But while setting forth seven intermediate assignments to persons who were named, it was silent as to the citizenship or residence of any one of them; except of the last, the present complainant, who was entitled, as already stated, a citizen of New York. On a demurrer to the bill, the question was, whether it was necessary to aver that each one of the assignees was or had been a citizen of a state different from that of Bell, the mortgagor and defendant.

In support of the demurrer: In Mollan v. Torrance, 9 Wheat. [22 U. S.] 537, a suit by an indorsee of a promissory note against an indorser, the declaration stated the plaintiff Mollan to be a citizen of one state, and the defendant Torrance to be a citizen of another; but was silent respecting the citizenship of one Lourie, a third person, the immediate indorser of the plaintiff, and a party through whom the plaintiff had to trace his title to the money for which the suit was brought. The court, distinguishing the case from that of Young v. Bryan, 6 Wheat. [19 U. S.] 146, where the judgment was sustained, say: "The suit is brought against a remote indorser, and the plaintiffs in their declaration trace their title through an intermediate indorser, without showing that this intermediate indorser could have sustained his action,"—and quoting Turner v. Bank of North America, 4 Dall. [4 U. S.] 8, decide that the count showed no jurisdiction. In Brown v. Noyes [Case No. 2,023], in the First circuit, the court speaking of the clause of the judiciary act now under consideration, and making no distinction in the position of the indorsees, says its policy "was to prevent parties coming into this court by assignments, when those previously interested were not entitled to come here." And in Heckscher v. Binney [Id. 6,316], "when the suit could originally have been brought here, it might be now, if the indorsee also lived out of the state, and could sue here."

Against the demurrer: Wilson v. Fisher [Case No. 17,803], in this circuit, has decided this point, which nothing but the statement there made by Judge Baldwin, that the point had nowhere else, nor at any other time, been directly adjudicated, can allow to be treated de novo. The meaning and extent of the law, is there well presented at the bar. It is immaterial, said Mr. Rawle, senior, through whose hands the debt may have passed by assignment. If the right to the debt is transferred to an alien he may sue, not as representing his immediate assignor, but the original party. Turner v. Bank of North America, 4 Dall. [4 U. S.] 8, could not be sustained, because it did not appear that the original payee, under whom of course the plaintiff claimed, was a citizen of a state different from that in which the defendant resided. "The act of congress," he said, "refers to the capacity of the party to whom the debt was originally due, to sue in the federal courts, his right passes to the last assignee, who, if he is an alien or a citizen of another state, has the same right to sue here, as if he was the plaintiff in the judgment." And he added, that "full effect is given to the proviso in the act of congress, if the assignee is in the same situation as the party originally entitled to the debt; it would be straining the law beyond its obvious meaning, to put him in a worse." Here the complainant being a citizen of one state, and the defendant a citizen of another, the case comes within the enabling part of the law; and as a suit might have been prosecuted in this court, if no assignment had been made, the complainant does not come even within the letter of the proviso.

GRIER, Circuit Justice. The bill avers that Milledollar, the mortgagee, is a citizen of New York. He could, therefore, have brought his suit in this court for the contents of the bond and mortgage, "if no assignment had been made." And to sustain the jurisdiction of the court in his case, it would have been necessary only to aver that the mortgagors were citizens of New Jersey at the time suit was brought. The complainant's case is therefore within the strict letter of the law—nor can we discover anything in the spirit, equity or policy of the act, or in adjudged cases, which would compel us to give it a construction such as the defendant asks. The statute does not take from the assignee of a chose in action his right to sue in the courts of the United States, unless his immediate assignor could have sustained such action; but only in case the court could have had no jurisdiction as between the original parties to the instrument, if no assignment had been made. The situation or rights of temporary intermediate assignees, holders, or indorsers enter not into the conditions of the case.

The only case which has been brought to our knowledge, in which this point is directly decided, is that of Wilson v. Fisher [supra], which fully supports our view of this point. Mollan v. Torrance 9 Wheat. [22 U. S.] 537, in the supreme court of the United States, which has been quoted as upholding a con-

trary doctrine, will be found on examination to have no application. It affirms the doctrine of Young v. Bryan, 6 Wheat. [19 U. S.] 146, that an indorsee who resides in a different state, may sue his immediate indorser residing in the state where suit is brought, although the indorsee may be a citizen of the same state with the maker. The reason is, because the indorsee sues upon his own contract with the indorser, and not on the original contract of the drawer. But in the case last quoted, of Mollan v. Torrance, though Torrance was sued as indorser, Mollan was not the immediate indorsee, and it did not appear that Lowrie, who was the immediate indorsee and contractor with Torrance, could have sued in the circuit court. The question whether, if the immediate indorsee could have sued, and the then present holder and plaintiff could also have sued by reason of citizenship, the rights of intermediate holders could affect the case, was not before the court. The language used in the opinion of the court, is perfectly correct, when applied to the case before it. No court can pronounce dogmas of universal application; and the application of general expressions, in an opinion, to cases not before the court, is a sure road to an erroneous result. The same remarks will apply to the cases decided in the First circuit (Brown v. Noyes [Case No. 2,023]; Heckscher v. Binney [Id. 6,316]), so far as the language of them can be made to apply to the present case at all. They are correct decisions of the case before the court. But the point now under consideration was not raised nor considered.

We are of opinion, therefore, that, as this bill shows that the complainant is a citizen of New York and the defendants citizens of New Jersey, at the time the bill was filed, and that the original contractor or mortgagee is a citizen of the same state, and could therefore have sued these defendants at the time this bill was filed, in the circuit court of New Jersey, "if no assignment had been made," this court has jurisdiction of the case, and the citizenship of the intermediate holders, owners or assignees, is immaterial, and need not be averred. Demurrer overruled with costs.

Case No. 9,550.

Ex parte MILLER.

[1 N. Y. Leg. Obs. 38.]

District Court, S. D. New York. 1842.

BANKRUPTCY—PARTNERSHIP—JOINT CONTRACT—MUTUAL INTEREST—SHARING PROFITS.

1. Where a guarantee was endorsed on a bond in the following words, "We do jointly and severally guarantee the payment of the within bond, with interest and all proper charges thereupon accruing as fully as if the said bond had been executed by us," and the creditor had elected to prove his debt against the bankrupt as a separate debt, *held*, that the court have not the power to place it in the class of partnership debts, whatever may have been its origin.

2. A mere joint proprietorship of property on joint contract does not render the persons concerned copartners.

3. The partnership relationship, though not limited to mercantile transactions, necessarily depends upon a mutual interest between parties in the profit and loss of the concern, either by actually sharing profits or the expectation of so doing.

[On the part of the creditors of Edmund H. Miller, a bankrupt.]

This was a case arising from the exceptions to the assignee's report, and the questions submitted for the opinion of the court were: 1st. Whether a contract joint and several in its terms may be enforced as a several obligation against each party. 2d. Whether a joint and several obligation entered into by partners under seal must be regarded a partnership undertaking. 3d. Whether the language of the undertaking does not distinguish between the absolute obligations of the parties, and that which they assume as guarantors, being in the latter case joint and several, and in the former, several only.

Mr. Joachimssen, for bankrupt.

Mr. Marbury, for creditors.

BETTS, District Judge. I think there is no support to this last criticism in the language of the contract. The terms are: "We do jointly and severally guarantee the payment of the within bond with interest, and all proper charges thereupon accruing, as fully as if the said bond had been executed by us." This undertaking, made the 20th of September, was written on a bond executed the 27th of June preceding. If it be admitted that "guarantee" is the operative word of the contract, it would rather follow that the terms succeeding it to be construed in qualification or explanation of the scope and meaning of that undertaking than as setting up an independent and different one. That is, the guarantee, being joint and several, is to bind the parties the same as if the bond itself had been so executed by them; and it would be a strained reading, in this view of the object of the parties, to understand the pronoun ("us") as turning a joint and several stipulation into one solely joint. The more natural sense of the expression would be to give to what is called a "guarantee" the same character that would have attached to the obligation had the parties in the same way signed the bond itself. It is plain the obligors intended to join both their joint and several responsibility, and the stipulation to that, and give the undertaking the same effect, though written on the back of the bond, as if subscribed on its face.

The second point raised must be decided in the negative. A mere joint proprietorship of property or joint contract does not render the persons concerned co-partners. 3 Kent, Comm. 36, 39, 40. The partnership relationship, though not limited to mercantile trans-

actions, necessarily depends upon a mutual interest between the two parties in the profit and loss of the concern; either by an actual sharing of profits, or an expectation of them. 2 Kent, Comm. 24, 28; Story, Partn. 170; Colly. Partn. 8. The stipulation therefore by these obligators, if exclusively joint in its terms, would not constitute them partners, nor the contract a partnership engagement. Nor does the fact that the obligors were partners constitute the agreement a partnership contract. The question need not now be mooted whether a joint obligation entered into by partners in respect to matters out of the scope of the partnership can be enforced against the partnership effects to the exclusion of partnership creditors. The immediate point presented for decision is whether this contract, being several as well as joint, must be classed by force of the bankrupt act with partnership demands. This inquiry is solved by well settled rules of law expounding the influence of partnership associations upon the individual capacity of the separate members; for whatever diversity of decision may exist with respect to the remedy of creditors on contracts of partners joint in terms, which ought in equity to be several also (Sumner v. Powell, 2 Mer. 30), in regard to real property acquired with partnership funds, but which under the ordinary rules of law belongs to the partners separately (3 Kent, Comm. 37, 39; Colly. Partn. 342, 347), no question is ever raised but that one partner may bind himself to third persons in his individual capacity, and his undertaking become in every respect a separate contract (Owen, 285, 297). The above case of Sumner v. Powell, 2 Mer. 30, is an authority for looking beyond a bond which is joint in its terms to the consideration upon which it rests and the equities of parties to it, and if found to arise out of considerations several in their character to impose a several liability on the obligors. Owen, 292, 293.

The court will not now decide whether the creditor has an indefeasible right to regard this debt, it being several and joint in its form, as the one rule or the other at his option; nor, he having elected to prove his debt against the bankrupt as a separate debt, whether it is now in the power of the court to place it in the class of partnership debts, whatever may have been its origin. 13 Ves. 70; 1 Rose, 159; 2 Cox, 218; 2 Rose, 34; 5 Madd. 419. This point will be reserved until all the facts are before the court. The creditors are at liberty therefore to go to proofs, to show the liability of the bankrupt to the creditor to have been of a partnership character, and proceedings on the dividend will stay until the report of the commissioner and the judgment of the court thereon.

[See Case No. 9,556.]

MILLER, In re. See Case No. 740.

Case No. 9,551.

In re MILLER.

[6 Biss. 30.] [1]

Circuit Court, N. D. Illinois. March, 1874.

COURTS—CONFLICT OF JURISDICTION — BANKRUPTCY COURT—FRAUDULENT PREFERENCE—ENJOINING SUIT IN STATE COURT.

1. When the bankrupt law [of 1867 (14 Stat. 517)], cannot be properly administered by the bankruptcy court, owing to the interference of a state court and its determination to adjudicate upon the rights of parties and property in the bankruptcy court, then the latter ought not to hesitate to assert its authority.

2. In questions under the bankrupt act, the federal and state courts are not independent, but the former are superior.

3. The finding of a jury that the debtor had committed an act of bankruptcy by making a preference to a creditor in transferring property to him, was in this case substantially an instruction to the marshal to take possession of it, or a ratification of his act, and the marshal was authorized so to do.

4. A decision by the bankruptcy court that a transfer was in fraud of the act is binding upon the state courts, and the creditor must come into the bankruptcy court to assert his rights as against such decision.

5. If, however, he sue the marshal and the assignee in trespass in a state court, the bankruptcy court may enjoin the parties to the suit.

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

E. A. Sherburne, for Baldwin, creditor.

George Herbert and Holmes, Rich & Noble, for the marshal.

DRUMMOND, Circuit Judge. A question of some practical importance was argued before me yesterday, which involves to some extent a conflict of jurisdiction between the state and federal courts. It is rather a peculiar case, and I am not aware that the same question has ever been presented before in any reported case.

The facts are that a petition in bankruptcy had been filed against one S. S. Miller. One of the grounds for adjudication was that he had been guilty of an act of bankruptcy in disposing of some of his goods two days before the filing of the petition, to one Baldwin, a creditor, with an intent to give a preference to him, and in fraud of the bankrupt act. The jury found the allegation to be true, and a decree in bankruptcy was entered against Miller. The effect of this decree was to establish that the sale to Baldwin was fraudulent as against the bankrupt law. A warrant had issued from the bankrupt court, and the property, which it had been claimed was sold by Miller to Baldwin, was taken by the marshal and turned over to the assignee, who sold it and now holds the proceeds.

Baldwin then brought an action of trespass in the superior court of Cook county against the marshal and the assignee, to recover damages for taking the property. The petition

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

presented in the district court asked for the interposition of the court in that suit in the state court, and set forth the above facts, and that Baldwin was a witness in the bankruptcy suit. There were also some affidavits filed, between which and the petition some discrepancies existed. The court on that petition made an interlocutory order restraining Baldwin and his attorneys from prosecuting the suit in the state court until further order.

On a motion to set aside this order, the whole question has been fully argued before me. The case is peculiar in this respect: that Baldwin was a witness in the bankruptcy proceedings, and in a certain sense appeared therein, and it was claimed that it was partly on his testimony that the adjudication was found against Miller. Although, therefore, he was not nominally a party to the bankruptcy proceedings, still, it is insisted he was really a party and had notice of those proceedings and of the adjudication. This being so, the question is whether it was proper for Baldwin under the circumstances and without leave of the bankruptcy court to commence, in the state court, a suit founded on the very sale of property in consequence of which an adjudication in bankruptcy was rendered. It was stated, in an affidavit filed, that the assignee was a party to the suit in the state court at the time of the granting of the injunctional order, but that the suit had since been dismissed as to him. This fact is relied upon by the counsel for Baldwin, as giving him a stronger standing in the state court. The suit being now only against the marshal, and not interfering with the property, and being for damages only, it is contended that Baldwin has a right to maintain his suit, although the assignee has the proceeds of the property.

An embarrassing question arises, because, it is said, all these facts have been presented to the state court, which has refused to consider them, and is determined to go on and render a judgment in the case. The question is, then, whether this was a proper proceeding on the part of Baldwin? I am inclined to think it was not, and, although it might be unpleasant to interfere with the state court, still, when the law could not be properly administered by the bankrupt court, owing to the interference of the state court and its determination to adjudicate on the rights of parties and property, as in this case, then the bankrupt court ought not to hesitate to assert its authority.

There seems to be an erroneous view prevailing among some of the bar and the public, that the state and federal courts are independent of each other in all questions of this kind—that when the state court is called on to yield, it is not consistent with its dignity to submit and allow itself to be overruled. This is not so. The state and federal courts are one for some purposes and distinct for others. The general government is supreme within its legitimate sphere, and this necessitates the state court yielding in such instances. Now the constitution gave power to congress to pass a bankrupt law, and gives the bankrupt court the power over the rights and property of the citizens of the states, and the present law declares that certain proceedings in the state courts shall be of no effect.

For instance, the bankrupt act dissolves all attachment suits commenced within a certain time prior to bankruptcy proceedings, and vests the property attached in the assignee. This is done by virtue of the general power which is given to congress to pass bankrupt laws. This law also puts an end to all insolvent proceedings under the laws of the states, and hence they are ipso facto rendered inoperative when bankruptcy proceedings are taken.

In the present case, then, under this state of things, what is the effect of bankruptcy proceedings? It is this: that this contract between Baldwin and Miller was declared a fraud on the bankrupt law, and inoperative as to creditors. Consequently, a decree in effect that this property belonged to the creditors, and that the assignee had a right to it under the fourteenth section of the bankrupt act,—which declares that "all property conveyed by a bankrupt in fraud of his creditors shall pass to the assignee,"—was substantially by relation an instruction to the marshal to take possession of it. It can hardly be said to be like the case where a party prosecuting in the state court is an entire stranger to the bankruptcy proceedings.

The decree must be presumed to have been correct. It might be said that while the sale by Miller was a fraud on the creditors, still Baldwin was no party to it and that "if he did not have reasonable cause to believe that a fraud was intended, and that the debtor was insolvent," the sale was good as to him. Who, however, is to decide this? It is admitted on all sides that this is a question which the federal court has the right to decide. This being a federal question, could an ultimate decision be rendered by the state courts? Was the assignee bound to follow Baldwin through every state court up to its highest tribunal, and so on to the supreme court of the United States, or must he come into the federal court and assert his rights. Either the case must go to the supreme court of the United States under the 25th section of the judiciary act [1 Stat. 85], or Baldwin must come into the federal court.

In the case of Buck v. Colbath, 3 Wall. [70 U. S.] 334, it was claimed that the marshal had improperly taken the property of "B." in an attachment suit in the federal court for the property of "A." There "B." was allowed to sue the marshal in the state court. In that case the supreme court put it on the ground that the question in the federal court was not as to the title to property between "A." and "B." But in the case now before the court that is the question, and the federal court has in one respect decided that

the property was Miller's; and this it had a right to decide, as is said by the supreme court in the case of Ex parte Christy, 3 How. [44 U. S.] 292. In Freeman v. Howe, 24 How. [65 U. S.] 450, it was decided that when the property is in the possession of the marshal it could not be interfered with by a process from the state court; and here the property was in effect in the possession of the court or its officers, and the maintenance of the action in the state court depends on the construction to be given to the bankrupt law.

It often happens that the federal and state courts decide differently between citizens of a state as to the rights of property, but here the federal court is, under the bankrupt law, the ultimate arbiter as to the construction of the bankrupt law, and by this the state courts are bound. This property must, therefore, come into the federal court to have rights determined. It is asked how Baldwin can have an appeal or writ of error. He has dismissed the suit against the assignee, but the assignee has the property or the proceeds, and Baldwin has a complete remedy for the value of the property taken against him; and an appeal or writ of error will lie, for the value of the property taken, in a suit against the assignee just as in any other case.

The order of the district court is only temporary, and under the peculiar circumstances of the case I shall not at present interfere with it. If there are any facts which in the opinion of counsel may justify it, Baldwin can make application to the bankruptcy court to proceed with his suit in the state court.

See further that an injunction will not be granted to stay proceedings in a suit instituted in a state court against the marshal for taking possession of property which did not belong to the debtor, under a warrant in involuntary proceedings. In re Marks [Case No. 9,095].

Case No. 9,552.

In re MILLER.

[3 Cin. Law Bul. 967.]

Circuit Court, D. Indiana. Nov. Term, 1878.

GRAND JURY—DISTRICT ATTORNEY—INSTRUCTIONS NOT TO PROSECUTE—OATH OF JURY.

The grand jury, having the case of Casey W. Miller, charged with embezzlement in the First National Bank of Indianapolis, under investigation, came into open court and reported to Judge Gresham that the district attorney had received instructions from the president of the United States against prosecuting a certain party for alleged embezzlement in the First National Bank of Indianapolis, that they had been requested to investigate the matter, and desire to know from the court whether it was their duty to proceed with the case, instructions of the president to the district attorney to the contrary notwithstanding.

GRESHAM, District Judge (charging jury). When you were impanelled at the beginning of the term you swore that you would diligently inquire and true presentment make of such matters as should be given you in charge, or might otherwise come to your knowledge, touching violations of the criminal statutes of the United States; that you would present no one through envy, hatred or malice, and that you would have no one unpresented through fear, favor, affection, reward, or the hope thereof. You could not, if you would, escape the obligation of this oath by heeding the instruction of the president in this particular case. The president may, if he feels so inclined, interfere, even in advance of indictment, by exercising the pardoning power. In no other way has he the slightest authority to control your action. He has it in his power to pardon the alleged offender, and unless he is willing to take this responsibility he has no more right to control your action than the czar of Russia. If you believe the president's instructions to the district attorney were intended to prevent you from making the fullest investigation into the matter now before you, and from returning an indictment against the accused if the evidence should warrant it, you should be inspired with additional determination to do your duty. The moment the executive is allowed to control the action of the courts in the administration of criminal justice their independence is gone. It is due the president to say that the court does not believe he has any desire to encroach on the judiciary, or that he contemplated any unwarranted interference by his instructions to the district attorney. The district attorney says in open court that he is ready and willing to aid you in any examination of this case which you may feel called upon to make. He and his assistants are faithful officers, and will render you all necessary aid in this as in other cases.

Case No. 9,553.

In re MILLER.

[1 N. B. R. 410 (Quarto, 105); 1 Am. Law T. Rep. Bankr. 121.] [1]

District Court, W. D. Pennsylvania. Jan. 28, 1868.

BANKRUPTCY — ORDER TO DISMISS PROCEEDINGS — PETITION OF ALL PARTIES.

When the petitioning creditor, the bankrupt, and all the creditors who have proved their debts, desire the court to dismiss the proceedings before the choice of an assignee, an order will be made by the court directing that the proceedings be dismissed, and allowing the messenger to deliver up to the bankrupt the property seized, upon the payment of costs.

[Cited in Judson v. Courier Co., 8 Fed. 425.]

This being the day to which the first meeting of creditors was adjourned, at the request of said creditors, and also the day

[1] [Reprinted from 1 N. B. R. 410 (Quarto 105), by permission. 1 Am. Law T. Rep. Bankr. 121, contains only a partial report.]

fixed for hearing the creditors, upon their petition praying for the discontinuance of the proceedings in this matter, which said petition was referred to me by special order of said district court, "with power to investigate the facts and to report upon the law and expediency of such discontinuance. And further, that said register call a meeting of the creditors," &c. And further, that said register report as soon as may be thereafter the action of said meeting to this court, and as to the power of the court to order such discontinuance. I sat, at the time and place above mentioned, for the purpose of performing the duties so assigned to me.

All the creditors of said bankrupt [William D. Miller] named in the schedule were notified of the time and place of this meeting, under the order of the court, by publication in the Erie Daily Republican, copies of which, containing the notice, were sent to each of the creditors, as well as to those who had proved their debts. Nineteen out of fifty-four of the creditors have proved their debts, amounting in all to the sum of $9,030.95. All of these were present at this meeting, or duly represented by their attorneys, except the "Akron Stove Company," whose claim, as proved, is only twenty-five dollars. All the remaining twelve who have proved their debts, amounting to $9,005.95, vote in favor of dismissing the proceedings in bankruptcy, in compliance with the prayer of the petition. The claims of the creditors who have not proved their debts amount to about twenty thousand dollars. In view of the facts that the petitioning creditor, D. J. Crowell, the bankrupt, and all the creditors who have proved their debts (with the single exception above mentioned), desire the court to dismiss the proceedings, the register is of the opinion that it is expedient and proper that it should be done, provided it is lawful to do so. On this point the following is respectfully submitted to the honorable judge of the district court:

By SAMUEL E. WOODRUFF, Register:

William D. Miller was duly adjudged a bankrupt on the 18th day of October, 1867, on petition of D. J. Crowell, one of his creditors. Twenty-four of his creditors petition the court to dismiss and supersede the whole proceedings. No assignee has yet been chosen. The bankrupt and the petitioning creditor, and all the other creditors who have proved their debts (save one who did not appear nor make any opposition, and whose debt only amounts to twenty-five dollars), join in asking the court to grant the prayer of the petition. Has the judge of the district court the power to do so?

Two learned attorneys appeared before the register, in support of the affirmative of this proposition, but they furnished no authority or law bearing on the point, and base their arguments upon the general power of common law courts to dismiss proceedings upon the application of the parties. The proceedings in bankruptcy are sui generis, and in absence of any express enactment, it is proper to look to the general scope and spirit of the act of congress creating the jurisdiction. I am not aware that the question under consideration has been determined or even discussed in proceedings under the act of March 2, 1867 [14 Stat. 517].

In coming to the conclusion I have arrived at, I give much weight to the action of the creditors who have proved their debts, at the meeting above referred to. At that meeting they decided that, in their opinion, it was best for all concerned that the proceedings should be discontinued—nemo contradicente. The act gives large powers in the premises to these meetings of creditors. When presided over by the register it calls them "courts of bankruptcy." Sections 11, 12. It authorizes a majority in number and value of such creditors to elect assignees (section 13), to remove an assignee by a similar vote (section 18), to determine the amount of dividends (section 27). Three fourths in value of them may supersede the proceedings by arrangement, and commit the whole estate of the bankrupt to trustees, who shall settle the estate under their direction (section 43), in which event the whole matter is taken out of the hands of the court, except as its aid is invoked by the creditors. The creditors who do not prove their debts are not allowed to have a voice in any of the proceedings, or to participate in the funds. The policy of the act is to have the estate disposed of in such manner as the proving creditors shall determine is for their interest. In the present case they have determined that their interests will be best promoted by allowing the bankrupt to resume the possession of his estate, and to continue business. The register is of the opinion that the court has power to grant their request. There are some decisions under the bankrupt laws that have a bearing upon this point. In Cullen's Bankrupt Laws (440) it is said: "The only case in which any express provision by statute has been made for superseding a commission is that of a petitioning creditor compounding his debts with the bankrupt; but the lord chancellor has always exercised a discretion of this kind whenever the ends of justice required, either for the sake of the creditors or of the bankrupt himself, that a commission should not be suffered to proceed." Hill. Bankr. (2d Ed.) 406: "A district judge derives the power to supersede a commission of bankruptcy from the bankrupt law, by construction and implication." Morris's Estate [Case No. 9,825], cited Hill. Bankr. 407. "A supersedeas lawfully ordered places the bankrupt and his estate in the same situation they would have been in if the commission had never existed." Id. 407.

For the foregoing reasons the register is

of the opinion that it is both expedient, and legal, that a decree be entered by the court, directing the whole proceedings in this matter to be dismissed, vacated, and annulled; and that the marshal, as messenger, be directed to render up to the said William D. Miller, all property in his possession by virtue of the warrant of seizure, upon the payment by the said William D. Miller, of all costs of the proceedings.

McCANDLESS, District Judge. The decision of the register is affirmed.

Case No. 9,554.

In re MILLER.

[The case reported under above title in 17 N. B. R. 402, and 26 Pittsb. Leg. J. 8, is the same as Case No. 9,401.]

Case No. 9,555.

In re MILLER.

Ex parte MONSON SAVINGS BANK.

[19 N. B. R. 78; 19 Alb. Law J. 40; 26 Pittsb. Leg. J. 175.] [1]

District Court, D. Massachusetts. Jan. 3, 1879.

BANKRUPTCY—SECURED DEBT—MORTGAGE—SALE THEREUNDER—PROVING BALANCE DUE.

The creditor bank held a mortgage for eight thousand dollars given by the bankrupt and one S. M. upon land owned by them in equal shares. After the bankrupt had been adjudicated and an assignee appointed, the bank, without notice to the assignee or leave of court, sold the mortgaged premises at auction for one thousand dollars and claimed to prove for the balance of the debt. It was afterwards agreed by the parties that the value of the land was six thousand dollars, and that the sale had been made "without any thought of the effect it might have upon the balance of their claim in bankruptcy." *Held*, that no sufficient equitable excuse was given for the failure to comply with the law in disposing of the security, and that the creditor could not prove for any sum whatever.

The Monson Savings Bank held a mortgage, given by Francis Miller, the bankrupt, and S. H. Miller, of land, in Springfield, owned by them in equal shares, to secure their joint note for eight thousand dollars and interest. After F. Miller had been adjudged bankrupt, and after the appointment of his assignee, the bank sold the land by auction, in pursuance of a power in the deed, without notice to the assignee, or actual knowledge on his part, or leave of court, and it was bought by one Holmes, who was the highest bidder, for one thousand dollars. Giving credit for this amount against the debt and interest, and certain taxes and other charges, there remained an excess of debt amounting to seven thousand seven hundred and eighty-one dollars and twenty-six cents, for which the bank offered proof. After the court had intimated that proof could not be allowed on that state of facts, the parties further agreed that the value of the land was six thousand dollars, and that the sale was made by the bank "without any thought of the effect it might have upon the balance of their claim in bankruptcy." The question was then argued, whether the bank could prove for any sum, and what.

M. P. Knowlton, for Savings Bank.
G. Wells, for assignee.

LOWELL, District Judge. The practice of courts of bankruptcy, adopted in its substantial features by our statute (section 5075), requires a secured creditor, if he intends to prove for any excess of his debt above the value of the security, to have that value ascertained either by agreement with the assignees or under the direction of the court. In England the creditor may, in order to prove at the first meeting, put his own value on the security, but at the risk of accounting for all that he obtains above that value, with no corresponding right to have credit for any deficiency; which leads, I suppose, to a settlement with the assignees, in the first instance, in all doubtful cases.

The reason of the rule is well shown by this case. It is, that the assignee may take care that the property brings its full value. Here the sale produced exactly one-sixth of the admitted value; and it will not readily be believed that this result was not purposely brought about for the benefit of the mortgagees, and that they have not retained the actual control of the property, hoping for a large dividend besides.

The decisions follow the statute, and reject proof of any part of a debt when the creditor has failed to take the steps required by law. In re Herrick [Case No. 6,421]; McHenry v. La Société Française [95 U. S. 58]. Our statute is so explicit that decisions are not needed. In bankruptcy there is, in my opinion, some equitable latitude; and if a case should arise in which some forms had been neglected, through mistake of fact, and possibly under some circumstances under one of law, and complete justice could be done, I think the court might permit proof for the proper sum. Lee v. Franklin Savings Bank [Case No. 8,188]. But I do not look upon this as such a case. The parties have agreed that the bank had "no thought" of the effect of their action upon the proof; but this is not enough. They may have known that their action was irregular, though they did not consider the consequences. If they had been ignorant of the bankruptcy, or of the appointment of an assignee, they might well ask to have their mistake corrected. The agreement finds no such state of facts. They acted in a way that was not only irregular, but unfair between man and man, in not giving the assignee notice of the sale.

That the bank was a secured creditor in

[1] [Reprinted from 19 N. B. R. 78, by permission. 26 Pittsb. Leg. J. 175, contains only a partial report.]

the sense of the statute, was not denied. It held the joint note of two persons, not alleged to be partners, and a mortgage upon land which the promissors held in common. There is no evidence that there was any relation of principal and surety between the debtors. If the petitioners claim to prove in full against the estate of one of those persons, they must, of course, give credit for the whole amount of the security, and if they restrict their proof to one-half of the debt, they must account for half the security. Richardson v. Wyman, 4 Gray, 553. It may be doubtful whether, in England, there could be proof at all against the estate of one joint debtor, while the other remained solvent. The general theory of administration there has been that the solvent debtor is to pay, and then make such proof as the whole equities will give him.

I do not doubt, however, that the practice here has been to admit full proof against one joint debtor, if the debt was unsecured, or the security was properly dealt with.

This debt was secured, and no sufficient equitable excuse has been given for the failure of the creditor to comply with the law in disposing of the security. Proof rejected.

Case No. 9,556.

In re MILLER.

[1 N. Y. Leg. Obs. 180.]

District Court, S. D. New York. 1842.

BANKRUPTCY—DEBT NOT PROVED—DIVIDEND—RIGHT TO PARTICIPATE—DISTRIBUTION.

A creditor is not entitled to come in and participate in a dividend, where his debt has not been proved, until after the order for a distribution has been passed, and the day of making such dividend has been designated.

[In the matter of Edmund H. Miller, a bankrupt.]

In this case exceptions were taken to the report of the assignee classing the creditors, to whom dividends were allotted by him. The immediate point raised for his honor's decision was, whether creditors were entitled to come in and participate in a dividend, provided the debts were proved previous to the payment of the money out of the hands of the assignee, although not until after the dividend had been declared.

BETTS, District Judge. The proceedings necessary now to bring into view are that on the 20th of April the assignee filed his report that he was prepared to make a dividend out of the assets of the estate, which had been reduced to money, and thereupon moved the court to order notice to be given thereof, and to designate the newspaper in which it should be published, and the day the dividend should be made. An order was entered in conformity to the motion the same day, for all persons having objections to make to such distribution to present the same to the court on Tuesday, the third day of May. No objections were interposed. On the 6th of May, the assignee filed his further report that upon the certificate of the clerk to him, dated May 5th, of debts proved, a dividend could be declared upon that amount, and moved an order accordingly. On the same day, an order was entered on the docket that the assignee pay a dividend pro rata amongst the creditors who may have proved their debts prior to the 11th instant; and if exceptions are filed to the validity of any debt proved, and notice be served on him previous to said day, that he defer payment on such debt until the further order of the court; and if the exceptions are sustained by the court then, that the assignee divide the sum therein embraced rateably amongst the other parties, who have proved their debts as aforesaid. On the 11th of May the assignee filed a further report that of the debts proved against the bankrupt all except one were debts owing by the copartners Pine, Miller & Co., of which the bankrupt was one. That objections had been filed to the validity of one debt proved, which was in the course of litigation, and an order was moved and granted on the 17th that the assignee marshal the debts due by the bankrupt, first discharging his individual indebtedness, and then applying the balance of the assets rateably amongst partnership creditors. On the 2d of June, the assignee filed his further report, specifying the debts and their order, upon which a dividend was computed, and the rate of such dividend. To this report different creditors excepted, and for various causes; but the question now to be disposed of is that raised by the objections of two creditors who proved their debts, and filed the proof on the first day of June.

It is first to be noted, that by the stated practice the assignee estimates his dividends on debts certified by the clerk to have been proved, and the proofs to be on file, and that the clerk is to supply the certificate up to and including the day designated by the court as the one on which the dividend is to be declared. Is the dividend made to be limited to debts in proof at that time, or must the assignee receive, as a new basis of contemplation, all debts proved anterior to the disbursements of the money?

This question is to be considered in a double aspect. First, in regard to the statutory provision; and 2d, upon general principles, deducible from bankrupt and insolvent laws as administered in the United States and England. The authority and direction on the subject conveyed by the statute are contained in the 10th section, and have relation to four particulars. 1st. That a distribution of assets, reduced to money, shall be made amongst creditors who have proved their debts with all practicable and reasonable speed, to commence within six months of the decree of bankruptcy; that notice thereof shall be published at least ten days in a newspaper designated by the court be-

fore the order therefor is passed; and all proceedings in bankruptcy shall, if practicable, be completed within two years. A suit with a third party shall not delay a dividend, and creditors not having proved their debts until a dividend or distribution shall have been made and declared shall be entitled to the same pro rata out of subsequent dividends, so as to make all equal. Sections 5, 10. The court is, moreover, required as a preliminary step to order a collection and distribution of the assets at the earliest periods consistent with a due regard to the interests of creditors. Clearly, then, upon these provisions of the act, it is not necessary or proper to await the movement of creditors, in order to put the matter of distribution in action. The orders will be entered, and the notice given, whether debts have been proved or not, and it would seem to comport with the manifest purpose of the act that such order should be peremptory as to time, and, when fulfilled, that it would become absolute as to all creditors who had come in and proved debts, or who had failed to do so. The provision saving to creditors their equal shares out of subsequent dividends when the debts have not been proved, until a distribution shall have been made and declared, plainly denotes that the proof must be in alike before the dividend is declared as before its payment; and that intendment is corroborated by a preceding clause, directing notice to be given in a paper designated by the court ten days before the order is passed. Passing the order would seem, therefore, to be the period that fixed the rights of creditors in respect to that particular dividend. This construction of the act is the only one that can give bearing and consistency to the proceedings under this branch of the law. If additional debts may be brought into the computation after the day designated by the order, the assignee can never determine and report a pro rata which can be subjected to the review of the court, as it would be subject to incessant fluctuations and renewals; and what would render it still more inconvenient and unequal in practice would be that, even after he had paid dividends under the rate, to a part of the creditors, others might come in and arrest payments in progress to the residue, and, by presenting from day to day a new basis of distribution, dwindle down the pro rata first established, and place those creditors to whom it was declared on a scale constantly descending in its proportions.

The inconveniency of these proceedings would induce courts to uphold to the diligent creditor his advantages, if not taken away by the imperative provisions of the law; and in my judgment the act, instead of militating against the course adopted in this case, favors and supports it, for by allowing creditors to come in subsequently to a full proportion, when they did not prove their debts until after a distribution had been declared and made, the intention of congress is that the failure to prove in time excludes the creditor from antecedent dividends is inferrible by very strong implication. This is also in consonance with the interpretation now given the English acts. 1 Schoales & L. 242; 2 Brown, Ch. 50. Nor does the word "made" require the construction put upon it on the argument that the creditor is in time if he proves his debt before the assignee pays out the money. The more natural interpretation of the term as associated and applied would be to regard it equivalent to that of passing the decree or order, because the previous terms of the section indicate that the dividend must be made upon the order passed therefor. The question would be essentially different if the application had been upon adequate equities to postpone the dividend until other creditors could be prepared to participate in it. This power the court could no doubt exercise at least any time within the six months appointed by the statute. 17 Ves. 513. That application would place creditors upon a different footing in relation to each other, for it would afford opportunity to look into and object to the debts proposed to be brought in for a share of the dividend, or, if accompanied by evidence that the first dividend would exhaust the whole estate, would rest upon considerations of impressive equity. This motion is not based upon such equities, and though on the argument it is suggested that no ulterior assets are to be expected that consideration is only urged to induce the court to give a peremptory order admitting those debts to take under the distribution, and not as an incident calling for the interposition of the court to stay distribution for the benefit of all other creditors alike with these particular ones.

I am of opinion therefore that under a proper construction of the act a creditor is not entitled to have his debt brought in for a dividend if not proved until after the order for a distribution is passed and the day of making it designated. That order must be vacated or postponed or otherwise disposed of before any other creditors can come in to share in such dividend. The exception to the assignee's report in this behalf cannot therefore be maintained upon the true import and spirit of the act. The rules prevailing in analogous cases are of like bearing. The decree of distribution and dividend is regarded in England and this country as fixing the rights of creditors as they exist at the time such decree passes. Even assumpsit has been authorized on the part of the creditor to recover the amount of the assignee, and the assignee was not permitted to dispute the amount allotted. Brown v. Bullen, 1 Doug. 407. The case of Pratt v. Rathbun, 7 Paige, 270, 271, is strong to show that creditors will not be allowed to come in as of course, after the day for proving debts before a master has elapsed, so as to obtain an advantage in the distribution of an insol-

vent's estate, but that the day of proof is not held to with strictness so long as the proof can be received afterwards without injustice to other parties. In that case, although the creditors had gone into proof in due time before the master, and supposed their debt was properly established, the chancellor only allowed them to come in subsequently and supply accidental omissions or insufficiency, on terms essentially changing the position they might have held, had their debt been proved at the time designated. No excuse is presented in this case other in reality than that the matter was not probably regarded as worthy any attention; and the business of the court in these numerous proceedings in bankruptcy can never be conducted with system and despatch if parties are not held to observe the orders of the court passed in interlocutory stages of the case with all reasonable exactness. This being a case of bald laches, the party does not entitle himself to come in and prove his debt, and take a dividend under the order as it stands.

[See Case No. 9,550.]

Case No. 9,557.

MILLER'S APPLICATION.

[Cited in Morse on Citizenship, 230; 18 Am. Law Reg. (N. S.) 673. Nowhere reported; opinion not now accessible.]

Case No. 9,558.

MILLER'S CASE.

[Brown, Adm. 156.] [1]

District Court, E. D. Michigan. March, 1867.

COURTS—CRIMINAL JURISDICTION—HIGH SEAS.

The great lakes are not "high seas" within the meaning of the act of July 29, 1850 [9 Stat. 441], punishing the burning of vessels.

[Cited in Ex parte Byers, 32 Fed. 406. Cited in dissenting opinion in U. S. v. Rodgers, 150 U. S. 280, 283, 14 Sup. Ct. 121, 122.]

Motion in arrest of judgment. The defendant [Henry Miller] was convicted of wilfully procuring the setting on fire of the passenger steamer Morning Star, plying between Detroit and Cleveland, on Lake Erie. The indictment was framed under the act of July 29, 1850 (section 7, 9 Stat. 441), punishing the offense when committed on the "high seas." The defendant's counsel moved the court that a rule be entered directing an arrest of judgment, for the reasons following, to wit: (1) Because the offense named in the indictment is charged to have been committed on the high seas, and this court has no jurisdiction over any part of the high seas. (2) Because the offense charged in the indictment, if committed on any part of Lake Erie, is not an indictable offense within any act of congress cognizable by this court. (3) It appears in evidence that if the offense charged in the indictment was committed at all, it was committed within the territorial boundaries of the state of Ohio, and hence the court had no jurisdiction, and erred in refusing to charge the jury, as requested by the defendant's counsel, that this court had no jurisdiction of the case.

G. V. N. Lothrop, for the motion.

Alfred Russell, U. S. Dist. Atty., for the Government.

WILKINS, District Judge. By the constitution congress may define and punish felonies committed upon the high seas. The motion in this case requires the court to determine the meaning of the words "high seas," as employed in the constitution and the penal acts passed thereunder. The 7th section of the act of July 29, 1850, under which this indictment is framed, provides that "every person not being an owner who shall on the high seas wilfully, with intent to destroy the same, set fire to any vessel," &c.

I regard it as settled that the high seas are the uninclosed waters of the ocean outside the projecting capes. Without going over the cases at length, I may refer to Wiltberger's Case, 5 Wheat. [18 U. S.] 76, and Bevans' Case, 3 Wheat. [16 U. S.] 336; U. S. v. Grush [Case No. 15,268]. The act of 1850, under consideration, is almost identical with the act of March 26, 1804, c. 40 [2 Stat. 290], and Judge Story, in U. S. v. Robinson [Case No. 16,176], gave a construction to that act, and decided that ship-burning on a bay in the island of Bermuda, land-locked and inclosed by reefs, was not committed on the "high seas" within the purview of the act. So Mr. Justice Nelson, in the late case of U. S. v. Wilson [Id. 16,731], also held in respect to this offense when committed on the East river. It should be observed that in most other acts touching offenses on the high seas, the words "or in any haven, creek, basin, bay or other waters within the admiralty and maritime jurisdiction," are added. And within this latter description the lakes would be included. But the act of 1845 [5 Stat. 726], itself extending the admiralty jurisdiction over the lakes, recognizes the distinction between the lakes and the high seas. The same jurisdiction is given by that act to the district courts in certain cases arising on the lakes, as in cases arising on the high seas.

It is true that, in Moore v. American Transp. Co., 24 How. [65 U. S.] 1, the supreme court declared that navigation upon Lake Erie was not inland navigation as contradistinguished from navigation upon the ocean, and used language classing the lakes with the ocean for certain commercial purposes; but the opinion in that case clearly points out the distinction between the lakes and the high seas.

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

I agree with the court in Wilson's Case [supra], that it is within the constitutional competency of congress to define and punish this offense when committed upon other waters than the high seas; but congress has not done so; and in cases like this and the case of the Lake Erie pirate, Burley, the federal courts cannot act without an amendment of the act of 1845 extending the jurisdiction to crimes, as well as to torts and contracts concerning lake shipping between the states. Such an act would be beneficial on account of the difficulty of fixing the locality of such crime so as to give jurisdiction to any particular state court, and by reason of the accessibility and effective process of the federal courts. In this and other similar cases the offender will in all probability go unpunished in any state court.

The evidence in this case exhibited a state of facts truly frightful to contemplate, and it is with great regret I feel compelled by the decisions of the supreme court to grant the motion and direct the discharge of the prisoner for want of jurisdiction.

Judgment arrested.

MILLER (ADAMS v.). See Case No. 63.

MILLER v. The ALICE GETTY. See Case No. 193.

Case No. 9,559.

MILLER v. ANDROSCOGGIN PULP CO.

[5 Fish. Pat. Cas. 340; Holmes, 142; 1 O. G. 409.] [1]

Circuit Court, D. Maine. March, 1872.

PATENTS—MAKING PAPER PULP—WOOD FIBER—INFRINGEMENT.

1. Letters patent for an "improvement in reducing wood to paper-pulp," reissued to A. Pagenstecher, assignee of Henry Voelter, June 6, 1871, which improvement consists in defibring the wood by acting upon a block by a grinding surface, which moves substantially across the fibers, and in the same plane with them, are valid.

2. Such invention is not anticipated by the French patent of Christian Voelter for grinding wood upon the ends of the fibers, or by the English patent of A. A. Brooman, for grinding wood by a stone moving diagonally across the fibers.

3. The novelty of the invention not having been disproved by the facts set up by the defense, and it appearing that there was an actual infringement, and that complainant had been in exclusive possession under the patent for a long time, with the acquiescence of the public: *Held*, that a provisional injunction should be granted.

[Cited in Hat-Sweat Manuf'g Co. v. Davis Sewing-Mach. Co., 32 Fed. 402.]

[Bill in equity [by Warner Miller] to restrain alleged infringement of letters patent [No. 21,161] for an improvement in reducing wood to paper pulp, originally granted Henry Voelter, Aug. 10, 1858, antedated Aug. 29, 1856, extended for seven years; reissued June 6, 1871, [No. 4,418,] to A. Pagenstecher, and by him assigned to the complainant.] [2]

A. A. Strout and Causten Browne, for complainant.

W. H. Clifford and Chauncey Smith, for defendants.

SHEPLEY, Circuit Judge. The defendants in this case are charged with an infringement of letters patent for a new and useful improvement in reducing wood to paper-pulp, for which letters patent were issued to Henry Voelter, assignor to Alberto Pagenstecher. The letters patent were originally issued to Henry Voelter, dated August 10, 1858, and antedated August 29, 1856; reissued April 6, 1869, to A. Pagenstecher, assignee; extended for seven years from August 29, 1870; reissued June 6, 1871, to Pagenstecher's assignee; reissue assigned to complainant June 8, 1871.

The Voelter patent is for an improvement in the art of reducing wood into pulp for use in paper, and also for certain improvements in machinery therefor. In the specification of the reissued patent, Henry Voelter states: "The art of reducing wood to pulp, by subjecting the same to the action of a revolving stone, is not a new one, machinery for grinding wood, while a current of water was applied to the stone, having been patented in France, by Christian Voelter, as early as 1847 (see vol. 10, second series, Brevets d'Invention); and in England, by A. A. Brooman, of London, in 1853 (see Repertory of Patented Inventions for May, 1854, p. 410).

"In all the processes known or used prior to my present invention, the wood has been acted upon by the stone in one of two ways, viz: either by causing the surface of the stone to act upon the ends of the fibers, the surface of the stone moving substantially in a plane perpendicular to the fibers of the wood; or, secondly, by acting upon the fibers in such a direction that they were severed diagonally, the surface of the stone moving diagonally across the fibers.

"The first plan, in fact, made powder of the wood. The pulp had no practical length, and, on trial, proved worthless, or nearly so. The second plan was carried out by the use of a stone revolving like an ordinary grindstone, the wood being applied upon the cylindrical surface thereof, with the fibers perpendicular, or nearly so, to planes passing through the axis of the stone and the point or locality where the grinding was performed; and this plan also failed because the fibers were cut off in lines diagonal to their own length, and were consequently too short to make good pulp. There were other difficulties attending the process, not necessary here to mention.

"Such was the state of the art prior to my

[1] [Reported by Samuel S. Fisher, Esq., and by Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Fish. Pat. Cas. 340, and the statement is from Holmes, 142.]

[2] [From Holmes, 142.]

invention; and my improvement in the art consists in grinding, or rather tearing out the fibers from the bundle of fibers which make up a piece of wood, by acting upon them by a grinding surface, which moves substantially across the fibers, and in the same plane with them."

The first claim in the reissued patent is for the improvement in the art herein described, which consists in tearing or grinding out fibers from blocks of wood, in the manner substantially as described, without cutting or severing the fibers either perpendicularly or diagonally to their length, as heretofore practiced in this art.

The third claim is for the combination of a grinding surface and cells or boxes for blocks of wood, so constructed and arranged with reference to the surface, that the fibers or blocks of wood placed therein lie in the plane, substantially, of the grinding surface, and across the line of motion of points in the grinding surface.

The fourth claim is for, in combination with a revolving grinding surface, blocks of wood so held thereon that their fibers are in the relation to the surface and to the motion of points thereon, substantially as described, so that, by the operation of the grinding surface upon the blocks, fibers will be separated from the same without being cut across.

It is clear that the defendants use the improvements and combinations described in the first, third, and fourth claims of the Henry Voelter patent.

The defense is placed substantially upon the ground that the Christian Voelter patent of 1847, referred to by Henry Voelter in his application in 1858, described the same mode of defibring the wood that the reissue describes and claims. Defendants contend further that the reissued patent, as interpreted by them, does not state otherwise.

After a careful examination of the specification in the last reissued patent, it appears to be evident that Henry Voelter, after referring to the inventions of Christian Voelter and A. A. Brooman as describing the state of the art prior to his invention, refers to these two patents, when he says, "In all the processes known or used prior to my present invention, the wood has been acted upon by the stone in two ways, viz: either by causing the surface of the stone to act upon the ends of the fibers, the surface of the stone moving substantially in a plane perpendicular to the fibers of the wood; or, secondly, by acting upon the fibers in such a direction that they were severed diagonally, the surface of the stone moving diagonally across the fibers. The first plan" (and herein I think he clearly refers to the invention of Christian Voelter) "in fact made powder of the wood. The pulp had no practical length, and on trial proved worthless, or nearly so." "The second plan" which Henry Voelter describes is an exact description of the plan of Brooman; and he goes on to state that this plan also failed because the fibers were cut off in lines diagonal to their own length, and were consequently too short to make good pulp.

Having thus described the state of the art prior to his invention, he describes his own improvement in the art to consist in grinding, or rather tearing out the fibers from the bundle of fibers which make up a piece of wood, by acting upon them by a grinding surface, which moves substantially across the fibers, and in the same plane with them.

This process of defibring the wood appears to the court to be clearly suggested, indicated, and claimed in the first application of Henry Voelter for a patent, as distinguished from the prior inventions of Christian Voelter and Brooman in those portions of the specification wherein he states that these prior patents are for the very same, or essentially the same invention, and that the principle and elements of his invention have nothing in common with any known or used machinery or apparatus for preparing and assorting wood-pulp, except the employment of a circular and rotating mill or grindstone as a reducing agent.

After further reference to the prior state of the art as developed in the patents of Christian Voelter and Brooman, he proceeds to state that a most important and decidedly novel feature is introduced in his invention, by constructing and arranging the reducing apparatus in such a manner as to admit, first, of a position of the block with its fibers parallel to the axis of the revolving stone. This position of the fibers of the wood in the plane, substantially of the grinding surface and across the line of motion of points in the grinding surface, is as clearly stated in his first application to be a most important and decidedly novel feature of his invention as it is in the third and fourth claims of the last reissued patent.

If the invention of Christian Voelter embraced the principles and elements of this invention so far as the position of the fibers of the wood in their relation to the plane of, and the line of motion of points in, the grinding surface is concerned, being the principle and elements which distinguish the process of defibring the wood from all prior processes which severed the fibers either perpendicularly or diagonally to their length, then there was a willful suggestio falsi in the original and all subsequent specifications of the Henry Voelter patent.

It can not for a moment be contended that Henry Voelter did not understand the invention of Christian Voelter so far as it related to this position of the fibers of the wood in their relation to the plane of, and the lines of motion of points in the grinding surface. If any such position of the fibers was contemplated in the invention of Christian Voelter, whereby they would be disintegrated and separated, instead of being ground off perpendicularly or cut off diagonally, then Henry Voelter, who was a brother and partner of Christian

Voelter, and familiar with his process, must not only have known it, but knowing it, have willfully misstated it; and, in the same paper in which he misstated it, have referred to the evidence which would have proved his statement to be false, and his claim that his process of defibring the wood, as distinguished from grinding or cutting off the fibers, was an important and novel feature of his invention, to be groundless.

The very vague and meager description in the Christian Voelter patent, of the mode in which the wood is applied, would not alone afford any conclusive evidence as to the relative position of the fibers of the wood to the grinding surface. The only description in the patent relates to the position of the block itself in relation to the grinding surface, and contains in it no word necessarily descriptive of the relation of the fibers of the wood to the grinding surface. He says only: "Several bits or pieces of knotless timber, of a length equal to the thickness of the grindstone, are pressed against its external circumference." Defendants contend that the word "length" refers to the dimensions of the block in the line of the fibers of the wood, as distinguished from its true length. The word "length" is undoubtedly sometimes used in this sense. Upon this point it is sufficient to say that these words of description are so ambiguous that they might have been applicable, either to a block of wood, with its fibers substantially parallel to the plane of the grinding surface and perpendicular to the lines of motion of points in the grinding surface, or applicable to a block of wood with the fibers substantially perpendicular to the grinding surface. The word "length," it will be observed in this description, is used only for the purpose of showing that the dimensions of the block in one direction are to be equal to the thickness of the grindstone, for the purpose of utilizing the whole grinding surface. The description itself, therefore, being so ambiguous as not to enable us to determine by that alone the relation of the grinding surface to the fibers, we must look to the remainder of the description to see if we can ascertain from the description of the results of the action, what action was contemplated. Is there anything in the subsequent language of the patent, describing what follows from the action of the grinding surface upon the fibers of the wood, which indicates whether the fibers were disintegrated, as they would be if the block were placed with the fibers in one position, or ground or cut off as they would be if the fibers were placed in the other position, in relation to the grinding surface? In the one case there would be long fibers or bundles of fibers of unequal thickness; in the other, short fibers more or less nearly partaking of the character of dust or powder. He says in the subsequent portion of his specification, referring to the bits of wood before referred to: "These pieces are soon fretted away by the ruggedness of the grindstone, and reduced to a kind of pulp, which, falling into a water-bath situated at the inferior part, is transformed into a pulp or paste of a greater or lesser thinness, according to the intention. That pulp is mixed with a variable proportion of rags, to be thus used for the fabrication of paper." It is manifest from this that the relation of the grinding surface to the fibers of the wood was one which was intended to fret away the wood into a powder or dust, which, falling into a water-bath, would, without any previous screening, be transformed into a pulp or paste suitable to be mixed with rags, to be thus used for the fabrication of paper.

The language used, the process described, the results attained, are utterly irreconcilable with the idea of any such defibring of the wood as would take place if the fibers were disintegrated and separated in such a manner as to require subsequent screening and classification, and are entirely reconcilable with the construction that the fibers were to be ground or fretted away to a powder, which, falling into a water-bath, would be transformed into a paste or pulp ready for admixture, like china-clay, with rags for the use and manufacture of paper.

Aided by this description of the results of the action of the grinding surface upon the wood, we find no difficulty in the construction of the Christian Voelter patent, or in determining that the first sentence quoted from the patent contemplates such a relative position of the fiber to the grinding surface as would afford the result described in the sentence last quoted; that is, substantially, that the ends of the fiber were presented to the action of the grinding surface.

This is the construction which Henry Voelter puts upon the Christian Voelter patent. This is the construction which the patent office has four times put upon it.

Without, upon this motion for a preliminary injunction, stating more elaborately the other reasons which have influenced the mind of the court in coming to this conclusion, I have only to remark, in conclusion, that I entertain no doubt that this construction, so repeatedly given and so long acquiesced in, is clearly correct.

The complainant has for a long time been in exclusive possession under the Henry Voelter patent, with the acquiescence of the public therein, and there is no evidence of any interruption of the exclusive possession under this patent, tending in any way to weaken the presumption in favor of his title arising from this enjoyment and acquiescence. The novelty of the plaintiff's invention is not questioned except by the claim that it was anticipated by the patents to Brooman and Christian Voelter. These patents were referred to in the original application of Henry Voelter; the construction of these patents has four times been passed upon at the patent office, as not anticipating the claims in question in the Henry Voelter patent. The

court entirely concurs in the construction thus given.

It is not perceived that any additional light upon the question of the interference with or anticipation of this patent by those set up in the answer could be afforded by any evidence likely to be taken before the final hearing in the cause. So far, therefore, as the question of the novelty of the invention is concerned, the question is as fully presented to the court as there is any reason to suppose it can be at the final hearing. Entertaining no doubt, upon the evidence now presented, of the novelty of the invention, the defendants' process being substantially identical with that claimed in the first, third, and fourth claims of the complainant's patent, it is clearly the duty of the court, under the circumstances, to give the plaintiff the benefit of that presumption of title which the patent affords, and which, in this case, it especially affords him, as against any adverse right set up under patents referred to by him in his original application, and so frequently decided by the patent office not to interfere with the originality of the inventions claimed by him.

MILLER (AUSTEN v.). See Case No. 661.

Case No. 9,560.

MILLER v. BALTIMORE & O. R. CO.

[1 Cin. Law Bul. 276.]

Circuit Court, S. D. Ohio. 1876.

PRACTICE AT LAW—NONSUIT—DEMURRER TO EVIDENCE — MASTER AND SERVANT — FELLOW SERVANTS—AMOUNT OF RECOVERY.

1. The circuit courts of the United States have no power to grant a peremptory nonsuit against the will of the plaintiff.

2. Upon a demurrer to evidence, every fact which can be reasonably inferred from the evidence is taken as admitted, and a demurrer is allowed in no case where there are facts and circumstances which tend to establish the issues.

3. As a general rule the master is not liable to his servant for injuries accruing to him from the negligence of a fellow servant engaged in a common employment. And all agents and employés who are engaged in the general business of operating a railroad are fellow servants.

4. The master, however, is bound to use ordinary care to employ and retain in his service competent servants.

5. If, therefore, injury should result to a brakeman upon a railroad from the negligence of an incompetent conductor, engineer, or brakeman, in whose employment the railroad did not use ordinary care, it would be liable.

6. In such case the plaintiff would be entitled to compensatory damages only, unless such injury was "the result of willful misconduct, or of that reckless indifference to the rights of the plaintiff which is equivalent to an intentional violation of them."

At law.

C. Atherton and Follett & Cochran, for plaintiff.

C. H. Kibler and Hoadly, Johnson & Colston, for defendant.

SWING, District Judge. The action was originally brought in the court of common pleas of Licking county, Ohio, by the plaintiff, Lewis E. Miller, against the Baltimore & Ohio Railroad Company, to recover damages sustained by him, while acting as brakeman, by being caught between two freight cars, while attempting to couple them, standing on a siding of the defendant's railroad at Thornport, Ohio. The plaintiff alleged that he was the hind brakeman of a train coming north on said railroad on September 2, 1872. That he was the inferior servant of the conductor and engineer of said train, and subject to their orders, and that under their employment the said conductor and engineer were his superior officers. That the forward brakeman on said train was without experience in the duties of his business, and inefficient, and that defendant knew it at and before that time. That the plaintiff was ordered by the conductor of said train to couple said cars, and the engineer detached the engine from his train, and attempted to couple the same to the first car on the siding. That by reason of the inefficiency of the front brakeman that duty devolved upon the fireman. That the plaintiff made the proper signal to the engineer not to come back with the first car against the second. That the plaintiff, in pursuance of his general orders, had procured a crooked link to connect the two freight cars, and went between them to adjust the same preparatory to the coupling of the cars, and that the engineer, not obeying his signal, and having, through the inefficiency of the front brakeman, failed to make the coupling between the locomotive and the front car, again thrust the locomotive against the front car, precipitated that against the second car, while plaintiff was adjusting the crooked link, thereby catching the body of plaintiff between the bumpers of the cars, and very seriously injuring him.

Plaintiff based his right of recovery on two grounds: 1st. That the injury resulted from the carelessness of a superior agent, to whose orders and control he was subject. 2d. Also, that the injury was attributable to the inefficiency of the forward brakeman, and the company was culpable in his selection and retention. On the part of the plaintiff, it was contended that the law of the case should conform to the rule declared in the case of Little Miami R. Co. v. Stevens, 20 Ohio, 415, and followed by a line of decisions in Ohio, declaring the corporation liable to an inferior servant for the carelessness and negligence of a superior servant placed in authority and control over the inferior one. On the part of the defendant, it was argued that the rule in Ohio was anomalous, and contrary to the weight of authority in England, and the most of the states of the Union, and should not be declared to be law by the federal courts.

The case being tried by a jury, and evi-

dence having been given by plaintiff to sustain the issues on his part, the plaintiff rested his case, and the defendant then moved the court to order a non-suit on the ground that the evidence in law was not sufficient to maintain the action.

BY THE COURT. Under the law of Ohio, the court, in a proper case, might either grant a non-suit, or arrest the testimony from the jury and direct a verdict for defendant, and, if we are to be governed by the law of Ohio, we should proceed to the examination of the merits of the motion. It is claimed that section 5 of the act of congress passed June 1, 1872 [17 Stat. 197], which provides "that the practice, pleadings, forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state, within which such circuit or district courts are held," would require us, in the disposition of this motion, to conform to the state practice. In our administration of the law, since the passage of that act, we have held that its provisions were not applicable to and did not control the judge in his trial of the cause; that in this he was governed by the common law and the decisions of the supreme court of the United States; and in this we are fully sustained by the recent decision of the supreme court of the United States in Nudd v. Burrows [91 U. S.] 426. Such being the rule by which we should be governed, we find it to be a well-settled rule "that the circuit courts of the United States have no power to grant a peremptory nonsuit against the will of the plaintiff." Elmore v. Grymes, 1 Pet. [26 U. S.] 469; De Wolf v. Rabaud, Id. 497; Crane v. Norris, 6 Pet. [31 U. S.] 598; Silsby v. Foote, 14 How. [55 U. S.] 218; Castle v. Bullard, 23 How. [64 U. S.] 172; Boucicault v. Fox [Case No. 1,691]; Schuchardt v. Allens, 1 Wall. [68 U. S.] 359. The motion will therefore be overruled.

After the overruling of the demurrer, counsel for defendant suggested to the court that the same object might be obtained by filing either a motion to arrest the testimony from the jury, or a demurrer to the evidence; but, it being suggested by the court that a motion to arrest the testimony from the jury was substantially a motion for nonsuit, the defendant thereupon demurred to the evidence.

BY THE COURT. In the case of Young v. Black, 7 Cranch [11 U. S.] 565, Justice Story says: "A demurrer to evidence is an unusual proceeding, and is allowed or denied by the court, in the exercise of a sound discretion, under all the circumstances of the case." And again the same learned justice, in the case of Towle v. Common Council of Alexandria, 11 Wheat. [24 U. S.] 320, says: "It is no part of the object of such proceeding (demurrer) to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony, or the presumption arising from the evidence. That is the proper province of the jury." Again: "If, therefore, there is parol evidence in the case which is loose and indeterminate, and may be applied with more or less effect to the jury, or of the evidence of circumstances, which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts of which the evidence is so loose and indeterminate and circumstantial, before the court will compel the other party to join therein." And in the case of Reed v. Evans, 17 Ohio, 128, the same rule is declared. See, also, U. S. Bank v. Smith, 11 Wheat. [24 U. S.] 172; Suydam v. Williamson, 20 How. [61 U. S.] 427. Applying the doctrine thus laid down to the evidence in this case, the demurrer must be overruled.

The defendant then proceeded to introduce testimony, and at the conclusion of the arguments of counsel THE COURT instructed the jury as follows:

It is claimed by the plaintiff that he was acting as brakeman, under the orders of his superiors, the conductor and engineer, when the accident from which the injury resulted occurred. It is also claimed that the accident resulted from the incompetency of servants in the employ of the defendant. The general doctrine "that a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service," may be said to be an admitted rule of law. The Ohio courts have engrafted upon this general rule the qualification that, if the servant was acting under the orders of a servant of superior grade, the principal is liable for injuries resulting from the negligence of such superior (Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 201), and such is believed to be the doctrine of the courts of Kentucky. But, so far as we have been able to examine the doctrine of the courts of the other states of the Union, they admit of no such exception. The question has not been passed upon by the supreme court of the United States, although it was suggested in the case of Union Packet Co. v. McCue, 17 Wall. [84 U. S.] 508, and Union Pac. R. R. v. Fort, Id. 508. The circuit courts of the United States, so far as we are advised, have followed the general rule. Haugh v. Texas & Pac. Ry. Co. [Case No. 6,221]; Dillon v. Union P. R. Co. [Id. 3,916]. The question not involving the construction of any statute of the state, but being one of general jurisprudence, we are not bound to follow the state decisions upon the question. Pine Grove Tp. v. Talcott, 19 Wall. [86 U. S.] 677.

We entertain a very high regard for the decisions of the supreme court of Ohio, and would be satisfied if the rule of law were in accordance with their decisions; but the weight of authority against it requires us, we think, to adopt the general rule that the defendant is not liable to the plaintiff in this cause if the injury complained of was caused by the negligence of either the conductor, engineer, or brakeman; they were all his fellow servants. Whart. Neg. 222; Redf. R. R., 229; and the very careful and extended collection of the authorities by Judge Dillon in the case of Dillon v. Union Pac. Railroad [supra].

Under the second branch of the plaintiff's claim there can be no doubt the defendant was bound to use ordinary and reasonable care and diligence in the selection of their employés, and to furnish suitable structure and machinery. And if the evidence shows you, in this case, that the defendant negligently employed an unskilled and incompetent conductor, engineer, or brakeman, and the injury accrued to the plaintiff by reason of the negligence of conductor, engineer, or brakeman, the plaintiff is entitled to your verdict, unless the plaintiff was fully advised of such incompetency, and remained in the service of the defendant after being so advised. See authorities supra.

If you should find for the plaintiff, you will give him such sum as will compensate him for the injury sustained. And this will embrace the loss of property destroyed, expenses incurred, loss of time, pain and suffering and permanent injuries resulting to him from the accident; but you cannot give exemplary damages, unless you find that the injury was done willfully, or was the result of a reckless indifference to the rights of the plaintiff, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489.

Verdict for plaintiff for $300.

Case No. 9,561.

MILLER v. BALTIMORE & O. R. CO.

[3 Cin. Law Bul. 151.]

Circuit Court, N. D. Ohio. 1878.

RAILROAD COMPANIES—INJURY TO EMPLOYE—FELLOW SERVANT.

At law.

Homer Goodwin, for plaintiff.

E. J. Estep and Judge Dickey, for defendant.

Before BAXTER, Circuit Judge, and WELKER, District Judge.

BAXTER, Circuit Judge. We have had this case under consideration, and have addressed our inquiries mainly to the principal point in the case. The plaintiff sets forth that he was an employé on the road of the defendant, serving under and subject to the orders of the engineer, and through the negligence of the engineer he was injured. Upon this question it is supposed that there is a difference in the law as administered by this court and the courts of this state; and it is argued that the federal courts, upon this question, are not bound by the adjudications of the supreme court of Ohio. We have not considered that question, nor have we reached any conclusion with reference to the order being suddenly made, an order directing the performance of a hazardous duty; nor have we considered the question attempted to be made as to the imperfect or defective machinery. We think the opinion in the case of Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 201, is the ablest, clearest, and most satisfactory discussion of this principle that is to be found in the books anywhere; and we have determined to adopt and adhere to the principles announced in that opinion, as the rule which will govern this court in all future cases involving similar questions. With the principles anuounced in that case counsel are supposed to be familiar, and it is not necessary to repeat them here. It is sufficient to say that this court, in the administration of the law upon questions of this kind, will stand squarely upon the principles announced by Judge Ranney in that case. The demurrer will, therefore, be overruled.

MILLER (BANKS v.). See Case No. 963.

MILLER (BARGER v.). See Case No. 979.

MILLER (BATTLES v.). See Case No. 1,110.

Case No. 9,562.

MILLER v. BERLIN.

[13 Blatchf. 245.] [1]

Circuit Court, N. D. New York. Jan. 18, 1876.

RAILROAD COMPANIES—TOWN BONDS IN AID OF—CONDITIONS OF ISSUE—BONA FIDE PURCHASER—OFFICERS—SPECIAL POWERS.

1. A statute of New York which authorized a town to loan its credit in aid of a railroad corporation, by issuing its bonds, prohibited the making of the loan except on the condition that the written consent of a majority of the taxpayers, representing a majority of the taxable property of the town, should first be duly acknowledged and recorded, together with a copy of the assessment roll of the town, in the office of the county clerk, and it made such record evidence, in any court, of the facts therein recited. The requisite number of consents were not obtained, and no consents were recorded in the clerk's office. Coupon bonds were, nevertheless, issued by commissioners specially charged by the statute with that duty, and the bonds recited that they were issued pursuant to law. In a suit against the town, to recover the amount of unpaid coupons, which, with the bonds with which they were issued, were purchased by the plaintiff's assignor, in good faith, before such coupons matured: *Held*, that the plaintiff need not prove that the bonds were issued in compliance

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

with the conditions and limitations imposed by the statute.

[Cited in Smith v. Yates, Case No. 13,131; Mutual Ben. Life Ins. Co. v. Elizabeth, 42 N. J. Law, 243.]

2. The right to recover could not be defeated by proof that such conditions and limitations were not complied with.

[Cited in Smith v. Yates, Case No. 13,131.]

3. When a municipal corporation has power, under any circumstances, to issue negotiable securities, a bona fide holder of them has a right to presume that they were issued under the circumstances which gave the requisite authority.

[Cited in brief in Bennington v. Park, 50 Vt. 187.]

4. A bona fide purchaser of such bonds is not bound to look further, when they, on their face, import a compliance with the law under which they were issued.

[Cited in Foote v. Hancock, Case No. 4,911.]

5. There is no distinction, in this respect, between bonds issued by officers of the municipality having general powers to represent it in its fiscal transactions, and bonds issued by officers acting under a special power in the particular transaction.

[This was a suit by John Miller against the town of Berlin.]

Newcomb & Bailey, for plaintiff.

R. A. & F. J. Parmenter, for defendant.

WALLACE, District Judge. The bonds to which the coupons in suit were originally annexed were issued in flagrant disregard of the rights of the defendant, by the commissioners who were specially charged with the protection of those rights. The act which permitted the town of Berlin to loan its credit in aid of the Lebanon Springs Railroad Company was framed with great care, to prevent the very contingency which has taken place. It was therein provided that it should be lawful for the commissioners to borrow, on the faith and credit of the town, such sum of money as a majority of the taxpayers representing a majority of the taxable property of the town should fix in writing, and it prohibited the exercise of this power except upon the condition that such consent should first be duly acknowledged and recorded, together with a copy of the assessment roll of the town, in the office of the clerk of the county, and it made this record evidence, in any court, of the facts therein recited. These provisions clearly indicate the intent of the statute, that the power to pledge the faith of the municipality should not be executed by the commissioners until, as a precedent condition, the consents of the requisite number of taxpayers had been obtained, and the evidence thereof perpetuated, so that any person interested could ascertain, and prove or disprove, the existence of the condition, in any court of justice. The existence or non-existence of the condition could be determined by a simple mathematical calculation, and the duty of the commissioners to issue, or to refuse to issue, the bonds was made as patent to the world as to the commissioners themselves. These provisions would seem to exclude any implication that the commissioners were to be the sole judges whether or not the facts existed upon which their authority was made to depend. It is conceded, that the requisite number of consents were not obtained, and no consents were recorded in the clerk's office. The inspection of the records of the clerk's office, by the person to whom the bonds were offered for sale, would have shown that the commissioners were attempting to bind the municipality in utter defiance of the conditions upon which they were to exercise their authority. If the liability of a municipal corporation upon bonds issued by its officers is to be tested by the ordinary rules of law applicable to a negotiable paper executed by an agent, it would not require argument to show that the defendant is not liable upon the bonds in question. The bonds, having been issued by agents acting under a special power, would not be the obligations of the corporation, unless they were issued within the limitations and conditions imposed upon the exercise of the power, and it would devolve upon a purchaser to ascertain whether or not the agents were acting within the terms of their authority. A purchaser of negotiable paper which purports to be executed by an agent, cannot recover without proof that the person who assumes to be the agent, is, in fact, the agent of the principal, or has been held out by the principal as an agent. Where, as in this case, the authority of the agent is to be found in an act of the legislature, those who deal with the agent are bound to know the extent and nature of the authority; and where the existence of facts which limit or control the scope of the authority are as much within the means of knowledge of third persons as within that of the agent, it is incumbent upon all who deal with the agent to ascertain whether the facts exist; and the representation of the agent, in such case, will not estop the principal.

But, the adjudications of the supreme court of the United States have invested municipal bonds, issued by the officers of the municipality, with anomalous and peculiar immunities, and it is now too late to apply the ordinary doctrines of the law of commercial paper as the test of the rights and liabilities of the parties to such instruments. Bissell v. Jeffersonville, 24 How. [65 U. S.] 287; Moran v. Miami Co., 2 Black [67 U. S.] 722; Woods v. Lawrence Co., 1 Black [66 U. S.] 386; Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 83; Gelpcke v. Dubuque, Id. 175; Meyer v. Muscatine, Id. 384; Lexington v. Butler, 14 Wall. [81 U. S.] 282; Grand Chute v. Winegar, 15 Wall. [82 U. S.] 355; St. Joseph v. Rogers, 16 Wall. [83 U. S.] 644. These adjudications establish two propositions, which must control this case. The first of the propositions applicable here may be stated in the language of Mr. Justice Swayne (1 Wall. [68 U. S.] 203): "When a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume they were issued under the circumstances which give the

requisite authority." This language is reiterated by Mr. Justice Clifford, in Lexington v. Butler, 14 Wall. [81 U. S.] 296. The second of these propositions applicable here is that which determines what constitutes a purchaser of such bonds a bona fide holder, and may be stated in the language of Mr. Justice Grier (Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 93), as follows: "We have decided, that, where the bonds, on their face, import a compliance with the law under which they were issued, the purchaser is not bound to look further." Both of these propositions were enunciated in cases where the bonds had been issued by officers of the municipality having general power to represent it in its fiscal transactions, and might not necessarily be applicable where the bonds were issued by officers acting under a special power in the particular transaction. But, when it is remembered that the general doctrine has always been, that a municipal corporation is the creature of the law which creates it, and can make no contracts and do no acts except such as are permitted by its charter, and that its contracts must be executed, and its acts done, by such officers, and substantially in such manner as the charter prescribes, it will be seen that all distinctions between the contracts and acts of officers of general authority, and those having only special powers, are immaterial. If a purchaser of negotiable paper executed by the officers of a municipal corporation is under no obligation to ascertain whether the officers are authorized to execute the paper in behalf of the corporation, it becomes entirely immaterial to ascertain whether they are acting under general or special powers. It is unnecessary to cite the various cases which sustain the foregoing propositions. It suffices to say, that they constitute an unbroken line of decisions, commencing with the case of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539, and continuing to the latest expositions of the supreme court upon the subject. In many of the cases the statute under which the bonds were issued was construed to authorize the officers who issued them to determine whether there had been a compliance with the antecedent conditions prescribed before the power should be exercised. In these cases, it was clearly unnecessary to determine any other question, because, if the officers were to judge for themselves when the exercise of their authority was warranted by the facts, that determination could not be questioned collaterally, and, after the bonds were issued, would be conclusive evidence of the authority of the officers to bind the municipality, and any purchaser of the bonds could recover upon them, whether he was a bona fide holder or not, unless fraud or malfeasance on the part of the officers could be shown. As the propositions mentioned have been advanced uniformly in every case arising upon municipal bonds, they cannot be treated as obiter; and, certainly, they cannot be limited in their application to cases where it was unnecessary to apply them at all. It must follow, as a necessary deduction from the two propositions mentioned, that a purchaser of municipal bonds issued by the proper officers of a corporation which, by law, is permitted to lend its aid to a railroad, is entitled to recover when the bonds recite that they are issued pursuant to law, without proving that they were issued in compliance with the conditions and limitations imposed by law upon the transaction. If he is not required to look beyond the recitals when he purchases the bonds, he cannot be required, upon the trial, to produce any evidence of the truth of the recitals. If these justify his purchase, he cannot be defeated if they are disproved upon the trial, for, as against a bona fide purchaser of a negotiable security, no defences are known to the law, except that the defendant never made the instrument, or that it is void by positive statute. From these views it follows, that, inasmuch as authority had been conferred by law upon the defendant to issue its bonds in aid of the railroad, and the commissioners were its officers for the express purpose of consummating this end, the plaintiff must recover, if he is an innocent holder of the bonds. That he is an innocent holder seems clear. It appears, that the bonds, with the coupons now in suit, were purchased before their maturity, by the German Savings Bank, in April, 1871. It does not appear whether or not any of the coupons past due were annexed to the bonds at the time of this purchase. If the past due coupons were purchased at the same time with those in suit, by the bank, I think its title as a bona fide purchaser of those thereafter to become due would not be invalidated by such fact. Each coupon, when severed from the bond, is a distinct obligation, and an independent instrument. Coupons are annexed to bonds in order that they may be severed and transferred by delivery, and thereby carry to the purchaser the interest which they represent. It is not necessary that the purchaser should produce upon the trial the bond to which the coupon was originally annexed, and the surrender or cancellation of the bond after the coupon has been transferred will not defeat the action. They possess all the attributes of commercial paper. Thomson v. Lee Co., 3 Wall. [70 U. S.] 327; Aurora City v. West, 7 Wall. [74 U. S] 105; Clark v. Iowa City, 20 Wall. [87 U. S.] 589. When the bank purchased these coupons, before they were due, and without notice of any defence to them, it became, prima facie, a bona fide holder of them, and the onus rests upon the defendant to show the existence of any other facts which deprive it of that character; and if, therefore, the purchase of overdue coupons at the same time would deprive it of that character, it was for the defendant to show the fact that such a purchase was made. If the bank was a bona fide purchaser, the plaintiff, who purchased of the bank, acquired all its rights.

These considerations lead to a denial of the motion for a new trial.

MILLER (BOUYSSON v.). See Cases Nos. 1,709 and 1,710.

Case No. 9,563.

MILLER et al. v. BRIDGEPORT BRASS CO.

[14 Blatchf. 282; 3 Ban. & A. 20; 12 O. G. 667.] [1]

Circuit Court, D. Connecticut. Aug. 11, 1877.[2]

PATENTS—LAMPS—REISSUE—CLAIM—SECOND CLAIM—VALIDITY.

1. The second claim of the reissued letters patent granted to E. Miller & Co., as assignees of Joshua E. Ambrose, January 11th, 1876, for an "improvement in lamps," (the original patent having been granted October 16th, 1860, and reissued May 20, 1873, and, as so reissued, extended for 7 years from October 16th, 1874,) namely, "The combination, in a lamp burner, of the following elements: first, a deflector; second, a perforated air distributor, which, with the deflector, forms the combustion chamber; third, a wick tube, extending from the fount to the combustion chamber; fourth, a tube or passage to conduct the gas from the fount to said combustion chamber, substantially as described," is for a different invention from any which was described and claimed in the original patent, and is invalid.

2. The combination contained in said second claim contains a lesser number of ingredients than the combination which composed the original invention, and the specification of the original patent did not suggest that a lamp containing the modified combination of the second claim of the reissued patent was feasible and within the scope of the invention, and, therefore, under the rule laid down in Gill v. Wells, 22 Wall. [89 U. S.] 1, said second claim is void.

[This was a bill by Edward Miller & Co. against the Bridgeport Brass Company to restrain the alleged infringement of letters patent No. 30,381, granted to J. E. Ambrose October 16, 1860, and reissued, No. 6,844, January 11, 1876.]

John S. Beach, for plaintiffs.

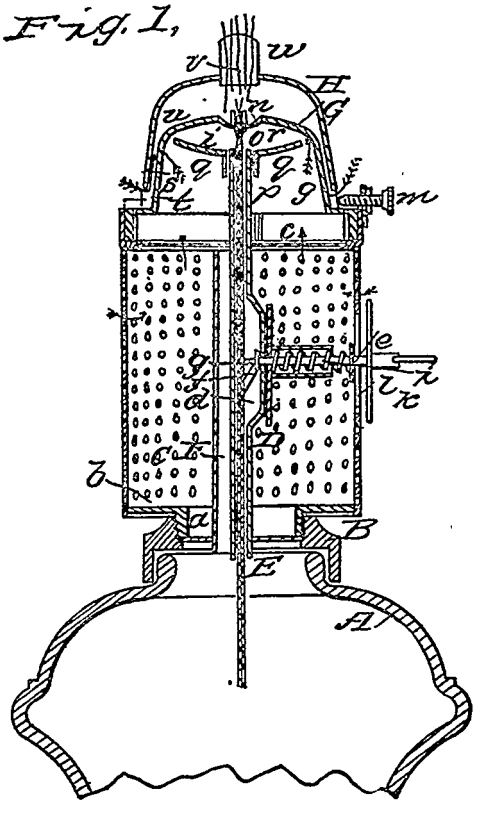
Charles R. Ingersoll, for defendants.

SHIPMAN, District Judge. This is a bill in equity to restrain the alleged infringement, by the defendants, of reissued letters patent, which were issued on January 11th, 1876, to the plaintiffs, as assignees of Joshua E. Ambrose, for an "improvement in lamps." The original Ambrose patent was dated October 16th, 1860, and was reissued May 20th, 1873, and the patent, as reissued, was extended for seven years from October 16th, 1874. The principal defences are, that the reissue is not for the same invention which was described and claimed in the original patent, and that the patent is void for want of novelty.

In the original patent, the patentee declared the object of his invention to be, to obtain a lamp which will burn, without a chimney, and without danger of explosion, those hydrocarbons which are volatile, and contain an excess of carbon, and stated that "the invention consists in the employment or use of a perforated cap, vapor tube, heaters and deflecting plate, arranged," as described, and in a wick-adjusting mechanism, which last-named element is immaterial in this case.

In the specification, the invention was, in substance, described to be the upper part of the body of a lamp, which received at its upper end a cap, C. This cap was of cylindrical form, and might be constructed of perforated sheet iron, the upper end having a perforated plate, c, fitted in it. The wick tube was within the cap or perforated cylinder. Adjoining the wick tube was a tube, F, the lower end of which communicated with the interior of the body of the lamp, the upper end of said tube being covered by the perforated plate, c. On the upper end of the cap, C, was placed a copper, dome-shaped heater, G, slotted at its upper end. A longitudinal bar in the centre of the slot divided it into two parts. The specification proceeded: "The wick tube, E, extends some distance above the perforated plate, c, and, on its upper end, a collar, p, is fitted, said collar having plates, q, projecting from it, slightly inclined from a horizontal plane. Between the inner ends of the plates, q, and the collar, p, there are openings, r. On the outer side of the heater, G, there are vertical ribs, s, at the lower ends

[Drawing of Patent No. 30,381, granted October 16, 1860, to J. E. Ambrose, published from the records of the United States patent office.]



[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 3 Ban. & A. 20, and here republished by permission.]

[2] [Affirmed in 104 U. S. 350.]

of which there are projections, t. These projections, t, serve as bearings for a heater, H, which is similar to G, in form. The ribs and projections, t, admit of a space, u, being between the two heaters, and the upper end of the heater, H, is slotted, as shown at v, and has a plate, w, extending upward for each end of it, and inclined at an angle of about 45°. The tube, F, admits of all vapor generated in the body, A, of the lamp, escaping up into the heater, G, and to the flame, the perforated plate, c, preventing the ignition of the vapor below the orifice of the tube. The plates, q, of the collar, p, and the openings, r, cause a draught to ascend directly upward to the flame, and air is also deflected directly against the inner sides of the heater, G, and becomes intensely heated, so as to supply the flame with warm oxygen. The bar, o, in the slot, n, of heater, G, serves to divide the flame, and prevents it from ascending up through the slot, n, before the carbon is consumed. Between the two heaters, G, H, oxygen passes and becomes highly rarified, and unites with the carbon in the flame, insuring perfect combustion. The plates, w, at the ends of the slot, v, of heater, H, serve to spread the flame and diminish its height, thereby keeping the flame at the point where the heat is most intense. The flame at the slot, n, in heater, G, is merely a gas-generating flame, the illuminating flame having its base at the slot, v, of heater H. By this arrangement the flame is supplied with sufficient oxygen, without a chimney, to support proper combustion and produce a brilliant illuminating flame, and the vapor which passes up through tube, F, is consumed without danger of being ignited below the orifice of said tube." The patentee, after stating that he was aware that dome-shaped heaters had been previously used, and, also, that perforated caps had been used in connection with said heaters, and disclaiming said parts when separately considered, claimed as his invention, "1st, the arrangement of the heaters, G, H, with a space between them communicating directly with the external air, in connection with the collar, p, and plates, q, q, fitted on the top of the wick tube, E, and the perforated cap, C, substantially as and for the purpose set forth; 2d, in combination with the parts aforesaid, the vapor tube, F, placed within the cap, C, and adjoining or contiguous to the wick tube, as and for the purpose specified."

This lamp was not a success, as a lamp which would burn without a chimney, and did not go into general use, but it contained valuable features. The tube, F, conducted the gas from the fount to a point near the end of the wick tube, so that the gas was conveyed to the flame and was consumed, and thus the danger of explosion was materially diminished. In addition, the upper part of the perforated cap, C, was a minutely perforated plate, or disk which extended transversely over the entire top of the cap, below the flame, (forming the floor of what is styled, in the reissued patent, the combustion chamber,) and prevented the return of lighted gas to the lamp fount below, or the ignition of gas within the cap, C, upon the principle of Sir Humphrey Davy's safety lamp. Thus, the combination of the tube and the perforated plate prevented danger of explosion. The perforated plate also performed the office of a distributer of air into the space where the wick was lighted and to the flame.

Lamps having these characteristics, in connection with the other well known parts of volatile oil lamps—a wick tube, a dome-shaped chamber, which serves to direct the air to the flame, and is generally called a deflector, and a chimney, were subsequently manufactured by the owners of the patent, and went into general use. The patent was reissued for the second time, in 1876. The specification of the reissue declares that the invention consists, secondly, "in combining, in a lamp burner, a deflector, a perforated air distributer, with the deflector, forming the combustion chamber, a wick tube extending from the fount to the combustion chamber, an adjusting device to regulate the elevation of the wick, and a tube to conduct the gas from the fount to the chamber above the air distributer." The descriptive portion of the reissued specification does not substantially differ from the language of the descriptive portion of the original specification. In the new specification prominence is given to the perforated plate c, which is called "a perforated air distributer, which, with the deflector, forms the combustion chamber." The second claim, which is the only one which is alleged to have been infringed, is as follows: "2. The combination, in a lamp-burner of the following elements: first, a deflector; second, a perforated air distributer, which, with the deflector, forms the combustion chamber; third, a wick tube, extending from the fount to the combustion chamber; fourth, a tube, or passage, to conduct the gas from the fount to said combustion chamber, substantially as described."

The lamps made by both plaintiffs and defendants contain the heater, G, without the ribs or projections or longitudinal bar; in other words, an ordinary deflector, the perforated plate, the vapor tube, and a wick tube; and are in great demand by the public. The utility of the lamp consists in its safety. A tube which conducted the vapor from the fount to the flame was used, in its simplest form, in the lamp of William Pratt, patented in 1857. In this lamp the flame was not to be protected from the external air. The wick tubes were the long diverging tubes now in common use.

Air distributers had long been known in lamps of the Ambrose class, but I am of the opinion that the minutely perforated transverse plate, c, extending across the lower part of the chamber below the flame, thus forming a perforated floor, and per-

forming the double office of preventing the lighted gas from communicating with the gas in the lamp fount, and also of distributing air to the combustion chamber, had not been anticipated in the defendants' exhibits. But it is not necessary to determine whether either the tube or the air distributer was novel in itself, as the combination only is claimed, and I am satisfied that the combination of the vapor tube to conduct the gas from the fount to the combustion chamber, and the perforated plate constructed as in the Ambrose patent, and performing its double office, with a wick tube, and with either the heater or deflector of Ambrose, or the ordinary deflector, was unknown prior to the date of the patent.

The important question in the case is, whether the lamp which is described and claimed in the second claim of the reissue, is the same invention which was described and claimed in the specification of the original patent. The principles upon which the decision of this question rests, are stated in Gill v. Wells, 22 Wall. [89 U. S.] 1, and in Stevens v. Pritchard [Case No. 13,407]. In the former case, the court, after declaring the rule to be, that, where a patentee who has invented a new and useful combination of several ingredients, also claims to have invented new and useful combinations of fewer numbers of the ingredients, the inventor is entitled to a patent for the several combinations, and may give a description of the several combinations in one specification, and may secure the benefit of each of the inventions by separate claims, and that if, by inadvertence, he should fail to claim one of the described combinations, may surrender the original patent and obtain a reissue for any combinations which were omitted in the claims of the original patent, proceed to say: "Very different rules, however, apply in a case where the only invention described in the original patent is the one which includes all the ingredients of the machine, provided there is no suggestion, indication or intimation that any other invention, of any kind, has been made. Such a patentee as the one last mentioned may subsequently discover that he can accomplish a new and useful result by a combination embracing less than the whole number of the ingredients included in the prior patented combination, but he cannot secure the right and privilege of a patentee in the combination of the smaller number of the ingredients, by a surrender of his first patent and a reissue of the same, which shall include the second combination as well as the first, because, the reissued patent, in that event, would not be for the same invention as the surrendered original."

The original patent states the object of the invention to be a lamp which would burn without a chimney, and the entire mechanism is directed to accomplish that object. It consisted, generally, of a wick tube, with collar and plates, perforated cap for the conveyance of air, the vapor tube, and two peculiarly constructed heaters, the lower one G, provided with ribs and projections, which served as bearings upon which the upper heater, H, was placed. The two heaters are related to each other, and the entire arrangement of the two, with their various parts, is particularly described, in the specification, to be designed to supply the flame with sufficient oxygen to support proper combustion without a chimney. The invention, so far as the heaters were concerned, consisted in their joint use. The lamp of the second reissued claim is without the complex arrangement of heaters. It contains one deflector, and is the ordinary lamp, with a chimney, for burning volatile hydrocarbons, plus the vapor tube and the perforated plate.

The specification of the original patent suggested no invention save the one contained in the entire combination. A combination of the vapor tube and the perforated plate, either with one heater, or with the other well known ingredients of a lamp, was not indicated as a distinct part of the invention. The second claim of the reissued patent describes an article materially different from the article which was originally patented. The claim contains a combination of a lesser number of ingredients than the combination which composed the original invention. One of the heaters, and all of the caps except the perforated plate, have disappeared. The deflector of this claim is not the heater, G, of the original specification, because no single deflector was therein described, except in its relation to, and as connected with, the upper heater. The two heaters are described as to be used together, and as necessarily related to each other. The whole scope and object of the invention was to produce a lamp by the combined use of the two heaters.

Had the patentee, in his original specification, suggested that a lamp containing the modified combination of the second claim of the reissue was feasible and within the scope of his invention, or that the combination of the vapor tube and the air distributer with the other well known parts of a lamp, would accomplish a beneficial result, the claim of the reissue would not have been in violation of the rule of law which has been quoted. But, upon the face of the two patents, I am of opinion that the claim of the reissued patent is for a different invention from any combination which is indicated or suggested in the original specification as capable of embodiment, so as to compose either an organized structure, or a distinct part of an organized structure.

A decree should be entered dismissing the bill.

[The case was taken on appeal to the supreme court, where the decree of the circuit court was affirmed. 104 U. S. 350.]

MILLER (BRYDIE v.). See Case No. 2,071.

Case No. 9,564.

MILLER v. BROOKLYN LIFE INS. CO.

[2 Bigelow, Ins. Rep. 35.]

Circuit Court, D. Maryland. 1868.[1]

INSURANCE—LIFE—PAYMENT OF PREMIUMS—WAIVER—AUTHORITY TO WAIVE.

1. Acknowledgment of receipt of premium does not estop the company from denying the payment as between the company and the party for whose benefit the policy is executed.

2. Where, in response to an application for insurance, the general agents of the company, without receiving any cash payments, write the insured, inclosing the policy, and saying, "We give you your policy," and inclose blank notes for a portion of the premium, prescribing how they shall be filled out and sent, and, as to the balance,—to be paid in cash, but receipted by them,—say they will call for it at the proper time, this is a waiver of payment, and renders the company liable to pay the insurance, though the insured die without paying the notes or the cash balance. And this is especially so when the cash part, which was to be paid by a third person, is not paid by him upon demand, and the agents then write the insured, "We now depend upon you for it," and subsequently write again, no payment having been made, "We are fearful you will lose your policy if payment is not made soon."

3. Where, in the margin of a life policy, there is a clause to the effect that agents have no authority to waive any of the provisions of it, one of which declared that the policy should be void in case of the non-payment of premiums or of premium notes, when due, *held*, that this did not refer to a premium recited as paid in the policy, but to future premiums.

This was an action by which the plaintiff [Helen A. M. Miller] sought to recover from the defendant $5,000, alleged to have been insured in her name on the life of her late husband, Walter T. H. Miller. There was little or no question as to the facts of the case, which were substantially these: On the 19th of June, 1868, Walter T. H. Miller, then residing in St. Louis, and being engaged in business there with his cousin, Solomon Scott, as his partner, signed an application for a policy of insurance for $5,000 on his life, telling Messrs. Dutcher & Fawcett, the general agents of the company at that point, through whom the application was made, that he was going to Maryland, and, when the policy was received to forward it to him at Reese's Corner, Kent county, Maryland, and to send with it the premium notes, which he would sign and return, and that his partner, Scott, had promised him to pay the cash portion of the premium, the premium being, in all, some $254.85, of which $86.26 was to be in cash; the balance in two notes, at six and twelve months. On July 2, 1868, D. & F., having received the policy from the home office, inclosed it with the premium notes and a statement of the cash due, receipted by them to Miller, saying, "We give you your policy," asking him to return the notes signed, and stating they will at the proper time, call on Scott for the cash premium. On July 10th, Miller sends them the notes signed; on the 22d July, D. & F. call on Scott for the cash, and he refused payment, and though he admitted having promised his partner, Miller, to pay the amount, says he had never promised them to do so; on July 23d D. & F. write Miller of Scott's refusal to pay, and saying they depend upon him for the cash, with the interest since accrued added; wish to have it in time for their monthly statement of August 1st. The letter was answered on August 3d by Miller, who regretted Scott's failure to pay, and promised to send forward, as requested, in a few days, a draft on New York for the amount due; on August 18th, Miller writes he is shipping some wheat to Baltimore, and will direct Messrs. Cox & Brown of that city to purchase and forward the draft. On September 10th, Dutcher & Fawcett write that they have never received a draft, and say, "Now, sir, we are fearful you will lose your policy, if payment is not made soon." Having heard nothing further from Miller, and learning that he was seriously ill, Dutcher & Fawcett, on October 14th, four days after his death, of which they were, however, then unaware, write to him, returning the premium notes which he had sent them, and pronounced his policy forfeited by the non-payment of the cash premium. Mr. Miller having died on the 10th October, 1868, the friends of Mrs. Miller applied to Mr. Metcalfe, agent of the company in Baltimore, and also to the home office, for blanks on which to make proof of his death. They were refused in both instances, the company declining to recognize the policy. They then procured blanks from another office, and having made the necessary proof, and demanded payment on the policy, which was refused, Mrs. Miller testified that her husband had, in July, 1868, handed her the policy, saying it was a present for her; and that she had never paid any premium on it. Mr. Scott, her husband's partner, testified for the defence that Mr. Dutcher had called upon him for the cash premium about the 20th of July, and that he had refused to pay it. On cross-examination he admitted he had promised Miller to do so, but said that he had not at that time intended buying out his share of their business, which he had subsequently done. When Mr. Dutcher called upon him they had some words, in the course of which Mr. D. said he had charged himself with the cash, in the expectation of getting it from him (Scott), as he had promised to pay it, and had given Miller time on the note premiums. Mr. Scott also identified Miller's letters above referred to. Mr. Fawcett identified copies of those sent to Miller by D. & F., and testified that the cash premium had never been paid or charged to themselves on the books of D. & F. The policy itself which was given in evidence by the plaintiff, recited that it was issued upon the faith of the statements, etc.,

[1] [Affirmed in 12 Wall. (79 U. S.) 285.]

contained in the application of June 19th, and recited also the first premium as "in hand paid." Among the provisos in the policy was one that if the assured "shall not pay or cause to be paid the premium as aforesaid on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to or received by said company in part payment of any premium, on the day or days when the same shall become due," the policy would become void, etc. On the margin of the policy was the following notice: "Agents of the company are not authorized or permitted to waive, alter, or change any of the provisions of this policy." At the foot of the receipt, which was sent to Miller with the policy, was a memorandum to the effect that "agents must not deliver policies until they are paid for." The printed instructions of the company to its general agents, offered in evidence by the defence, contained directions to the same effect, with the additional notice that if the agents should disregard this rule the premium would be charged to them, and further, providing for the forfeiture of the policies in case of non-payment for thirty days. The president of the company testified that the cash premium had never been received by the company, or charged to Dutcher & Fawcett, they having in their monthly report marked the premium as unpaid.

Stirling & Maund, for plaintiff, contended, first, that the defendant had waived the cash payment, which was a condition precedent to the delivery of the policy, and having trusted to the credit of the deceased, and accepted his premium notes, the policy went into actual operation as a contract of assurance, and could not be forfeited by any subsequent failure of Miller to meet the credit so given. Secondly, that the transaction between the agents and Miller amounted to an actual payment made Dutcher & Fawcett, the creditors of Miller, on the one hand, and debtors of the company, on the other; thirdly, that the policy, having been regularly executed and delivered without any fraud on the part of the plaintiff or her husband, became a valid contract of assurance, and, by the recital on its face of the receipt of the premium, estopped the company from denying that the same was paid, except only so far as to allow the company to enforce a recovery of the money actually unpaid by deduction from the amount due by the company on the policy, or by suit against the party by whom it was payable.

W. S. Bryan, for defendant, contended that the facts showed that Dutcher & Fawcett had delivered the policy only upon the faith of Miller's statement that the cash premium was in Scott's hands, ready for them, and that they had never, then or afterwards, waived its payment, and, even if it should be held that Dutcher & Fawcett had waived the cash payment that, Miller being aware of the limit of their power as agents, they could not bind the company by their action in so doing.

GILES, District Judge, after taking time to consider, announced the decision, and, taking up the plaintiff's position, in reversed order, ruled that the company was not estopped from denying the payment of the premium by the recital in the policy, and that, though that point was upheld by the authority of Parsons, in his late work on Marine Insurance, the court could not accede to that doctrine, unless in a case where the interests of innocent third parties, who have purchased upon the faith of such a recital, have intervened, which had not happened in this case.

With regard to plaintiff's second point, the court held that there was nothing to show actual payment to the agents, nor any transaction tantamount to a payment. There was, it is true, an order on a party in St. Louis for the money, but there is no evidence of the agents having received that as a payment, nor of their having charged themselves with the money in the account rendered the company on the 1st of August.

With regard to the plaintiff's first position THE COURT held that there was a waiver of the cash payment by the general agents, which bound the company. THE COURT said that the fact that the payment of the cash premium was waived, and the policy delivered and considered as binding, was evident throughout the whole correspondence. In the agents' first letter they say, "We give you your policy," and they inclose the notes for the balance of the premium, prescribing how they shall be filled out and sent, and as to the cash, say it will be called for at the proper time. This was a clear and unquestionable act of waiver. They make no demand upon Scott until the 22d July, and, upon his refusal to pay, write their second letter to Miller, in which they say, "We now depend upon you for it (the cash), to which you must add interest," etc. This letter clearly treated the policy as existing. The third letter does not vary the position; in it they say, "Now, sir, we are fearful you will lose your policy, if payment is not made soon." Now, a man cannot lose what he has never had. Throughout the whole transaction—the giving credit, the taking of a third party for payment, and the coming back upon Miller upon the third party's refusal to pay—there has been a clear waiver of the cash payment, and a delivery and treatment of the policy as a valid executed contract, recognized alike by the agents in St. Louis and the principal in Maryland. From the 2d of July up to the death of Miller, the company could have sued him for the unpaid premium.

THE COURT further held that the general agents had power to waive the payment of the first cash premium. The marginal no-

tice referred to the provisos contained in the policy, and the proviso relied upon referred, not to the first premium, for that was recited in the policy itself as paid, but to the future premiums only, and a failure to pay upon the days therein named. There was no provision in the policy that it shall not become binding until the first premium is paid, and consequently there was no violation of any provision of the policy by the agents when they delivered it as binding before the premium was paid. The memorandum at the foot of the due bill was a mere direction to the agent, and nothing more. The private instructions of the company to its general agents had never been brought to the knowledge of the assured, and had, therefore, nothing to do with this case. It seemed to THE COURT, however, that those very instructions contemplated that a policy might be delivered by the agents without payment of the premium. This is shown by the rule that premiums not paid in such cases will be charged to the agents personally. It appearing, then, that the cash payment was waived by the agent, and that the waiver was within the general scope of the business of the general agents of the company, and the assured not being bound by the secret instructions issued by the company to their agents, THE COURT will enter judgment for the plaintiff for the amount of the policy, less the amount due for premiums, etc. Exceptions reserved by defence, Judgment entered for $5,013.25 and costs.

[This case was taken, on writ of error, to the supreme court, and the judgment of the circuit court was affirmed. 12 Wall. (79 U. S.) 285.]

Case No. 9,565.

MILLER v. BUTLER.

[1 Cranch, C. C. 470.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

BILL OF EXCHANGE — ACCEPTANCE — GIVEN FOR AWARD—MISTAKE OF ARBITRATORS.

1. A bill of exchange may be accepted, by the drawee's writing the word "accepted" ["excepted"] upon it.

[Cited in Cortelyou v. Maben, 22 Neb. 700, 36 N. W. 160.]

2. In an action by the indorsee, against the acceptor of a bill of exchange, drawn for the amount of an award, the acceptor cannot avail himself of a mistake of the arbitrators in making up the award.

Assumpsit on an inland bill of exchange, drawn by Reed on the defendant, in favor of W. Hartshorne, Jr., or order, stating it to be the amount of an award between Reed and the defendant, which bill was underwritten, "Excepted, Tristam Butler," in the handwriting of the defendant. Hartshorne indorsed it to the plaintiff.

Mr. Swann, for defendant, objected that that was not an acceptance, but THE COURT (DUCKETT, Circuit Judge, absent) overruled the objection.

Mr. Swann then offered to read the award, (Hartshorne being one of the referees who had signed the award,) and to read an acknowledgment by the arbitrators made subsequent to the award, that if a certain affidavit (then produced,) had been produced to them before the award, it would have reduced their award sixty dollars, and contended that the defendant had a right to discount those sixty dollars against the plaintiff.

But THE COURT rejected the evidence, the bill being negotiable, and in the hands of a third person.

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

MILLER (BUTTNER v.). See Case No. 2,254.

Case No. 9,566.

MILLER v. DELAWARE, L. & W. R. CO.

[2 N. J. Law J. 50.]

Circuit Court, D. New Jersey. Sept. Term, 1878.

BANKRUPTCY — ACTION TO RECOVER DEBT DUE BANKRUPT—SET-OFF.

[It is no defense to an action by an assignee to recover a debt due the bankrupt that said debt has been claimed by the bankrupt as set-off in a pending suit.]

[This was an action by Miller, assignee in bankruptcy of Wyckoff and others, against the Delaware, Lackawanna & Western Railroad Company. Heard on demurrer to plea.]

To a declaration by an assignee in bankruptcy containing the common counts for money due to the bankrupts, a plea was filed alleging that the defendants, before the filing of the petition in bankruptcy, had begun a suit against the bankrupts in the New Jersey supreme court, and that the bankrupts did claim, by way of set-off in that action, the sum of money claimed in this suit, and for the same cause of action, and that that suit was still pending and undetermined.

A demurrer to this plea was sustained. The plaintiff's counsel cited Serra e' Hijo v. Hoffman [30 La. Ann. 67].

Edward Q. Keasbey, for demurrants.
Mr. Keen, for defendants.

MILLER (DUNBAR v.). See Case No. 4,130.

Case No. 9,567.

MILLER et al. v. The EASTERN RAILROAD.

[27 Leg. Int. 188; [1] 7 Phila. 597.]

District Court, E. D. Pennsylvania. May 12, 1870.

TOWAGE—SKILL REQUISITE—CAUTION.

Proper skill and caution in performing towage service must be understood as such skill and

[1] [Reprinted from 27 Leg. Int. 188, by permission.]

caution as persons of ordinary prudence, duly qualified for the business of towage, and exercising an honest care of the interests confided to them, ordinarily use.

On the 7th of December, 1869, the above tug, having made up a tow of sixteen barges, (in four tiers astern,) proceeded to tow the same to the locks of the Delaware and Raritan Canal. The tow was prepared to start the day before, but owing to the threatening appearance of the weather, it was deferred until the 7th; and although even then the weather was doubtful, and blowing from the northeast, a start was made with the wind increasing. After proceeding a short distance, the navigator of the tug determined to return, and in turning the tug and tow for that purpose, the "Tinney," (one of the barges in tow,) an undecked boat, owned by the libellant, sunk. She was the starboard or weather barge of the tier, next the tug, and consequently the most exposed of any of the tow. The "Tinney" was subsequently towed ashore where she now lies.

The learned judge of the admiralty, in referring the case to nautical assessors, Captains John H. Young and Thomas G. Munroe, said: "Considering the weather at the time of starting, the particular service intended, the arrangement of the tows, and the relative position of the Tinney, taking her construction into view, and attributing the proper effect to any other circumstances which the assessors may adjudge material, did the tug, in their opinion, use proper skill and caution, in undertaking the towage of such a barge as the Tinney, as it was undertaken? The words 'proper skill and caution' will be understood by the assessors to mean such skill and caution as persons of ordinary prudence, duly qualified for the business of towage, and exercising an honest care of the interests confided to them, ordinarily use."

Thereupon the assessors reported as follows, viz.: "We are of opinion that the navigator of the tug did not use proper skill and caution in arranging the tow, and did not take into proper consideration the construction of the 'Tinney.' The fact that the Tinney was not a decked boat rendered it prudent that her position should have been among the best, instead of which it was unquestionably the very worst of any boat in the tow. While there were several decked boats among the tow, it does not appear that there were any arrangements made to place them in the more exposed parts of the tow. Again, the master of the tug did not use good judgment in electing to start with so large a tow as sixteen barges, at that season of the year, with the threatening weather that then prevailed. He was a man of long experience in that business, had entire control, accountable to none but his employers, fully aware, or should have been, of the ability of his tug to perform the service of the day, and to carry his tow safely through. It appears in the testimony, that the said tug had previously towed as many as twenty-eight boats at one time without assistance, yet it does not appear that those boats were loaded, and the assessors feel constrained to assume that they were not loaded; the more particularly so, when it is borne in mind, that she had a tug to assist her with only sixteen boats. In conclusion, we are of opinion, that the captain of the tug erred with regard to the ability of his tug to carry so heavy a tow through safely under the then existing bad weather; he also erred in not placing some of the decked boats in the more exposed parts of the tow, as he had a perfect right to do. Any curtailment of the tug master's authority, with regard to placing, arranging, making up, or starting the tow, according to his own judgment, would lead to so many difficulties, that all vessels yield implicit obedience to his orders."

J. Hill Martin, for libellants.

A. I. Fish, for respondent.

CADWALADER, District Judge. If either party has the right to complain of my consulting assessors in this case, the libellant is the party. If the assessors had answered my question differently, I might not have been able to decide the case without a commission to new assessors. As the matter stands, I concur in the opinion of the assessors.

Decree for libellant.

Case No. 9,568.

MILLER v. ELLIOT.

[5 Cranch, C. C. 543.] [1]

Circuit Court, District of Columbia. March Term, 1839.

PARTY WALL—HOW BUILT—DUTY OF SURVEYOR—REIMBURSEMENT—ACTION TO RECOVER.

1. It is a condition annexed to the title of every house-lot in the city of Washington, that when the proprietor builds a partition-wall between himself and his neighbor, he shall lay the foundation equally upon the lands of both; and that any person who shall afterwards use the partition-wall, or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use.

2. It is the duty of the city surveyor to attend, when requested, and examine the foundations or walls of any house to be erected, when the same shall be level with the street or the surface of the ground, for the purpose of adjusting the line of the front of such building to the line of the street, and correctly placing the party-wall on the line of division between that and the adjoining lot; and his certificate is evidence, and binding on the parties interested; but it is not necessary to the plaintiff's right of action for half the value of the wall, that it should have been so adjusted by the surveyor; or that the walls should be of the thickness required by the third article of the commissioners' regulations of the 20th of July, 1795.

3. The value of half the wall may be recovered in an action upon the case in assumpsit.

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

Assumpsit for money paid, laid out, and expended, for the defendant's use and at his request; to recover one half of the costs of so much of the partition-wall erected by the plaintiff [Samuel Miller] as was used by the defendant [Jonathan Elliot] in building his house on the adjoining lot. Verdict for the plaintiff, subject to the opinion of the court, whether the plaintiff had a right to place half of his partition-wall on the lot of the defendant, and whether the defendant is liable to the plaintiff for half the cost of so much of the wall as the defendant used in building his house adjoining it.

The case was submitted to the court upon notes of argument by the counsel.

Mr. Addison, for plaintiff.
Mr. Morfit, for defendant.

CRANCH, Chief Judge. The original proprietors of the lands now composing the city of Washington, by deeds dated about the 29th of June, 1791, conveyed their lands to Thomas Beall and John M. Gantt, in trust, among other things, to be laid out for a federal city, with such streets, squares, parcels, and lots, as the president of the United States should approve; and that they should convey to the commissioners of the city, for the use of the United States, forever, all the streets, &c., and that the residue of the lots should be equally divided between the United States and the original proprietors; and that the trustees should convey to the original proprietors the lots assigned to them in the division; and that the residue should be sold and conveyed to the respective purchasers. But such conveyances, as well to the original proprietors, as to the respective purchasers, were to be "on, and subject to, such terms and conditions as shall be thought reasonable by the president for the time being, for regulating the materials and manner of the buildings and improvements on the lots generally, in the said city, or in particular streets, or parts thereof, for common convenience, safety, and order; provided such terms and conditions be declared before the sales of any of the said lots, under the direction of the president." Under this provision of the trust-deeds, the president of the United States, on the 17th of October, 1791, before the sale of any of the public lots, declared certain "terms and conditions for regulating the materials and the manner of buildings and improvements on the lots in the city of Washington." The fourth of these terms is, "That the person or persons appointed by the commissioners to superintend the buildings, may enter on the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof; which foundations shall be laid equally upon the lands of the persons between whom such party-walls are to be built; and shall be of the breadth and thickness determined by such person proper; and the first builder shall be reimbursed one moiety of the charge of such party-wall, or so much thereof as the next builder shall have occasion to make use of, before such next builder shall any ways use, or break into the wall; the charge, or value thereof, to be set by the person or persons so appointed by the commissioners." It is, therefore, a condition annexed to the title of every house-lot in the city of Washington, that when the proprietor builds a partition-wall between himself and his neighbor, he shall lay the foundation equally upon the lands of both; and that any person who shall afterward use the partition-wall, or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use.

By the charter of 1820, § 7, the power is given to the corporation of Washington, "to regulate, with the approbation of the president of the United States, the manner of erecting, and the materials to be used in the erection of houses;" and by section 8, "to regulate party, and other walls and fences." By the by-law of March 30, 1822, (Rothwell's City Laws, 142,) the corporation reënacted the building regulations of the 17th of October, 1791, and those of the commissioners of July 7, 1794, originally made under the authority of the Maryland act of 1791 (chapter 45), except so far as modified by the proclamation of President Monroe, of January 14, 1818, which modification does not affect the present case. The surveyor of the city of Washington, was an officer appointed by the commissioners during their existence, and afterwards by the superintendent during his existence, and afterward by the commissioner of the public buildings, and finally by the corporation of Washington, under the by-law of August 13, 1828. The office of surveyor of the city is recognized, and his fees are regulated by several acts of congress, namely, March 3, 1803 (Burch, 245; 2 Stat. 235); March 27, 1804 (Burch, 246; 2 Stat. 297); and January 12, 1809 (Davis' Laws, 189; 2 Stat. 511; Burch, 267–269). By the fifth section of the act of January 12, 1809, it is enacted, "That it shall be the duty of the surveyor to attend, when requested, and examine the foundation or walls of any house to be erected, when the same shall be level with the street, or surface of the ground, for the purpose of adjusting the line of the front of such building to the line of the street, and correctly placing the party-wall on the line of division between that and the adjoining lot; and his certificate of the fact shall be admitted as evidence, and binding on the parties interested." The same thing is enacted totidem verbis in the by-law of August 13, 1828, authorizing the appointment of a surveyor, &c. This surveyor is the officer who is to perform the duties required by the second and fourth articles of the regulations of the 17th of October, 1791; but by the act of January 12, 1809, as well as by the by-law, he is only to perform them when required, and when the wall

shall be level with the street, or the surface of the ground. This act modifies the second article of the regulations in that respect, and dispenses with the necessity of applying to the surveyor. It is no valid objection, therefore, to the plaintiff's right of recovery, that he did not apply to the surveyor to adjust the party-wall, if such was the case. But that fact does not appear. It might, for aught that appears, have been, that the surveyor did so adjust it, as well as the front walls; or that the party-wall may have been laid with the consent of the defendant.

It is also objected by the defendant that the walls were not of the thickness required by the third article of the commissioners of July 20, 1795, made under Act Md. 1791, c. 45, entitled "An act concerning the territory of Columbia." But a compliance with that regulation, is not a condition preliminary to the plaintiff's right of action for half of the cost of the party-wall. The plaintiff may possibly have subjected himself to the penalty of $20, but that penalty does not enure to the benefit of the defendant, and is not a bar to the plaintiff's right of action. It is also moved, in arrest of judgment, that the action should have been debt, and not case. But there is nothing in the record to show that case or assumpsit was not the proper form of action. Let the judgment be entered up according to the verdict.

NOTE. See Act Jan. 12, 1809, § 4, which applies to two cases only. (1) Where a house is built on a subdivision of a lot or square before the surveyor shall have measured the whole front, &c. (2) Where the house was built before the date of the act (12th January, 1809). That section therefore does not touch this case of Miller v. Elliot.

Case No. 9,569.

MILLER v. EVANS.

[2 Cranch, C. C. 72.][1]

Circuit Court, District of Columbia. April Term, 1813.

PAYMENT—BONDS—LAPSE OF TIME—PRESUMPTION.

In an action upon a bond, payable by instalments, the jury may, and ought to, presume payment of any instalment payable more than twenty years before the commencement of the suit, and may presume payment of an instalment payable nineteen years and ten months before suit brought.

Debt upon a bond payable by instalments. Nineteen years and ten months elapsed since the last instalment became payable, and another instalment had become payable more than twenty years before the suit was brought.

N. Herbert, for plaintiff.

Mr. Taylor, for defendant.

THE COURT (nem. con.) instructed the jury that as to the instalment due more than twenty years they ought to presume, and as to the other they might presume, payment.

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

Case No. 9,570.

MILLER v. FALLS CO.

[Nowhere reported; opinion not now accessible.]

MILLER (FORMAN v.). See Case No. 4,940.

MILLER (GADSBY v.). See Case No. 5,167.

Case No. 9,571.

MILLER v. GAGES.

[4 McLean, 436.][1]

Circuit Court, D. Ohio. July Term, 1848.

WRIT—INDORSEMENT—AMENDMENT—PLEA IN BAR—ABATEMENT.

1. The indorsement on the writ, required by the state statute, which has been adopted, may be objected by a motion to quash the writ.

[Cited in Woolridge v. M'Kenna, 8 Fed. 662.]

2. In such case an amendment would be permitted.

[Cited in Brown v. Pond, 5 Fed. 35.]

3. A neglect to make the indorsement is no ground for a plea in bar. A plea in abatement is the only one that could be filed.

At law.

Mr. Perry, for plaintiff.

OPINION OF THE COURT. The defendant in this case craved oyer of the writ, set it forth, and demurred to the declaration. Several causes of demurrer are assigned, but the variance assigned between the indorsement on the writ and the declaration, being the only one relied on, will be noticed. The statute adopted in our practice, requires the clerk to indorse the cause of action on the writ, without prescribing any form. An indorsement, therefore, which shall state the cause of action in general terms, will be a compliance with the law. As this is a requisite of the statute, it may constitute a ground of objection to the writ, where the indorsement is not made. The most appropriate manner of taking advantage of a neglect to make the indorsement would seem to be by a motion to quash the writ. On such a motion the court would, of course, permit an amendment of the writ to be made. A defective indorsement might be pleaded in abatement, by craving oyer of the writ; but it is no ground for a plea in bar. The demurrer is overruled, and leave given to amend the writ.

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

Case No. 9,572.

MILLER v. HALSTED.[1]

District Court, D. New Jersey. Nov. 2, 1872.

CORPORATIONS—LOAN BY DIRECTOR—MORTGAGE—BANKRUPTCY—ASSIGNEE—OBJECTION—TEMPORARY EMBARRASSMENT—INSOLVENCY.

[1. A loan to a corporation by a director thereof, and the giving of a mortgage to secure the same, is not within the rule prohibiting contracts by a trustee with himself in relation to the property held by him in trust.]

[2. An assignee in bankruptcy of a corporation will not be heard in a court of equity to object to a contract made by the corporation with one of the directors, unless he offers to return to the director his advances under the contract.]

[3. A mortgage given by a corporation to secure advances from one of its directors is not invalid merely because the advances were applied to the payment of debts for which the director was security.]

[4. Temporary embarrassment is not "insolvency" within Act N. J. April 15, 1846, § 2, prohibiting insolvent corporations from making contracts.]

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

[This was a suit by Elias N. Miller, assignee in bankruptcy, against N. N. Halsted, to have a certain mortgage given by the bankrupt declared void. The district court rendered a decree for respondent. The assignee appeals.]

STRONG, Circuit Justice. Notwithstanding the very thorough argument which has been submitted to me in support of this appeal, my opinion accords so nearly with that of the district court that I deem it unnecessary to discuss at length the question involved in the case. I shall content myself therefore with presenting some considerations in addition to those which governed the action of the district judge; considerations which lead me to the same conclusion as that at which he arrived.

That the chattel mortgage given by the company to Halsted was not void in its inception, because unauthorized, is, I think, quite clear. It was formally authorized by a resolution of the board of directors, and I cannot doubt the board, as constituted, was competent to direct its execution. Their minutes show that a quorum was present when the resolution was passed; and, though the mortgagee was one of the directors who constituted the quorum, I am not prepared to say that, for such a reason, the board was incapable of authorizing the mortgage subsequently made. There is uncontradicted evidence that, in addition to the four directors whose names are noted upon the minutes, Mr. Grier, another director, was present at the meeting at which the resolution was adopted. Were it then conceded that Halsted had such an interest in the resolution that he was incompetent to vote for it, or even to aid in constituting a quorum for corporate action upon it (which I doubt), there was a quorum without him, and a majority of the quorum must have voted for the resolution. Certainly no other director than Halsted had any disqualifying interest when the resolution was adopted, or when the mortgage was made. As the mortgage was given to cover only subsequent advances, it vested in the mortgagee merely a dry trust, which continued such until advances on the faith of it were afterwards actually made. Then, and then only, can any person besides be said to have had an interest either in the resolution or in the mortgage. The formal execution of the mortgage, therefore, as the contract of the company, must be treated as established.

And here I may remark it has not been seriously claimed that the mortgage is tainted with actual fraud: Fraud upon the company is not aperted, and certainly, in view of the evidence, it cannot be. I have, however, carefully gone over the proofs, and the result has been that I find nothing which would justify my coming to the conclusion that actual fraud upon the company, or upon any creditors of the company, was either perpetrated or intended. If, therefore, the mortgage is not available to the appellee as a security for the money advanced by him, it must be because it was given in contravention of some legal policy, or in conflict with some statute. Was it, then, inconsistent with any rule of legal policy? Halsted, the mortgagee, was a director of the company, and as such he was a trustee for the stockholders. I recognize in its broadest extent the principle that a trustee cannot contract, either directly or indirectly, with himself, for his own possible benefit, in relation to the property committed to his charge. I agree that all such contracts, even though untainted with actual fraud, are avoidable at the option of the cestui que trust. How far this rule is applicable to one of the several directors of a corporation aggregate, all of whom are, I admit, in an important sense, trustees of the rights and property of the corporation and of its stockholders, it is not necessary now to define. Conceding that it applies to all cases of purchase of the company's property by a director, to all cases of sale by him to the company, and generally to every contract in which his interest may be inconsistent with the interests of the company, it is still undoubtedly true that he may lend to the corporation, and take a valid security for the repayment of the loans. Such a contract is not one made for his benefit, in which his interests are adverse to those of his cestuis que trustent, and therefore the reasons why other contracts, made by persons sustaining fiduciary relations, and by which they may possibly secure benefits to themselves, are held avoidable, are wholly inapplicable to it. A contract of loan at legal rates of interest is one in which it is impossible for the lender

[1] [Not previously reported.]

to take undue advantages of the borrower. Nothing, I think, is more common than are loans made by directors of railroad, manufacturing, and other corporations to the companies of which they are directors; and it would be disastrous in the extreme were it held that such loans are against the policy of the law. Individuals are often elected directors because of their ability and supposed willingness to make pecuniary advances when needed. It is not unfrequently the case that loans can be obtained from no other source, and, if securities taken for such loans have not the same validity and effect as similar securities given to other creditors, the consequence must be the prostration of many business corporations, and the destruction of the interests of stockholders. And I know of no adjudicated case of authority that classes securities for loans of money taken by directors of joint-stock companies from the companies among those contracts which are avoidable because one of the parties stands in a fiduciary relation to the property respecting which the contracts are made. It is very certain that even a guardian, an executor or administrator may advance money for his cestui que trust, and thereby entitle himself to subrogation to the peace and right of the creditor whose claim he has paid. In such cases the law not only implies a contract to repay the money advanced, with interest, but it gives a preference. And surely an express engagement is not illegal when the duty undertaken thereby is implicitly recognized. Surely, if a director of a company may lend to it lawfully, he may take from it any of the ordinary securities for loans. It is, however, not worth while to spend time in showing that the mortgage to Halsted is not within the rule that a trustee cannot deal for his own advantage with the property held by him in trust, for, even if it is, it is not void. At most it is only avoidable, at the instance of the company or of the stockholders, in equity, and then only on repayment of the money advanced. The assignee in bankruptcy is doubtless clothed with the rights of the bankrupt company. If they could come into a court of equity to avoid the mortgages, so can he. But he must come as they must have come, doing equity, when he seeks it; and that is, repaying the money advanced. It is almost superfluous to say that a creditor of the mortgagors, in the absence of fraud, has no standing against the mortgage in a court of equity. The directors of the company are not trustees for him. Hence, though the assignee represents creditors as well as the bankrupts, it is as the representatives of the latter only that he can complain. He can only assert the rights which they had.

I proceed next to inquire whether the mortgage was forbidden by the statutes of New Jersey. The act of April 15, 1846, intended to prevent frauds by incorporated companies, enacted in its second section that whenever an incorporated company shall become insolvent, or shall suspend the ordinary business of the said company for want of funds to carry on the same, it shall not be lawful for the directors or managers of the said company, or for any officer or agent thereof, to sell, convey, assign, or transfer any of the estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements of the said company, nor shall it be lawful to make any such sale, conveyance, assignment, or transfer in contemplation of the insolvency of any such company; and every such sale, conveyance, assignment, or transfer shall be utterly null and void as against creditors. Other sections of the act make provision for winding up and distributing the assets of insolvent corporations. The whole statute is, in effect, a winding-up act. Whether it has been superseded by the general bankrupt law, I do not care to consider, because I am clearly of opinion that it has no applicability to the present case, even if in force. The evidence convinces me that at the time when the mortgage was given to the appellee the company had not suspended its ordinary business for want of funds to carry it on, or for any reason; nor had it become insolvent, within the meaning of the New Jersey statute. And it is clear the mortgage was not made in contemplation of insolvency. Undoubtedly there was embarrassment. There were debts becoming due, and some already due, which the company had not then the money to discharge. But they had property which, if converted into money, or hypothecated, was much more than sufficient to pay all the debts. And, instead of there having been any contemplation of insolvency the plain and only object for creating the mortgage was to enable the company to go on with its business. Whatever may be the meaning of the word "insolvent" in the bankrupt law, I cannot think the New Jersey legislature intended to treat embarrassment as insolvency, or to arrest the action of every corporation that might find it necessary to borrow money in order to meet its accruing obligations. Looking at the whole statute, I doubt not the word "insolvency" was designed to have its general and popular meaning, namely, the condition of having insufficient property to pay existing debts. Very plainly, such was not the condition of these mortgagors when their mortgage was given to the appellee. I think, therefore, the case is unaffected by the state enactment.

Nor was the mortgage invalid because of the provisions of the 35th and 39th sections of the bankrupt act [of 1867 (14 Stat. 534, 536)]. It was executed more than six months before the petition was filed under which the mortgagors were adjudicated bankrupts. It was not, therefore, a fraud against that act. Had it been actually fraudulent, the assignee might doubtless avoid it, irrespective of the time when it was made; but, in the absence of actual fraud, the right to set aside a preference is, I think, under our bankrupt

law, limited to transactions which took place within six months from the time when the proceedings which resulted in declared bankruptcy commenced. I come next to inquire whether I ought to declare the mortgage void because the mortgagee left the chattels in the possession of the mortgagors, and consented that they should sell and apply the proceeds of sale to the payment of other debts. This, it must be conceded, is always evidence of fraud, amounting sometimes to conclusive proof. But in this case the contract was made in New Jersey. There it was also to be performed, and I think, therefore, the legal effect upon the contract of established facts is to be regulated by the law of that state. The district judge has shown to my satisfaction that in New Jersey leaving the subject of a chattel mortgage in possession of the mortgagor does not necessarily establish that the instrument is fraudulent, nor does suffering the mortgagor to use or sell a portion of the hypothecated property. The articles sold are discharged from the lien of the mortgage; but it is a question of fact whether the transaction was covinous, so that the articles remaining unsold are also discharged. The conduct and agreement of the mortgagee are important in determining the intent with which the instrument was made, but they are admissible of explanation. I assent so entirely to the opinion of the district judge upon this part of the case that I deem it useless to discuss the matter at length. Meeting, then, the question as an inquiry of fact open to my decision whether the mortgage was a fraud either upon the company or upon creditors of the company, I am forced to the conclusion that it was not.

There remains but one question. It is whether the advancements made by Halsted are covered by the mortgage. It is plain that the mortgage was authorized, and given to cover only subsequent loans or advancements. Such is the purport of the resolution which authorized the instrument. But the evidence is satisfactory that Halsted, the appellee, advanced to the company, after the mortgage was given, more than $28,000; much more than the sum which he has been allowed to take. It is true that the money advanced was applied to the payment of debts, for which Halsted had previously become security. But for those debts the company was primarily liable, and payment of them secured the relief which was sought through the agency of the new loan. Certainly there was nothing in the resolution adopted by the board of directors that limited the application of any money which might be obtained on faith of the mortgage to any specified debts of the mortgagors, much less anything that even impliedly prohibited its devotion to uses in which the lenders might have an interest. I do not feel called upon to say more. Agreeing, as I do, so fully with the reasons which the district judge has given from his order, I regard it unnecessary to reiterate his opinion, and I therefore content myself with affirming the decree he made. The order of the district court is affirmed.

MILLER (HALSTED v.). See Case No. 5,969.

MILLER (HOLLENBACK v.). See Case No. 6,609.

Case No. 9,573.

MILLER et al. v. HOOE et al.

[2 Cranch, C. C. 622.] [1]

Circuit Court, District of Columbia. Nov. Term, 1825.

GARNISHMENT—ABSENT DEBTOR—NO EFFECTS WITHIN JURISDICTION—ATTACHMENT.

1. Upon a chancery attachment in Alexandria county, District of Columbia, against the effects of an absent debtor, the garnishee, residing in Alexandria county, is not liable to the plaintiff for goods of the defendant which are in the garnishee's custody in Virginia, where the debtor himself resides.

2. If the resident garnishee is not indebted to the defendant, and has no effects of the defendant in his possession in this district, and the defendant himself is not found in the county of Alexandria, no decree can be rendered against either the garnishee or the debtor, and the bill must be dismissed, as this court has no jurisdiction in the case.

This was a chancery attachment in the county of Alexandria, District of Columbia, to attach the effects of John Hooe, a resident of Virginia, in the hands of Jonathan Janney, a resident of the county of Alexandria, for a debt due by Hooe to Mordecai Miller & Son, of Alexandria. The subpoena was served upon Janney on the 3d of April, 1824. The garnishee, Janney, answered that he was not indebted to Hooe at the time of service of the attachment, or at any time afterwards, but that Hooe was indebted to him at the time of the service of the attachment in the sum of $587; that Hooe has his crop of wheat ground at Janney's mill in Virginia, which was under the immediate direction and management of one John P. Smoot, who was authorized to give receipts for flour brought to the mill, and to deliver the flour to the respective owners; that Hooe agreed that Janney should retain as much of his flour as would satisfy and discharge the debt to Janney; that after he had retained enough flour for that purpose, there remained more than enough to pay the debt due to Mordecai Miller & Son, the complainants, but Hooe sold it to one George Johnson, to whom it was delivered after the service of the subpoena upon Janney, who, as the property was out of the jurisdiction of this court, did not think himself justified in withholding it from Mr. Johnson, who had purchased it. He denied all fraud and collusion, &c.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that as the garnishee

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

was not indebted to the defendant Hooe, and had not any effects of that defendant in his hands within the jurisdiction of this court, no decree could be made against either of the defendants, and ordered the bill to be dismissed.

Case No. 9,574.

MILLER et al. v. HUBBARD et al.

[4 Cranch, C. C. 451.] [1]

Circuit Court, District of Columbia. March Term, 1834.

CONTRACTS—ABANDONMENT — AMOUNT EARNED — FORFEITURE—GARNISHMENT—ASSIGNMENT.

1. If a contract with the Chesapeake and Ohio Canal Company be declared by them "abandoned" for non-compliance with the terms thereof, according to a right reserved to the company by the contract, the contractors do not thereby forfeit the money which they have earned up to the time of the abandonment, except the 20 per cent. reserved as security for the execution of the work contracted for; although by the terms of the contract, upon the contract being declared "abandoned," it was agreed that "the company should be exonerated from every obligation thence arising, and that the reserved percentage on the contract price should become the property of the company to indemnify them for such breach of contract."

2. The attaching creditor is not in a better condition than his debtor would have been in if the attachment had not been laid.

3. A draft by the defendant on the garnishee, in favor of a third person, before the attachment, is an assignment to the payee of the amount stated in the draft, and will be preferred to an attachment.

[Cited in Jones v. Pacific Wood, Lumber & Flume Co., 13 Nev. 359.]

This was an attachment of money in the hands of the Chesapeake and Ohio Canal Company, due to the defendants [Frink Hubbard and others, and the Chesapeake & Ohio Canal], who were contractors to perform certain work upon the canal, and who were indebted to the plaintiffs [Miller and Mackay]. Before the attachment was laid, the company had declared the contract abandoned, for non-performance of the whole work by the appointed time. Before the attachment the defendants had given to one Rohrback a draft for an amount large enough to cover the whole amount due to them by the company.

Two questions were raised in the cause. (1) Whether the defendants, the contractors, by the abandonment of the contract had not forfeited all the money remaining in the hands of the company. (2) If not, then whether the money, at the time of the attachment, was the money of the defendants, or of Rohrback.

Mason & Wallach, for plaintiffs.

R. S. Coxe, for the company.

C. Cox, for Rohrback.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). Attachment under the Maryland act of 1795, c. 56. The attachment was issued and served on the 19th of February, 1833. The defendants had been contractors for work on the canal, but having failed to comply with the terms of the contract, it had been declared by the president of the company, "abandoned" on the 9th of February, 1833, under a power reserved in the contract to that effect. By the contract, monthly estimates of the quantity and value of the work done, were to be made by an engineer in the employment of the company, at the prices contained in the proposals, which were to be final and conclusive, unless objected to before payment thereof, and within twenty days after they should have been returned to the president and directors. Within ten days after such return, not less than four-fifths of the sum appearing to be due for work performed since the preceding estimate, were to be paid; the balance being reserved by the president and directors, to ensure the fulfilment of the contract; no portion of which reserved money under any circumstances to be paid until the contract should be fulfilled. It was also agreed, that when the president of the company should have declared the contract abandoned, "the company should thereupon be exonerated from every obligation thence arising; and the reserved percentage on the contract price, should become the property of the company, to indemnify them from such breach of contract."

The following facts were stated and admitted in the argument: That after the contract was declared "abandoned," an estimate was made by the proper officer of the company, of the work done since the preceding estimates, amounting to about $800; to four-fifths of which the defendants were entitled, unless they had forfeited the same by the abandonment of the contract. That on the 16th of February, 1833, the defendants drew an order on the company in favor of the plaintiffs, for the amount due by the defendants to the plaintiffs; and also an order on the company in favor of Jacob Rohrback, for $705.47, "out of any money that may be due to us after a full settlement of our accounts with the said company." That this last mentioned order was delivered to the plaintiffs as the friends of Rohrback, at the same time with the order in favor of the plaintiffs. That the plaintiffs immediately presented to the company for acceptance, the order in their favor; but the company refused to accept it. The plaintiffs did not present the order in favor of Rohrback, although they had it in their possession, nor did they give any notice thereof to the company; but issued the present attachment founded upon the note of the defendants of the 4th of February, 1833.

The following questions were raised in the argument: (1) Whether the defendants, by the abandonment of the contract, had for-

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

feited all the money remaining in the hands of the company. (2) If not, then whether the money (exclusive of the 20 per cent. which was admitted to be forfeited,) was at the time of the attachment, or at any time since, the money of the defendants, or whether it was the money of Rohrback by virtue of the draft, of which the company had not notice until after the attachment was served.

1. Upon the first question, the court is of opinion that the defendants, by non-compliance with the contract, forfeited only the reserved 20 per cent., and that all the residue of the estimated value of their work was due to them, or their assignee or assignees.

2. Upon the second question, the opinion of the court is, that the attaching creditors are not in a better condition than their debtor would have been in, if the attachment had not been laid; and as they could not, after their draft in favor of Rohrback, which is an assignment to him of so much of his claim as is stated in the draft, have received from the garnishees that amount to their own use; and as it is admitted that the draft was sufficiently large to cover the whole amount due by the garnishees to the defendants, there was no money of the defendants in the hands of the garnishees, at the time of the attachment. It is true, that if the garnishees had paid the money to the defendants, after the draft in favor of Rohrback, and before the garnishees had notice of that draft, they would have been discharged; but that would only affect the right of property as between Rohrback and the defendants. They would have received it in trust for him, and he might recover it from them by an action for money had and received to his use. But the garnishees, having received notice of that draft, before they paid over the money to the defendants, are bound by that notice; although in their contract with the defendants they expressly state that, "no draft will be accepted by the president and directors, from any contractor." This clause only relates to voluntary acceptance, and cannot affect the legal obligations of the parties, independent of acceptance.

It is said that the plaintiffs also had a draft from the defendants on the garnishees for the amount of the note upon which the attachment is founded, and given simultaneously with the draft in favor of Rohrback, and that, therefore, the plaintiffs ought to share the fund with him in the proportion of their respective claims. But the court can make no such order in this case, even if such were the rights of the parties; for this attachment can only affect the property of the defendants in the hands of the garnishees, at the time of the service of the writ, or since; and if they had no property in the hands of the garnishees at that time, or since, the attachment must be quashed, and the contending parties left to their legal or equitable remedies.

That a previous assignment of a debt, by the defendant, will be preferred to an attachment, appears by the following authorities: Serg. Attachm. 80; Privilegia Londini (3d Ed.) p. 277; Lewis v. Wallis, T. Jones, 222; Walker v. Gibbs, 2 Dall. [2 U. S.] 211; Stevenson v. Pemberton, 1 Dall. [1 U. S.] 3; Sharpless v. Welsh, 4 Dall. [4 U. S.] 279; U. S. v. Vaughan, 3 Bin. 394; Caldwell v. Vance, cited in Id. 400; Bank of North America v. McCall, Id. 338; King v. Gorsline [Case No. 7,796], in this court, May term 1831.

As the attachment must be quashed, it is not necessary that the court should notice the objections made by the counsel of Rohrback, that the affidavit did not state that Miller, one of the plaintiffs, was a citizen of Maryland; and that the word defendant was, by mistake, used for deponent. Attachment quashed.

MILLER (INDIANA v.). See Case No. 7,022.

Case No. 9,575.

MILLER v. JONES.

[Nowhere reported; opinion not now accessible.]

MILLER (JONES v.). See Case No. 7,482.

Case No. 9,576.

MILLER v. JONES.

[15 N. B. R. 150.] [1]

Circuit Court, D. New Jersey. Sept. 27, 1876.

APPEAL—MOTION FOR NON-SUIT—FRAUD IN LAW—HOW DETERMINED — CHATTEL MORTGAGE—POSSESSION—UNRECORDED BANKRUPTCY—RIGHTS OF ASSIGNEE.

1. A denial of a motion for a non-suit is not reviewable in error.

2. Whether an instrument is of itself a fraud in law is a question that must be determined from the instrument alone.

[Cited in Re Bloom, Case No. 1,557.]

[Cited in Lister v. Simpson, 38 N. J. Eq. 446.]

3. The existence of a collateral understanding adverse to or different from a written instrument is a fact that must be found by a jury.

[Cited in Argall v. Seymour, 48 Fed. 549; Etheridge v. Sperry, 139 U. S. 278, 11 Sup. Ct. 569.]

4. Under the laws of New Jersey, a chattel mortgage is good against subsequent creditors from the time of filing.

5. A statement which notifies creditors of the extent of the mortgagee's lien is sufficient to accompany the refiling of the mortgage.

[Cited in brief in St. Louis Drug Co. v. Robinson, 81 Mo. 19.]

6. An assignee has the rights of a judgment creditor as against a chattel mortgage not properly recorded.

[Cited in Cady v. Whaling, Case No. 2,285; Re Gurney, Id. 5,873; Lloyd v. Hoo Sue, Id. 8,432; Re Werner, Id. 17,416; Adams v. Merchants' Nat. Bank, 2 Fed. 180.]

[1] [Reprinted by permission.]

7. An assignee cannot recover the value of the property covered by a mortgagee if the mortgagee took possession before the commencement of the proceedings in bankruptcy, although the mortgage was not properly recorded.

[Cited in Re Gurney, Case No. 5,873; Argall v. Seymour, 48 Fed. 549.]

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

Kauffman & Hauck by their chattel mortgage dated December 1st, 1871, mortgaged to David Jones certain chattels, being the ordinary goods and chattels connected with the brewery, including lager beer then manufactured, to secure the payment of a then present indebtedness of thirteen thousand nine hundred and sixteen dollars, "or thereabouts." In the schedule affixed to the mortgage was this clause: "Also all personal property whatsoever of every nature, name and kind not above enumerated, except the books of account and evidence of debt belonging to said Kauffman & Hauck, at said brewery, whether included by name in this schedule or not, of whatever said personal property may or shall consist, and whether said personal property is now on and at said brewery premises, or whether the same shall be placed there during the time the said money mentioned in said mortgage and every part and parcel thereof shall be and remain unpaid." The mortgage was given to secure "Upon demand, all present indebtedness now due, owing, and accruing from said party of the first part to said David Jones, or which may at any time hereafter be due, owing, and accruing from the said party of the first part to the said David Jones, up to the amount in all of fifteen thousand dollars, and not exceeding that amount," with interest. The mortgage was acknowledged January 5th, 1872. Filed January 11th, 1872; refiled November 30th, 1872, and November 29th, 1873. On the 13th of August, 1874, the mortgagee took possession of the mortgaged premises and sold them upon due notice. The mortgagors were adjudicated bankrupts in December, 1874, and an action of trover and conversion was brought by [E. N. Miller] the assignee of the bankrupts to recover the value of the mortgaged premises sold by the mortgagee.

J. Whitehead and T. N. McCarter, for appellant.

C. Borcherling and A. Q. Keasbey, for appellee.

STRONG, Circuit Justice. There is nothing in this record, so far as it is exhibited to me, which exhibits a foundation for any of the errors assigned, except those which relate to the opinion of the court upon the reserved question. I need hardly say that a denial of a motion for a non-suit is not reviewable in error. Nothing was submitted to the jury at the trial except the two questions, what was the value of the goods in controversy, and whether the chattel mortgage under which Jones acquired the possession of the property was fraudulent in fact. No verdict was returned upon the last. The court reserved the question whether the mortgage was fraudulent in law, and allowed each party to turn the case into a bill of exceptions, that the finding on the question reserved might be reviewed by writ of error, in the same manner as if the conclusions of the court had been delivered as a charge to the jury, subject to exception. I am therefore to treat the opinion of the court, upon the reserved question, as a charge to the jury, to which exception was duly taken, and I am justified in assuming that the mortgage was not fraudulent in fact. The learned judge of the district court held that it was fraudulent in law, and ordered judgment for the plaintiff for several reasons, but principally on the supposed authority of Robinson v. Elliott, 22 Wall. [89 U. S.] 513. That was the case of a chattel mortgage of goods in a retail store, given to secure the payment of a series of notes. It contained the following provision: "And it is hereby expressly agreed that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part, (the mortgagors), may remain in possession of said goods, wares, and merchandise, and may sell the same as heretofore, and supply their places with other goods; and the goods substituted by purchaser for the goods sold shall, upon being put into said store or any other stores in said city, where the same may be put for sale by the said parties of the first part, be subjected to the lien of this mortgage." The instrument then concluded with separate powers to the mortgagors, on default in payment of their respective claims, to seize and sell (not the whole mortgaged property), but a sufficient amount of goods to satisfy the claims. This mortgage was held to be fraudulent in law, and void. There were peculiar circumstances in the case. There was an express stipulation that the mortgagors might deal with mortgaged property as their own; they might sell it and apply the proceeds as they pleased. It can hardly be asserted that there was any covenant to appropriate the proceeds either to the payment of the debt or to the purchase of other goods to be substituted for those sold, as was said by Davis, Justice, in delivering the judgment of the court: "Whatever may have been the motive which actuated the parties to the instrument, it is manifest that the necessary result of what they did was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own and appropriate the proceeds to their own purposes, and this for an indefinite length of time. A mortgage," he added, "which in its terms contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors, and where the instrument on its face shows that the legal effect of it is to

delay creditors, the law imputes to it a fraudulent purpose." Robinson v. Elliott [supra] was not intended to rule that the possession of chattels mortgaged might not be retained by the mortgagors, and retained by express agreement of the mortgagee. This was in effect conceded. It was the power given expressly by the mortgagee, to the mortgagors, to dispose of the mortgaged property for their own purposes, which in the judgment of the court stamped the mortgage with legal fraud; it was that which rendered the instrument in the opinion of the court no protection to the mortgagees, while it was a hindrance to other creditors. It has, in many cases, been decided that a mortgage of chattels which permits the mortgagor to remain in possession, and to dispose of the goods in the ordinary course of his business, is not of course fraudulent as a matter of law. The English registration acts and those of many of our states have, at least, for their object protection of both the mortgagor and mortgagee, in the retention of possession and use by the former, and this without any wrong to other creditors, for provision is made for notice to them. But the retention of possession by the mortgagor involves necessarily the consumption in a greater or less degree of the thing mortgaged. All personal property is consumed more or less by its use, certainly the use involves a constant depreciation in value. If, therefore, authorized consumption of the chattels mortgaged renders the mortgage in all cases fraudulent in law, it follows that no valid mortgage of chattels can be made which stipulates for continued possession by the mortgagor. Then the registration acts are totally inoperative. But this is nowhere claimed. It was not in Robinson v. Elliott [supra]. It has been held, indeed, in a few states, that a chattel mortgage which stipulates that the mortgagor may continue in possession and sell the goods in the ordinary course of business is constructively fraudulent, but the doctrine is denied in England, in Maine, Massachusetts, Iowa, and Michigan. Hughes v. Cory, 20 Iowa, 399; Gay v. Bidwell, 7 Mich. 519; Abbott v. Goodwin, 20 Me. 408; Mitchell v. Winslow [Case No. 9,673], and substantially in Massachusetts. 82 Mass. [16 Gray] 597; 44 Mass. [3 Metc.] 515; 56 Mass. [2 Cush.] 294; Brett v. Carter [Case No. 1,844].

It is not necessary, however, for me in this case to enter at large upon the discussion of this question, in regard to which it must be admitted there is much diversity of opinion and judgment. In the case I have in hand, the provisions of the mortgage under consideration differ from those of the one in controversy in Robinson v. Elliott. There is no express agreement even that the mortgagors might continue in possession of the chattels mortgaged, though such an agreement may perhaps fairly be implied. But certainly there is no stipulation that the mortgagors might sell or dispose of the chattels mortgaged for their own use, or for any purpose at all. On the contrary, it is expressly covenanted by the mortgagors that, "in case default shall be made in the payment of (the debt)," or in case they shall at any time before the day of payment stipulated for, remove said goods and chattels (mortgaged), or any of them, or permit or suffer any legal process against property to be issued against them, etc., the mortgagees might take and carry away the chattels mortgaged and sell them. This, to say the least, is an implied denial of any right in the mortgagors to sell the property for their own uses and purposes. On the face of the mortgage then, there is nothing that expressly or by necessary implication empowers the mortgagors to use the property as their own, or to withdraw it from the mortgage. On the face of the instrument, the property is absolutely pledged to the mortgagee as a security for the payment of the debt due him, and there is only an implied understanding that the possession might be retained until default in payment, or until an attempt should be made to withdraw the property from the operation of the mortgage, coupled with an express negative of a right to sell and deliver the property to others. The case is not then within the words or the reason of the rule asserted in Robinson v. Elliott. The learned district judge noticed this difference between the mortgage in the present case and that in Robinson v. Elliott, but thought it of no importance, because, as he said, through all the years of its existence the mortgaged goods and chattels were continually changing with the knowledge and assent of the mortgagee, and he could not help knowing that such a consequence must necessarily follow the mortgagor's method of carrying on business. There can be no difference, he said, in principle, whether an arrangement between the parties is the result of an open and express contract, revealed to the world, or of a parol secret understanding concealed within their own bosom. This may be true if the parol understanding be an established fact. But when the question is whether an instrument in writing is of itself a fraud in law, the answer must be made in view of the instrument alone. A court cannot call to its aid a presumed or assumed collateral understanding adverse to or differing from the written contract of the parties. The existence or non-existence of such an understanding or argument is a fact, which like other facts must be found by the jury. Certainly must this be so when the conduct of the parties after the mortgage was made is relied upon as proof of the collateral parol understanding. In such a case the fraud or honesty of the attempted transfer of the property is dependent for its proof upon a mingled body of evidence, partly parol and partly written, which of course must go to the jury. I think, therefore, the district court erred in concluding, upon the supposed authority of Robinson v. Elliott, that the mortgage under

consideration in this case was fraudulent in law.

This brings me to the consideration of the question whether the mortgage was in operation against creditors because it was not refiled in accordance with the statutes of the state. It was dated December 1, 1871. It was filed January 8, 1872, refiled November 30, 1872, and a copy was filed November 29, 1873. The statute of New Jersey relative to chattel mortgages enacted March 24, 1864 [Laws N. J. 1864, p. 493], has reference to mortgages unaccompanied by an immediate delivery, followed by an actual and continued change of possession of the things mortgaged, and it declares that every such mortgage shall be void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed as directed in the act. Nixon, Dig. 613. The second section directs where the mortgage shall be filed, but does not prescribe when. It may, however, I think, fairly be inferred that the filing must be before the rights of creditors other than the mortgagees have arisen. The third section enacts that every mortgage filed in pursuance of the act "shall cease to be valid as against the creditors of the person making the same, or against purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days preceding the expiration of the said term of one year a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property therein claimed by him by virtue thereof, shall be again filed," etc. Now if it be assumed that the filing on the 8th of January, 1872, was not within the provisions of the act (which I confess I am unable to see), the filing on the 30th of November, 1872, may be considered as the original filing, and the refiling of November 29, 1873, was in time; both filings are good as against subsequent creditors. Such I understand to have been the opinion of the district judge, and in this he is sustained by authority—with this opinion I concur. But he seems to have thought that the statement which the statute requires to accompany the filing and the refiling was not such as the law required. I agree that a statement is necessary in addition to the filing and refiling, but a statement was made and filed on both occasions. The statement in each case claims the whole amount mentioned in the instrument to be due thereon, and as constituting the interest of the mortgagee at the date of the refiling. Referring to the instrument it appears that the sum mentioned therein as due to the mortgagee was thirteen thousand nine hundred and sixteen dollars or thereabouts, but it recites that a further credit was asked and proposed to be given, so that the entire amount should be fifteen thousand dollars, and not more. The security was therefore intended to cover the amount of fifteen thousand dollars. That sum the mortgagee was to advance, if he had not already advanced it, and that sum is the only sum spoken of in the mortgage as the "amount" intended to be secured by it. I am inclined to think, therefore, that the statements made when the mortgage was filed were sufficiently specific. They notified all subsequent creditors that the mortgagee had a lien upon the property to the extent of fifteen thousand dollars. I do not, however, consider this very important, for reasons which I will hereafter give; and the district court does not appear to have rested the case upon this point. If it were conceded that the mortgage was void as against other creditors of the mortgagors, it is not to be denied that it was good as between the parties. Creditors might avoid it or disregard it, because it was a fraud on them. It was enabling the mortgagor to hold out to them a false credit, by the possession of chattels which he had owned, but a title to which he had secretly conveyed to another. The fraud consisted in the retention of possession after the right to possession had been conveyed away; hence the recording or registration of chattel mortgages. The object was to render continued possession by the mortgagor legal, by requiring record notice of the mortgagee's rights to be given to all subsequent creditors of the mortgagor or purchasers from him. But when the possession was actually passed to the mortgagee, pursuant to the provisions of the mortgage; when the mortgagor no longer retains the possession, there is no false credit exhibited, and the possession of the mortgagee is not a fraud upon other creditors. No one doubts that in this case Kauffman and Hauck might have actually delivered the chattels to Jones as a security for the debt due him. And had they done so the pledge would have been good, even as against creditors. Until the delivery creditors having recovered a judgment might have levied upon the goods, and held them by right superior to that of a pledgee or mortgagee without possession, except so far as he may have been protected by the statute. And I think, notwithstanding some decisions to the contrary, an assignee in bankruptcy of the mortgagors stands in the position of such creditors with equal rights; the adjudication of bankruptcy being equivalent to the recovery of a judgment and a levy—but his rights are no greater. I cannot see that a creditor of Kauffman and Hauck, who may have recovered a judgment against them after Jones, the mortgagee, took possession of the mortgaged chattels, and sold them, would follow the chattels by an execution. The taking possession by the mortgagee would have been no fraud upon such a creditor; not taking possession is the only fraud of which he could complain. How can the assignee in bankruptcy be in any better condition? Long before the adjudication of bankruptcy was made in this case the mortgagee had obtained actual possession of all the mortgaged property and had sold it,

and this under an authority given by the mortgagors some years before the adjudication in bankruptcy, not in virtue of any preference given within four months. The taking possession then was not a fraud against the provisions of the bankrupt act [of 1867 (14 Stat. 517)], and I am therefore unable to see how it was in any aspect a wrong to the creditors or to their representative, the assignee in bankruptcy. In Brown v. Platt, 8 Bosw. 324, wherein a chattel mortgage claimed to be fraudulent in law as against creditors was assailed, Judge Woodruff held the attack to be unavailable, because, before any creditor questioned the validity of the mortgage, the goods were delivered into the actual possession of the mortgagees upon terms securing to them the custody and right of disposition, with authority to apply the proceeds first to the payment of their own debt. A similar doctrine was held in Massachusetts (Mitchell v. Black, 72 Mass. [6 Gray] 100); then it was ruled that one who had advanced money to a merchant to enable him to purchase merchandise, taking as security therefor (pursuant to agreement) bills of sale from the vendor and also from the debtor, assignments of the bills of lading, and had afterwards allowed the debtor to sell some of the goods as if they were his own, might take possession of the goods unsold at the same time, in order to secure his debt, and that such taking possession, though at a time when the debtor is known to himself and the creditors to be insolvent, is effectual. The retention of possession by the debtor was a fraud in law; but as no other creditor's rights had intervened when the assignee of the bills of lading took possession, he was declared to hold rightfully even as against other creditors. Equally in point is Sawyer v. Turpin [91 U. S. 114].

This is all I need say respecting the only question reserved. But, as the case goes back for a new trial, I add a few words upon a subject learnedly discussed by the district judge, and which may be matter of debate at the second trial. The mortgage included not only the personal property of the mortgagors owned by them at the time the instrument was made, but also after-acquired property. Now I agree that at law, after-acquired property cannot be subject of mortgage or sale, at least it must potentially exist and be capable of delivery. The rule, however, is confessedly different in equity. Lunn v. Thornton, 1 Man., G. & S. 379, was an action at law, in which it was held that a grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void unless the grantor satisfied the grant by some act done by him; with that view, after he has acquired the property therein, the decision was rested upon the authority in part of the fourteenth rule of Bacon's Maxims: "Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio praecedens quae sortiatur effectum interveniente novo actu." But this maxim is a rule of law, not of equity. In Mitchell v. Winslow [Case No. 9,673], Judge Story ruled mortgages of after-acquired chattels to be valid in equity, and the same thing has been decided repeatedly since, both in this country and in England; and in equity, whatever may be the rule in law, there is no necessity for the "novus actus interveniens." Holroyd v. Marshall, 10 H. L. Cas. 191, decided in the house of lords in 1862, is the case of the highest authority. There it was decided, after a thorough review of previous decisions, that the title of a mortgagee of after-acquired personal property was superior to that of an execution-creditor of the mortgagor who had put in his execution after the debt had fallen due, and had been demanded, though possession had never been taken from the mortgagor. See, also, Brett v. Carter [Case No. 1,844]. But if this were not so, what principle of law or equity forbids the creation by a deed, such as a chattel mortgage, of a power to seize the subsequently acquired personal goods of the mortgagor as they may be acquired in satisfaction of the mortgagor's debt? If it be admitted such property does not pass immediately on the execution of the deed, or immediately on its acquisition, why does it not when seized under such a power? In Lunn v. Thornton it was more than intimated that a distinction exists even at law between such a case and a mere mortgage of personalty that might thereafter be acquired. The instrument in that case created no such power. The mortgage in the present case expressly gives power to the mortgagee to take and carry away the goods mortgaged, including the future acquisitions, and to sell the same in satisfaction of the debt. Such a seizure and sale were made before any other creditor interfered or had a right to interfere. I forbear any further discussion of this subject; perhaps I ought not to have said so much as I have said, for no question in regard to it was reserved.

The judgment of the district court is reversed, and a new trial is ordered.

Case No. 9,577.

MILLER v. KELLY.

[Abb. Adm. 564.] [1]

District Court, S. D. New York. Nov., 1849.

SALVAGE—CLAIM BY CREW—ACTION IN PERSONAM AGAINST MASTER—CONTRACT FOR THE VOYAGE—MAINTENANCE OF CREW.

1. No claim for salvage can be maintained by the crew of a vessel upon the ground that by their services she is brought through a storm into port, sound in hull.

2. An action for compensation for salvage services rendered to a vessel, cannot be maintained in personam against the master, unless it was performed for his benefit.

3. A mariner who ships "by the run," takes the risk of adverse weather and of other kin-

[1] [Reported by Abbott Brothers.]

dred accidents attendant upon maritime enterprise; and if the vessel be driven out of her course by stress of weather, and obliged to take shelter in an intermediate port, and is there detained, the seaman has no claim for additional compensation for extra services thus required.

[Cited in The Clarita and The Clara, 23 Wall. (90 U. S.) 17; Burdett v. Williams, 27 Fed. 119; The C. P. Minch, 61 Fed. 513.]

4. Where a seaman ships "by the run" or "by the voyage," the vessel, although detained at an intermediate port by stress of weather, is bound to maintain him while he remains attached to her, whether his services are useful to her or not.

This was a libel in personam filed by William Miller against James Kelly, to recover compensation for services rendered on board the respondent's vessel. In December, 1848, the libellant shipped at Boston on board the brig W. T. Dugan, of which the respondent was master, for a voyage to New York. He shipped as mariner, and engaged "for the run," at $8, which sum was paid him in advance. The brig, on the voyage, encountered a gale off Martha's Vineyard, in which she was much injured. She put into Nantucket in distress, and there remained for about three weeks, at the end of which time she was towed on to New York by a steamer sent on for the purpose. The libellant commenced this action to recover compensation for the extra services rendered by him to the ship during the storm, and during the detention of the vessel at Nantucket. He claimed to recover either by way of salvage, or on a quantum meruit for such services as being extra his contract.

E. C. Benedict, for libellant.

I. The voyage for which the libellant shipped was the usual direct "run" from Boston to New York, a well-known voyage of safe navigation, from three to six days long—a mere passage from one city to the other. This alone was in the minds of the parties, and on this alone their minds met. If, without the fault of the seamen, this voyage, or run, was deviated from or rendered impossible, whether by accident or design, it was at the risk of the master, who alone controls the voyage. In such case, the men are entitled to a quantum meruit. If the voyage is thus made longer in time or distance, whether the hindrance, departure, or extension occur at either end, or at an intervening port, (not in the run,) the wages are to be increased pro rata. Laws Oleron, art. 19; Cleirac, Oleron, 64, notes 1 and 2; Curt. Merch. Seam. 63.

II. The libellant's demand is as equitable and just as it is legal. Where seamen have encountered great peril in saving their own wrecked vessel, maritime courts are inclined to allow them something in the nature of a salvage quantum meruit, but usually in the name of wages. They are not held to be excluded from their wages by rules which, literally construed, would seem to exclude wages.

F. F. Marbury, for respondent.

BETTS, District Judge. The libellant, in December, 1848, hired himself to the respondent at Boston, as a mariner on board the brig W. T. Dugan, for a voyage to New York, for the sum of $8 for the run. That sum was paid him in advance. This method of hiring was familiar to the ancient marine law. Jac. Sea Laws, 133. It is substantially superseded in modern practice by contracts for monthly wages. Id.; Curt. Merch. Seam. 62, 63. But the obligations in the two cases are equivalent, being an engagement to perform the voyage named.

The vessel, on her regular course, encountered a gale off Martha's Vineyard on the 2d of January, at 3 a. m., which continued until half-past 3 a. m. of the next day, blowing violently from the N. W. The anchors were thrown over without effect; the cable parted, and the main anchor was lost, when both masts were cut away, in order to check the driving of the vessel. She was shortly after brought up by the kedge anchor. In falling, the masts stove a hole in the long boat. The brig came to about five miles east of Cape Pogue. The wind continued N. W., and a light spar was obtained and rigged as a jury-mast; the kedge hawser was cut, and the brig put before the wind for Nantucket, where she arrived, grounding while working into the harbor, and was then towed in by a steamer. The weather was severe and freezing during the efforts to make harbor, and ice made over the decks, rigging, &c. She remained in Nantucket about three weeks, and was then towed to New York by a steamer sent to her for that purpose.

The libellant claims compensation for the time he was thus detained, by way of salvage for assisting in saving the vessel, or as a quantum meruit for his services during the delay of her voyage.

The claim for salvage cannot be sustained. The Neptune, 1 Hagg. Adm. 237; The Branston, 2 Hagg. Adm. 3, note; [Hobart v. Drogan] 10 Pet. [35 U. S.] 110, 3 Kent, Comm. 246. No services were rendered by the seaman beyond what were required of him by his duty to the ship. He was bound to the hazards of the voyage, and to bestow his best efforts for the preservation of ship and cargo. Detentions through perils and disasters of the sea, are risks assumed by seamen in every shipping contract, and no legal right arises to them from those causes, or their extra exertions to save their vessel, to demand an increased compensation. Abb. Shipp. 647. The vessel was not a wreck, out of which, by his special exertions, a portion of her tackle or of her cargo has been preserved. She came bodily into port, sound in hull. No claim for salvage can be raised by a crew against a vessel so circumstanced. 3 Kent, Comm. 367. And even if such claim might be enforced in rem against the hulk, as a remnant of the entire ship, the demand could not

be maintained in personam against the master without proof that the salvage service was performed for his benefit. Sup. Ct. Rules, 19.

The claim for continuing wages on a quantum meruit, is pressed upon the consideration, that the libellant engaged for a continued run or voyage to New York, and that by putting the vessel back off her course, the respondent committed a deviation which entitles the libellant to pay for his time intervening up to the arrival of the vessel in her port of destination.

It cannot be maintained that returning to Nantucket from the anchorage of the brig was a voluntary deviation. There was an imperative necessity that something should be done for the preservation of the vessel and her crew; and, in her crippled condition, nothing else could be attempted so safe and serviceable to both, as to reach that harbor. The measure was compelled by stress of weather, and the absolute exigencies of the vessel and her crew. The libellant could not claim a guaranty of fair weather and a swift run. He took the risk of adverse winds and all accidents incident to maritime voyages. Had the ship been driven on shore, or on a rock, or imbedded in ice, and detained thirty or sixty days, the misfortune would have been part of the risk he assumed in undertaking the voyage. He engaged to perform the voyage: and the fair and reasonable interpretation of the contract is, that he is to stay by and aid the ship in accomplishing it, so long as she can be bona fide employed in its performance. In all the books, shipping by the run is considered equivalent to shipping for the voyage. Curt. Merch. Seam. 63, and authorities cited. In each case the seaman is bound to the vessel so long as she continues on the iter; and her being driven from a direct course by distress, or going voluntarily off it for shelter or repair, in no way relieves him from his contract.

Should it happen on a hiring for a voyage to Europe, that the ship was compelled, ex necessitate, to make harbor in Bermuda, the Western Isles, or Madeira, and be detained a period longer than the usual transit to her port of destination, the seamen would not thereby be released from their obligation to continue to the termination of the undertaking.

The obligation between the parties is reciprocal. The ship is bound to support the crew whilst they remain with her, although their services may be of no value to her, and, as in this case, to continue them on board to the port of their discharge, should the vessel be conducted there wholly independent of their assistance.

I do not discuss the question as to the right of the libellant to demand his discharge at Nantucket, when it was found the vessel must remain there to be repaired, or until she could be towed by a steamer to New York. He made no such request. It was probably most to his interest, in a place so separated from intercourse with other ports during the winter season, to remain with the vessel and be maintained at her expense. Whilst he did continue with her and she was engaged in providing means to complete her voyage, and during its completion, he must be regarded as acting under his contract, and can be entitled to claim no more than the stipulated wages. I shall, therefore, pronounce against the demand, but, as there is color of equity in his claim, and it does not appear to be presented vexatiously, I shall not impose costs on him. Libel dismissed without costs.

Case No. 9,578.

MILLER v. KEYS.

[3 N. B. R. 224 (Quarto, 54).] [1]

District Court, D. South Carolina. 1869.

BANKRUPTCY — FRAUDULENT PREFERENCE — UNABLE TO PAY DEBTS—INSOLVENCY—PRIMA FACIE CASE — CONSIDERATION FOR NOTE — PRICE OF SLAVES.

1. Creditor upon a note of which slaves were part consideration, filed petition in involuntary bankruptcy against a farmer, charging him with having made fraudulent preferences, being insolvent. *Held*, a note made prior to the emancipation proclamation, of which slaves were a consideration, is valid, and the debt will support a petition of creditor in bankruptcy.

2. To constitute a fraudulent preference where the alleged bankrupt is claimed to be insolvent, he must so be and know himself so to be, and actually intend and actually give a preference to a creditor.

3. A trader unable to pay his debts in the ordinary course of business is prima facie insolvent, and the burden of proof is upon him, in such a case, to show that he is solvent—aliter, as to a farmer, where the petitioner must prove the actual insolvency of the alleged bankrupt.

This was a petition by creditor [H. C. Miller] for involuntary bankruptcy of the respondent [J. Crawford Keys] upon four counts, only three of which, however, were relied upon as material, to wit: A mortgage of some three thousand one hundred acres of land to one Tompkins, to secure a debt of four thousand dollars; a subsequent conveyance of the same in fee to pay this debt and six thousand dollars more; the delivering up to Keys & McCully of a note for one thousand dollars, to whom respondent owed seven hundred dollars; each count alleging that the transaction specified was made whilst the respondent was insolvent, and with the intent to give a preference. The petitioner claimed two notes, and the position was taken in the outset by the defense, that he had no status in court, on the ground that one was paid and the other was "tainted with negro." The testimony was pretty conclusive as to the first, but the last was given for the balance of a large transaction had about the commencement of the war, only a

[1] [Reprinted by permission.]

portion of which was negroes. His honor charged the jury that a note for negroes before Lincoln's proclamation took effect was perfectly valid, but that the question did not arise in this case properly, as the note grew out of a mixed transaction, and from the original proportions of the consideration, the respondents, by whatever basis of calculation they might adopt, must owe the petitioner two hundred and fifty dollars, which was enough to establish his right to be in court.

A great deal of testimony was offered on the question of insolvency. The respondent told petitioner, when the latter first demanded payment, after the war, that he was (then) wholly unable to pay—could scarcely live, and the English rule of technical insolvency was strongly pressed. Various estimates were made of the value of the lands mortgaged (and subsequently conveyed) to Tompkins, but the preponderance of the testimony made them a hard bargain on the whole at fifty cents per acre; the note delivered up to Keys & McCully was shown to have been given for a two-third interest in a similar tract in the mountains of Pickens. It was further shown that at the time this note was re-delivered, the respondent owed K. & McC. about seven hundred dollars, that no credit was given, and they went on furnishing him with supplies and fertilizers, and, as one of the firm said, the respondent's credit had been perfectly good with them, and remained unimpaired, and that no settlement had yet been made. The case was argued at length and with great zeal and ability on both sides.

McGowan & Perry, for petitioner.
Reed & Trescote, for respondent.

THE COURT charged the jury with great clearness, and very fully. Both parties expressed their satisfaction, and declined to ask special instructions. Without attempting to quote the charge, THE COURT said, in substance, that to make out the case it was necessary that insolvency and a preference must concur. A trader unable to pay his debts in the ordinary course of business, is insolvent, prima facie, and it is incumbent on him to show that he is not so in fact. This rule does not apply with the same strictness to the farmer, and as to them this rule is reversed. The petitioner must take the onus of showing actual insolvency. The "preference" must be an advantage actually given to one or more of his creditors over the others, with the knowledge of his situation and the intent to accomplish this end. The "intent" is an element of the objectionable transaction, according to the letter of the law, and though one is presumed to intend the natural results of his acts, the intent is essential, and must be shown by his acts and the circumstances. When the respondent sold the land to Tompkins, he believed at least that he was paying a debt of ten thousand dollars, and if he considered these lands of such comparatively insignificant value, it would be hard to believe, upon the estimate of the relative value of his assets and liabilities, that he intended or thought he was giving a preference to this creditor. The solution of the mortgage is much more difficult, not only on account of the difference of the sum, but also because it was merely a security for that sum, and did not relieve his estate of it by a settlement in full. The Keys & McCully transaction is a peculiar one, and is to be solved by the testimony which you have. No credit was given upon the books, but if, from the testimony, you are satisfied that the seven hundred dollars was paid by the respondent in full, by the re-delivery of the one thousand dollar note, then is not this more than he could pay to others, and to that extent a preference? If you shall conclude that this note was re-delivered to meet the heavy advances of provisions and of fertilizers subsequently made, as well as the debt already contracted, then you may reach a different conclusion. These are questions which it is your peculiar province to solve. The insolvency and the intent to give preference must concur.

The jury returned a verdict of not guilty.

Case No. 9,579.

MILLER v. LERCH.

[1 Wall. Jr. 210.] [1]

Circuit Court, Third Circuit. Oct., 1848.

RELIGIOUS SOCIETIES—INCORPORATION—POWER TO HOLD IN TRUST—BEQUEST TO CHARITABLE USES.

A religious corporation, created under the act of April 6, 1781, of the Pennsylvania legislature, can be a trustee for the heir at law of the testator, who devised certain lands to it in trust for uses that were void. The statute of mortmain, 9 Geo. II. c. 39, has never been in force in Pennsylvania.

[Cited in De Camp v. Dobbins, 31 N. J. Eq. 691.]

Peter Miller of Easton, devised an estate of about $300,000 to two church corporations of that town, upon certain trusts which his heir at law, the present plaintiff, contended were void, but which the corporations asserted were charitable uses, and as such entitled to the protection given to that class of gifts. A large part of the devise was real estate, which the present action—one of ejectment—was brought to recover. The question was, whether admitting the trusts to be void, the plaintiff had such a legal title as would enable him to recover here in ejectment. In other words, whether the legal title was not in the corporations, and whether the remedy of the heir was not by bill in equity on the other side of this court. Both corporations were created under an act of legislature, April 6, 1791 (3 Smith's Laws, 20), which, with a supplement, em-

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

powered them to "take, receive and hold all and all manner of land, &c., to be employed and disposed of according to the objects, articles, and conditions" of their charters, "provided that the clear yearly value or income of the messuages, &c." did not exceed $2000. The charters gave no express power to hold lands in trust for purposes not within the scope of their objects.

J. M. Porter and M. H. Jones, in support of the action.

If the legal title is out of the heir and in the corporations, it can be there for one of two purposes alone; that is to say, either for the use of the corporations themselves; or in trust for the heir at law. Certainly the corporations do not hold for themselves. The statutes of mortmain apply to Pennsylvania corporations, whatever counsel (Vidal v. Girard, 2 How. [43 U. S.] 127) may have said arguendo. The judges of the supreme court of this state, in their report upon the English statutes in force here (3 Bin. 626) Dec. 14th, 1808, say that these acts "are so far in force, that all conveyances either by deed or will, of lands, tenements or hereditaments, made to a body corporate, or for the use of a body corporate are void, unless sanctioned by charter or act of assembly." And the legislature of the state declared the law to be the same way, twenty-five years afterwards in the preamble to one of its statutes. Act April 6th, 1833. The enacting part of the statute, it is true, had reference to a particular matter, but the general and then existing law of the commonwealth is explicitly and intelligently declared in this preamble;—a preamble that would operate not only as a declaration of the then existing law, but if necessary as an adoption of the statutes of mortmain, so far as any thing but enactment can adopt them. "Whereas it is contrary," says this act, "to the laws and policy of the state, for any corporation to prevent or impede the circulation of landed property from man to man, without a license from the commonwealth, and no corporation, either of this state or of any other state, though lawfully incorporated or constituted, can in any case, purchase lands within this state, either in its corporate name, or names of any person or persons whomsoever for its use, directly or indirectly, without incurring the forfeiture of said lands to this commonwealth, unless said purchase be sanctioned and authorized by an act of the legislature thereof; but every such corporation, its feoffee or feoffees, hold and retain the same, subject to be divested or dispossessed at any time by the commonwealth according to due course of law," &c. Indeed the act "enabling religious societies of Protestants within this province to purchase lands," (Act Feb. 6, 1730–31, 1 Smith's Laws, 192), was necessary to counteract the operations of these statutes. But that act never went further than to enable those societies to take sites for churches, houses of religious worship, schools, almshouses, and for burying grounds. And though the act under which these corporations are created, allows them to hold lands to a larger extent, yet it does not enable them to take such a vast estate as is here devised; the yearly value of which is far above $2,000. Neither can the corporations be trustees for the heir. Indeed, as is well known, it was formerly doubted whether a corporation could be a trustee for any purpose; whether it could be seized to any use and convey by bargain and sale; and though the modern doctrine is, that a corporation may be a trustee for some purposes, that is to say, for purposes within its scope, it has never been held that a corporation can be seized of a bare legal estate to hold in trust for a purpose no way connected within its scope,—which is foreign from its purpose—and which arises only in consequence of the uses being void for which the property was conveyed. The uses are void: The devise is void; and the heir takes directly. He has, we think, the legal title and, of course, can maintain ejectment.

Mr. Sergeant and Mr. Bayard on the other side were relieved by the court, after merely stating their points.

GRIER, Circuit Justice. In England, under the statute of 9 Geo. II. c. 36,[2] when lands are devised to a charity, the trust not only is itself void, but it vitiates the devise of the legal estate on which it was engrafted. And therefore in such cases the heir may recover at law, except where there are other trusts not charitable, which, of course, would entitle the trustees to retain the estate, and oblige the heir to prosecute his claim in equity. Jarm. Wills, 200. But this statute, which is usually, though rather inaccurately, called the "statute of mortmain," was never adopted in Pennsylvania, nor is there to be found any similar provision in her own legislation. It is, however, by virtue of this statute alone, and not by any principle of the common law or provision of earlier statutes, that courts of law in England treat the devise or gift as void, and permit the heir to recover in them. Doe v. Wrighte, 2 Barn. & Ald. 710. I am aware that the judges of the supreme court of Pennsylvania, in their report upon the English statutes in force in Pennsylvania, make the following remarks: "There are several statutes called statutes of mortmain, one of which (the statute de religiosis) was passed in the 7th year of Edward I. (statute

[2] This statute enacts (section 1) that no manors, lands, &c., nor money, &c., shall be given, &c., to charitable uses, unless by deed indented and executed before two witnesses, 12 months before the death of the donor, executed with certain formalities, and by § 3, that gifts, &c. "made in any other manner or form . . . shall be absolutely, and to all intents and purposes, null and void."

the 2d); another in the 13th year of Edward I. (chapter 32); another in the 15th year of Richard II. (chapter 5); and another in the 23d year of Henry VIII. (chapter 10). These statutes are, in part, inapplicable to this country, and, in part, applicable and in force. They are so far in force that all conveyances either by deed or will, of lands, tenements or hereditaments made to a body corporate or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly. So also are all such conveyances void made either to an individual or to any number of persons associated but not incorporated, if the said conveyances are for uses or purposes of a superstitious nature, and not calculated to promote objects of charity." 3 Bin. 626.

How far this report may be entitled to consideration as a judicial authority, it is not necessary for me to consider; for the assertion that deeds and wills of land made to a body corporate are void, has long been admitted to be a mistake. Indeed, I fully concur with those who refuse to admit that any of the English statutes of mortmain have, or ever had, any operation in Pennsylvania. They were mere statutes of policy, in contravention of the common law, and were passed to prevent the king and mesne lords from being deprived of their feudal and seignoral rights accruing by prerogative and tenure. Some of them were aimed avowedly at the Roman Catholick religion. Our tenures of land subject them to none of those feudal burthens from which they escape by alienation to a corporation, and which, for this reason, were called alienations in mortmain, or dead hand. Lands held by corporations may, in general, be aliened and taxed as lands held by natural persons are; and the state loses none of her prerogatives over them, except the possible chance of an escheat or collateral inheritance tax. They are, therefore, not properly in mortmain as regards the prerogative of the state as superior lord. And how can the terms "superstitious" be predicated of any religion in this state?, whose constitution acknowledges no church as orthodox, and holds all sects and all religions entitled not merely to toleration, but to equal protection? But it is not necessary for the court here to affirm or to deny any speculative doctrine on this subject. It has been examined with great learning and ability by my predecessor, the late Hon. Henry Baldwin, in his opinion in Magill v. Brown [Case No. 8,952] (the case of Sarah Zane's will), decided in 1833, and more recently by Horace Binney, Esquire, in his argument at Washington, in Vidal v. Philadelphia [Id. 16,939]; both printed in pamphlet form. To those documents I would refer the persons who take an interest in the inquiry.

It is enough for the purposes of the present case that these statutes would not make void a conveyance in mortmain, but only expose the land to forfeiture by the entry of the commonwealth. It is therefore a doctrine well settled in Pennsylvania, that a corporation has a right to purchase, hold and convey lands in this state without a license, until some act is done by the government, according to its own laws, to vest the estate in itself. The fact, therefore, that the license contained in the acts of incorporation limits the income of these corporations to $2,000, cannot affect the present question, as it does not avoid the devise in consequence of its being beyond the limits of the license. The legal estate passes by the gift or devise to the corporation, and is defeasible by the commonwealth alone. Leazure v. Hillegas, 7 Serg. & R. 313; Runnion v. Costar, 14 Pet. [39 U. S.] 122. The remedy therefore of the plaintiff should be by bill in equity, and not by ejectment. If, on the hearing of the case in equity, the court should be of opinion that the trusts limited on this devise are such as a chancellor would not execute, it will treat the devisees as trustees for the heirs at law or next of kin, and decree a conveyance of the legal estate to them. Judgment accordingly.

Case No. 9,580.

MILLER v. LINDSEY et al.

[1 McLean, 32.] [1]

Circuit Court, D. Ohio. July Term, 1829.[2]

GRANTS—VIRGINIA MILITARY DISTRICT — CESSION —SUBSEQUENT PATENT — STATUTE OF LIMITATIONS — AGAINST GOVERNMENT — VOID SURVEYS.

1. Subsequently to the cession of the Virginia military district, the state of Virginia had no right to issue a patent for land within it.

2. The statute of limitations does not run against the government, but against a title where the possession is held adversely.

3. The act of 1807 [2 Stat. 424], which prohibits entries from being made on lands which had been surveyed or patented, does not protect void surveys or patents.

[This was an action in ejectment by Thomas B. Miller against Stephen Lindsey and others.]

Mr. Leonard, for plaintiff.

Mr. Caswell, for defendants.

OPINION OF THE COURT. This ejectment is brought to recover possession of 450 acres of land, within what is called the Virginia military district. The defendants are proved to be in possession of the land claimed by the lessors of the plaintiff. To sustain the plaintiff's right, a patent dated the 1st December, 1824, founded on an entry and survey, is given in evidence. The defendants offered in evidence a patent issued by the commonwealth of Virginia, dated March,

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

[2] [Affirmed in 6 Pet. (31 U. S.) 666.]

1789, to Richard C. Anderson, for the same land, which the court overruled, on the ground that the state of Virginia, subsequently to the cession of this district of country, had no power to appropriate any part of it, or to give a patent for the same. An entry and survey of the same lands, made in January, 1783, which were duly recorded, were then given in evidence by the defendants, and they offered evidence conducing to prove a possession of more than thirty years.

To do away the effect of this evidence, the plaintiff gave in evidence the warrant on which the defendant's entry and survey were made, with proof tending to prove that the services for which the warrant was granted, were in the Virginia state line, and not in the continental line. Indeed, this appears on the face of the warrant. And the question of law is made to the court, whether an uninterrupted possession of more than twenty-one years, under the circumstances of the case, does not constitute a bar to the plaintiff's right of action. Possession to operate as a bar, must be adverse to the right asserted. The right of the plaintiff in this case, it appears, originated in 1824; so that the adverse possession can only be counted from that time. Less than twenty-one years' possession does not constitute a bar; and it is very clear that the statute cannot run against the government. This district of country was ceded by Virginia to the federal government, for the express purpose of satisfying claims of the Virginia troops, for services on continental establishment; after the good lands in certain other districts, should be exhausted. By the cession, this district was placed under the jurisdiction of congress, subject to the trust specified; and patents for lands within it, emanated from the federal government. But at no time were the lands in the district, subject to appropriation by warrants issued by Virginia for services in her state line.

In an act passed by congress the 2nd March, 1807, to extend the time for locating military warrants in this district, and for other purposes, it is provided, "that no locations within the above mentioned tract, shall, after the passage of that act, be made on tracts of land for which patents had been previously issued, or which had been previously surveyed; and any patent obtained contrary to the provisions of that act, was declared to be null and void." The entry set up by the defendants was made in 1783, and the cession of this district in 1784; so that the entry was prior to the cession. But it is not pretended that at the time this entry was made, the warrant authorized it. Provision was made by Virginia elsewhere for the satisfaction of warrants issued for state services. The act of 1807 was designed to protect irregularities in surveys, but not to give effect to void ones. In the case of Taylor v. Myers, 7 Wheat. [20 U. S.] 23, the court decided that this act did not protect a survey where the entry had been withdrawn. The warrant under which this entry was made gave no authority to the holder to make it. He might as well have assumed the right of making the entry without any warrant. And that a survey unsupported by an entry does not come within the law, is clear, from the case above cited. It appears, therefore, that the defendants cannot legally resist the right of the plaintiffs, under their patent, by pleading the statute of limitations, or under the law of 1807.

The jury found a verdict of guilty against the defendants, on which the court entered a judgment.

This case was taken to the supreme court by a writ of error, and the judgment of the circuit court was affirmed. 6 Pet. [31 U. S.] 666.

Case No. 9,580a.

MILLER v. LONG ISLAND R. CO.

[10 Reporter, 197;[1] 5 Cin. Law Bul. 634.]

Circuit Court, E. D. New York. July 13, 1880.

RAILROAD—USE OF STEAM — NUISANCE — INJUNCTION — ABUSE OF FRANCHISE — PARTIES TO INJUNCTION — FENCINGS WITH CROSSINGS IN TOWN —PRIVATE INCONVENIENCE.

1. Where a railroad is a lawful structure, and the use of steam is permitted by law, the use of the road and the use of the steam on it, independently of any abuse, is not a public nuisance to be enjoined. Where the abuse, if any, is general and common to all owners of adjacent property, the defendants can be called to account only by the sovereign authority.

2. The fencing of a railroad in a city with gates at the street crossings is a regulation for public safety, and any incidental inconvenience is merged in the superior interest of the public.

Bill in equity. The action was brought to restrain defendant from building a railroad, and fencing the same, on Atlantic avenue, in Brooklyn.

S. Hand, S. Sterne, and G. Thompson, for plaintiff.

B. F. Tracy and E. B. Hinsdale, for defendant.

BLATCHFORD, Circuit Judge. The railroad in question being a lawful structure, and the use of steam power on it being lawful, the use of the road, and the use of the steam power on it by the defendants, is not and cannot be of itself, independently of any abuse in the manner of use, a public nuisance to be enjoined. If there be any abuse in the use of the road, or of steam power on it, such abuse is, on the evidence, one which affects the plaintiff and his property no differently from the manner in which it affects all owners of property along the avenue. The abuse, if any, is one for which the defendants must and can be called to account, not by the plaintiff, but by the sovereign authority of the state or of the city. Osborn v. Brooklyn

[1] [Reprinted from 10 Reporter, 197, by permission.]

City R. Co. [Case No. 10,597]; Currier v. West Side Elevated R. Co. [Id. 3,493].

The foregoing observations apply equally to the fencing. The use of the road and of steam power on it being lawful, it seems to be proper and necessary that the road should be fenced in with gates at the street crossings. This is a regulation for public safety properly made by the common council under the act of 1876. Any incidental inconvenience from the fencing is merged in the superior interest of the public. Kellinger v. Forty-Second St. R. Co., 50 N. Y. 206.

Bill dismissed.

MILLER (LYALL v.). See Case No. 8,613.

MILLER (LYELL v.). See Case No. 8,620.

MILLER (McCLEAN v.). See Case No. 8,692.

Case No. 9,581.

MILLER v. McELROY.

[2 Pa. Law J. 305; 1 Am. Law Reg. 198; 1 Pa. Law J. Rep. 326.]

Circuit Court, E. D. Pennsylvania. Oct., 1839.

COPYRIGHT — PRELIMINARY INJUNCTION — DOUBTS OF VALIDITY—DEFENDANT SOLVENT.

[The court will not grant a preliminary injunction to restrain the publication and circulation of a work claimed to be an infringement of the plaintiff's copyright in a case where there is no reason to believe that the defendant will not be able to meet any damages which might be assessed against him upon final hearing, and also where there are grave doubts as to the validity of the plaintiff's copyright, as well as to the infringement complained of.]

At law.

Before HOPKINSON, District Judge.

An action was tried, a few months since, in the courts of Pennsylvania, in which "the commonwealth, at the suggestion of James Todd and others, was plaintiff, and Ashbel Green and others, defendants." [4 Whart. 531.] From the nature of the controversy, the importance of the judgment that might be rendered, and the number and respectability of the persons interested in it, the trial produced an extraordinary excitement. The parties were respectively desirous to have a report of the trial for publication, and persons were accordingly employed by each of them to make a report of the proceedings before the court. These reports were published a short time since, each in an octavo volume, within three or four days of each other. If both are true and faithful, they cannot substantially differ from each other, as they both profess to give an account of the same proceedings. The report made on the part of the defendants was prepared by the complainant in the bill now before this court, Samuel Miller, Jr. Esq.; the other report was made or published by the respondent, Archibald M'Elroy. The bill among other things, prays that an injunction may issue from this court against Archibald M'Elroy, to restrain him from printing, publishing, selling, or otherwise disposing of the parts of his said report, or book, which the complainant charges to be for the most part, very nearly in the same words or of the same purport and effect as certain parts of the work of, or report printed and published by the complainant, who alleges, that it is absolutely impossible that the said parts of the work so published by the said Archibald M'Elroy, should be so nearly in the same words, or of the same purport and effect as the said parts of the complainant's work, if the former had been prepared from original notes, taken by the said Archibald M'Elroy, and had not been copied more or less literally from the latter. The affidavit which accompanies the bill, repeats and affirms these allegations. On the 28th day of last March, the complainant entered in the clerk's office of the district court of the United States, the title of his book, as follows:—"Report of the Presbyterian Church Case. The Commonwealth of Pennsylvania, ex relatione James Todd and others, v. Ashbel Green and others. By a Member of the Philadelphia Bar." It is agreed that the verdict of the jury was rendered on the 26th of March. At the time when this title page was deposited with the clerk, the book was not printed, nor was the manuscript arranged or prepared for printing and publication, although the materials were in the hands of the complainant, the author and reporter. The publication was not made for several months after, as has been already stated.

In addition to these facts, it appears further, by the bill and affidavit, that some months before the publication of the complainant's book, he had printed several copies of certain parts of it, as a paper book for the use of the counsel, who argued the motion for a new trial, and of the judges, before whom that motion was argued, but that these copies were printed after the complainant had deposited the title of his book in the clerk's office; that these paper books were never published or exposed to sale by the complainant, or by any one on his account, or by his permission or order; but that such publication and sale were by him strictly prohibited. It is further stated, or agreed, that the whole of the contents of the volume or book of the complainant, with those parts of it now charged to have been taken from him by the respondent, were printed and published in a certain weekly paper, printed and published in the city of Philadelphia, by William S. Martien, entitled the "Presbyterian," in eleven successive numbers, by the verbal permission of the complainant; which publication was also made after the title of the book had been deposited in the clerk's office, but a considerable time before the printing and publishing of the book. The bill and affidavit allege that the parts of the work of the respondent complained of were taken from the said paper books, and from

the said newspaper. No allegation is made that any parts of the said book or report of the respondent were taken or copied from the book of the complainant, the title page of which he had deposited in the clerk's office, nor that the said book was in any manner used by the respondent in making his report. Indeed it could not be so, as the two books were published almost simultaneously. The complaint is distinctly, that the parts of the respondent's report, which are claimed to be the work and property of the complainant, were taken from certain paper books he had printed for the purposes mentioned, and from certain public newspapers, in which his report had been published with his consent.

Putting, for the present, the paper books printed for a special purpose, and in some degree confidential, out of the case, the publication by the complainant of his work in a newspaper, for which there was no copyright, circulated probably in every state of the Union, and was the property of every one who paid for it, presents some very important, and, as I believe, novel questions. I presume they are so, as neither the industry of the counsel concerned in the argument, which has been conspicuous, nor my own research, has found any judicial answers to them. They are these: 1st. Whether an author, who gives his work to the public by printing and publishing it in a public paper, not protected by any copyright, can have such a right in the same work, by afterwards publishing it in a different form, as in a volume or book. 2d. Whether an author, by depositing in the clerk's office a title page, when the work it is intended for was not then printed, nor written, nor the manuscript prepared for printing and publication, although the notes or materials were in the hands of the author, from which the work or book was to be, and afterwards actually was composed, may have a copyright of the work, so afterwards prepared and composed, by affixing to it the title page so deposited? Lastly, which seems to me to press clearly upon this case—3d. Supposing the two points mentioned to be answered affirmatively in favour of the author, and that a book so secured, by depositing the title page as aforesaid, is protected from violation, and that no man can re-print and publish it, or any part of it, without the permission of the author; yet the question remains, whether one can be charged with an infringement upon this right, if he has, in fact, never seen or copied from the book so entered and secured—or in any manner used it in his publication, but has re-printed the same matter, in part or in whole, from a public newspaper in which he found it, where the author had himself published it, and in which paper neither the author nor any other had any copyright? 4th. Whether the notice given in some of the papers of the copyright, as stated in the affidavit, can help the complainant?

These are grave questions, not to be decided on a preliminary inquiry and argument; but to be left without prejudice, to the full and final hearing of the case. If, on that hearing, the complainant shall sustain his case and complaint, he will recover a judgment to compensate him for the wrong he has suffered, and I have no reason to believe, that the respondent will not be able to answer it. In the case of Ogle v. Ege [Case No. 10,462], on a prayer for an injunction, Judge Washington says: "If there appear a reasonable doubt as to the plaintiff's right, or the validity of his patent, the court will require the plaintiff to try his title at law."

Other questions were raised on this argument, such as, that the title of the book is not the same with that deposited in the office; and that the affidavit in charging the infringement is not direct but argumentative, which it is unnecessary for me to notice at this time. It is my desire and intention to keep myself free and open upon all the points that may hereafter be presented to my judgment in the case. Were I to grant the injunction, I should decide the questions I have stated, as well as others, affirmatively for the complainant. I am not now prepared to do this, whatever may be my opinion hereafter. The parties will come to the final hearing on their respective rights, without prejudication of any of them. The injunction is refused.

Case No. 9,582.

MILLER v. McINTIRE et al.

[1 McLean, 85.] [1]

Circuit Court, D. Kentucky. May Term, 1830.[2]

LIMITATION OF ACTIONS—EQUITY — BAR TO EQUITABLE TITLE—AMENDMENT TO BILL—RELATION BACK—EFFECT OF.

1. An amendment of a bill generally, relates to the time of filing the bill. But where a new title is introduced by the amendment, affecting the interests of new parties, no relation can withdraw such title from the statute of limitations.

[Cited in Buel v. St. Louis Transfer Co., 45 Mo. 562.]

2. The amendment in such case, or where a question of notice arises, can only have the effect of an original bill.

[Cited in School Town of Monticello v. Grant, 104 Ind. 170, 1 N. E. 302.]

3. At law the statute is applied only against a grant—in equity it operates to bar an equitable title, by analogy to a case at law.

[Cited in Munson v. Hallowell, 26 Tex. 475.]

[This was a suit by Henry Miller's heirs and devisees against Jacob McIntire and Isaac McIntire for the possession of certain real estate.]

Mr. Richardson, for complainants.

Mr. Haggin, for defendants.

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

[2] [Affirmed in 6 Pet. (31 U. S.) 62.]

OPINION OF THE COURT. The bill was filed in May, 1808, which represented that on the 10th of December, 1782, Henry Miller the ancestor of the complainants, made an entry of 1687 acres of land; which was surveyed the 9th of April, 1804, and patented 12th July, 1820. That the defendants were in possession, and the bill prays they may be compelled to disclose their title and surrender the possession. The bill was amended in June, 1815, by stating that on the 19th June, 1780, an entry of one thousand acres of land was made by Nicholas McIntire on the waters of Licking, &c., which was surveyed contrary to location, and for which a patent was obtained of elder date than the complainants'. That Nicholas McIntire devised the land to his sons Isaac and Jacob, and that Isaac conveyed to John McIntire who is made a defendant. Several others are also made defendants. In his answer Jacob McIntire admits the entry set up in the amended bill, and he states that the entry was amended the 14th December, 1782, and by this amendment it was made to interfere with the complainants' entry. John McIntire states in his answer that he holds the title bond of Nicholas McIntire for a moiety of the land, and that a deed was executed to him for the same by Isaac McIntire, which had never been recorded. He pleads an adverse possession of more than twenty years, in bar of the complainants' right. The complainants' title was fully sustained by the decree of the supreme court in 1826, the respondents therefore exclusively rely on their possession under the statute. Until the defendants were made parties to the suit, by the amended bill, the statute would continue to run in their favor. An amendment of the bill will, generally, have relation to the time of filing the bill; but this can never be the case, where the amendment sets up a title not asserted before; and a question under the statute of limitations or as to notice is involved. From the evidence it appears that more than twenty-six years elapsed, from the time adverse possession was taken by the defendants, until suit was commenced. The Virginia statute of twenty years' limitation, and ten years after the decease of the ancestor, was in 1792 adopted by Kentucky on the adoption of her constitution; and it was provided that the statute having begun to run before the change of government, should continue to operate, as though no change had taken place. An objection is made that the statute does not run against an equitable title; and that it cannot bar the complainants' right, as they did not obtain their patent until 1820. The decisions in 2 Mar. 570, 1 Mar. 53, 506, and 3 Mar. 146, are referred to as sustaining this position. At law the statute is not applied as a bar, except as against a grant, but this is not the rule in equity. The chancellor, by analogy to the statute, will give effect to it, as against an equitable right, where under the same circumstances it would operate against a grant. As more than ten years elapsed from the decease of the complainants' ancestor, at which time there was adverse possession, until the commencement of this suit, the complainants are clearly barred. And under the twenty years' limitation they are also barred; the bill of the complainants must, therefore, be dismissed with costs.

This case was appealed to the supreme court, which affirmed the decree. 6 Pet. [31 U. S.] 62.

Case No. 9,583.

MILLER v. McQUERRY.

[5 McLean, 469; [1] 10 West. Law J. 528.]

Circuit Court, D. Ohio. Sept., 1853.

SLAVERY—HOW CREATED—HOW RECOGNIZED—FUGITIVE SLAVES—RECLAMATION—HOW PROVIDED FOR—TRIAL BY JURY—PRESUMPTIONS.

1. Slavery is a municipal regulation; is local; and can not exist without the authority of law. But it need not be shown that it is created by express enactment. It may arise from long recognized rights, countervened by no legislative action. African slavery is thus recognized in Kentucky, and the judges of the supreme court of the United States, whose jurisdiction is co-extensive with the country, are bound to take judicial notice of its existence in those states where it prevails.

2. The constitution of the United States did not leave the enforcement of the provisions for the reclamation of slaves with the states. It vested that power in the government of the United States. This doctrine was affirmed by the supreme court of the United States in Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539, has been denied by no respectable state court, and has been sustained by the action of the legislative department of the government.

3. In proceedings, under the fugitive slave law, the inquiry is not strictly whether the fugitive be a slave, or a freeman, but whether he owe service to the claimant. The decision, upon that question, is no bar to an inquiry in the proper tribunal, as to the personal status of the fugitive. The examination is preliminary, and not a final adjudication.

4. The seventh amendment to the constitution, preserving the right of trial by jury in all suits at common law, where the value in controversy exceeds twenty dollars, does not apply to an examination as to the claim for services under this law. Such an examination is not a proceeding at common law, but a statutory one.

5. The presumption of freedom attaches to every resident of a free state, without regard to color; and on the same principle, in a slave state, every colored man is presumed to be a slave.

6. It is not necessary, under the act of 1850 [9 Stat. 462], to produce the record showing the status of the fugitive in another state. The fact that he owes service may be established by other, and oral testimony.

Mr. Ware, for claimant.

Messrs. Joliffe and Birney, for fugitive.

OPINION OF THE COURT. An affidavit being made on the 16th day of August, 1853, that George McQuerry was illegally imprisoned, he was brought before McLEAN, Circuit Justice, that the cause of his detention

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

might be inquired into. The plaintiff, as above stated, objected to the discharge of McQuerry, on the ground that he was held by him as a fugitive from labor. After the evidence was heard, and the facts relied on by defendant's counsel were admitted by the plaintiff; and after the counsel on both sides had argued the facts, and the law of the case, the judge proceeded to give his opinion.

After stating how the cause came before him, he observed, "The right of the claimant to the services of the defendant is the first point to be examined. If the claim as made has been proved, then the detention is not illegal."

Jacob Miller, the son of the claimant, was first examined. He is twenty-one years of age. His father resides in Washington county, Kentucky. He has known the fugitive ever since he can remember, as the slave of his father. A little more than four years ago, he absconded from the service of his father, in company with three others, who were also the slaves of his father. The mother of the fugitive came to his father through the mother of the witness. The fugitives were advertised shortly after they absconded, and a reward of four hundred dollars was offered for their return. They were pursued by different persons, but were not overtaken. One of them was arrested, at Louisville, and returned, but shortly after he again absconded. When Wash., as the fugitive was generally called, was lately arrested, at Troy, in Ohio, he said nothing about being free, but observed that he had no intention to run off an hour before he started; that he was persuaded to do so by Steve, one of the individuals who accompanied him.

William Kelly—Is twenty-three years old, lives in the same county of Washington, within two and a half miles of the claimant, and for nine or ten years has known Wash. to be the servant of the claimant. He lived with the complainant as his other slaves, and was subject to his control. He ran away from his master better than four years ago. Was present when Wash. was arrested near Troy a day or two ago. Wash., at first, did not recognize him, but did so after a little conversation. He told the witness that he was sorry he left Kentucky; did not intend to go an hour before he left, and that he was persuaded to leave by Steve.

James Kelly—Aged twenty-eight years; is brother of the above witness. Has known Wash. eleven years as the slave of the claimant. He corroborates the statements of the preceding witness as to the absconding of Wash., that he was advertised, admitted the right of his master, as stated by the other witnesses.

Isaiah Yoker—Lives in the same county, has known Wash. as the slave of the complainant twelve or thirteen years. He corroborates the other statements made by the witnesses examined before him.

Mr. Trader—Is a deputy marshal, and resides at Dayton. He arrested the fugitive, who said that the claimant was his master, and that he had always been well treated.

Mr. Black—Is also a deputy marshal. He heard Wash. say that the claimant was his master, and that he had been well treated. That he had been persuaded to run away.

As a matter against the right of the claimant it is admitted, that the defendant has resided four years in Ohio, and conducted himself well, being considered as a free man.

From the facts proved, there can be no doubt that the fugitive, under the laws of Kentucky, is the slave of the claimant, and that he absconded from his service a little more than four years ago. The testimony is clear on this point. No attempt has been made to controvert the facts, or to impeach the credibility of the witnesses. Of the many cases my judicial duties have required me to examine, where damages were claimed for aiding the escape of fugitives from labor, no case has been proved with more distinctness and fullness than this one. No one capable of comprehending evidence can doubt, that the fugitive lived with the claimant, as his slave, for many years, and that he left that service, without the leave of his master, several years ago.

No proof, it is contended, has been offered to show that Kentucky is a state in which slavery is authorized by law. And a discussion in the senate of the United States is referred to, in which certain senators declared that there was no law in the South expressly establishing slavery. It is with regret that I hear this argument relied on in this case. It was used by gentlemen of the South, to justify the introduction of slavery into our territories, without the authority of law. In Groves v. Slaughter, a Mississippi case, reported in 15 Pet. [40 U. S.] 450, the supreme court of the United States declared, that slavery was local, and that it could not exist without the authority of law. That it was a municipal regulation. Whether this law was founded upon usage, or express enactment, is of no importance. Usage of long continuance, so long that the memory of man runneth not to the contrary, has the force of law. It arises from long recognized rights, countervened by no legislative action. This is the source of many of the principles of the common law. And this for a century or more may constitute slavery, though it be opposed, as it is, to all the principles of the common law of England. I speak of African slavery. But such a law can only acquire potency by long usage. Now it may be admitted that in some of the Southern states, perhaps in all of them, there can not be found a statute which contains the words, "And be it enacted that slavery shall exist;" and this was what was denied in the senate. But this does not shake the decision of the supreme court, above referred to. Usage, of great antiquity, acquires the force of law. The denial, therefore, that slavery existed by

virtue of an express law, or by statute law, which was intended to be denied, was no denial at all. But no usage can acquire the force of law, except it has been long recognized as the basis of action, and as the principle on which the rights of property are maintained.

There is no slave state, where the existence of slavery is not recognized and maintained, by numerous statutes and judicial decisions. The statute books of the South are full of such enactments. The relation of master and slave is fully recognized, and, to some extent, regulated. The decision of the supreme court above referred to settles a most important principle. And I have no regrets that I was the means of inducing that decision. It gives the proper limitation to slavery. It can not be extended beyond the jurisdiction of the states sanctioning it, and can not, legally, be affected by the legislative action of any free state. The principle, I believe, was sanctioned by the southern states, and was not controverted by any non-slaveholding state. On the question of slavery in our territories, this doctrine was first departed from. The supreme court has long since held that that court and its judges recognize, without proof, the laws of the several states and territories. The jurisdiction of that court, and of its members, extends throughout the Union. In the respective states they administer the local laws, so that the laws of the states come under their special cognizance in acting upon individual rights. Kentucky is a slave state. Except in regard to land titles, no other subject has been more productive of legal controversy than contracts arising out of slavery.

It is contended that the law authorizing the reclamation of fugitives from labor is unconstitutional. That the constitution left the power with the states, and vested no power on the subject in the federal government. This argument has been sometimes advanced, and it may have been introduced into one or more political platforms. In regard to the soundness of this position, I will first refer to judicial decisions. In the case of Prigg v. State of Pennsylvania, 16 Pet. [41 U. S.] 539, the judges of the supreme court of the United States, without a dissenting voice, affirmed the doctrine, that this power was in the federal government. A majority of them held that it was exclusively in the general government. Some of the judges thought that a state might legislate in aid of the act of congress, but it was held by no one of them, that the power could be exercised by a state, except in subordination of the federal power. Every state court which has decided the question, has decided it in accordance with the view of the supreme court. No respectable court, it is believed, has sustained the view that the power is with the state. Such an array of authority can scarcely be found in favor of the construction of any part of the constitution, which has ever been doubted. But this construction, sanctioned as it is by the entire judicial power, state as well as federal, has also the sanction of the legislative power.

The constitution of the United States, it will be observed, was formed in 1787. Afterwards it was submitted to the respective states for their ratification. The subject was not only largely discussed in the federal convention, but also in every state convention. No question has ever arisen, in regard to our federal relations, which was of equal importance to that of the adoption of the constitution; none in our political history was more thoroughly discussed. The men of that day may be emphatically said to have understood the constitution. In a very few years after the constitution was adopted by the states, the fugitive act of 1793 [1 Stat. 302] was passed. That law is still in force, except where the act of 1850 contains repugnant provisions. In the congress which enacted the act of 1793, it is believed, that some of the members had been members of the convention. They could not have been ignorant of the provision of that instrument. And by the passage of that act they exercised the power, as one that belonged to the federal government. Here is a force of authority, judicial and legislative, which can not be found on any other seriously litigated point in the constitution. Such a weight of authority is not to be shaken. If the question is not to be considered authoritatively settled, what part of that instrument can ever be settled? The surrender of fugitive slaves was a matter deeply interesting to the slave states. Under the confederation there was no provision for their surrender. On the principles of comity amongst the states the fugitives were delivered up; at other times they were protected and defended. This state of things produced uneasiness and discontent in the slave states. A remedy of this evil, as it was called, was provided in the constitution.

An individual who puts his opinion, as to the exercise of this power, against the authority of the nation in its legislative and judicial action, must have no small degree of confidence in his own judgment. A few individuals in Massachusetts may have maintained, at one time, that the power was with the states; but such views were, it is believed, long since abandoned, but they are reasserted now, more as a matter of expediency than of principle. But whether we look at the weight of authority against state power as asserted, or at the constitutional provision, we are led to the same result. The provision reads: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service may be due." This, in the first place, is a federal measure. It was

adopted by the national convention, and was sanctioned as a federal law, by the respective states. It is the supreme law of the land. Now a provision which can not be enforced, and which has no penalty for its violation, is no law. The highly respectable gentleman who read an ingenious argument in support of these views, is too good a theologian to contend that any rule of action which may be disregarded without incurring a penalty, can be law. It may be a recommendation, but it can not be a law. This was the great objection to the articles of confederation. There was no power to enforce their provisions. They were recommendatory, and without sanctions. There is no regulation, Divine or human, which can be called a law, without a sanction. Our first parents, in the garden, felt the truth of this. And it has been felt by violators of the Divine or human laws throughout the history of our race.

The provision in the constitution is prohibitory and positive. It prohibits the states from liberating slaves which escape into them, and it enjoins a duty to deliver up such fugitives on claim being made. The constitution vests no special power in congress to prohibit the first, or to enforce the observance of the second. Does it, therefore, follow that effect can be given to neither, if a state shall disregard it? Suppose a state declares a slave who escapes into it shall be liberated, or that any one who shall assist in delivering him up shall be punished. If this power belongs to the states, and not to the federal government, these regulations would be legal, as within the exercise of their discretion. This is not an ideal case. The principle was involved in the Prigg Case, and the supreme court held the act of the state unconstitutional and void. It is admitted that there is no power in the federal government to force any legislative action on a state. But, if the constitution guarantees a right to the master of a slave, and that he shall be delivered up, the power is given to effectuate that right. If this be not so, the constitution is not what its framers supposed it to be. It was believed to be a fundamental law of the Union. A federal law. A law to the states and to the people of the states. It says that the states shall not do certain things. Is this the form of giving advice or recommendation? It is the language of authority, to those who are bound to obey. If a state do the thing forbidden, its act will be declared void. If it refuse to do that which is enjoined, the federal government, being a government, has the means of executing it. The constitution provides, "that full faith shall be given to public acts, records, and judicial proceedings," of one state in every other. If an individual claims this provision as a right, and a state court shall deny it, on a writ of error to the supreme court of the Union, such judgment would be reversed. And the provision is that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Congress unquestionably may provide in what manner a right claimed under this clause, and denied by a state, may be enforced. And if a case can be raised under it, without any further statutory provisions, so as to present the point to the supreme court, the decision of a state court, denying the right, would be reversed. So a state is prohibited from passing a law that shall impair the obligations of a contract. Such a law the supreme court has declared void. In these cases, and in many others, where a state is prohibited from doing a thing, the remedy is given by a writ of error, under the legislation of congress. The same principle applies in regard to fugitives from labor.

A fugitive from justice may be delivered up under a similar provision in the constitution. It declares that, "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This is contained in the same section as the clause in relation to fugitives from labor, and they both stand upon the same principle. In both cases congress has provided a mode in which effect shall be given to the provision. No one, it is believed, has doubted the constitutionality of the provision in regard to fugitives from justice. The men who framed the constitution, were adequate to the great duties which devolved upon them. They knew that a general government was essential to preserve the fruits of the Revolution. They understood the necessities of the country. The articles of confederation had been found as a rope of sand, in all matters of conflict between the different states, and the people of the different states. Without a general government, commerce could not be regulated among the states, or with foreign nations; fugitives from labor could not be reclaimed; state boundaries could not be authoritatively established. I am aware it has been stated, that the subject of slavery was not discussed in the convention, and that the reclamation of fugitives from labor was not, at that time, a subject of much interest. This is a mistake. It was a subject of deep and exciting interest, and without a provision on the subject no constitution could have been adopted. I speak from information received from the late Chief Justice Marshall, who was one of the chief actors in that day, than whom no man then living was of higher authority. The want of a general regulation on the subject of fugitives from justice and from labor was felt, and the above provisions in the constitution were intended as a remedy. It has proved to be an adequate remedy as against fugitives from justice. In no instance, it is believed, has the constitutionality of this provision been doubted. But the provision in relation to fugitives from

labor, resting upon the same principle, is now opposed. If the introduction of this provision into the fundamental law of the Union, was not intended to operate as the law of the Union—if it was recommendatory in its character only—it was useless. The power to surrender fugitives from labor, under the confederacy, was with each state. It could be done, or refused, at the discretion of the state. Did the framers of the constitution intend to leave this matter as it was under the confederation? The provision introduced shows an intention to make some provision on the subject. But by the argument, it is said, the provision made left the power with the states, and did not vest it in the general government. The answer to this is, it was in the states before the provision, and on this view, it added nothing to the power of the states. If such be the true construction of the provision, it fixes an act of consummate folly on the framers of the constitution, and on the members of the state conventions who adopted it. In laying the foundation of a general government, they incorporated into the fundamental law a useless provision, and omitted to provide for an emergency which was felt and complained of in one half of the states. The men of that day were not likely to be guilty of such an omission. They understood the federal and state powers too well, not to know that without some effective provision on this subject, the superstructure which they were about to rear would soon be overthrown. These were the circumstances under which the constitution was framed and adopted. With the abstract principles of slavery, courts called to administer this law have nothing to do. It is for the people, who are sovereign, and their representatives, in making constitutions, and in the enactment of laws, to consider the laws of nature, and the immutable principles of right. This is a field which judges can not explore. Their action is limited to conventional rights. They look to the law, and to the law only. A disregard of this, by the judicial powers, would undermine and overturn the social compact. If the law be injudicious or oppressive, let it be repealed or modified. But this is a power which the judiciary can not reach.

The citizen of a slave state has a right, under the constitution and laws of the Union, to have the fugitive slave "delivered up on claim being made," and no state can defeat or obstruct this constitutional right. The judiciary power of the Union has the primary or eventual power to determine all rights arising under the constitution. This will not be controverted by any legal mind, which has properly investigated the great principles of the constitution. And the question now made is not, in principle, different from a numerous class of cases arising under powers prohibited to the states. The worthy and estimable gentlemen who read an argument on this occasion, in commenting on the cases covered by the fugitive law, embraced all cases of contract, and even that between a minister and his congregation. He supposes if the minister should leave his congregation before his stipulated engagement had transpired; that he was liable to be arrested and returned to his congregation under the fugitive law. This is a case, under this law, which no one before has supposed to be embraced by it. And if the law did cover such a case, it would be the most difficult to carry out of any other which has been imagined. If the minister could be returned, neither the court nor the congregation could compel him to preach. No profession or class of men would be less likely to do anything on compulsion. But the law applies to no case of contract. Where the parties to the agreement are capable of making a contract, the remedy for a breach of it is by action at law. In the case of slaves and of apprentices, there is no remedy against the individual who absconds, by an action.

Various objections are stated to the fugitive slave law of 1850. The duties of the commissioners, the penalties inflicted, the bribe secured to the commissioner, for remanding the fugitive, are all objected to as oppressive and unconstitutional. In regard to the five dollars, in addition, paid to the commissioner, where the fugitive is remanded to the claimant, in all fairness, it can not be considered as a bribe, or as so intended by congress; but as a compensation to the commissioner for making a statement of the case, which includes the facts proved, and to which his certificate is annexed. In cases where the witnesses are numerous, and the investigation takes up several days, five dollars would scarcely be a compensation for the statement required. Where the fugitive is discharged, no statement is necessary. The powers of the commissioner, or the amount of the penalties of the act, are not involved in this inquiry. If there be an unconstitutional provision in an act, that does not affect any other part of the act. But I by no means intimate that any part of the act referred to is in conflict with the constitution. I only say that the objections made to it do not belong to the case under consideration.

The act of 1850, except by repugnant provisions, did not repeal the act of 1793. The objection that no jury is given does apply to both acts. From my experience in trying numerous actions for damages against persons who obstructed an arrest of fugitives from labor, or aided in their escape, I am authorized to say, that the rights of the master would be safe before a jury. I recollect an instance where a strong anti-slavery man, called an Abolitionist, was on the jury in a case for damages, but who, being sworn to find as the evidence and the law required, agreed to a verdict for the plaintiff. He rightly determined that his own opinions could not govern him in deciding a controversy between parties, but that under his oath he was bound by the law and the

evidence of the case. It was in the power of congress to give a jury in cases like the present, but the law contains no such provision, and the question raised is, whether the act without it is constitutional. This question has been largely discussed in congress, in the public press, and in conventions of the people. It is not here raised as a question of expediency or policy, but of power. In that aspect only is it to be considered. The act of 1793 has been in operation about sixty years. During that whole time it has been executed as occasion required, and it is not known that any court, judge, or other officer has held the act, in this, or in any other respect, unconstitutional. This long course of decisions, on a question so exciting as to call forth the sympathies of the people, and the astuteness of lawyers, is no unsatisfactory evidence that the construction is correct.

Under the constitution and act of congress, the inquiry is not strictly whether the fugitive be a slave or a freeman, but whether he owe service to the claimant. This would be the precise question in the case of an apprentice. In such a case the inquiry would not be, whether the master had treated the apprentice so badly as to entitle him to his discharge. Such a question would, more probably, arise under the indenture of apprenticeship, and the laws under which it was executed. And if the apprentice be remanded to the service of his master, it would in no respect affect his right to a discharge, where he is held, for the cruelty of his master or any other ground. The same principle applies to fugitives from labor. It is true in such cases evidence is heard that he is a freeman. His freedom may be established, by acts done or suffered by his master, not necessarily within the jurisdiction where he is held as a slave. Such an inquiry may be made, as it is required by the justice of the case. But on whatever ground the fugitive may be remanded, it can not, legally, operate against his right to liberty. That right when presented to a court in a slave state, has, generally, been acted upon with fairness and impartiality. Exceptions to this, if there be exceptions, would seem to have arisen on the claims of heirs or creditors, which are governed by local laws, with which the people of the other states are not presumed to be acquainted. If a fugitive from labor, after being liberated by a judge or commissioner, should voluntarily return to his master, southern courts have held that his original status would attach to him; he would be held as a slave. And, of course, the decision of the judge or commissioner, having been that he did not owe service to the claimant, could not operate as a bar to the rights of the master. The claim to freedom, if made, in the slave state, would be unaffected by the preliminary inquiry and decision. That decision is, that the slave does, or does not, owe service to the claimant. It does not finally establish the fact, whether the fugitive is a freeman or a slave. If the decision on such an inquiry as this, should finally fix the seal of slavery on the fugitive, I should hesitate long, notwithstanding the weight of precedent, without the aid of a jury, to pronounce his fate. But the inquiry is preliminary, and not final. It is true, it may be said, that the power of the master may be so exercised as to defeat a trial for the freedom of the fugitive. This must be admitted, but the hardship and injustice supposed arises out of the institution of slavery, over which we have no control. Under such circumstances, we can not be held answerable.

It may be said that the seventh article in the amended constitution which gives a trial by jury, "where the value in controversy shall exceed twenty dollars," does not apply to a case like this. The provision is, "in suits at common law." This is not strictly a proceeding at common law. The common law is opposed to the principle of slavery. The proceeding is under constitutional and statutory provisions, under the forms specially provided, and not according to the course of the common law.

This is represented to be an ex parte proceeding. It does not bear this character. Had it been represented to me, that the fugitive could produce evidence conducing to prove that he did not owe service to the claimant, time would have been given to procure the evidence. The only allegation, as to what the counsel expected to prove by absent witnesses, was, that the fugitive had resided in Indiana and Ohio four years, and that he was esteemed and considered a freeman. This the counsel for the claimant admitted, and as no further allegation of evidence was alleged to be in the power of the party, of course there was no ground for a postponement. The presumption of freedom attaches to every resident of a free state, without regard to color; and, on the same principle in a slave state, every colored man is presumed to be a slave. But this presumption, in this case, is counteracted by the facts proved.

It is argued, that the evidence is defective, as the record showing the status of the fugitive, as authorized by the act of 1850, is not produced. Such record is not necessary to establish the right of the claimant. If it were produced, the identity of the fugitive would still be an open question. On the question of identity, anything which conduced to prove that the person described in the judgment was not the one before the judge or commissioner, would be admissible.

I am gratified with the gentlemanly bearing and courtesy with which this argument has been conducted. It was due to the occasion and the circumstances. No other course was expected.

Upon the whole, no doubt can exist on the evidence, that the fugitive owes service to

the claimant; and, under the law, I am bound to remand him to the custody of his master, with authority to take him to the state of Kentucky, the place from whence he fled.

MILLER (MASSOLETTI v.). See Case No. 9,264.

MILLER (MAZE v.). See Case No. 9,362.

Case No. 9,584.

MILLER v. MOORE.

[1 Cranch, C. C. 471.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

PRINCIPAL AND AGENT—AUTHORITY TO INDORSE—EVIDENCE—PRODUCTION OF WRITTEN AUTHORITY.

In an action by the indorsee of a promissory note against the maker, the plaintiff need not produce written evidence of the authority of the indorser's agent to indorse.

Debt on a promissory note, made by Moore to W. T. Alexander, or order, for value received, negotiable in the Bank of Alexandria; indorsed, "Pay to Richard and Stephen Winchester, or order"—signed, "William T. Alexander, by his attorney in fact, John T. Wellford"—and "Pay Mordecai Miller," signed, "R. & S. Winchester."

Mr. Swann, for defendant, contended that the plaintiff must show a written authority from W. T. Alexander to John T. Wellford, to indorse and transfer the note.

But THE COURT permitted parol (viva voce) testimony to be offered, to show that Wellford was an agent for Alexander, and that he had been accustomed to indorse the name of Alexander on notes, and that Alexander had sanctioned such indorsements.

Case No. 9,585.

MILLER v. NEW YORK et al.

[13 Blatchf. 469.] [2]

Circuit Court, S. D. New York. Aug. 4, 1876.

BRIDGES — OBSTRUCTION TO NAVIGATION— VIOLATION OF LAW—REGULATION OF COMMERCE.

1. A citizen of New York brought suit in this court against the municipal corporations of the cities of New York and Brooklyn, and certain individual citizens of New York, to restrain the building of a bridge in New York across the East river, a navigable river, on the ground that it would be a public nuisance: *Held*, that this court had no jurisdiction of the suit, so far as any question of a violation of the law of New York was concerned, but that it could take jurisdiction to enquire whether the bridge was being so built as to violate the constitution or laws of the United States.

2. The history of the legislation of New York and of the United States, in regard to such bridge, reviewed.

3. Under such legislation of the United States, if the bridge is constructed in conformity with the requirements of law, it follows that the navigation of the river will not thereby, in contemplation of law, be obstructed, or impaired or injuriously modified.

4. Congress had power to authorize, as a regulation of commerce, the building of the bridge in the prescribed manner.

[Cited in People v. Kelly, 76 N. Y. 482.]

5. It appearing that the bridge was being constructed according to the requirements of the legislation of congress, and that the state of New York had, by subsequent legislation, sanctioned its being constructed in such manner, an injunction to restrain its erection, as a public nuisance, was refused.

[6. Cited in Walsh v. Trustees of New York & Brooklyn Bridge, 96 N. Y. 438, to the point that the "Trustees of the New York and Brooklyn Bridge" are not a corporation, and, as such, necessary parties to the suit.]

[This was a bill by Abraham B. Miller against the mayor, aldermen, and commonalty of the city of New York, city of Brooklyn, and others, for a preliminary injunction to restrain the erection of a bridge over the East river, between New York and Brooklyn.]

William H. Arnoux, for plaintiff.

Charles H. Tweed and Edgar M. Cullen, for defendants.

JOHNSON, Circuit Judge. The plaintiff in this suit is a citizen of the state of New York, and the defendants are the municipal corporations of the cities of New York and Brooklyn, and also certain individual citizens of the state. This court, therefore, derives no jurisdiction from the citizenship of the parties, for it is, in general, only when there is a controversy between citizens of different states that jurisdiction is conferred upon the ground of the citizenship of the parties. We must look, therefore, to the subject-matter of the suit, to sustain the jurisdiction. The circuit courts of the United States have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority. Act March 3, 1875, § 1 (18 Stat. 470).

The claim of the plaintiff is, that the proposed bridge over the East river, between the cities of New York and Brooklyn, will be a public nuisance, from which he will suffer a particular private injury, other than the common injury which every citizen suffers from a public nuisance. Now, if the bridge will be a public nuisance, it must be because it will violate the law of New York or that of the United States. For a violation of the law of New York the plaintiff cannot come into this court. He and the defendants are citizens of New York, and he must seek his remedy from the justice of that state. Jurisdiction in that behalf between citizens of the same state is not conferred upon the circuit courts of the United States. In Milnor v.

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

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

New Jersey R. Co. [Case No. 9,620], Mr. Justice Grier, giving judgment in the circuit court for the district of New Jersey, said: "The complainants in these bills, in order to show jurisdiction in the court, have stated themselves to be citizens of the state of New York. Their right to a remedy in the courts of the United States is not asserted on account of the subject-matter of the controversy, but they rest upon their personal right, as citizens of another state, to sue in this tribunal. It is plain, by their own showing, that they can demand no other remedy from this court than would be administered by the tribunals of the state of New Jersey, in a suit between her own citizens. A citizen of New York who purchases wharves in Newark has no greater right than the citizen of New Jersey." In the case now before this court, a citizen of New York sues corporations and citizens of New York. That alone does not make a case of jurisdiction in this court, nor would the jurisdictional difficulty be avoided by the existence of a cause of action for a violation of the law of New York. On neither ground, nor on both combined, can this court entertain jurisdiction. Just as diversity of citizenship, in the case before Judge Grier, required him to administer the law of New Jersey between the parties in that suit, so, identity of citizenship in this case excludes a violation of the law of New York from being the subject of redress in this court between these parties. Here, the subject-matter of the suit alone gives jurisdiction, and it must, in its exercise, be confined to that subject-matter.

The inquiry is, therefore, whether, by the constitution or laws of the United States, the bridge in question will be a public nuisance and specially injurious to the plaintiff. If, upon inquiry, it shall be found that the bridge in question is being built in conformity with, and not in violation of, the constitution and laws of the United States, then no court of the United States can regard it as a public nuisance, nor undertake by injunction to interfere with its construction.

The congress has legislated directly upon the subject of this bridge, and in that law has referred to the previous legislation of New York. It will, therefore, be most convenient to state, in their chronological order, the laws of the state and of the United States relating to the building of the bridge.

Chapter 399, p. 948, of the Laws of New York, passed April 16th, 1867, created a corporation by the name of The New York Bridge Company, for the purpose of constructing and maintaining a permanent bridge over the East river, between the cities of New York and Brooklyn. To this corporation power was given to acquire and hold so much real estate as might be necessary for the site of the bridge, and of all piers, abutments, walls, toll houses, and other structures proper to said bridge, and for the opening of suitable avenues of approach of said bridge, but not any land under water, in the river, beyond the pier lines established by law. By the 10th section, it was further enacted, that the bridge should not be at a less elevation than one hundred and thirty feet above high tide at the middle of the river; that it should not obstruct any street which it should cross, but that such street should be spanned by a suitable arch or suspended platform as should give a suitable height for the passage under the same for all purposes of public travel or transportation; that no street running in the line of the bridge should be closed without full compensation to the owners of land fronting on the same, for all damages they might sustain; that the bridge should commence at or near the junction of Main and Fulton streets, in Brooklyn, and should be so constructed as to cross the river as directly as possible to some point at or below Chatham Square, in the city of New York, not south of the junction of Nassau and Chatham streets; and that it should be built with a substantial railing or siding, and should be kept fully lighted through all hours of the night. This section was prefaced with a provision in these words: "Nothing in this act contained shall be construed to authorize, nor shall it authorize, the construction of any bridge which shall obstruct the free and common navigation of the East river, or the construction of any pier in the said river, beyond the pier lines established by law." It will be observed, that this is not a prohibition of the obstruction of navigation. Appropriate language of prohibition is found immediately below—"it shall not obstruct any street which it shall cross." This provision is limited to enacting that the statute shall not be taken to authorize the obstruction of navigation.

This act was followed, in 1869, by chapter 26 of the Laws of that year (page 15), passed February 20th, by which, after providing for the representation of the two cities of New York and Brooklyn, in the board of directors of the bridge company, it was enacted that the company should proceed without delay to construct the bridge.

In the same year, an act of congress was passed, approved March 3, 1869 (15 Stat. 336), which enacted (section 1) that "the bridge across the East river, between the cities of New York and Brooklyn, in the state of New York, to be constructed under and by virtue of an act of the legislature of the state of New York, entitled, 'An act to incorporate the New York Bridge Company, for the purpose of constructing and maintaining a bridge over the East river, between the cities of New York and Brooklyn,' passed April 16th, 1867, is hereby declared to be, when completed in accordance with the aforesaid law of the state of New York, a lawful structure and post road for the conveyance of the mails of the United States: provided, that the said bridge shall be so constructed and built as not to obstruct, impair or injuriously modify, the navigation of the river; and, in order to

secure a compliance with these conditions, the company, previous to commencing the construction of the bridge, shall submit to the secretary of war a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of a mile above and below the site, exhibiting the depths and currents at all points of the same, together with all other information touching said bridge and river, as may be deemed requisite by the secretary of war to determine whether the said bridge, when built, will conform to the prescribed conditions of the act, not to obstruct, impair or injuriously modify, the navigation of the river." By the second section, it was further enacted, "that the secretary of war is hereby authorized and directed, upon receiving said plan and map, and other information, and upon being satisfied that a bridge built on such plan, and at said locality, will conform to the prescribed conditions of this act, not to obstruct, impair or injuriously modify, the navigation of said river, to notify the said company that he approves the same, and, upon receiving such notification, the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But, until the secretary of war approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced, and, should any change be made in the plan of the bridge, during the progress of the work thereon, such change shall be subject likewise to the approval of the secretary of war." It will be observed, that this act of congress takes up the subject of the effect of the bridge upon the navigation of the river, where it was left by the law of New York, and introduces positive provisions on the subject, in place of the merely negative provision of the New York statute. That statute goes no further than to say that it shall not be construed to authorize an obstruction, while the act of congress contains a provision, that the bridge shall be so constructed and built as not to obstruct, impair or injuriously modify, the navigation. It goes further and fixes the mode by which it shall be ascertained whether these conditions are observed in the plan of the bridge. The determination of this question is committed to the secretary of war, who is directed, upon being satisfied that the bridge, as proposed, will not obstruct, impair or injuriously modify the navigation, to notify the company that he approves the bridge. When this has been done, the act declares that the company may proceed to the erection of the bridge, conforming strictly to the approved plan and location.

If the foregoing is a correct interpretation of the act of congress, and if the steps pointed out in the act have been taken, then there is the direct authority of congress for proceeding in the construction of the bridge, in conformity with the approved plans, and a conclusive determination that the navigation of the river will not thereby be obstructed, impaired or injuriously modified, unless congress does not possess the power thus to legislate. But, in the case of State of Pennsylvania v. Wheeling Bridge Co., 18 How. [59 U. S.] 421, the authority of congress, under the constitution, to authorize, as a regulation of commerce, that which the judgment of the supreme court had determined to be an obstruction of the navigation of the Ohio river, was maintained. The court held, that the previous judgment had been given on the ground that the regulations of commerce, by authority of congress, existing at the time, were contravened by the bridge, and that it, consequently, was unlawful. The new statute removed this unlawfulness, by adopting a new regulation of commerce. The first clause of the head note to the case states accurately the doctrine maintained by the decision: "The power of congress to regulate commerce includes the regulation of intercourse and navigation, and, consequently, the power to determine what shall or shall not be deemed, in judgment of law, an obstruction of navigation." In that case, the state of Pennsylvania brought its suit in the supreme court of the United States, which had jurisdiction by reason of the character of the party, irrespective of the subject-matter of the action. The state was entitled to maintain its action by showing an obstruction unlawful either by the law of Virginia, or by the law of the United States; and, therefore, it was requisite, in giving judgment against its claims, to deny the unlawfulness of the obstruction, in both of its aspects. The bridge appeared to have the sanction of congress and of the state legislature, and so its lawfulness could not be impeached. But, all the cases in the supreme court, authoritatively decided, hold that the laws of congress, in regulation of commerce, are paramount. Thus, in the case of Willson v. Blackbird Creek Marsh Co., 2 Pet. [27 U. S.] 250, which came up by writ of error from the court of appeals of Delaware, of which state the plaintiffs in error (who were defendants below), were citizens, Chief Justice Marshall said: "This abridgment," (of the navigability of a river by a dam erected under a law of Delaware), "unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." He further observed, that, if congress had passed any act which bore upon the case, the court would not feel much difficulty in saying that a state law coming in conflict with such act would be void. The case was, however, disposed of on the ground that congress had not exercised its power to regulate commerce in such a way as was repugnant to the law of Delaware in question, and that it, therefore, was not invalid.

The first determination in State of Pennsylvania v. Wheeling Bridge Co., 13 How.

[54 U. S.] 518, was only the other side of the same doctrine. There the court held that congress had regulated commerce upon the Ohio river in such a way as came in conflict with the legislation of Virginia, and that the action of congress was paramount.

Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713, was a suit where the jurisdiction rested upon the diversity of citizenship, and where a bridge about to be built by authority of a law of Pennsylvania was assailed as creating an unlawful obstruction to navigation, especially injurious to the rights of the plaintiffs as wharf and dock owners. All the court agreed in the view, that the power of congress was paramount, when exercised. The majority, however, held that it had not been so exercised as to require the court to declare unlawful what was about to be done in pursuance of a law of Pennsylvania, and the decision was against the plaintiffs.

In this circuit have occurred the cases of Silliman v. Hudson River Bridge Co. [Cases Nos. 12,851, 12,852], and 1 Black [66 U. S.] 582, and 2 Wall. [69 U. S.] 403, and of Silliman v. Troy Bridge Co. [Case No. 12,853], in each of which the lawfulness of a bridge built in pursuance of a law of the state of New York was finally sustained. In the Hudson River Bridge Co. Case, an injunction was granted originally, but, upon final hearing, the judges of the circuit court differed in opinion, and the judges of the supreme court, likewise, were equally divided upon the question of the jurisdiction of the circuit court perpetually to restrain the erection of the bridge over the Hudson river, authorized by a law of the state of New York. The case was, therefore, remitted to the circuit court, and the bill was, consequently, dismissed. Upon appeal from this final decree, the supreme court was again equally divided, and the judgment, therefore, stood affirmed. In the last case, that of the Troy bridge, the question whether that bridge would cause a material obstruction to the navigation of the Hudson, if built in conformity to the law of the state of New York, was examined at the suit of a citizen of another state, who, as a navigator under a coasting license, was interested in the question, and it was held that such an obstruction would not be created by the building of the bridge in the manner authorized by the law of New York.

It results from the cases considered, that the authority of congress is paramount, in the regulation of commerce, under the constitution; and that its determination in respect to interference with navigation, by obstructions thereto, is conclusive. What it authorizes may be justified upon its authority. What it forbids is necessarily unlawful. Nor is it to be forgotten, that this power of congress is at all times capable of exercise. If it should turn out that the judgment of congress has been mistaken, and that navigation is injuriously affected, it can, by law, require the bridge to be altered or removed, and can adapt its regulation of commerce to its view of the public interests.

It remains to consider whether the authority of the act of congress has been pursued. It appears, from the papers presented on this motion, that the required papers were presented by the bridge company to the secretary of war, and that after a careful investigation, through the corps of engineers and a special commission appointed for the purpose from that body, the secretary of war made his decision in writing, under date of June 19th, 1869, signed with his hand, and endorsed upon the report to him of the chief of engineers. By that decision he approved the plan as so reported, with the single modification, that the height of the centre of the main span of the bridge should not be less than 135 feet in the clear, at mean high water of the spring tides, and provided that the structure should conform in all other respects to the conditions recommended by the commission. By the same document he directed the chief of engineers to furnish the bridge company with a copy of the report of the commission, and a copy of the report on which his endorsement was made, and to notify the company that the plan and location of the bridge were approved, subject to the conditions imposed in that endorsement. On the 21st of June, 1869, the chief of engineers wrote to the president of the bridge company, in pursuance of the orders of the secretary of war, as follows: "Sir—I am directed by the secretary of war to inform the New York Bridge Company that he approves the plan and location of the East river bridge, as reported by the company to the commission instituted by orders from the war department, provided the bridge conform to the following conditions:" These conditions are then specified, in accordance with the decision of the secretary, but are not necessary to be here stated.

The substance of the requirement of congress was, that the secretary of war should approve the plan, and that, upon such approval and notice thereof, the company should have authority to proceed. It was not, in my opinion, necessary that the notice to the company should be under the hand of the secretary himself. It suffices that he, in writing under his hand, made the determination, and directed the notice to be given, and that it was given accordingly. It is not claimed that any departure has occurred, in the actual construction of the bridge, from the plans and conditions imposed by the secretary of war, nor that any such departure is intended; and, therefore, if I am right in the positions before maintained, the plaintiff is not entitled to the writ of injunction which he asks from this court.

But, if it should be considered necessary that any further assent or approval should be given by the state of New York to the construction of this bridge in the manner proposed and sanctioned by the secretary of war,

I am of opinion that such assent has been given by the act of the legislature of New York, passed May 14, 1875 (Laws N. Y. 1875, p. 290). This act was passed years after the transactions heretofore commented on, and after the form and conditions for the construction of the bridge were settled so far as the company and the United States could settle them, and the work had progressed far towards its termination. The act in question is entitled, "An act providing that the bridge in the course of construction over the East river, between the cities of New York and Brooklyn, by the New York Bridge Company, shall be a public work of the cities of New York and Brooklyn, and for the dissolution of said company, and the completion and management of the said bridge by the said cities." By force of and under its provisions it became the law of New York, that the bridge in course of construction over the East river should be completed and managed as thereinafter provided, for and on behalf of the cities of New York and Brooklyn, as a consolidated district. The said bridge was thereby declared to be a public highway, for the purpose of rendering the travel between the said cities certain and safe at all times. It was further declared, that, from and after the dissolution of the company, the said bridge "shall be a public work, to be constructed by the two cities for the accommodation, convenience and safe travel of the inhabitants of the said district;" and that "the said bridge, and all its appurtenances, and all the property and effects connected therewith, shall vest absolutely in the cities of New York and Brooklyn." By this legislation, the bridge, in its entirety, as then contemplated, became a public work, and received the sanction of the state of New York. No indictment against the two cities for erecting or maintaining it, founded upon the idea of its being a nuisance, could have been supported in the courts of New York, and, of course, the plaintiff could not there have effectually asserted what the state itself could not have maintained.

I have not thought it worth while to advert to the very indirect interest of the plaintiff in the question involved. He is not a navigator, nor interested in navigation directly. He is a warehouse keeper, and the more vessels that can come near his warehouses the better are his chances of getting business. Whether an obstruction below him will be an injury or a benefit when the Hell Gate channel is cleared out, is, at least, problematical. Nor has it seemed necessary to notice the delay of six years, during which several millions have been expended on the bridge, while the plaintiff could have proceeded at once to present the question for judicial consideration.

The motion for an injunction must be denied.

[NOTE. In June, 1880, the case came up for final hearing. The bill was dismissed, with costs. 10 Fed. 513. The cause was then taken by the plaintiff, on appeal, to the supreme court, where the decree of the circuit court, dismissing the bill, was affirmed. 109 U. S. 385, 3 Sup. Ct. 228.]

Case No. 9,586.

MILLER v. O'BRIEN.

[9 Blatchf. 270;[1] 9 N. B. R. 26; 21 Pittsb. Leg. J. 82.]

Circuit Court, S. D. New York. Dec. 30, 1871.

BANKRUPTCY—SALE BY SHERIFF — NOTICE — SEIZURE UNDER PRIOR ATTACHMENT—RIGHTS OF ASSIGNEE.

1. A sheriff who, after proceedings in bankruptcy are commenced, wherein an assignee is appointed, levies an execution upon, and sells, property which was of the bankrupt, is liable to the assignee for the proceeds of such property, although he pays such proceeds to the execution creditor, before receiving actual notice of the bankruptcy.

[Cited in Re Grinnell, Case No. 5,830; Beecher v. Gillespie, Id. 1,224; Conner v. Long, 104 U. S. 241.]

2. It makes no difference, that, before the proceedings in bankruptcy were instituted, the sheriff seized, under an attachment in the suit, in which the execution was afterwards issued, the property in question, and held it to be levied on in case execution should issue, or sold it by order of court, and held its proceeds for the same purpose.

3. The operation of the bankruptcy act [of 1867 (14 Stat. 517)] dissolved the attachment, and the title of the assignee vested as of the time of the commencement of the proceedings in bankruptcy.

[Cited in Hatfield v. Moller, 4 Fed. 719; Olney v. Tanner, 10 Fed. 108.]

[This was an action by Elias N. Miller, assignee in bankruptcy, against James O'Brien, sheriff. The case is heard on a demurrer.]

Aaron P. Whitehead, for plaintiff.

Edmund Randolph Robinson and Aaron J. Vanderpoel, for defendant.

WOODRUFF, Circuit Judge. Reduced to its simplest form, the question raised by the demurrer herein is, whether a sheriff, who, after the proceedings are commenced in bankruptcy wherein an assignee is appointed, levies an execution upon and sells property which was of the bankrupt, is liable to the assignee, notwithstanding he pays the proceeds of sale to the creditors before he receives actual notice of the bankruptcy.

It is true, that, in the discussion of the subject on the part of the defendant, some importance was given to the circumstances, that the property had been attached by the sheriff a few days before the proceedings in bankruptcy were instituted, and, that, by order of court, the property seized was sold as perishable, and the proceeds were held by the sheriff in lieu of the property, to abide the event of the suit, and to be levied upon if judgment was obtained and execution issued. But, it is quite clear, that, as between the

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

assignee in bankruptcy and the sheriff, these circumstances are not material. The statute, in the most explicit terms (section 14), declares the attachment dissolved. In like explicit terms, it declares (section 14) that the assignment to the assignee shall relate back to the commencement of the proceedings in bankruptcy, and that the title to all the bankrupt's estate shall vest in the assignee. This can only mean, that the title of the assignee shall be vested with like legal effect as if the assignment had been executed at the commencement of the proceedings. The sale of the property as perishable, assuming that it was justified by the order of the state court, had no effect except to substitute, in the hands of the sheriff, the proceeds of sale in the place of the property seized. It gave the creditor no greater right, and it in no wise enlarged the power or duty of the sheriff.

When, therefore, by operation of law, the attachment was dissolved, the title of the assignee in bankruptcy was perfect, and the sheriff was liable to pay over the proceeds of the property to him. The sheriff had ceased to have any claim or right to withhold them. Unless, then, he is protected by the issue and levy of the execution, and the payment of the money to the execution creditors, before he was actually notified of the bankruptcy, he is still liable, and the demurrer herein must be overruled.

The question is an important one, but not because it involves any conflict between the courts of the state and the federal courts. The law is the same in both courts. The paramount law having dissolved an attachment, although valid and operative when issued, the relinquishment of the property to the assignee in whom the property was vested, is in no derogation of the authority of the state court, but a legal duty recognized in all tribunals. And so, when an execution was issued, if the property was no longer liable to levy for the satisfaction of the judgment, it is no matter of conflict between the one court or the other, which of them is called upon to recognize or administer the law. The question is important, however, because the construction and effect of the bankrupt act, contended for by the plaintiff, may operate very harshly upon sheriffs and like ministerial officers, and it accords with our sense of justice to say, that they ought not to be held liable for their acts in the execution of process, done in good faith, without actual notice of any proceedings in bankruptcy against the debtor. But the same may be said of private persons dealing, in good faith, and without notice, with the debtor, pending the proceedings, an example of which was considered by Mr. Justice Sharswood in Mays v. Manufacturers' Nat. Bank of Philadelphia [64 Pa. St. 74]. I shall not discuss the question at length. I am wholly unable to withdraw the question, as it is presented under the bankrupt law of the United States, from the reasoning and the principles upon which the same question was settled in England, under the bankrupt law of that country. It was there settled, after full and repeated discussion, in several cases, and finally in the house of lords.

By operation of law, the money received by the sheriff was the money of the present plaintiff, whether the sheriff knew it or not; and in that statement lies the whole of the plaintiff's case. All the arguments founded in the duty of the sheriff to execute process, in the hardship of holding him to take the hazard of the title to property which he applies to executions in his hands, and in various other considerations, which were urged upon me with great ability on the argument, are most fully considered in the English cases to which I have referred. Balme v. Hutton, 9 Bing. 471; Garland v. Carlisle, 10 Bing. 452; Id. (in house of lords) 4 Bing. N. C. 7, 4 Clark & F. 693; and numerous cases cited and commented upon in those cases. On principle, those cases seem to me to have been correctly decided, while it at the same time seems possible to guard against fraud in the conduct of the bankrupt and his creditors pending the proceedings, by some provision in the law which shall not necessarily operate with such hardship upon innocent parties acting in good faith. The demurrer must be overruled, with leave to withdraw the demurrer and plead, on the usual terms.

MILLER v. PROCEEDS OF THE KATE HINCHMAN. See Cases Nos. 7,620 and 7,621.

MILLER v. QUERRY. See Case No. 9,583.

MILLER (READ v.). See Case No. 11,610.

MILLER (REARDON v.). See Case No. 11,616.

Case No. 9,587.

MILLER v. The REBECCA.

[Bee, 151.] [1]

District Court, D. South Carolina. 1799.

MARITIME LIEN—SUPPLIES—ADVANCES—BOND TAKEN—RECEIPT.

The owner of this vessel pledged her to raise money for repairs, wages, &c. Part of the wages were not proved to have been paid, but advances, specified in the bond as necessary were made beyond the amount of the bottomry bond. Court retained the suit, and ordered payment from sale of the vessel.

The owner of this vessel [Snow Rebecca] being, as the bond itself sets forth, in want of money to fit her out, to pay wages in advance, and repairs necessary to her going to sea, borrowed three hundred dollars from [Stephen] Miller, the master, and duly executed this deed under hand and seal. To do away its validity, a paper has been produced signed by Miller, acknowledging the receipt of a bottomry bond for three hundred dollars in full for two months of his own wages in

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

advance; and of one month's wages, also in advance, of the mate, four seamen, and a boy. It is contended that this money was never paid. But the bond states other purposes and wants, and it has been proved that Miller paid the following sums expressly within the letter of the contract.

For disbursements	$188 00
Butcher's bill	46 00
Ship carpenter for repairs	10 18
His own wages amounted to	66 64
Total	$310 82

BY THE COURT. Admitting, then, that the other wages mentioned in the bond are still due, yet more has been expended on account of this vessel than is secured by the deed in question. There has been no fraud or collusion, the lien is just and legal, and as no other court can do complete justice by a proceeding in rem, I am of opinion that this suit must be retained and the vessel considered as liable for the amount of this bond.

This case was assimilated to Hopkinson, 163; but there, the bond was given to persons who never advanced a shilling for the vessel's use. The consignees of the ship, who could not take a bottomry bond payable to themselves, procured one to be made to a third person, who could not have any legal lien, inasmuch as he had incurred no risque. On account of this collusion, that suit was dismissed.

Case No. 9,588.

MILLER v. The RESOLUTION.

[Bee, 404;[1] 3 Hopk. Works, 70.]

Admiralty Court, Pennsylvania. 1781.[2]

TREATIES—EFFECT OF ALLIANCE WITH FRANCE.

The United States, by their alliance with France were not considered as parties in the capitulation made by the Marquis De Bouillé with the inhabitants of Dominica.

In admiralty.

Before HOPKINSON, District Judge.

The ship Resolution, belonging to Brandlight and Sons, merchants in Amsterdam, sailed from the Texel on the 9th of January, 1780, bound for the island of St. Eustatius. This voyage was interrupted by stress of weather, which obliged her to put into Lisbon, where she remained some months to refit, but afterwards arrived at St. Eustatius. From St. Eustatius she sailed for the island of Dominica, where she arrived on the 1st of October, 1780. In March, 1781, she sailed from Dominica for Amsterdam, with a valuable cargo of sugar and coffee, shipped by sundry persons, certified to be capitulants in the island of Dominica; which cargo was consigned to Messrs. Brandlight and Sons, of Amsterdam, the owners of the vessel. Soon after the commencement of her voyage from Dominica, she was captured by a British armed vessel, and taken as prize into Nevis, where Admiral Rodney examined her papers, and thereupon dismissed her. She again proceeded on her voyage, but was afterwards captured by another British vessel, from whom she was recaptured by an American privateer; from this privateer she was again taken by a British ship, and finally retaken from her by Peter Miller, the libellant in this cause, and sent into the port of Philadelphia. It is not contended but that in each and every of the captures and recaptures, she remained more than twenty-four hours in the possession of the conqueror. Being thus found in the hands of the enemy, and taken from them by force of arms, the libellants pray that both ship and cargo may be condemned as lawful prize and booty of war.

But it has been contended in behalf of the claimants, that it appears in testimony that the island of Dominica did on the 7th of September, 1778, surrender by capitulation, to the Marquis De Bouillé, general of the French forces in the Windward Islands; that by the terms of this capitulation, all the property and estates in Dominica, with their produce were secured to the inhabitants, and protected from confiscation; particularly by the seventeenth article, in these words: "The merchants of the island may receive vessels to their address from all parts of the world (English vessels excepted) without their being confiscated; and they may sell their merchandize, and may carry on their trade, and the port shall be entirely free for them for that purpose, paying the customary duties paid in the French islands." And it is alleged, that this privilege and protection was extended to absent persons having property or concerns in the island, by virtue of the ninth article of the same capitulation in these words: "The absent inhabitants, and such as are in the service of his Britannic majesty, shall be maintained in the possession and enjoyment of their estates, which shall be managed for them by their attorneys." That these United States being in strict alliance with the court of France, are bound by the terms of every capitulation, convention, or treaty, which the court of France, or any person or persons under that authority, shall make in the course of the war, the war being a common cause, and both allies principals in the conduct of it: that it was also in proof, that the king of England, by his proclamation, dated in December, 1780, extended the effects of the capitulation of Dominica, to Dutch vessels for four months, notwithstanding the rupture between Great Britain and Holland, by the capture of St. Eustatius: and, that this ship, under the sanction of the said capitulation which secured her and her cargo from capture by the French or Americans, and under the said proclamation, which

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

[2] [Affirmed in part and reversed in part, in 2 Dall. (2 U. S.) 1, 19.]

protected her from British capture, sailed from Dominica, with the property of capitulants on board; and that the passport of Monsieur Du Challeau, the French governor of Dominica, endorsed on the manifesto of the cargo, ought to protect this property from being made prize of by the friends and allies of France.

It has been further insisted, that a recaptor acquires no other right than what the captor had; inferring that as the British captor could not have procured a condemnation (as appears by the acquittal of Admiral Rodney) neither can an American recaptor make this vessel legal prize; that the British captain should be considered as a pirate, and that the law is, that goods taken by pirates, and again retaken from them, shall be restored to the former owner; that if it should be objected, that most of the real consignees of this cargo are not inhabitants of Dominica, and therefore not within the capitulation; it is answered, that article the ninth extends the operation of this capitulation to absent inhabitants, even such as are in the service of the king of Great Britain having property in the island, whose business may be transacted by attorneys; and that if the attorney is an inhabitant, and signed the capitulation, it is the same thing in effect as if the principal had done it. And lastly, that although no express authority can be produced to prove directly that allies in war are bound by the capitulations, conventions, and treaties of each other, reciprocally; yet a striking analogy may be found in the case of ransom. That it cannot be denied, but that if a French vessel takes a prize and ransoms her for a limited time, the ransom bill would protect the property from capture and condemnation by the Americans. If, therefore, the act of an individual captain of a French privateer can screen the property of an enemy from an ally, much more should the solemn capitulation of a French general with the whole inhabitants of a captured island bind the same ally.

To this it has been replied: that the ship Resolution and her cargo were found in the possession of the enemy, who held the same by force as their property for more than twenty-four hours, which brings the case strictly within the ordinance of congress of February last, which excludes any claims of former owners after a possession of twenty-four hours by the enemy: that we have no business to inquire by what right the enemy became possessed; it is sufficient for us that we found it there: that the doctrine respecting pirates does not apply, because the British, as a sovereign nation, has an undoubted right to wage war, and to take prizes, which pirates have not: that if any subject of a sovereign power takes unlawfully, let him or his prince answer the wrong, the captors at war with them being altogether blameless, whose right to take from an enemy cannot be doubted: that it appears evidently by the letters and other exhibits in this cause, that this cargo is in fact British property, and not the property of the inhabitants of Dominica; and although consigned to merchants in Amsterdam, the net proceeds were to be remitted to merchants in London, and other parts of the British dominion: that it is absurd and untrue to suppose that the benefits of the capitulation were designed to extend to London merchants who had never been inhabitants of the island of Dominica, and who are and will remain British subjects, aiding, by their wealth and influence, in the war against France and her allies: that the capitulation included only real inhabitants, either present on the island, or absent on business at the time, and placed them in a state of perfect neutrality with respect to the war; a character which can by no means be applied to the real consignees of this cargo: that if the effects of this capitulation were to be thus extended, France would have obtained a conquest which can produce nothing but expense, trouble, and loss to her, but will tend to strengthen and enrich the enemy; and that it would be, for the present, the interest of Great Britain to surrender all her West India islands upon the same terms.

It has been further urged by the counsel for the libellants, that allies are not mutually bound by every ex parte treaty or convention: that consent is necessary to include one in the engagement made by the other; as for instance, in a truce or cessation of hostilities: that France does not deem herself so bound, is evident from her conduct with respect to Bermuda and the Bahama Islands, whose property congress have exempted from capture and condemnation by Americans; yet their vessels are confiscated in the French courts of admiralty: and that this exemption, granted by congress to Bermudians, runs strictly parallel with the terms granted by the French general to the people of Dominica, so far as allies in war were to be affected by such treaties. That the law respecting ransoms cannot apply to the present case, because, if, after our ally has made a capture, and discharged the prize on a promised ransom, we should violate the ransom bill, we should in fact plunder our friend of his actually acquired property; and it is for this reason that allies are bound by ransom bills: that this case coming precisely within the ordinance of congress respecting twenty-four hours' possession by the enemy, this court is bound to decree according to that ordinance, and hath no power to judge how far its operation may, or may not, under particular circumstances, affect the terms of our alliance with France, the true limits of which are only to be ascertained by the sovereignty of the states, and are not submitted to the determination of this court. That, as to the passport subscribed by Monsieur Du Challeau, he

did it as a matter of course in consequence of the depositions annexed to the bills of lading, which were taken by the British judge of the island, and who might probably be in the interest of the parties; or, at least, that it was done with the official negligence too usual in passing customhouse papers. It was further suggested, that the manifest variance between the bills of lading, with their depositions annexed, and the private letters of advice found on board; the direct fraud manifest in some of those letters, and the mysterious complexion of others, are alone sufficient to justify a condemnation of this property; double papers and fraudulent clearances being legal cause of confiscation. In short, that this whole business appears to be a mercantile scheme concerted between British merchants and Brandlight and Sons, of Amsterdam, in conjunction with the shippers at Dominica, to impose on the French governor, and to derive an unfair advantage from the liberal terms of the capitulation: that, if this property is to be deemed neutral, the true doctrine is, if a neutral voluntarily puts his property on board an enemy's ship, he does at his own risk; but if an enemy unjustly takes neutral property, and the same is retaken, the remedy is against the enemy who did the wrong, and not against the recaptor who only did his duty; that it is true, that the passport of Governor Du Challeau recommends this vessel to pass unmolested by the friends of France, but does not say she shall not be taken from the enemy in case she should fall into their hands: that if the inhabitants of Dominica, in their present situation, be considered either as French or as British subjects, still the recapture is good; if French, then the property (supposing it to belong to the shippers) having been more than twenty-four hours in the possession of the enemy, is prize to the recaptor by the marine ordinances of France and America; if British, it belonged to the enemy, and is therefore prize. And lastly, that this capitulation should not be construed to extend further than the protection of property upon the island, and within its ports and harbours, but cannot reasonably be expected to insure safety on the high seas in the midst of a raging war.

This cause, so far as it respects the cargo of the ship Resolution, rests principally on one question, viz. whether the United States by their alliance with France, are, or are not to be considered as parties in the capitulation made by the Marquis De Bouillé with the inhabitants of Dominica. No authority has been produced, and I believe that none can be, to shew that allies are mutually bound in all cases. It is manifest, that it is not generally so understood; because it is usual in forming treaties of alliance to insert special clauses specifying those cases, wherein the promises and engagements of the one shall bind the other: for it would be a very dangerous doctrine that should bind sovereign powers in engagements to which they had neither expressly nor implicitly given consent, or that one ally should necessarily become a party in the conventions which the generals and officers of the other may, under particular straits and circumstances, make with the common enemy, unless the ally be mentioned in the convention, and the terms thereof be afterwards acceded to by him. Thus, in the case of Dominica, had Governor Stuart, when he surrendered the island to the Marquis De Bouillé expected that the United States should be bound by the terms of the capitulation, he would have made this one of the articles, and not entrusted so important a point to a speculative question, how far one ally may or may not be virtually bound by the engagements of the other. This, however, he has not done, either because it would imply an acknowledgment of the sovereignty of the United States, or because he deemed the objects of the capitulation to be limited to property within the island. Be this as it may, the British could not reasonably complain that the French had violated the articles of the capitulation, should the Americans take the goods of the inhabitants of Dominica found upon the high seas, because such an assurance made no part of the stipulation. "If he who can and ought to have explained himself clearly and plainly, has not done it, it is the worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed." Vatt. Law Nat. bk. 2, c. 17, § 174. But whatever doubts there may be of the right of Americans to take the property of the people of Dominica under the present circumstances, there can be none of taking British property, wherever found, without any danger of impairing the friendship of our good ally. And from a scrutiny of the papers found on board this vessel, there is strong reason to believe that this cargo, however artificially covered, is, in fact British property.

As to the general doctrine respecting allies, the case of Bermudas is, I think, strong in point. The vessels of that island were by congress exempted from capture by Americans, and yet the French made prize of them whenever they could; nor was it ever suggested that they had thereby violated the faith of the alliance. Had the British expected, or France desired, that the United States should be parties in the capitulation of Dominica, it cannot be doubted, but that this would have been made one of the terms of that capitulation, or that France would, before this, have signified her desire to congress, and that congress would have instructed the masters of privateers as to this matter. Having made no national agreement to spare the property of the people of Dominica, when found on the high seas, much less are we bound to rescue it from the hands of an enemy at our risk and expense, in order to restore it, salvage free, to their use. This would be to put them on a better footing than our own merchants, whose property, after

twenty-four hours' possession by the enemy, would be confiscated to the recaptor, whereas it is contended that no confiscation whatever should pass on the property of the people of Dominica. Being fully satisfied as to this general point, it renders a minute display of the striking contradictions between the bills of lading and letters of advice, and other papers found on board this vessel, the less necessary. Many of them are manifestly fraudulent; and although the property is carefully wrapped in neutral covers, the net proceeds appear to be finally intended for subjects of Great Britain, residing at London, or elsewhere.

With respect to the king of England's proclamation, I conceive that it is founded on partial, not on general grounds. Were it not that this, with four or five other Dutch vessels were at this time to sail from Dominica, freighted with the property of British merchants, it is more than probable that this proclamation had never been published.

I adjudge that the cargo of the ship Resolution be condemned as lawful prize to the libellants; and that the ship Resolution, with her tackle, apparel and furniture be restored to Brandlight and Sons, merchants of Amsterdam.

NOTE. The claimants appealed from this decree; and, after long argument, the judges of appeal reversed the decree, so far as the same respected the condemnation of the cargo, which they fully acquitted, upon the shippers paying freight to the owners of the ship. [2 Dall. (2 U. S.) 1.] There was afterwards a rehearing of this cause before the court of appeal, on a suggestion of new testimony having been found amongst some papers taken in a ship (the Ersten) bound from Ostend to Dominica; but the court adhered to their judgment; except only as to some part of the cargo, which was condemned on account of irregularities in the bills of lading, and letters of advice, respecting those particular articles. [Id. 19.]

MILLER (RICHARDSON v.). See Case No. 11,791.

MILLER (ROBERTSON v.). See Case No. 11,926.

MILLER v. The ST. JOSEPH. See Cases Nos. 12,229 and 12,230.

MILLER (SANGSTER v.). See Case No. 12,320.

MILLER (SCHRENKEISEN v.). See Case No. 12,480.

MILLER v. SCOTT. See Case No. 5,620.

Case No. 9,589.

MILLER v. SMITH et al.

[4 Ban. & A. 314;[1] 16 O. G. 313.]

Circuit Court, D. Connecticut. May, 1870.

PATENTS—CLAIM—INFRINGEMENT—PADLOCKS.

Upon the construction given by the court to the second claim of the patent granted to James W. Lyon, for improvement in padlocks, dated April 22d, 1862, and numbered 35,030, the defendants *held* not to have infringed.

[This was a bill by Nathan G. Miller against Friend W. Smith and others for an injunction to restrain the alleged infringement of certain letters patent.]

Charles E. Mitchell and Benjamin F. Thurston, for complainant.

Rodney Mason, for defendants.

SHIPMAN, District Judge. This is a bill in equity, based upon the alleged infringement of letters patent [No. 35,030] which were granted to James W. Lyon, on April 22d, 1862, for an improvement in padlocks. The patent was assigned to the plaintiff on March 18th, 1874. The device, which is alleged to be an infringement, is used upon the post-office street letter-boxes in various cities of the country, and is manufactured by the defendants under a contract with the United States government, and was patented December 23d, 1873. It was adopted by the post-office department after a competitive trial, and is a secure and successful lock. There is no evidence that the plaintiff's lock has ever been manufactured, and there is satisfactory evidence that it is an unsafe lock. The patent was purchased after the plaintiff knew that the defendants had obtained their contract.

The specification of the plaintiff's patent states as follows: "The first part of my invention consists in combining with the shackle two separate and independent sets of tumbler-catches—one set to lock the heel, and the other set to lock the front or staple of the shackle—the two sets being so arranged and so adapted to each other, substantially as hereinafter described, that both sets are released from the shackle by the direct action of the key lifting the several tumblers of each set, in the usual manner of actuating tumblers, by a key, and without the employment of other intervening mechanism, between the key and either end of the shackle, than the tumbler-catches, which are each so constructed and so arranged and adapted to each other in the combination as to perform the function of a catch or bolt, a tumbler, and a detector, the whole performing the office, and affording the security of a double series of tumbler catches. The second part of my invention" (which is the part claimed to have been infringed) "consists in providing against the release of the tumbler-catches from the heel of the shackle by the action of a key, other than the proper key or a duplicate thereof, by the relative arrangement of the grooves g, in the dogs or tumbler catches a, with the pins of flanges b on the part d, projecting from the heel of the shackle, whereby they act in combination with each other as guards or detectors against attempts to open the lock with a key or other instrument which will move the tumblers a to a greater or less distance than the proper key." The second claim is as follows: "I

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

claim in combination, the grooves g, in the dogs a, and the flanges or pins on the projecting part of the heel of the shackle, substantially as and for the purpose described."

If the second claim is for a combination of gated tumblers, called grooves in the patent, which must be moved to a definite distance before the lock can be unlocked, with a stump or projection mounted upon the heel of a shackle, extending below the point of suspension of the shackle, on the opposite side of the pivot from the nose, these parts being so arranged that the ends of the tumblers nearest the stump are in such location, with respect to the stump on the heel, that the parts of the tumblers in which there are no gates will directly resist any attempt to open the shackle until the tumblers are so moved that the gates come directly opposite the stump, then the defendants infringe. In other words, if the plaintiff's patent is broad enough to include any projection upon the heel of a shackle, extending downward below the pin on which the shackle vibrates, and acting in combination with grooved or slotted tumblers, so as to enter the slots of the tumblers when the tumblers are acted upon by the proper key, then it includes the defendants' lock.

But I think that the second claim of the plaintiff's patent is for the particular mechanism therein specified. Padlocks, locking either with single or double acting tumblers or levers or slides, and locking either at the heel or nose of the shackle, or by means of a stump or projection extending from the heel engaging with gated tumblers (the term "heel" including that portion of the shackle which is at all times within the case), are old, and, so far as the principle of operation is concerned, it is not material to which part of the bolt or shackle, within the case, the tumbler is applied. In the present state of lock-making an inventor can hardly obtain an exclusive right to the location of his mechanism upon any particular part of the bolt or shackle.

The invention of the plaintiff's assignor, which is mentioned in the second claim, did not consist in placing a stump or pin upon an extension of the heel of the shackle below the point of suspension of the shackle upon its pivot, but it consisted in the manner of the construction of the flanges or pins upon the projection which together answered the purposes of a stump, and in the manner in which it engaged with the tumblers. This invention was one of narrow limits. His padlock had two parallel plates having grooves upon their inner and opposed faces or slots, and a projection extending below the pivot on the heel of the shackle, on which were flanges or pins, which, bearing against the ends of the plates or tumblers, prevented the shackle from being turned until the tumblers were so turned by the key that the flanges or pins were in opposition to the grooves or slots, when the shackle could be turned, the end of the projection passing between the plates, as the grooves or slots received the flanges or pins.

The lock of the defendants, as shown in their patent, has a long curved L-shaped arm extending from the heel of the shackle below the point of suspension of the shackle upon its pivot. A key, inserted in the key-hole which opens in the bottom of the case, is brought to bear upon a set of slotted loosely-pivoted tumblers resting upon each other, raising them until their slots come into line with each other and directly opposite the end of the arm of the shackle which had rested against the shoulders of the tumblers, and is then caused to enter the slots. There is no infringement. Let the bill be dismissed.

Case No. 9,590.

MILLER v. SMITH.

[1 Mason, 437.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1818.

SALE — AGREEMENT TO RESCIND — REDELIVERY — MITIGATION OF DAMAGES — REPRESENTATIONS — QUALITY.

1. Where a sale is made of goods and they are delivered, and an agreement is afterwards made to rescind the contract, the contract is not completely rescinded until a re-delivery of the goods.

[Cited in Folsom v. Cornell, 150 Mass. 118, 22 N. E. 705; Blanchard v. Trim, 38 N. Y. 229; Getty v. Rountree, 2 Pin. 391.

2. In an action for goods sold, the defendant may give in evidence, in mitigation of the damages, that the goods were of a quality inferior to what they were represented to be at the sale.

[Cited in Elminger v. Drew, Case No. 4,416; Withers v. Greene, 9 How. (50 U. S.) 227.]

[Cited in Harrington v. Stratton, 22 Pick. 512. Cited in brief in Hyatt v. Boyle, 5 Gill & J. 118.]

Assumpsit for goods sold and delivered. Plea, the general issue. At the trial it was proved, that the defendant [Caleb Smith] in March last purchased of Messrs. Athearn and Williams, commission merchants of Boston, who were the consignees and agents of the plaintiff, 100 kegs of Miller's No. 3 tobacco, at eleven and a half cents per pound, at six months' credit, amounting in the whole to $795.80; under an express representation, that the tobacco was as good as Messrs. Athearn and Williams had before sold to the defendant of Miller's No. 3 tobacco, and as good as the defendant had previously bought of a Mr. Reed. The tobacco was delivered accordingly; and sometime afterwards the defendant complained, that the quality of the tobacco was greatly inferior to what it was represented to be. Messrs. Athearn and Williams, upon this complaint, being satisfied, that the tobacco was not as good as they supposed it to be, and as they had represented it to be, offered to take it back again, which offer was accepted by the defendant. But before the actual return, Messrs. Athearn and Williams, having communicated the facts to the plaintiff [Hugh R. Miller], the latter utterly re-

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

fused to rescind the bargain or receive the tobacco back again, upon the ground that No. 3 tobacco was always known to be of the most inferior quality, and never sold under a warranty. The defendant sent the tobacco to Boston, but Messrs. Athearn and Williams, under the orders of their principal, refused to receive it; and it was then sold at public auction by the defendant for the benefit of whomsoever it might concern, and the nett sales amounted to $405.69. The defendant at the trial insisted upon two points. 1st. That the original contract of sale was rescinded, and therefore the plaintiff was not entitled to recover in an action for goods sold and delivered. 2dly. That if the sale was a subsisting contract, still the plaintiff was not entitled to recover more than the price, at which the tobacco sold at auction. The plaintiff on the other hand insisted, 1st. That the contract of sale never was rescinded. 2dly. That in this action the plaintiff was entitled to recover the contract price of the tobacco without any deduction; and, that if the defendant was entitled to any allowance for the supposed misrepresentation, it must be sought in a cross action, founded upon the original representation.

G. Sullivan, for plaintiff.
Webster & Curtis, for defendant.

STORY, Circuit Justice. There is no pretence in this case, that the representation was fraudulent. It was made, as all parties agree, innocently, under a misapprehension of the state of the tobacco, which had not been examined by the consignees. I think, that the consignees had authority to make the representation, and that the plaintiff is bound by it. When the plaintiff sent the tobacco to the consignees for sale, there was an implied authority to represent the article to be, what it was marked and described to be. The representation of the consignees went no farther than this, that the tobacco was as good as Miller's No. 3 had previously been. Now, in point of fact, the tobacco was very inferior in quality to what Miller's No. 3 usually was. And certainly if that be so, the defendant has sustained an injury by the misrepresentation, and he is entitled to a recompense, however innocently it may have been made.

As to the points of law raised in the case, I am clearly of opinion, that the contract was not rescinded. There was an agreement to rescind, which was never carried into effect, but was stopped by the plaintiff's interference; and as the tobacco was never received back, the original contract remained valid. To constitute an actual rescission of the contract, there should have been a re-delivery of the goods. Until that is done, the agreement to rescind is in fieri.

The other point presents no pressing difficulty. Where goods are sold as of a certain quality, and they turn out to be of an inferior quality, the defendant may, in an action for goods sold and delivered, give the facts in evidence to reduce the damages; for the plaintiff is entitled to recover no more than the real value of his goods. The authorities directly support this doctrine; and there is neither reason nor justice in straining after technical objections to overthrow it. Vide Crowninshield v. Robinson [Case No. 3,451]. The auction sale is not, however, conclusive upon the plaintiff, as to the value of the tobacco. The true rule for the jury is, to deduct from the original price the real difference in value between this and the common Miller's No. 3 tobacco; and in making their estimate, they will weigh all the evidence, and give the plaintiff, what is his just due, making all deductions.

Verdict for the plaintiff, $596.85.

MILLER (SMITH v.). See Case No. 13,080.

Case No. 9,591.

MILLER v. STEWART.

[4 Wash. C. C. 26.] [1]

Circuit Court, D. New Jersey. April Term, 1820.

PRINCIPAL AND SURETY — BOND — INTERLINEATION —CONSENT—KNOWLEDGE—RELEASE.

1. Debt on bond given by the defendant and others to the plaintiff, as collector of direct taxes and internal duties.

2. A surety cannot at law or in equity be bound further than by the very terms of his contract, and if the principal and the obligee change the terms of it without his consent, the surety is discharged.

[Cited in brief in Field v. Brokaw, 148 Ill. 658, 37 N. E. 80. Cited in Hunt v. Smith, 17 Wend. 180: Palmer v. Yarrington, 1 Ohio St. 260; Bank of Steubenville v. Carrol, 5 Ohio, 215. Distinguished in Dunham v. Downer, 31 Vt. 259.]

3. Where an interlineation had been made in a bond after its execution, without the knowledge of the surety, by which additional duties were to be performed by the collector, the surety could not be held responsible for those duties, stated in the bond before the interlineation; and the bond was entirely void.

[This was an action by Ephraim Miller against Thomas Stewart.]

Before WASHINGTON, Circuit Justice, and PENNINGTON, District Judge.

WASHINGTON, Circuit Justice. This case comes before the court upon demurrers to the fourth and fifth pleas. The declaration is upon a bond executed by the defendant and others to the plaintiff, collector of the direct taxes and internal duties for the fifth collection district of New Jersey. The condition recites, that the plaintiff, collector as aforesaid, hath, by virtue of authority vested in him by

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

the laws of the United States, appointed S. C. Ustick (one of the obligors) deputy collector of direct taxes and internal duties in the fifth collection district of New Jersey, for the townships of Nottingham, Chesterfield, Mansfield, Springfield, New Hanover, Washington, Little Egg Harbour, and Burlington, in the county of Burlington, and then proceeds, "that if the aforesaid Ustick has discharged, and shall continue truly and faithfully to discharge the duties of said appointment, according to law, and shall faithfully collect and pay according to law all moneys assessed upon the said townships, then, &c." This bond bears date the 4th of January, 1814, and the breach in the declaration is, "that after the making of the bond, to wit, on the 31st of December, 1817, the said Ustick, as deputy collector aforesaid, collected of internal duties and taxes assessed on the several townships in the condition aforementioned, the sum of $2595; which said sum, on the day and year last mentioned, according to law, and the condition aforesaid, ought to have been paid to the plaintiff, but which is still in arrear and unpaid, contrary, &c."

The fourth plea to this declaration, after admitting the appointment of the said Ustick, under the hand and seal of the plaintiff, to be deputy collector as set forth in the condition of the bond, and that the defendant, at the request of the said Ustick, did, as one of his sureties, execute the said bond, proceeds to state that the plaintiff, after the execution of the said appointment, so as aforesaid made, of the said Ustick, and after the execution of the said bond, viz. on the same day, and before the said Ustick had acted under the same, did, with the assent of the said Ustick, alter the said appointment so as aforesaid made, by inserting or causing to be interlined therein, "Willingborough," making it by such interlineation, an appointment for the said township of Willingborough, in the county of Burlington aforesaid, which interlineation and change was made without the knowledge, privity, or consent of the said defendant; and further, that the said Ustick did accept to act and account under the said appointment so altered, and hath continually ever since so acted and accounted as the plaintiff's deputy for the said township of Willingborough, and the eight townships mentioned in the condition of the said bond, under the said altered or new appointment, for which cause, &c. the defendant is discharged from any liability, &c.

The fifth plea, after admitting, as in the fourth plea, and also that Ustick might, on the 31st of December, 1817, have been in arrears for collections made by him to the amount stated in the declaration, proceeds to state, that at the time of the appointment so as aforesaid made, and until the said 31st of December, 1817, it was by law required of the said Ustick to transmit to the plaintiff, at the expiration of every month after he commenced his collections, a statement of the collections by him made during the month, and to pay over quarterly the moneys by him collected, and to complete the collection of all sums assigned to him for collection, pay over the same, and render his final account to the plaintiff, within six months from the time he received the collection lists, and in failure of his so doing, the plaintiff was by law empowered to remove said Ustick from his said office, and immediately to sue for and recover the arrearages for which he was liable. The plea then proceeds to state that though Ustick did not, at any time, from the said 4th of January, 1814, account and pay over in the manner prescribed by law, yet the plaintiff did not remove him from his said office, nor prosecute him for his defaults, and for the arrearages due from him, nor give notice to the defendant of such his defaults, but fraudulently and negligently, and in violation of his duty, permitted him to continue in office, and during all the time to the commencement of this suit, the plaintiff did fraudulently and unlawfully conceal from the defendant the defaults of said Ustick, and his being so in arrear. The plea then alleges the insolvency of Ustick and the other sureties, and concludes, by reason of all which, &c. the said defendant is discharged.

The question which arises upon the fourth plea is, whether the alteration made in the appointment of Ustick, after the execution of the bond, and without the knowledge or consent of the defendant, discharges him from his obligation? The ground work of this plea is, not that the obligation on which this action is brought, ceased to be the deed of the defendant, because of the alteration made in the appointment of Ustick; but that the contract of guarantee into which the defendant had entered, having been changed by the obligee and the principal in the bond without his consent, he is, by such change, discharged from his obligation for the official conduct of the principal.

No principle of law is better settled at this day, than that a surety cannot, either at law or in equity, be bound farther than he is so by the very terms of his undertaking, and that if the parties to the original contract think proper to change the terms of such contract without the consent of the surety, (which unquestionably they have a right to do) the surety is discharged. The reason of this rule is obvious. The surety is not bound by the contract as it was entered into by him, because that contract, being afterwards altered by the principal parties to it, it is no longer the same, but a different contract, for the performance of which the surety came under no obligation. Neither is he bound by the contract in its altered form, because he is no party to it. It cannot be split into parts, without the consent of the surety, so as to be his contract to a certain extent, and not his contract for the residue of it. Neither is it of any consequence that the alteration in the contract is trivial, nor even that it is for the

advantage of the surety. For if the obligee, by a subsequent agreement with his debtor, the principal obligor, agree with him to enlarge the time stipulated in the bond for payment or performance, even for a day, and upon the terms of the principal paying off a part of the debt immediately, or giving additional security, both of which considerations are manifestly advantageous to the surety by diminishing his responsibility; still, if such agreement receive not the sanction of the surety, he is discharged upon the ground that the terms of the contract to which he was bound, being changed without his consent, it is a different contract from that which he engaged to guaranty, and consequently not his contract. "Non haec in foedera veni," is an answer in the mouth of surety; from which the obligee can never extricate his case, however innocently, and by whatever kind intentions to all parties he may have been actuated.

With these principles in view, I come to their application to the present case; and the main inquiry must be into the legal effect of the interlineation stated in this plea, and acknowledged by the demurrer to have been made without the consent of the defendant. The appointment of Ustick was incorporated into, and became part of the condition of this bond. Ustick is there stated to be a deputy collector, duly appointed by the collector and obligee, for eight townships distinctly described; and the defendant undertook that the said Ustick should faithfully discharge the duties of his said appointment according to law and should faithfully collect and pay, according to law, all moneys assessed upon those townships. The contract, then, in effect, was, that the defendant should guaranty the good conduct of an officer, then clothed with powers and duties defined and circumscribed within a specified sphere, in which he might legitimately act as such officer. The principal parties to that contract afterwards agreed to enlarge the sphere of action of that officer, and to change the appointment recited in the condition of the bond, in such manner as to constitute him a deputy collector for nine townships; and this was effected by an interlineation in the original appointment. It is true that the same individual may be a collector for eight townships, and also for an additional township; but is he the same officer? I think not. His official designation, his duties and his responsibilities are different in the two appointments. If the plaintiff, before or after the execution of this bond, had appointed Ustick his deputy for as many other townships as he thought proper, the defendant could raise no objection on that ground to invalidate his obligation, because such appointments formed no part of his contract, and Ustick would have been not less the officer to which that contract referred. But when he ceases to be the same officer as the condition of the bond designated him, by a change of the instrument of appointment to which that bond refers, and all that without the consent of the surety; how can it be contended that the contract continues to be the same that it was at the time it was entered into? If Ustick had been appointed by a separate instrument a deputy collector for the ninth township, it must be admitted that he would have held two distinct offices; and the collector might well have required of him new securities, on account of his new office. The only difference between this case and the one supposed is, that in the former he has but one instrument and appointment, and in the latter he would have two; but this only shows that his character is essentially changed by the alteration made in the original appointment.

There is another view of this question which still remains to be taken. The law of the United States requires that the deputy collector should be appointed by an instrument under the hand and seal of the collector, and it sufficiently appears by the pleadings in this case, that Ustick was so appointed. What is the legal effect of the alteration made in the original appointment which the deputy collector afterwards accepted and acted under? It amounted, I think, to a surrender of the first appointment, and the making and delivery of a new deed of appointment. It is laid down in Co. Litt. 232, that if the feoffee grant the deed to the feoffor, though by parol, such grant is good, and that both the deed and property belong to the feoffor. In the case of Eppes v. Randolph, 2 Call, 103, it was decided that a re-acknowledged deed is good, and takes effect from the time of the re-acknowledgment; that the estate was vested in the grantee whilst he held the deed, the evidence of his title; but that when he surrendered the deed to the grantor, his legal estate ceased, and the grantor was at liberty to grant the same to him, or to any other person, and that he might either destroy the deed and make a new one, or, by re-delivering it, give it force as a new deed from that time. A deed once executed and delivered cannot be altered by the grantor, and yet retain its validity, except upon the supposition of its having been surrendered by the grantee to the grantor and of a new delivery after the alteration has been made. But the surrender and re-delivery of the deed, and more especially if the terms of it have been changed by consent of the parties to it, constitutes it to all intents and purposes a new deed. If this be so, it is then most clear that the contract of the defendant as surety for Ustick, under the appointment recited in the condition of his bond, had nothing to operate upon, after that appointment was changed.

It has been contended by the plaintiff's counsel, that no inconvenience can result to the defendant by the change made in the appointment of Ustick, because the declaration confines the plaintiff's demand to the taxes and duties collected by him in the eight town-

ships to which he was originally appointed. This argument is specious and has the imposing appearance of a compromise fairly offered, to get rid of a legal objection to the plaintiff's demand. But it affords no answer to that objection, which is, that the defendant's contract has been changed without his consent, and that he ceases to be bound by it. If the defendant had become surety for the performance, by Ustick, of certain articles of agreement, and those parties had afterwards thought proper to strike out some of the articles, or to add others; it would be no answer to the defendant's plea that the contract was not the same of which he had guarantied the performance, to say that the breaches laid in the declaration were confined to the original articles.

Upon the whole, I am of opinion that the fourth plea is a legal bar to the plaintiff's demand, and that the demurrer must be overruled. It is unnecessary to give any opinion on the fifth plea.

PENNINGTON, District Judge. I am perfectly satisfied that the justice of this case is with the plaintiff; I must therefore require some strong authority to induce me to sweep his right from under him. There are some contradictory sayings in the books respecting the effect of alterations in deeds; (but the best authorities lay it down, that an alteration in a deed by the consent of the parties does not destroy it, even if the alteration is in a material part.) 4 Com. Dig. 169, tit. "Fact," and Woolley v. Constant, 4 Johns. 54. Mr. Justice Thompson, in delivering his opinion in this last case, cites a case from Moore, K. B. 547, to this effect, viz. a bond was given containing a recital of a former bond or recognizance, against which the one in question was taken by way of indemnity. The former bond was recited with a blank for the Christian name and addition of the obligee, and this blank was afterwards filled up. In a suit on the bond of indemnity this matter was specially pleaded, and the plaintiff replied that the blank was filled up by the assent of the obligor, and on demurrer judgment was given for the plaintiff. This, and the case of Woolley v. Constant, in point of principle, are the same as the case under consideration. The instrument appointing Ustick a deputy, is not void by the alteration. As to its having been surrendered and re-delivered, as suggested by one of the counsel for the defendant, it appears to me not to be founded in fact; the plea does not say so, and I cannot think myself called upon to presume it. If the alteration affected the rights of the defendant, or increased his responsibility, it would alter the case; but his liability is not increased; he stands in the precise situation as if no alteration had been made; and it appears to me that he comes with an ill grace, to lay hold of an indulgence given to his friend, as the means of shaking off a solemn responsibility which he had voluntarily put himself under to benefit him. If sureties are favoured, they are not discharged from their legal obligations. I confess that it gives me pain, to differ in opinion with the learned judge presiding in this court; but I am bound to deliver such an opinion as my conscience and judgment point out to me. I must therefore say that I am of opinion that the plaintiff is entitled to judgment.

Judge PENNINGTON having dissented, and the court being divided in opinion, the case was adjourned to the supreme court.

The certificate of the supreme court was in favour of the defendant. 9 Wheat. [22 U. S.] 680.

[The opinion of Circuit Justice Washington was sustained by the supreme court, Mr. Justice Johnson and Mr. Justice Todd dissenting.]

Case No. 9,592.

MILLER v. SULLIVAN.

[4 Dill. 340; 5 Reporter, 328; 5 Cent. Law J. 460; 26 Pittsb. Leg. J. 16.] [1]

Circuit Court, D. Nebraska. Nov., 1877.

GUARDIAN AND WARD—NEBRASKA—SPECIAL STATUTE OF LIMITATIONS—GUARDIAN'S SALES.

1. The legislation of the state of Nebraska, as respects sales of real estate by guardians, considered, and the principles of Grignon's Lessee v. Astor, 2 How. [43 U. S.] 319, adopted and applied.

2. The special five years statute of limitations for the protection of the rights of a purchaser of land at a guardian's sale, is available to the holder of the title thus acquired, even though the sale by the guardian might not be good if it had been attacked within the five years.

[Cited in Seward v. Didier, 16 Neb. 64, 20 N. W. 12.]

There is no controversy over the chain of title of the plaintiff [Mary F. Miller], it being from the United States to Touisant Kenseller—a half-breed Indian—from him to William Miller, and from Miller to the plaintiff. The title of the defendant [Julia Sullivan] is one acquired by virtue of proceedings had in the probate court of Richardson county, Nebraska, upon application of the guardian of the patentee, who was a minor. The material questions in the case relate to the validity of the guardian's sale of the land, and the effect of the five years statute of limitations in respect of such sales. The records of the probate court, at and before the time when the sale was made by the guardian, were loosely and imperfectly kept. The then probate judge testifies that the county furnished him no record books, and he kept the appointments, orders, and proceedings in his court on sheets, put away in envelopes. The original appointment of the guardian, and that he took the oath required by law, appear on the files of the probate court, and by recitals in the license of Febru-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 26 Pittsb. Leg. J. 16, contains only a partial report.]

ary 10th, 1862. The bond required of a guardian on his appointment, was given and approved, and is still extant, and is substantially in the form required by law. The petition of the guardian, in 1864, to sell the land now in controversy, duly sworn to, and containing all the essential requirements of the statute, is still on the files of the probate court. A bond of the guardian, not dated, and not appearing to be approved, reciting the license to sell, is also on the files of that court. No report of sale, under the petition and license of 1864, is on file in the probate court. The then probate judge testified that the bond was approved; that the sale by the guardian was reported to and approved by him, and that the land sold for its full value. The guardian's deed, dated January 10th, 1865, recites a sale of the land in controversy, September 5th, 1864, after notice in a public newspaper. The guardian was the father of the ward. No notice of the application of the guardian for license to sell was served upon the father, he being the guardian and next of kin, or on the minor, nor upon any other person; but the aunts of the minor, who seem to have been supposed to be his next of kin, or part of his next of kin, were of age, and authorized an attorney to appear for them, and he did so appear in the probate court, and "waived notice to bring in the next of kin." The statute then in force on the subject of guardian sales (section 7), required "that, upon the presentation of this petition (to sell), the court shall thereupon make an order, directing the next of kin of the ward, and all persons interested in the estate, to appear," etc. Section 8 provided: "A copy of such order shall be personally served on the next of kin of such ward, and all persons interested in the estate. * * *" In section 42 of the succeeding chapter, the legislature uses this language: "All those who are next of kin, and heirs, apparent or presumptive, of the ward, shall be considered as interested in the estate." When personal notice of the time and place is required to be given, they (the next of kin and heirs apparent) shall be notified as persons interested, according to the provisions respecting similar sales by executors and administrators, which provisions are that it must be personally, by publication, or assented to in writing, by "all persons interested in the estate." Section 23 of the guardian's act under consideration, provides that the sale shall not be avoided on account of irregularity in the proceedings: provided, it shall appear (1) that a guardian was licensed to make the sale by a probate judge of competent jurisdiction; (2) that he gave bond; (3) that he took the oath; (4) that he gave notice of the time and place of sale, as prescribed by law; (5) that the premises were sold, accordingly, at public auction, and are held by one who purchased in good faith. The statute of Nebraska also provides: "No action for the recovery of any real estate sold by a guardian * * * shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years after the termination of the guardianship, excepting," etc. Territorial Laws Neb. 1861, p. 68, § 22; Gen. St. Neb. p. 287, § 63. The land in question was purchased at the guardian's sale in good faith, and the defendant and those under whom he claims have been in actual possession of it ever since. It was unimproved when sold by the guardian, and has been improved by the purchaser from the guardian. This suit was not brought within five years after the minor attained his majority, which, of course, terminated his guardianship. A jury was waived, and the cause was submitted to the court upon evidence which showed the foregoing facts.

Mr. Ambrose, for plaintiff.

Mr. Manderson and Mr. Martin, for defendant.

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

DILLON, Circuit Judge. This case presents questions of great importance. I have considered them deliberately, but shall dispose of them briefly.

The statute of Nebraska did not require notice of the application of the guardian for license to sell to be served upon the minor or ward, but only "on the next of kin, and all persons interested in the estate."

If we consider as proved the facts testified to by the probate judge in connection with what is shown by the records of the probate court, the most serious defect alleged to exist in the sale arises out of the want of service of notice upon the next of kin and others interested in the estate. The guardian was duly appointed, took the required oath, gave bond, filed a petition to sell; the aunts of the minor authorized an attorney to appear for them and waive notice, which he did; a license to sell was granted, a bond was given and approved, and a sale was made in good faith and confirmed, and a guardian's deed executed and possession taken under the sale, and maintained ever since.

Guided by the views of the supreme court of the United States, I doubt very much whether, under the Nebraska statute, the application of a guardian for a license to sell should be regarded as an adversary proceeding as against the "next of kin and all persons interested in the estate" of the ward. Grignon's Lessee v. Astor, 2 How. [43 U. S.] 319; Thompson v. Tolmie, 2 Pet. [27 U. S.] 157; Cooper v. Reynolds, 10 Wall. [77 U. S.] 303; Good v. Norley, 28 Iowa, 188, and cases cited on page 208. The supreme court of Nebraska has never held otherwise upon this statute. But whatever may be the true view on this point, I am of the opinion that the five years limitation provided by the statute

of Nebraska, in respect of sales by guardians, will protect the sale in question. The sale was made by a guardian duly appointed, and who duly qualified; a petition for a sale was presented and granted; a bond was given; the sale was made at public auction after the prescribed notice had been published. If the father was the next of kin, he of course had notice, being the guardian, and the aunts of the minor authorized an attorney to appear for them, and he did so appear and waive notice. Possession was taken under the sale, and more than five years elapsed after the minor attained his majority before this suit was brought. I am of opinion that the five years limitation statute applies to such a sale and protects the purchaser.

Such a purchaser can avail himself of the bar afforded by the statute, without showing a sale which would have been valid if it had been attacked within the five years. Holmes v. Beal, 9 Cush. 223; Norton v. Norton, 5 Cush. 524; Arnold v. Sabin, 1 Cush. 525; Wilkinson v. Leland, 2 Pet. [27 U. S.] 627; Howard v. Moore, 2 Mich. 226; Coon v. Fry, 6 Mich. 506; Pursley v. Hayes, 22 Iowa, 35; Good v. Norley, 28 Iowa, 188; Boyles v. Boyles, 37 Iowa, 592; Dolton v. Nelson [Case No. 3,976].

I stand by my opinion in Good v. Norley, 28 Iowa, 188, 206. The case might be different—I do not say it would be—if no possession had been taken and maintained under the purchase for more than five years after the termination of the guardianship. It might be different if one had assumed to make a sale as guardian, who had never been appointed guardian or licensed to make the sale. But we need not consider such supposed cases.

Upon the actual case before us, we think the statutory bar is effectual, and that the defendant is entitled to judgment. This is a wise statute, doubly wise in a new country, for reasons which fully appear in this case. It would be robbed of its virtue if it was confined to cases where the sale was valid, for such sales do not need the protection of such a statute. "They that are whole need no physician." Judgment for the defendant.

MILLER (THAMES v.). See Case No. 13,860.

Case No. 9,593.

MILLER v. TOWBOAT.

[Nowhere reported; opinion not now accessible.]

MILLER (UNITED STATES v.). See Cases Nos. 15,770–15,775.

MILLER (VAN KLEECK v.). See Case No. 16,860.

MILLER (VAN MARTER v.). See Case No. 16,863.

MILLER (WATERBURY BRASS CO. v.). See Case No. 17,254.

MILLER (WEED v.). See Case No. 17,346.

MILLER (WELLFORD v.). See Cases Nos. 17,380 and 17,381.

Case No. 9,593a.

MILLER v. WASHINGTON.

[2 Hayw. & H. 241.] [1]

Circuit Court, District of Columbia. March 16, 1857.

CONSTRUCTION OF CITY CHARTER—DEFINITION OF "OCCUR," "HAPPEN"—APPOINTMENT DURING RECESS OF BOARD OF ALDERMEN.

1. There is no difference in the meaning of the word "occur" in the charter of the city of Washington and the word "happen" in the constitution of the United States.

2. The clause in the charter of the city of Washington, referring to the nominations to be made by the mayor, and confirmed by the board of aldermen, was modeled after the constitution of the United States, and was intended to accomplish the same object.

3. A party rejected by the board of aldermen, on the mayor's nomination, cannot be reappointed by the mayor in the recess of the same board, to the same office from which he was rejected by the board.

This was an action of debt [by Aaron W. Miller against the mayor, etc., of Washington] on the following bill:

"Corporation of Washington. To A. W. Miller, M. D., Dr. For 5 months service as physician to Washington City Asylum and Small-Pox Hospital, from July 1st to November 30th, inclusive, at $50.00 per month. $250.

"Washington City, Dec. 15, 1856."

The plaintiff is one of the officers appointed by the present mayor (M. B. Magruder) after rejection by the board of aldermen, and now claims compensation for his services as physician to the alms house, at the rate fixed by law, during the period he has rendered such services, under temporary appointment by the mayor, "to expire at the end of the next ensuing session of the board of aldermen." (The corporation attorney, Mr. Carlisle, having given an opinion to the board of aldermen, affirming the power of the mayor to reappoint temporarily under such circumstances.)

W. H. Davidge, for plaintiff.

J. M. Carlisle, for the corporation.

DUNLOP, Chief Judge. By the case agreed it appears that the plaintiff was duly appointed physician of the city asylum and hospital by the mayor of Washington, which appointment was so made to fill a vacancy occurring in the recess of the board of aldermen; that the plaintiff qualified according to law, and discharged the duties legally appertaining to that office; that at the ensuing session of the

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazelton, Esq.]

board of aldermen, the plaintiff was nominated by the mayor to the board of aldermen for said office, to which nomination the board refused to consent, by which I understand, and it is admitted in the argument of the case agreed, he was rejected by the board of aldermen; that from time to time after the adjournment of said board sine die, and to the day of meeting regularly fixed by law, the plaintiff has been reappointed and has from time to time duly qualified, and at each meeting of the board (that is to say, separate and distinct sessions as fixed by law) has been nominated, but said nomination has not been consented to, (that is to say, has been rejected by the board of aldermen;) and there is due the plaintiff, who has faithfully discharged the duties of said office, the amount claimed in the account filed, if the mayor had the right from time to time to so appoint as aforesaid. It is further agreed, that any ordinance of the corporation touching the subject-matter of this suit shall be considered as making a part of the case agreed, and may be read in evidence at the hearing. The charter of 1820, which rules this case, (the charter of 1848 making certain officers elective by the people, not applying to this officer) in its second section says: "He (the mayor) shall nominate, and with the consent of the board of aldermen, appoint to all offices under the corporation (except commissioners of election) and may remove any such officer from office at his will and pleasure. He shall appoint persons to fill up all vacancies, which may occur during the recess of the board of aldermen, to hold such appointment until the end of their ensuing session." And in the fourth section of the same charter of 1820: "And each board shall meet at the council chamber on the second Monday of June next, for the dispatch of business, at 10 o'clock in the morning, and at the same hour on the second Monday of June in every year thereafter, and at such other time as the two boards may by law direct." The two boards, therefore, by their own ordinance, were, under this charter enabled, besides the annual session, to appoint and fix as many other sessions as they saw fit, and as the public interests required, and they exercised this power in the passage of the ordinance of the 3d of June, 1853 (see section 4). This 4th section makes in addition to the 2d Monday of June, each and every Monday from the 4th Monday in June to the last Monday in May, inclusive, the beginning of a distinct stated session. That is, therefore, a recess, in the meaning of the charter of 1820, between the stated sessions from Monday to Monday, whenever the board adjourns sine die, leaving the time of its reassembling to be as prescribed by ordinance.

The counsel for the plaintiff claim that the acts of the mayor, set forth in the case agreed, in continuing to reappoint the plaintiff to the office he now fills, after repeated rejections by the board of aldermen, are lawful exercises of power by the mayor under the city charter, and that the plaintiff is entitled to the salary appertaining to the office by law; that a vacancy having occurred in the recess of the board of aldermen, the first appointment was covered by the authority in the charter; that this first appointment, and the commission issued to the plaintiff, conferred on him the office to the end of the then next ensuing session of the board of aldermen; that his nomination by the mayor and rejection by the board of aldermen at that session did not terminate his office, but that it continued till the end of said session, and that when the board adjourned without day for that session a new vacancy occurred, which the mayor had authority to fill, and so on, session after session, under like circumstances, during the pleasure of the mayor. It is plain, if this is the true construction of the city charter, there is no check in the board of aldermen on the mayor's power of appointment to office. They hold their control by sufferance only, and at the mayor's will. It is said the enactment in the city charter herein cited is in substance the same with the provision in the constitution of the United States, on the same subject of appointments to office, and that several attorney generals of the United States have asserted doctrines, in construing the federal constitution, in harmony with the pretensions of the plaintiff in this case. Const. U. S. art. 2, sec. 2. The only difference in the two provisions, as to filling vacancies, is that in the city charter the power is to fill vacancies which may "occur" in the recess, and in the constitution of the United States, to fill the vacancies which may "happen" in the recess. In both the appointments are to continue till the end of the next session. There may be a difference in the meaning of the words "occur" and "happen," but I shall indulge in no verbal criticism, but treat the two provisions as in substance the same. I do not doubt that the city charter in this particular was modelled after the constitution of the United States, and was intended to accomplish, as to office, the same objects. Upon a careful examination of the opinions of the attorney generals, Mr. Wirt, Mr. Taney, Mr. Legare and Mr. Mason, it will be found they do not warrant the pretentions of the plaintiff. The case before Mr. Wirt, October 22d, 1823, was this: General Swartwout's commission as navy agent at New York, expired during the session of the senate. The president's nomination of another person at the same session of the senate, to fill that vacancy was not acted upon, and the senate adjourned, leaving the office vacant. The question before him was the power of the president under such circumstances to fill it.

Mr. Wirt says: 1 Op. Atty. Gen. 631: "Had the vacancy first occurred during the recess of the senate, no doubt would have arisen as to the president's power to fill it. The doubt arises from the circumstance of its having

first occurred during the session of the senate. But the expression used by the constitution is 'happen;' all vacancies that may happen during the recess of the senate. The most natural sense of this term is 'to chance, to fall out, to make place by accident.' But the expression seems not perfectly clear. It may mean 'happen to take place;' that is, 'to originate' under which sense the president would not have the power to fill the vacancy. It may mean, also, without violence to the sense, 'happen to exist;' under which sense the president would have the right to fill it by his temporary commission. Which of these two senses is to be preferred? The first seems to me most accordant with the letter of the constitution; the second, most accordant with its reason and spirit." He adopts the latter as most consistent with the spirit of the constitution, and resulting from the necessity of keeping the offices of the government filled. Again he says (page 632): "Put the case of a vacancy occurring in an office held in a distant part of the country on the last day of the senate's session; before the vacancy is made known to the president the senate rises. The office may be an important one; the vacancy may paralyze a whole line of action in some essential branch of our internal police; the public interests may imperiously demand that it shall be immediately filled; but the vacancy may happen to occur during the session of the senate, and if the president's power is to be limited to such vacancies only, as in the case put, must continue, however ruinous the consequences may be to the public. Cases of this character might be easily multiplied; and it would seem to me highly desirable to avoid a construction which would produce effects so extensively pernicious, if it can be done with a just respect to the language of the constitution. Now, if we interpret the word 'happen' as being merely equivalent to 'happen to exist' (as I think we may legitimately do) then all vacancies which, from any casualty, happen to exist at a time when the senate cannot be consulted as to filling them, may be temporarily filled by the president; and the whole purpose of the constitution is completely accomplished. The casualty which has prevented the co-operation of the senate may be such as in the case hypothetically stated above. It may arise from various other causes; the falling of the building in which they hold their sessions; a sudden and destructive pestilence disabling or destroying a quorum of that body; such an invasion of the enemy as renders their reassembling elsewhere impracticable or inexpedient; and a thousand other causes which cannot be foreseen. It may arise, too, from their rejecting a nomination by the president in the last hour of their session, and inadvertently rising before a renomination can be made. In all these cases there is no guilt, either on the part of the senate or the president; but, by some casualty, the vacancy happens to continue and to exist in the recess; and the public good, nay even the safety of the nation, may require it to be filled."

Mr. Wirt affirmed the power of the president to fill the vacancy in the recess of the senate. The facts in Gwinn's Case, 2 Op. Atty. Gen. 525. July 19, 1832, are thus stated by him: "After the adjournment of congress, on the 3rd of March, 1831, and before their meeting in December of the same year, a vacancy occurred in the above named office of register, and Sam'l Gwinn was appointed to fill it. During the late session of congress he was regularly nominated to the senate, and rejected by them. The president having afterwards received strong testimonials in his favor from the state of Mississippi, and being requested by one of the senators from that state to renominate him, his name was again sent to the senate, with the additional recommendations which had been forwarded to the president. The second nomination was made on the 11th of June, last. It was considered on the 10th of July, and laid on the table. And on the 16th of July, the last day of the session, the following resolution was moved and considered: 'Resolved, that the president of the United States be informed that it is not the intention of the senate to take any proceeding on the renomination of Sam'l Gwinn, to be register of the land office at Mount Salus, in Mississippi, during the present session.' This resolution was ordered to lie on the table; and the senate adjourned without taking any further order in the matter. In this state of things, can the president, during the recess, appoint Mr. Gwinn, or any one else to the office before mentioned?"

Mr. Taney adopted Mr. Wirt's interpretation of the constitution as to vacancies happening to exist in the recess, and decided that the president could fill the vacancy. In the course of his opinion he says (page 528): "It was intended to provide for those vacancies which might arise from accident, and the contingencies to which human affairs must always be liable. And if it falls out that, from death, inadvertence, or mistake, an office required by law to be filled is, in the recess, found to be vacant, then a vacancy has happened during the recess, and the president may fill it. This appears to be the common sense and natural import of the words used. They mean the same thing as if the constitution had said, 'If there happen to be any vacancies during the recess.' The framers of the constitution had provided for filling the offices, with the concurrence of the senate; but, foreseeing that, from the various casualties to which human concerns are exposed, vacancies would be found during the recess, they give power to fill them, until an opportunity can be afforded of bringing the appointments before the senate; and they use words which denote the character of the vacancies which they foresee may occur, and for which they are providing. He may fill

up vacancies which 'happen' during the recess. But vacancies are not designedly to be kept open by the president until the recess, for the purpose of avoiding the control of the senate. And the word 'happen' is used to describe the class and kind of vacancies, and not the particular time at which they took place. I might suggest another case, showing that the restricted construction contended for, cannot be the one contemplated by the framers of the constitution. Suppose a nomination made to a vacant office, and confirmed by the senate; the office is not filled until the person appointed accepts. Suppose he refuses to accept, and his refusal is not known until after the adjournment; in such a case, the original vacancy would remain unfilled; and as it took place during the session, and not after the adjournment, the president could not fill it. It cannot be imagined that such cases were intended to be excepted out of the power granted to him. It has been said that this power, if possessed by the president, may be so used as to defeat the intention of the constitution, and exclude the senate from all share in appointments. The answer to such an objection appears to be a plain one. If the president willfully abuses a power given to him, the constitution has a remedy. In this case the senate have had a full opportunity of acting, but have not acted, and have held the nomination under advisement, and left it to fall vacant as soon as they adjourned. They must be supposed to have had sufficient reasons for keeping the nomination in their power, and suspending their action upon it. The president could not nominate another person for the same office until this was disposed of, and was either withdrawn by him or finally acted on by the senate. And as the senate have had an opportunity of acting, but have determined to suspend their decision, I cannot see how an appointment now made by the president can be supposed to interfere with the rights of the senate. There is nothing in the case that can be construed into a desire to avoid their constitutional control." Can it be truly said in this case, after the repeated rejections and re-appointments of the same individual by the mayor of Washington, there was no desire to interfere with the rights of the aldermen, or to avoid the control secured to them in the city charter?

The case before Mr. Legare, Oct. 22, 1841, as assumed by him was (3 Op. Atty. Gen. 674): "A vacancy having occurred during a recess, the president had filled it up by a temporary appointment under the clause of the constitution in question; then after the meeting of the senate he made another appointment, which was not acted on by the senate; and so, the office being now vacant, the question is, has the president power to fill it up again by granting a commission which shall expire at the end of the next session of the senate." And Mr. Legare held the president could fill it again. "I say it has 'happened,' for if any stress is laid on the peculiar use of the word as implying something fortuitous and unexpected, the presumption must be that the omission to confirm the nomination was a mere oversight." And again (page 675): "But if it has taken no order upon the president's nomination; if it has left a chasm quo ad hoc in the power or executing the law, and that, too, contrary to the commands of the law itself, the respect which the law acknowledges and challenges from that august body would require us to presume that the omission was a mere accidental one. The people, however, were wisely jealous of this great power of appointing the agents of the executive department, and chose to restrain its discretion by requiring it in all cases to nominate, but only in case it had the concurrence of the senate to appoint. But as it might be easily foreseen that to allow the execution of the law to depend altogether upon the discussions or movements of a deliberate assembly would bring with it all the evils of a plural executive, and lead to perpetual interruptions of the whole course of public affairs, and even to most dangerous interregna in the executive powers essential to the order and defence of society, the convention very wisely provided against the possibility of such evils, by enabling and requiring the president to keep full every office of the government during a recess of the senate, when his advisers could not be consulted; not only so, but, making allowance for the tardiness and uncertainties inseparable from debates and proceedings of all deliberate bodies, they extended this indispensable authority to the last moment of the session. My opinion is, that the same overruling necessity which applied to the original vacancy applies to the second one, created by an omission of the senate to act on a nomination. That body has only a negative and secondary agency in appointment to office. It has no share of the executive power, properly so called, that is, active, discretionary executive power; it simply controls the head of that department in the choice of its agents."

Attorney General Mason's opinion of the 13th of August, 1846, was founded upon the following case (4 Op. Atty Gen. 523): "During the year 1845, in the recess of congress, this (the office of postmaster, at Buffalo, New York) office being vacant, an appointment was made, and a commission granted, to expire at the end of the session of the senate next ensuing. During the late session of the senate, a person was nominated for permanent appointment according to law. The senate rejected the nomination on Saturday, the 8th of August, instant. On the 10th another nomination was made, on which the senate made no decision. The executive appointment made during the recess expired at the end of the session, and the question is, can any appointment be now made to supply the vacancy?" In the course of his opinion Mr. Mason says (page 525): "In the case of Amos Binney, as

in Swartwout's, the commission expired during the session of the senate; the nominations were not acted upon, and after the adjournment of the senate President Adams filled the vacancy by an executive appointment. From the commencement of the government it is believed that a power has been exercised, which would appear to be inconsistent with a construction of the section of the constitution which would confine the meaning of the word 'happen,' to the time at which the office is in fact vacated. In cases where an officer dies during the session of the senate, but notice of his death is not received until after adjournment, it has always been filled as a vacancy happening during a recess of the senate." Again he says (page 526): "It is doing no violence to the language of the constitution, to maintain that this vacancy happening from the inaction of the senate on the nomination made, is within the meaning of the section quoted, and may be filled by an executive appointment. I am not disposed to enlarge the powers of the president, by narrowing the wholesome restraints imposed by the constitution. But that instrument invests him with powers in good faith, and sufficient to enable him, by their exercise, to acquit himself of his duties to the public. The constitution, as a general proposition, gives to the president the power of appointment; to guard against its improper exercise the concurrence of the senate is made necessary. But, for the reason above stated, authority is given him to make temporary appointments; this power depends on the happening of vacancies when the senate is not in session. It is no disrespect to the senate to suppose that their failure to act on this nomination was accidental; nor is it an unauthorized conclusion, that in view of the construction established by the opinion referred to, the senate were aware that the president had power to avert any public mischief caused by this omission on their part; but, whatever may have been the cause, the vacancy did happen to exist when their session ended, and it is entirely within the objects with which the qualified power was given to exercise it in this case. I have not stated the arguments as fully as I would have done if the question had not been so elaborately discussed in the opinions of my predecessors to which I have referred. Whatever may be the estimate of that construction, by which the vacancies in Swartwout's and Binney's cases, occurring during the session, and not filled at the end of the session, I concur with Mr. Taney[2] and Mr. Legare, that when the office is lawfully filled until the session is closed, and happens to be vacant at that time, by reason of the inaction of the senate on the nomination of the president, it may be filled by an executive appointment. I cannot perceive that it is unsafe to adopt a construction which has been so long given, and to follow precedents so long established, especially in a case where there has been no desire to avoid the controlling action of the senate, and where public considerations so imperiously require that the power shall be exercised."

It is thus seen that all these legal functionaries of the government, who have asserted the power of the president to fill vacancies existing, after a session of the senate has intervened since the vacancies originated, have done so in cases, and only in cases where the senate failed to act on the nominations duly made to that body and adjourned, leaving the office vacant. Mr. Wirt, it is true, asserts the same power in the case of a rejection in the closing hours of the senate, and rising inadvertently before another nomination could be made, but even he does not say that the rejected nominee is competent to fill the vacant place under the president's power to make another temporary appointment. It cannot be denied by any one who reads the clauses of the city charter herein cited, that congress meant to confer on the aldermen some control over the mayor in appointments to office, and it is admitted in the agreement that this is so as to permanent appointments, but not as to temporary appointments to fill vacancies. Judge Story, in his Commentaries, in treating of the powers in the federal constitution to appoint to office and to fill vacancies thus speaks (3 Story, Const. 1833, § 1524): "It would not, therefore, be a wise course to omit any precaution, which at the same time that it should give to the president a power over the appointments of those who are in conjunction with himself to execute the laws, should also interpose a salutary check upon its abuse, acting by way of preventive as well as of remedy. Happily, this difficult task has been achieved by the constitution. The president is to nominate, and thereby has the sole power to select for office; but his nomination cannot confer office, unless approved by a majority of the senate. His responsibility and theirs is thus complete and distinct. He can never be compelled to yield to their appointment of a man unfit for office; and, on the other hand, they may withhold their advice and consent from any candidate, who in their judgment does not possess the qualification for office. Thus no serious abuse of power can take place without the co-operation of two co-ordinate branches of the government, acting in distinct spheres. And in case of rejection, the most that can be said is that he had not the first choice. He will still have a wide range of selection; and his responsibility to present another candidate, entirely qualified for the office, will be complete and unquestionable." In section 1551 he says: "The propriety of this grant (that is to fill vacancies in the recess) is so obvious that it can require no elucidation. There was but one of two courses to be adopted; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or that the

[2] Gwinn's Case, 2 Op. Atty. Gen. 525.

president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject. The former course would have been at once burdensome to the senate, and expensive to the public. The latter combines convenience, promptitude of action, and general security." Section 1553: "By 'vacancies' they understood to be meant vacancies occurring from death, resignation, promotion, or removal. The word 'happen' had relation to some casualty not provided for by law."

In this case there is no casualty; the rejection is an event contemplated by law and provided for by law. The chief power of the mayor, in the city charter over appointments to office, is to nominate, and with the consent of the aldermen, to appoint. The lesser or subordinate power is to fill vacancies in their recess, when the aldermen cannot be consulted, and in that event the appointment is temporary, only to last till the end of the next session of the aldermen. But if the doctrine of the plaintiff's counsel is true, the check of the aldermen is a delusion, and their authority in approving or rejecting appointments is abrogated. The mayor, under the lesser power to make temporary appointments in the recess of the co-ordinate branch of the city government, draws to himself the whole control over the city officers, and keeps in office permanently, or at least during his own entire term of office, a public officer over and over again rejected by the aldermen, and in defiance of their rejection. The minor power absorbs the major, and the charter, which certainly meant to invest in the aldermen some control and check upon the mayor in filling the city offices, is to that extent repealed. In section 1502, Story says: "A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it, and cannot supersede or interfere with any other of its fundamental provisions; each is equally obligatory, and of paramount authority within its scope, and no one embraces a right to annihilate any other." This principle of construction commends itself for its common sense, and is universal in its application to the true interpretation of all delegated powers, and in fact all written instruments. Such construction must be given to the city charter as will preserve all its provisions, and maintain the just authority both of the mayor and the board of aldermen. An officer rejected by the board of aldermen on the mayor's nomination cannot, I think, be re-appointed by the mayor in the recess of the same board. It must be presumed the aldermen acted in good faith, and believe the officer unfit for the station; at all events they have so determined. If they have abused their power they are answerable to the people who elected them. The charter gave them authority to act on the nomination and to reject it. The charter required the mayor to consult them in the appointment, and they have given their advice. The assent of both is required to invest the appointee with the office, and the aldermen have refused their assent and rejected the appointee. By the charter, although the aldermen cannot say who shall fill the vacant office, they have a right to say who shall not fill it, and in the case of Dr. Miller they have said he shall not. After Dr. Miller's first rejection, and after the adjournment of the aldermen, conceding Mr. Wirt's doctrine to be sound, that a vacancy still exists, or that a new vacancy has arisen, the mayor cannot reappoint the rejected appointee. In the language of Judge Story, he cannot have "his first choice," but he still has "a wide range of selection;" and the aldermen have assumed the responsibility to their constituents of limiting the range of his selection. Even Mr. Wirt does not intimate that a rejected nominee could be reappointed by the president in the recess of the senate. He plants himself upon the inaction of the senate; so do Chief Justice Taney, Mr. Legare and Mr. Mason. They all speak of cases where the senate has adjourned, without final action on the president's nomination. It is true in the case of Gwinn there was a rejection, but at the same session of the senate there was a renomination upon additional recommendations of character and the request of one of the senators of Mississippi, and the senate adjourned without acting on the renomination, and the chief justice relies on this inaction.

The case before us is not the case of a renomination at the same session of the aldermen on additional testimonials of character, a proceeding altogether proper and due to the confirming body, but the case of repeated rejections of the same nominee, at separate and distinct sessions of the aldermen, followed by repeated and renewed and continuing reappointments of the same rejected nominee up to the bringing of this suit, in which the plaintiff claims compensation for his services in said office. It seems strange to speak of a vacancy, by repeated rejections of the same nominee as a casualty, a happening by chance, which is supposed, and perhaps truly, by the learned attorney general referred to, to be the case where the senate has adjourned without action on the president's nominations, and so a vacancy "happening to exist," in the recess of the senate; the word "happen" in the constitution being constrained by Mr. Wirt to mean "happen to exist." A vacancy by rejection of a nominee, it would seem, is not a casualty, but an event contemplated by law, by the nomination of some other fit person; and, unless the rejecting body adjourns so suddenly that the executive has no time to make a new nomination, it cannot be justly said, even upon the principle of Mr. Wirt's opinion, that a vacancy has happened, or happened to exist, by chance, in the recess. Even where this last mentioned case occurs, by the sudden rising

of the confirming body without notice to the executive, the rejected nominee, for the reasons I have urged, cannot be reappointed in the recess. If he can, the minor power to fill vacancies subverts to the greater power to nominate, and with the consent of the aldermen, to appoint. He is excluded from the range of the executive selection, or the power and check of the senate in the one case, and the board of aldermen in the other is utterly gone.

I cannot acquiesce in any such construction of the city charter, or the constitution of the United States, to which it is likened, nor do I see any warrant for such construction of the constitution of the United States, in the opinions of any of the attorney generals of the United States, referred to in the argument. Dr. Miller, I think, after the determination of the first session of the board of aldermen, at which he was rejected, ceased to be lawfully in office, and the judgment of the court on the case agreed, must be for the defendants.

NOTE. The following rules were adopted March 25, 1857, by the court, in compliance with the provisions of an act of congress on the subject passed at the last session: "Three terms of this court shall be held in every year, commencing on the respective days following, viz: On the third Monday of October, on the third Monday of January and on the first Monday of May. The first term under this rule shall be held on the third day of October next."

Case No. 9,594.

MILLER v. The W. G. HEWES.

[1 Woods, 363.] [1]

Circuit Court, E. D. Texas. May Term, 1870.

COLLISION—NEGLIGENCE—DAMAGES—FOR WHAT ALLOWED.

1. It is no defense to a libel to recover damages resulting from a collision to say that nothing could be done at the moment to prevent it, if it could have been avoided by reasonable precautions or ordinary foresight.

2. Article 14 of the sailing regulations applied.

3. When a steamer through its own fault collided with a skiff in which were the libellant and his son, whereby the son was drowned and the libellant so seriously injured as to confine him to his bed for seven weeks, and render him unfit for labor until the date of the decree and partially disable him for life, and the skiff was broken, the court allowed as damages the necessary cost of repairs to the skiff with compensation for the loss of its use while undergoing repairs, the cost of the cure of libellant, also a sum of money as compensation for his sufferings, also a sum equal to the amount of such wages as the libellant with the aid of his son could have earned up to the time of the decree, and compensation for his permanent partial disability. The latter was arrived at by the present allowance of a sum equal to the amount of such income as the ordinary labor of libellant would produce for one-third of the period of his expectation of life according to the mortality tables.

[Cited in The Mineola, 44 Fed. 144. Followed in The William Branfoot, 48 Fed. 917.]

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

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

W. P. Ballinger, T. M. Jack, M. F. Mott, and G. P. Finlay, for libellant.

F. H. Merriman and L. A. Thompson, for claimant.

BRADLEY, Circuit Justice. James Miller sues the steamer W. G. Hewes, and her master George E. Tripp, for damages in a case of collision, and the case appears to be as follows: On the 17th of February, 1868, about one o'clock, p. m., the day being clear, the libellant, with his son, was in a skiff, used as an oyster boat, in Matagorda Bay, at Indianola, just starting out for the Big Bayou to gather oysters. The steamer W. G. Hewes was at the same time leaving her wharf at Indianola for her trip to Galveston, loaded pretty well down (her captain says about 8½ feet) with the usual Texan cargo of cattle, hides, etc., and with passengers. The steamer was aground at her wharf, lying with her stern outward, and was obliged, first, to back out of her berth for some distance and then turn to the left, eastwardly, in a circular direction, until she was brought to her course, which was in a southeasterly direction. She then started on her way, in the general direction of the skiff. The wind, what little there was, had been ahead, and the skiff, it seems, was obliged to tack, but at this time she lay becalmed, from a quarter to half a mile from the wharf, and was drifting a little towards the shore. The libellant and his son, seeing the steamer starting, got their oars out to pull. The steamer, having started on her course, was now approaching the skiff at the rate of seven or eight knots an hour. The libellant, watching her, perceived, when she was about 200 yards from him, that she was making in the direction of the skiff, and fearing he would be run down, called out as loudly as he could: "For God's sake, stop the steamer, I can't get out of the way." Several passengers, on board the steamer, at the same time saw the danger the skiff was in, and the man on the lookout at her bow, or some other person there, called out to the pilot: "Stop the boat, there's a little boat right ahead." A voice, from the pilot house, answered: "D——n the little boat." The bell, however, was rung, to stop the steamer, and the captain says her engine was stopped; but her way could not be checked, and she struck the skiff. Previous to the collision several persons called to those in the skiff to jump overboard. The boy did so, and was drowned. The libellant remained in the skiff, which was much damaged, and filled with water and sank. The libellant himself was so much injured by the wheel of the steamer, that he was rendered helpless. He was picked up by a boat, sent from the steamer, and handed over to another boat which had put out from shore, and was taken home. The physician who attended him, says that

two ribs were broken on his right side, and all his ribs on the left side from the seventh down; and that he suffered a very severe rupture which renders a bandage necessary to keep his stomach and bowels from protruding, and which is not likely ever to be healed. The libellant suffered much pain; was confined to his bed for many weeks; and has become forever disabled from doing any hard work.

The captain of the steamer, to account for the collision, says that the steamer suddenly and unavoidably sheered to the right, and would not obey her helm. That the cause of this sheer was the low state of the water at the time—such that, with the draft the steamer had, her keel was in the mud; that it is impossible to steer a vessel under such circumstances. That this is always the case when the vessel's bottom is near the bottom of the water. That he took the route he did, on this occasion, because of the lowness of the water; if the water had not been so low, the usual route would have been on the other side of a certain wreck, which was farther from the shore and farther from the position of the skiff.

This sheer of the steamer, which the captain calls "an abrupt and unavoidable sheer," is the only serious excuse offered for running down the skiff, and is the substantial defense on which the respondents rely. And yet, strange to say, this ground was not alleged in the original answer, sworn to by the captain; but is set up at the present trial, by way of amendment to the answer. Besides, it is an accident which the captain of the steamer, according to his own account, had reason to expect would happen. He says, himself, that these sudden sheers, and the disobedience of the vessel to the helm, always occur when the vessel's bottom is in contact with the mud —which he, of course, knew to be the case with his steamer at the time. How, then, if he knew this from his previous experience, can he set it up as an excuse? Ought he not to have guarded against this danger when about to overtake a small and helpless vessel lying becalmed, and unable to get out of his way? It seems to me that it was his duty to have slackened his speed, so that if he could not control his vessel's course, he might have controlled her motion. The sixteenth article of the sailing regulations, adopted by congress, by act of 29th of April, 1864, has a strong bearing on this question. It is as follows: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse." 13 Stat. 58. Certainly the approach of the steamer towards the skiff, in this case, did involve risk of collision, if, as the captain says, he had reason to expect that he could not depend on his helm to govern the course of his vessel. This made it absolutely his duty, in approaching another vessel, to avoid such a speed as would prevent him from stopping and backing in case a sudden sheer should render it necessary. The skiff was easily discernible. She was seen, not only by passengers on the steamer, but by persons on the wharf, long before the danger became imminent.

I cannot bring my mind to any other conclusion, than that the collision was caused by the fault of the steamer.

The question of damage is next to be considered. In the first place the amount of injury to the skiff required $75 to put her in repair, besides the time she was unfit for use. I will, therefore, allow $100 on that account. The physician's bill for attending the libellant was $300. That will also be allowed. The libellant's injuries were very severe and he suffered much pain, being confined to his bed for seven weeks. Such suffering cannot well be estimated at a money value. I shall allow the libellant $500 on this account. The value of his time from the period of the accident to the present, according to his statement (which is uncontradicted), would have been $4 a day including the aid given by his son. That is what he says he made at his ordinary employment. His injuries have rendered him unable to make more than 25 to 50 cents per day; and even this pittance is produced by the aid of his little children. I shall allow him $2 a day, making some allowance for sickness and slack work. For two years and three months this would amount to $1,400. These sums, in the aggregate, amount to $2,300.

Besides this, the libellant is entitled to compensation for being disabled for life. There is no fixed and settled rule for estimating the value of this injury. It depends on so many contingencies, that it is a thing of very difficult adjustment. A compensation based on a table of mortality would not be an accurate one, because a fixed sum of money, less than such a calculation would call for, received now, with the ability to invest and improve it at use, and also with ability to pursue some light business or trade, would enable the libellant to do better for his family, and lay up more for their use at his death than he would probably have done had he remained in health and in the pursuit of his ordinary employment. He is now forty-five years of age. The tables of mortality would indicate his expectation of life to be something near twenty-five years. Suppose he lived that period, the latter years would be feeble and inefficient. The present allowance of an aggregate sum, equal to the amount of an income such as his ordinary employment would produce for one-third of that time, would probably be more nearly equitable than the exact present value of such an income for life. Supposing, therefore, he could have annually realized, by said occupation, the sum of $700, after having deducted the value of his son's services, this sum in eight years would amount to $5,600, which, with the sum of $2,300, before allowed, would make in round numbers, $8,000—

exactly the amount decreed by the district court.

On the whole, therefore my opinion is, that the decree of that court should be affirmed, and that a decree for $8,000, besides costs, should be entered in favor of the libellant against the steamer, her tackle, furniture, etc.

See The Merrimac, 14 Wall. [81 U. S.] 203, decided in 1871, where the United States supreme court announces substantially the same rule as that stated in the first head note of this case.

Case No. 9,595.

MILLER v. WHEATON et al.

[2 Cranch, C. C. 41.] [1]

Circuit Court, District of Columbia. June Term, 1812.

BAIL—CIVIL CASE—AFFIDAVIT.

Affidavit to hold to bail.

F. S. Key, for Briscoe, moved to enter his appearance for this defendant without bail. The plaintiff had filed, as his cause of action, a promissory note of Wheaton, and an affidavit by an indifferent witness that Briscoe acknowledged to him that he was a partner with Wheaton in the transaction and equally liable for the debt.

THE COURT (FITZHUGH, Circuit Judge, absent) held it to be sufficient to hold Briscoe to bail.

Case No. 9,596.

MILLER v. YOUNG.

[2 Cranch, C. C. 53.] [1]

Circuit Court, District of Columbia. July Term, 1812.

DEEDS—INTER SE—WARRANTY—DEPOSITION—NOTICE—MAGISTRATE'S CERTIFICATE.

1. The statute of Virginia against conveying pretensed titles does not vacate the deed, as between the parties.

2. If the creditor accepts a deed of land in payment of the debt, it is a bar to an action for the debt; and, if the title be defective, the creditor must look to his warranty.

3. In taking a deposition under the act of congress, it is not necessary that the party or the magistrate should give notice to the adverse party or his attorney, if neither be within one hundred miles of the place of caption; nor that the magistrate should certify that he was not of counsel for either of the parties, nor interested in the event of the suit.

[Cited in Stewart v. Townsend, 41 Fed. 123.]

Indebitatus assumpsit for goods sold and delivered. The defence was that the defendant paid the debt by a deed of land in Kentucky, with general warranty, which the plaintiff received in payment. To this the plaintiff replied that the title was bad; that the defendant never had possession of the land, and had no title.

Mr. Jones and Mr. Taylor, for plaintiff, contended that the deed was void under the Virginia act of 6th of December, 1786, against conveying pretensed titles, which was in force in Kentucky, and did not destroy the original cause of action for goods sold; and if not void under that statute, yet, as the defendant had no title, it was no payment, and the plaintiff had a right to recover in this action. Moses v. MacFerlan, 2 Burrows, 1012; Dutricht v. Melchor, 1 Dall. [1 U. S.] 428; Cochran v. Cummings, 4 Dall. [4 U. S.] 250.

C. Lee and E. J. Lee, contra. The deed was executed, delivered and accepted, and contained a warranty of title upon which the plaintiff may have his remedy; and whenever a party has a remedy upon a sealed instrument, he is bound to resort to it. Preston v. Young, 4 Cranch [8 U. S.] 239; Toussaint v. Martinnant, 2 Term R. 105; Weaver v. Bentley, 1 N. Y. Term R. [Caines] 49; Sugd. Vend. 175; Hunt v. Silk, 5 East, 449; Lindon v. Hooper, Cowp. 414. The statute against pretensed titles, if in force in Kentucky, does not vacate the deed. Duval v. Bibb, 3 Call, 362. The plaintiff ought to have returned the deed, and reconveyed the property before he brought this suit. Pollard v. Dwight, 4 Cranch [8 U. S.] 421.

On the trial, C. Lee, for defendant, objected to a deposition taken on behalf of the plaintiff, that notice was not given to the defendant, although neither the defendant nor his attorney was within one hundred miles of the place of caption; and contended that the statute only dispenses with notice by the magistrate, not by the party. It does not say that the deposition, in such case, may be taken without notice—and the party is as much bound, in justice, to give notice when taking a deposition under the act of congress, as under a dedimus.

THE COURT, however (THRUSTON, Circuit Judge, absent), without hearing the other side, overruled the objection.

E. J. Lee, for the defendant, also objected to the deposition that the magistrate had not certified that he was not of counsel for either party, nor interested in the event of the cause.

But THE COURT overruled this objection also.

The parties agreed that judgment should be rendered for the plaintiff upon certain terms.

THE COURT, however (THRUSTON, Circuit Judge, absent), had made up their opinion, that the statute against pretensed titles did not vacate the deed; and that the agreement to settle the account, being executed by a deed with general warranty, which was accepted by the plaintiff, the transaction was closed and could not be disaffirmed; and that the plaintiff must resort to his warranty.

MILLER (YOUNG v.). See Case No. 18,165.

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

Case No. 9,597.

MILLER & PETERS MANUF'G CO. v. DU BRUL.

[2 Ban. & A. 618; [1] 12 O. G. 351; 5 Cent. Law J. 467.]

Circuit Court, S. D. Ohio. May, 1877.

PATENTS—REISSUE—PRESUMPTION AS TO COMMISSIONER—MERIT—UTILITY.

1. The presumption of law is that the commissioner of patents has done his duty in granting a reissue thoroughly, faithfully and properly, and the question is not open for re-examination, except on the ground of fraud.

2. If there be any merit or utility in an invention, it entitles the inventor to a patent, although such merit or utility be slight, and the grant by the patent office is prima facie evidence of such merit or utility.

[Cited in Strobridge v. Lindsay, 2 Fed. 695.]

3. Reissued letters patent No. 6,662, granted to F. C. Miller, September 28th, 1875, for improvement in cigar molds, *held* valid.

[2] [This suit was brought [by the Miller & Peters Manufacturing Company against Napoleon Du Brul] upon reissued letters patent [No. 6,662] granted Frederick C. Miller, September 28, 1875, as a reissue of letters patent [No. 155,806] granted the same October 13, 1874, for improvement in cigar molds. The alleged invention related to cigar molds, which consists of an upper and lower half; the lower half being provided with sockets and the other half with corresponding matrices attached to rigid backing and intended to fit into the sockets of the lower half. The original patent contained one claim only, which was for a certain plug of wood placed in the socket of the lower half, and designed to prevent the splitting of them in that socket. This plug of wood in the lower socket was the only improvement referred to in the statement of the invention in the original specifications as being the inventions of the patentee. The description of the molds in which this plug was used, taken in connection with the drawings and model, showed a certain flange upon the basis of the matrices of the upper half of the mold. These flanges, however, were provided for an entirely different purpose from that designed to be answered by the plugs in the lower half of the plug, and sustained no relation to such plugs. The patent was reissued with the two claims recited in the opinion, the subject matter of which was these two flanges. It appeared in evidence that cigar molds known as the "Old German mold," had been in common use in this country many years prior to the alleged invention. These molds were constructed of wood, the same materials used by complainant, with small sockets used in the lower half of the mold, and separate matrix or matrices in sections of one each, attached to rigid backing by glue or nails, or both, forming the upper half-mold. They differ from the complainant's, so far as the point here in controversy is concerned only in backing the flanges at the base of the matrices of the upper-half mold. It was claimed by the complainant that these flanges somewhat facilitated the construction of the mold. Registration was secured in the old German mold by the laying the cups of the upper half-mold in the sockets of the lower, then applying glue to the back of the cups, afterwards placing the rigid backing board upon them. The cups would adhere to this backing, and being withdrawn in their proper position, could then be nailed or riveted firmly to the backing board. Complainant claimed that by the use of this flange the matrix was retained in position in the lower socket while receiving the glue, and until the glue was dried, thus securing more perfect registration and cheapening the cost of the mold. Among the patents set up as anticipation aside from the "Old German mold," were patents granted the defendant himself, May 16th, 1871, and May 9th, 1871, and the patent granted Maguire May 6th, 1873, all for improvement in cigar molds.

[It was also shown in the evidence that the defendant had, as early as 1870 and 1871, manufactured and sold cigar molds, having the matrices made in sections of four each with the flange at their base like the flange claimed by the complainant, and used with the corresponding lower-half. The patent to defendant of May 16th, 1861, showed the mold with the matrices made in sections of four or five each, also provided with these flanges. The several sections were shown in this patent connected by rabbit joints between the matrices. The patent described in the mold was made preferably of iron or sheet metal, but stated that any material might be used. Wood was shown to be the material common in use for that purpose for that time. It also stated that the matrices might be made in sections of one or more each. That patent to Maguire showed similar matrices attached to a similar backing by glue, and with flanges extending from matrix to matrix, but made in a single section, that is the matrices of the entire molding connected by their flanges without division between the flanges. The defendant denies the validity of the issue, and the novelty and the patentability of the alleged invention. He admitted that he had made cigar molds with flanges in some respects resembling those shown in the reissued patent, but claimed that he did so under and in accordance with the patents granted to himself in 1871, and subsequently he denied that he used any other feature of the alleged invention. It was also specially insisted upon by the defendant at the hearing, that as complainant's alleged invention consisted, at most, only in adding the flanges to the bases of the cups, or matrices, which were otherwise used precisely as in the old German mold, and as he had described and shown and used such flanges

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

[2] [From 5 Cent. Law. J. 467.]

upon the bases of matrices, when made in sections of four each, as early as 1871, and had in his patent also stated that they might be made in sections of one each, which would make the same as the complainant's, he had a right to proceed under his patent of 1871, to make the molds there shown with the matrices divided into sections of one each. It was also insisted that as the claims were not limited to the cups when made in sections of one each, the defendant's patent of 1871 and the molds made by him at that time, even if used without the suggestion as to dividing them into sections of one each, each mold would be a complete anticipation; also, that the Maguire mold would be a complete anticipation of the claims, and that if the claims were limited to the mold when the matrices were in sections of one each, it requires no invention to divide up the Maguire into sections of one each, precisely as the "old German mold" has been divided. It was also insisted that, as the only merit claimed for the flanges was in the process of construction, and not in the completed mold, where it performed no functions other than was performed by the backing of the old German mold, the patent should have been for the machine as completed; that the claim was not capable of that construction, and that, if so construed, there was no evidence that the defendant used the process of construction in which the complainant claimed to get some advantage from the flange. It also appeared in evidence that the defendant's patent of 1871 had been reissued with claims for those flanges.] [2]

Wood & Boyd, for complainant.
Hatch & Parkinson, for defendant.

SWAYNE, Circuit Justice. This is a suit brought on reissued letters patent for improvement in cigar-molds, granted F. C. Miller, September 28th, 1875, as a reissue of letters patent originally granted same, October 13th, 1874. The bill charges the infringement of the first and second claims, which are as follows: "1. The series of cups, e, which are constructed with flanges e' and attached to a suitable backing, substantially as and for the purposes specified. 2. The movable half-mold, composed of a series of cups, e, which are constructed with the flanges e' and attached to a backing, in combination with the stationary half-mold, having a corresponding series of sockets, d', substantially as and for the purpose specified."

The defences relied on are: 1. That the reissue is broader than the original, and not for the same invention. 2. Want of novelty. 3. Want of patentable invention. As to the validity of the reissue, it is delegated, by the act of congress upon the subject, to the commissioner of patents, carefully to examine the question whether the patentee is entitled to a reissue, and to decide according to the result of that examination. The presumption of law is, according to the authorities, that the commissioner has done his duty thoroughly, faithfully, and properly, and has arrived at a conclusion in accordance with his action. The question is not open for re-examination, except on the ground of fraud. Battin v. Taggert, 17 How. [58 U. S.] 84; Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 796; Seymour v. Osborne, 11 Wall. [78 U. S.] 516, and other cases. The presumption is, that everything is correct and valid touching the reissue. I have found nothing in this case sufficient to open up the question for re-examination. I need not remark further on the subject.

On looking through the patents which have been introduced on the part of the defendant, and examining the models which show the invention, we find nothing that exactly anticipates said invention. In this connection it is proper to read a part of the specification: "The plungers or cups of the upper or movable half-mold are formed separately, and subsequently secured to the backing, while in the sockets in the lower or stationary half-mold, in order to obtain a perfect register between the cups and the sockets, heretofore the cups have been made of the same width, or nearly so, from top to bottom—that is to say, the width at the top at a particular point would be the same, or nearly so, as the width at the bottom at this same point, and the face of the backing to which they are attached, checked their further entrance into the sockets, by bringing up against the top of the socket-board By reason of this construction of the cups, it was exceedingly difficult to secure the backing to it without injuring the cups or the surfaces of the sockets by forcing the cups too far into the socket, and, in case the cups were secured by gluing, either their backing would glue onto the top of the socket-board, or else it had to be withdrawn before the cups had been previously secured. To avoid these difficulties is the object of the first part of my invention, which consists in providing the plungers or cups with laterally projecting flanges, by means of which they are supported on the top of the socket-piece while in the sockets, so that the backing may be brought down upon them with any requisite force to secure them without danger of injuring the molds proper, and which also serve to form a space between their backing and the socket-board, so that, in gluing, the backing may be held clamped to the cups for any length of time necessary to make a permanent and reliable connection."

Then, after referring to another feature not here in controversy, the patentee proceeds in describing this invention: "The cups e are made singly and separate from the backboard a, for the reason that it is very difficult and very expensive to make them of one piece, and at the same time

[2] [From 5 Cent. Law J. 467.]

make the whole set or series fit accurately to the corresponding female sockets underneath, while, by making them singly, I make them cheaply, and then, by laying them one by one into the female sockets d', and while in such position, gluing or otherwise uniting the backboard a to them, I secure a fitting and correspondence of the two sets of sockets or cups that is absolutely unattainable in any other manner. Not only this, but if one of the cups e be accidentally broken, I can at once and in an inexpensive manner, replace; while if the cups were in one piece, and then one of the cups were to be broken, the whole series would become practically worthless. In furtherance of this object, I make each cup e with flanges or shoulders e', which gives each cup the broadest possible base to stand on, yet leaves space between the cups for the attainment of the nice adjustment, with reference to the socket d', which I have spoken of. The grain of the wood of these cups runs, by preference, in the direction of their length, and transversely of the length of backboard a. When the shoulders e' fit down upon the socket-board d, as shown in Fig. 2, the spaces between the faces of the sockets d' and cups e are circular in cross-section, and fitted to give the proper cylindrical shape to the cigars. Further, the flanges e' e' on the cups enable me to make the molds properly rounded in cross-section, without altering the depth of either the male or female cups, by simply making the male cups with thinner or thicker edges, as the case may require."

In the flanges attached to each upper cup, at the bottom of the upper cup, required to be separate and distinct from the others, and the flanges required to be distinct from the backing-board, and attached to it in the manner described, I find what I do not in any other case. There is no description in any patent of exactly the same thing. There is to be found in no mold which has been produced by the defendant, exactly the same thing. In several instances, there has been a very near approach to the alleged invention of the plaintiff, but in no instance has the mark been quite hit. It is neither claimed nor proved that any mold was ever made or used exactly as described in the complainant's patent. The variations in several instances are exceedingly small, but they are sufficiently marked to leave a distinction between them and the requirements and description of the complainant's invention, as set forth in his patent.

The case turns entirely on the complainant's flanges. For the reasons which I give, I have come to the conclusion that his invention belongs to him, as inventor, and that it has the requisite novelty. So far, I think, his case stands on firm ground. Then comes up the question of patentability. I have no hesitation in saying that upon the argument it seemed to me that there was no sufficient novelty and merit. Single cups, attached to a backing, having been invented before, it seemed to me, that the point beyond this prior invention, which the complainant has reached, was not sufficient to sustain a patent. In this aspect of the case I thought there was no novelty. It is proved, that small as these flanges are, inconsequent as they seem, little bearing as they have upon the question, there is some merit, some utility. If that be so, that, united with the novelty which has been found to exist, and which is established in the proof, small as that merit is, it entitled the complainant to a patent, in the judgment of the commissioner of patents, in the judgment of the patent office, and it entitles him to the judgment of this court upon that point. If this be so, the patent seems to be supported, and the complainant is entitled to the benefit. We have no authority to measure the degree of merit in the case in this connection. The action of the patent office is prima facie proof to that effect. The testimony in the record bears upon the proof and sustains the judgment of the patent office, if this were material. The testimony of Miller is full to this effect, and, in my judgment, it has not been effectively contradicted. The testimony of Peters, of the complainant corporation, is less cogent, but substantially to the same effect. The testimony of Tietig and of Heintz bears somewhat in the same direction, but with less force.

Now, this general reflection strikes me as very material to the solution of any doubts upon the subject, and the idea has had great weight with me in coming to the conclusion which I have reached, and with very considerable hesitation, for the time, of the correctness of my judgment. There can be no doubt that, in the distinct conception of the patent, complainant has done what was not done before. One or two persons have suggested that the proper cups can be made single and separate from the others, or connected with them—the cups being made in sections consisting of one, two or more, and the last patent of Du Brul contains, perhaps what may be called the flange, but that flange is inside. I examined the model, and came to that conclusion. Here the flange regulates the depths, and that is set out in the patent. This flange attached, when properly connected, regulates the depth to which it can be pressed, and that makes the peculiar mold in which lies the merit of the alleged invention.

But, departing from the details, it may be assumed, I think, from the proof, that nobody had found or described, or insisted on Miller's particular configuration of these molds. Why should not others let his alleged invention alone? They can use anything that preceded it—the old German mold; any of those covered by the Du Brul patents. They can use anything in relation to which evidence has been given, and which anticipated the alleged invention of the complainant. Now, if his

was so worthless or wanting in originality, so immaterial, as it is claimed, why should not they let it alone?

The conclusion I have here reached in sustaining the patent only requires that this should be done. It does not interfere with the use of any of these inventions, which really seem to be better than his, and all which antedate his. His invention, such as it is, worth much or little, belongs to him, and, under the patent, he is entitled to the exclusive manufacture of it. I am, therefore, constrained to come to the conclusion that the plaintiff is entitled to the injunction.

MILLER COUNTY (UNITED STATES v.). See Case No. 15,776.

MILLER, The MINNIE. See Case No. 9,638.

Case No. 9,598.

MILLER'S FALLS CO. v. BACKUS.

[5 Ban. & A. 53;[1] 17 O. G. 852.]

Circuit Court, D. Massachusetts. Dec. 12, 1879.

PATENTS — CHANGE IN FORM AND PROPORTIONS — INVENTION EMPLOYED—BRACES.

1. Mere change in the form and proportions of a known instrument or machine, however great, will often be held to be merely colorable or unessential, unless invention was employed in making the change.

2. Reissued letters patent number 6,350, dated March 23d, 1875, granted to Charles H. Stockbridge for improvement in the stocks or braces for bits and other tools, *held* valid and infringed by the defendant.

[This was a bill by the Miller's Falls Company against Quinby S. Backus to restrain an infringement of certain letters-patent.]

Charles E. Mitchell and J. L. S. Roberts, for complainants.

B. F. Thurston and Livingston Scott, for defendant.

LOWELL, District Judge. The plaintiffs are the owners of the reissued patent No. 6,350, dated March 23d, 1875, granted to them upon an invention of Charles H. Stockbridge, their assignor. The original patent [No. 62,232], dated February 19th, 1867, is not in evidence. I understand that the specification was identical with that of the reissue, with the exception of the claim.

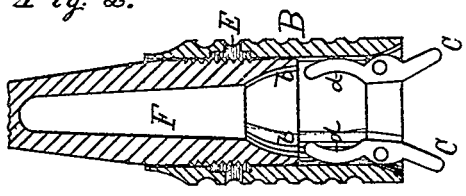
The invention relates to an improvement in the stocks or braces for bits and other tools. The specification and drawings show a socket with the usual rectangular cavity for receiving the shank of the tool. Upon the outside of the socket is a screw. A nut, sleeve or shell screws on to the socket, and beyond the screw is a continuation of the nut, which contains two dogs pivoted near the base or mouth of the nut, one on each side, and having the ends nearest the socket free to move inward. The end of the socket nearest the nut consists of an annular cam or inverted hollow cone. When the dogs touch the walls of this cam, they are forced inward and come under the shoulder of the shank of the tool which has been placed in the socket, and help to hold it fast. The defendant says that the dogs are intended to act merely as chocks or wedges to engage the shoulder of the tool and prevent its being pulled out, while the plaintiffs insist that the dogs grasp or gripe the round part of the tool and hold it by the force of the gripe as well as by chocking the shoulder, and that their holding power does not depend upon their being directly under the shoulder. The specification is somewhat uncertain upon this point. In one place, it speaks of the "grasping ends" of the dogs, and, in another, of the tool as being locked or fastened in the socket because the ends of the jaws come under the shoulders of the shank of the bit and prevent its withdrawal. I am satisfied that the dogs do or may act, in fact, as grasping devices. Both experts speak of them as such, and the model or specimen, which is admitted to be made after the pattern of the specification, will operate in that way. The plaintiffs must have the advantage of the fact, in the decision of the questions which depend upon it.

Before the time of Stockbridge's invention, Draper and Parker had taken out patent No. 48,763, upon an invention of W. W. Draper, and it is understood that the defendant now owns this patent. The bit-brace of Draper consisted of a socket provided with a screw, and next above the socket—that is, nearer the hand of the operator—was a cone. A nut was adapted to screw on to the socket, and on each side of the middle of the nut, outside of it, were loosely pivoted, by their middle, two pieces of iron, which may be called "dogs" or "jaws," much longer than the nut, and which met, or might meet or nearly meet, below the lower end of the nut. When the nut was screwed upon the socket, the upper ends of the dogs or jaws were forced apart by passing over the cone, and thus the lower ends were forced together and surrounded the tool just below the shoulder, and held it in place. A question was raised concerning this invention, precisely like that in respect to Stockbridge's—whether the jaws can grasp the tool, or only act on the shoulder. Here, again, I am of opinion that the jaws are capable of grasping some tools, and might, without invention, be made to grasp a great variety of sizes of tools, and, therefore, this invention of Draper would anticipate that of Stockbridge, if the claim of the latter should be broadly construed. The claim of Stockbridge is: "The combination of the socket F, having cams b b, and a nut, B, provided with dogs C C, substantially

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

[Drawing of reissued patent No. 6,350, granted March 23, 1875, to C. H. Stockbridge, published from the records of the United States patent office.]

Fig. 2.



as and for the purposes set forth." The cams here referred to are sections of the annular cam.

It is admitted by the plaintiffs that, in the existing state of the art, his claim must be limited to substantially such a nut or other elements as are described. The defendant admits that he may claim something, but only on the theory that his dogs or jaws serve to chock the shoulder of the tool inserted in the socket. If construed to extend to jaws which grasp the tool, he says it is anticipated by Draper. The defendant has organized, on the inside of a nut or sleeve, a pair of grasping-jaws which work like those of Draper, and has patented this form of brace. The question, therefore, is a very material one, whether, since Stockbridge's patent is held by me to be for grasping as well as chocking contrivance, it is valid. Mere change in the form and proportions of a known instrument or machine, however great, will often be held to be merely colorable or unessential. The inquiry is whether that indescribable quality called invention has been employed in making the change. The Stockbridge brace appears to be more compact, more convenient to handle, and altogether better for use in the ordinary work for which it is designed than that of Draper, and the change is so great, especially in the nut or sleeve, that it cannot, in my opinion, be called a mere constructive modification. The plaintiffs may, therefore, claim such a nut as Stockbridge describes, with the grasping dogs or jaws placed inside the nut or sleeve and forced into their final position by the annular incline, called in the patent the "cams b b."

The defendant has reversed the action of the cone or incline at the end of the socket so as to press apart the upper end of the dogs, and thus to force together their lower ends. This seems to me to be a formal or colorable variation, or, if that expression is too strong, an obvious change of construction, not affecting the combination in its essence. Although the jaws, by themselves considered, are the invention of Draper, they cannot be substituted for the dogs or jaws of Stockbridge on the inside of his nut or sleeve, without infringing his combination. This depends upon the simple but material question of fact, whether Stockbridge's dogs act as grasping-jaws, which I have already said I find them to be.

Decree for complainants.

Case No. 9,599.

MILLER'S FALLS CO. v. IVES et al. (two cases).

[14 Blatchf. 169; 2 Ban. & A. 574; 14 O. G. 203.] [1]

Circuit Court, D. Connecticut. March 23, 1877.

PATENTS—REISSUE—BRACE FOR TOOLS.

1. The invention set forth in reissued letters patent granted to the Miller's Falls Manufacturing Company, November 29th, 1870, for an improvement in instruments for operating tools, such as augers, bits, &c., the shanks of which are of variable sizes (the original patent having been granted to James M. Horton, July 8th, 1862,) defined.

2. The invention set forth in letters patent granted to Charles H. Amidon, January 14th, 1868, for an improvement in bit-stocks, defined.

3. The claims of the patents construed, and the patents *held* to be valid.

4. The construction of devices which infringe the patents, set forth.

[These were suits by the Miller's Falls Company against W. A. Ives & Co. to restrain the infringement of letters patent No. 35,856, granted to J. M. Horton, July 8, 1862 (reissued No. 4,187, November 29, 1870), and No. 73,279, granted to C. H. Amidon, January 14, 1868.]

Charles E. Mitchell, for plaintiffs.

Benjamin F. Thurston, for defendants.

SHIPMAN, District Judge. These are two bills in equity, each of which is brought to restrain the defendant corporation from an alleged infringement of letters patent granted to James M. Horton, on July 8th, 1862, and reissued for the second time to the Miller's Falls Manufacturing Company, on November 29th, 1870, and also from an infringement of letters patent granted to Charles H. Amidon, on the 14th of January, 1868. Each patent is now owned by the plaintiffs. The Horton patent was for an improvement in instruments for operating tools, such as augers, bits, &c., the shanks of which are of variable sizes. The Amidon patent was for an improvement in bit-stocks. The infringement complained of in the first suit was the making and selling by the defendants of bit-braces, known in the market as the "Ives Brace" and the "Ives Novelty." The second suit was brought to restrain the defendants from making the "Centennial" and the "Centennial Novelty" braces, the manufacture of which last named tools was commenced after the first suit had been brought. The two bills of complaint may be treated as substantially one action. The principal defence as against the Horton patent is non-infringe-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 574; and here republished by permission.]

ment, and as against the Amidon patent is want of novelty.

The Horton device was an auger handle, provided with a metal band, called in the patent a barrel, around its centre, the lower portion of which barrel is formed into a projecting cylinder or socket, recessed or slotted upon its opposite sides. The recesses receive two jaws, the ends of which are curved so as to lie loosely in the recesses, and act as hinges upon which the jaws swing. Along the centre axis of the cylinder there is a rectangular tapering bore, large enough to receive the shank of the boring tool. A revolving nut, which forces the jaws together, is fitted upon the screw threads which are cut upon the periphery of the cylindrical portion of the cylinder. When the nut is near the handle, the lower parts of the jaws swing upon their hinged parts, so as to receive the shank of the tool to be used. When the nut is screwed up, the curved ends of the jaws enclose the shoulder of the auger shank.

swivelled head, and at the other the clamping mechanism which is the subject of the invention. The end of the stock which receives the shank, and is called the foot, is cylindrical, and has a male screw thread cut upon its outer surface. A slot is cut vertically through the foot, and within this slot rest the jaws which seize and hold the shank. At the bottom of the slot is bored a cylindrical cavity with an enlarging orifice. A thimble or nut is constructed with a female screw thread corresponding at its lower portion with the thread on the foot, while the upper part is protuberant and contracted towards the mouth at the upper end. This nut screws upon the foot, and forces the jaws upon the shank. These jaws are in thickness suitable to fill loosely the slot. Their lower ends are attached to each other by a curved wire, which is rigidly set in one part, and projects loosely through the other part. The upper and lower ends of the jaws are bevelled, so that they may be forced together by the in-

[Drawiugs of patent No. 35,856, granted July 8, 1862, to J. M. Horton, published from the records of the United States patent office.]

Fig. 1.

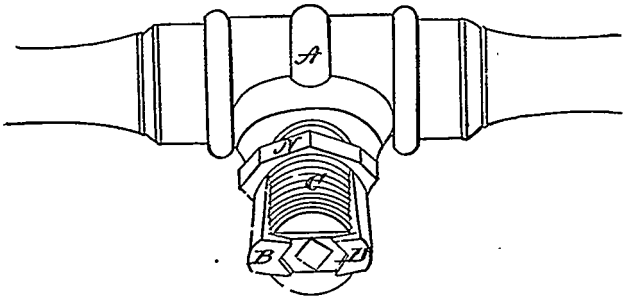
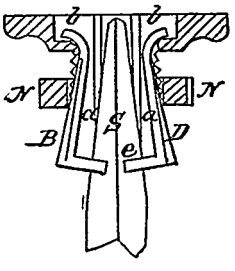


Fig. 3.



The claims are: "(1) The combination of the barrel A, provided with a socket C, jaws B and D and nut N, working on a screw for holding a boring tool, substantially in the manner described and specified. (2) The socket C of the barrel A, having cavities b b, in combination with the jaws B D having curved ends to fit therein, to allow the necessary lateral movement in the socket without falling out, substantially as described and specified."

The Amidon brace consists, as described in the patent, "first, in the construction and use of two jaws, which conform to the taper of the bit shank, and are forced equally upon said shank at both ends, by a screw nut or other device; second, in the special construction of the end of the bit stock to hold said jaws and retain them always in place; third, in the formation of the groove in the edge of each jaw, so that the shoulders of the bit shank are enclosed, and the accidental withdrawal of the bit prevented;" and, fourth, in a particular not material to the present case. The bit stock has at one end the ordinary

clined surfaces of the nut and the cavity at the bottom of the slot, when the nut is screwed upon the foot. In the opposing surfaces of the jaws are formed grooves, which, when the jaws are in position, form a recess of square section. This recess is made tapering, so as to correspond with the taper of the bit shank, and is largest at the outer end, so that the shoulders of the bit shank may be enclosed within the jaws and the removal of the bit be prevented, except by relaxing the pressure of the jaws. As the jaws are loosely connected at the lower ends by the wire, they may either move apart, as on a pivot at that end, or they may be moved bodily away from each other, so as to accommodate a bit shank of any size or taper.

The three claims which are material to this case are: "(1) In combination with the jaws G, G, or their equivalents, constructed to move away from or towards each other in the manner described, so that they may conform to the taper of the bit-shank, the screw thimble F, or its equivalent, to force the said jaws upon said shank, as and for the pur-

pose set forth. (2) The jaws G, G, constructed with the groove, formed substantially as set forth, so as to enclose the taper sides and the shoulders of the shank, as and for the purpose described. (3) The cavity D, formed with a bevelled orifice, as shown, in combination with the jaws G, G, constructed with correspondingly bevelled ends, as and for the purpose shown and described."

The Ives brace is substantially like the Amidon. The Novelty brace differs from the Ives mainly in the fact that, in the thimble, the threaded portion is separated from the swell portion, and the nose or head of the thimble is attached fixedly to the socket. The lower portion of the thimble revolves towards the foot, and, by its revolution, produces the same effect as if the whole thimble revolved.

1. As to the character of the Horton invention, and the construction of the Horton patent. Devices for holding tools or articles which have shanks of variable sizes and tapers were known prior to the date of the Horton patent, and consisted broadly of clamping jaws and a nut which caused the jaws to effect a gripe upon the tool to be held. Thus, the clamp described in the Mechanics' Magazine (volume 14, p. 116) consisted of two jaws, with a recess in them to hold whatever was placed therein. The jaws are forced together by a dome-headed nut acting upon their noses. The "Stever Chuck" had a slotted socket with a screw thread, and two jaws, which clamp the tool by a screw nut or sleeve acting upon the jaws. The "Meriden Cutlery Chuck" had a slotted socket, with a round tapering bore at the bottom of the chuck, and two jaws forced together by a collar or sleeve, which moves forward upon the socket without any screw-thread, and is retained in its place by friction. The D. H. Chamberlain awl holder, patented in 1854, which will be more particularly considered hereafter, has a socket, and a dome-headed nut moving upon the screw on the socket, which nut acts upon two jaws, which approach each other and grasp the shank of an awl or other similar instrument.

The peculiar features of the Horton handle consisted in combining with the handle or stock of a boring tool, a slotted cylinder, provided with a rectangular tapering bore for holding firmly the shank of a boring tool, and hinged jaws working in the slot, having the necessary lateral movement to receive, without displacement, variable sizes of tools, and a nut moving on the screw thread upon the circumference of the cylinder, which nut clamps the jaws together so as to hold the shank. The shank is held firmly in place by the tapering bore and by the jaws which seize the angular portion of the bit, and serve not only to draw out the auger from the wood, but also help to prevent the auger shank from being twisted in its place as the bit enters the wood. The nut wedges the swinging jaws against the edges of the shank of the tool, and binds the projecting noses of the jaws against the upper end of the shank, so as to hold the tool firmly in position as it advances in the wood, and so as to draw it back as it is endeavored to be pulled out. Neither of the pre-existing devices had this combination of barrel, slotted socket with threaded outer surface, tapering bore, hinged jaws and nut. It is not claimed by the learned expert of the defendants that the Horton invention was antedated by any of the devices placed in evidence. The patent was for a handle of a boring tool having these described elements in combination, which several elements are formed substantially as described in the specification. The first claim was for the entire combination of the several elements. The second claim omitted the encircling nut, and made prominent the shape of the jaws by which lateral movement was permitted in the socket, without the jaws falling out.

2. The next question is whether the Ives and the Novelty braces infringe the Horton patent. These braces, which are substantially a reproduction of the Amidon brace, are manifestly an improvement upon the Horton invention, but have its leading features. These features, in the defendants' braces, are a threaded and slotted cylinder, which loosely holds a pair of movable jaws pivoted at the foot, or secured by a projection at the bottom of the slot, and enclosing a bit shank which they are made to clamp firmly by the action of an encircling nut, which is forced upon the shank at both ends, and closes the noses of the jaws over the top of the shank, so that the tool is held and retained in its proper position. The tapering bore of the Horton patent is transferred, in the defendants' braces, to the faces of the jaws, and becomes the tapering grooves which enclose the shank as the jaws are pressed against it by the action of the nut or thimble. The defendants insist that the jaws of the Ives braces and of the Horton patent are not the same, because they say that the only office of the Horton jaws is to prevent the auger bit from being withdrawn from the handle, and are a substitute for the nut or rivet which secures the handle of an old-fashioned auger, while the Ives jaws gripe the shank and prevent its turning around in the handle. But, the Horton jaws do not merely hold the auger bit in the handle. They also resist any tendency to turn around or to be twisted in the handle. Arguing upon this idea, that the office of the jaws in the two devices is different, the defendants easily prove that the respective jaws are radically different from each other, and that the grooved jaws of the Amidon bit holder, which grasp the shank so that it cannot turn, perform a different office from the jaws of the Horton handle, which, they say, serve merely to withdraw the auger bit; but, the premises being unsatisfactory, I am of opinion that the conclusion is also untenable. The principle of the Horton invention is reproduced in the Amidon and the defendants'

bit stock, and, while that principle is developed so as to make a more perfect instrument, it is developed in substantially the same way, and by the same general mechanical means. The lateral movement which is mentioned in the second claim of the Horton patent, is produced, in the Novelty brace, by the jaws being loosely pivoted together in the bottom or foot of the cylinder, instead of swinging in recesses or cavities of the cylinder, as in the Horton patent, and is produced, in the Ives brace, by the movement of the jaws in a projection substantially similar to the arrangement in the Horton cylinder. The hinge-like movement of the jaws is substantially alike in each brace.

3. Is the Amidon patent invalid for want of novelty? That the Ives and Novelty braces infringe the Amidon patent, is not practically denied, and the principal question which remains as to these two braces is the validity of the patent. The Amidon bit stock is an improvement upon the Horton handle, and it becomes important to ascertain wherein the improvements consist. They are found in the shape of the jaws, and of the nut or thimble, and in the cavity at the bottom of the socket. These jaws are bevelled at the upper and lower ends, so that they are forced together by the surfaces of the thimble and of the cavity at the foot of the cylinder. The grooves of the jaws are so tapered as to fit the edges and shoulders of the shank, and the protuberant portion of the sleeve gives the jaws such a capacity of movement that they can take in a bit shank beyond the end of its shoulder, and the jaws will conform to the shape of the shank. The bevel of the jaws at their upper and lower ends, whereby the jaws are forced together, and the taper of the grooves in the jaws, are the peculiar and distinguishing features of the jaws. The protuberant swell of the thimble, whereby the jaws have greater capacity of adjustment to the taper and shoulder of the bit shank, and the contracting mouth of the thimble, which draws the noses of the jaws together over the top of the shank, are the peculiar features of the thimble. The recess at the bottom of the slot, formed with a bevelled orifice, has its office to force the lower ends of the jaws together, as they are forced by the pressure of the thimble against the walls of the cavity. In the peculiar formation of these parts of the combination consist the patentable features of the Amidon patent.

The question of novelty depends materially upon the construction which is given to the patent and to its first claim, which is as follows: "In combination with the jaws G, G, or their equivalents, constructed to move away from or toward each other in the manner described, so that they may conform to the taper of the bit shank, the screw thimble F, or its equivalent, to force the said jaws upon said shank, as and for the purpose set forth." If this claim means the jaws G, G, or any jaws constructed so as to move away from or towards each other, in the general manner described, so that they may conform to the taper of a bit shank, in combination with the screw thimble F, or any thimble which forces the jaws upon the shank, the claimed invention was probably well known. Such a construction would limit the patentable part of the invention to the third claim, and would make it consist of the recess at the bottom of the slot in combination with bevelled jaws; but such a construction is not in accordance with the actual invention or with the specification. The peculiarities of the jaws G, G, are minutely described, and stress is laid upon the peculiar shape of the jaws, which evidently constituted, in the mind of the patentee, the distinctive feature of his invention. The protuberance and convergence of the screw thimble are described, though the same prominence is not given to the thimble as to the jaws. The first claim specifies the peculiarly shaped jaws G, G, or jaws which are substantially formed like the jaws G, G, in the following particulars, viz., which are constructed to loosely fill the slot, and so that they may move apart on a pivot, or may be moved bodily away from or towards each other in the described manner, and thus conform to the taper of different bit shanks, in combination with the peculiarly shaped screw thimble F, or a thimble which is so constructed as to allow, by its protuberance, the range of movement of the jaws which thimble F permits, and also to bind the heels and noses of the jaws upon the shank. This claim has special reference to jaws pivoted and bevelled, which have the range of movement between the laterally supporting walls of a slotted cylinder which the jaws G, G, have, in combination with the encircling thimble, which, by its protuberant shape, also gives the jaws their capacity of movement, and, by its convergence, clamps the noses of the jaws. The grooves are particularly specified in the second claim, which is for the peculiarly shaped jaws G, G, with tapered and grooved faces. The third claim is for the cavity D, in the bottom of the slot, with a bevelled orifice, in combination with the jaws G, G, which combination permits a lateral movement of the jaws within the cylinder, and the closing of the heels of the jaws within the cylinder, and the closing of the heels of the jaws when acted upon by the thimble.

This statement of the invention and this construction of the patent excludes from the consideration of anticipatory devices, the Stackpole brace of 1862, the Stackpole patent of 1867, the Goodell brace, and the Bartholomew brace of 1867. The jaws of neither of these braces have tapering ends or noses which are closed over the shoulders of the bit shank, and which are acted upon by a protuberant and convergent sleeve or thimble. These devices were not, however, mainly relied upon by the defendants, who chiefly urged, as an anticipatory invention, the Dex-

ter H. Chamberlain awl holder, patented in 1854. This tool is a useful one for holding the shanks of awls, or other similar small tools, but could not be relied upon to endure the strain and twist which necessarily comes upon an auger or bit, whose radially cutting edges are forced by successive revolutions into the wood. The tool consists of a pair of clamps, each one of which is cylindrical upon the outside. The upper and lower ends are conical, which ends are cut off and do not run to a point. Through the centre of the inside of each one of the clamps, is cut a triangular groove from top to bottom, so that, when the clamps are placed together, the triangles face each other, and make a uniform, straight, square groove throughout the extent of the clamps or jaws. These jaws enclose the shank of an awl, and are screwed together and kept in place by a dome-shaped screw nut. These jaws are not like the Amidon jaws, loosely placed in a slotted socket, to give lateral motion, nor are they so constructed as to accommodate themselves to bit shanks of varying taper, nor is the dome-shape sleeve the equivalent of the protuberant and converging sleeve of the Amidon patent. In brief, the Chamberlain holder has neither the movable nor tapered jaws, nor the thimble, of the Amidon stock.

On February 16th, 1871, the plaintiffs, or their predecessors, licensed the defendants to make two thousand braces of their patent, No. 111,649, dated February 7th, 1871, for a royalty of ten per cent. on the net prices for which the defendants sold the braces. They did not manufacture the precise invention represented in their patent, but made a quantity of the braces known as the "Ives Brace," and which are made according to the Amidon patent. I have not seen the Ives patent, and therefore do not understand precisely the difference between the two articles, but understand, from the testimony of the defendants' expert, that there is less capacity of lateral movement in the jaws at the foot of the brace in the Ives patent, than in the Amidon, and that the elder patent is broader than the Ives patent. The defendants were licensed only to make the article which was shown in their patent. On December 30th, 1875, the defendants, by agreement, submitted to a preliminary injunction against manufacturing the Ives brace, and conceded that it was an infringement of the Amidon patent, without conceding any other questions in the case, in regard to other braces. It was further agreed, that, in any accounting, the defendants shall account for all Ives braces, in accordance with the terms of said agreement of February 11th, 1871. Upon this state of facts, I think that the Ives brace is not protected by the license, and it is also true that the plaintiffs have agreed that the infringement is to be paid for as if it was so protected.

The questions in regard to the Centennial and Centennial Novelty braces only remain. These two braces differ from the Ives and the Novelty mainly in this, that the jaws are attached to the side walls of the bevelled cavity in the foot, and that these side walls move on a pivot towards each other, when operated upon by the screw thimble, and so pinch the jaws together. This accomplishes the same result, in substantially the same way in which it is accomplished in the Amidon patent, where the heels of the jaws are forced together in the bevelled orifice by the screw thimble acting directly upon the jaws, or, as it is expressed in the patent, the jaws are "forced together by the inclined surfaces of the thimble F and the cavity D, when the said thimble is screwed on the foot." It is not material whether the walls of the orifice pinch the jaws, or the jaws are pinched against the walls. These two braces, differing from the other braces of the defendants only in the particular which has been named, infringe also the third claim of the Amidon patent, and, equally with the other braces, infringe the first and second claims of that patent, and also of the Horton patent.

There should be a decree for an injunction against the four braces of the defendants, and for an accounting.

Case No. 9,600.

MILLETT v. SNOWDEN.

[1 West. Law J. 240.]

Circuit Court, S. D. New York. 1844.

COPYRIGHT—MUSIC—STATUTORY PENALTY FOR INFRINGEMENT—INTENTION.

[The publisher of a newspaper who printed therein a piece of music which had been copyrighted is liable for the statutory penalty for infringement of one dollar per sheet, although he knew nothing of the copyright, and copied the music from another newspaper.]

The plaintiff [William E. Millett] obtained a copyright for a piece of music called "The Cot Beneath the Hill, a Ballad.—Poetry by James F. Otis, Esq.," and now seeks to recover the penalty, as provided by statute, of one dollar per sheet for violation thereof. He charges that [William E.] Snowden, in the June number of the Ladies' Companion, published such piece of music, &c. The defendant proved that the music had been copied from a Boston paper by the young man having charge of that department in the Ladies' Companion, and that neither said young man nor Mr. Snowden knew of its being copyrighted, and that the music was changed in a trifling degree from the original. He also offered to prove that the words to which the music was set never belonged to plaintiff, and that he (defendant) had no intention of infringing the copyright.

Before BETTS, District Judge.

THE COURT, in its charge, stated that intention could not be taken into view. If a

copyright has been invaded, whether the party knew it was copyrighted or not, he is liable to the penalty. As to its being different from the original, in music, as in writing, the omission of a word or line or paragraph could not change it so as to avoid the statute. The poetry, in this instance, could not affect the result, as the copyright was for the music. A defendant is at liberty to show that the work copyrighted was not original with plaintiff, or that it was an abbreviation or alteration, and the jury could determine whether it was calculated to infringe the copyright or not. In cases of patents, the jury is at liberty to assess damages, but not in violation of copyright. The penalty in the latter is fixed by law. The jury, if they consider that defendant has republished without leave obtained in writing from plaintiff, must proceed to ascertain the number of sheets proved to have been sold, or offered for sale (not the number printed), and return a verdict of one dollar for each sheet so sold or offered to be sold.

Verdict for plaintiff, $625.

Case No. 9,601.

MILLICK et al. v. PETERSON.

[2 Wash. C. C. 31.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.

PRINCIPAL AND AGENT—DECLARATIONS OF AGENT—EVIDENCE—POLICY OF INSURANCE—PAYMENT.

1. The declarations of an agent for the defendant, by whose orders the plaintiffs had made insurance for the benefit of the defendant, were not admitted to prove the liability of the defendant for the premium.

2. The policy of insurance, without other proof of the payment of the premium, is not evidence of its payment.

This was an action on the case, to recover a premium of insurance paid by plaintiffs [Millick & Burger] for defendant [Peterson] on a policy effected on the Phoenix, the property of defendant, in an insurance office at New-York. The order for insurance was given by W. Wiseman, without mentioning the defendant; and the policy stated W. Wiseman as the person insured. Evidence was given to prove that Wiseman acted as the agent of the defendant, in ordering the insurance. Wiseman sent to the plaintiff his note for the premium, as usual, payable in twelve months; but before the note became due, Wiseman failed. The plaintiff, understanding that the insurance was made for the defendant, procured from Wiseman the defendant's letter, ordering him to have it effected; and got him to add on the foot of it, the order he had given to the plaintiff. A witness was examined, who stated sundry conversations he had had with Wiseman respecting this business; and was about stating that Wiseman told him the defendant would pay the debt.

THE COURT thought this improper evidence. Wiseman was the defendant's agent only to effect the policy. His declarations that defendant would pay, are not evidence in the cause. It was proved by a witness, that it is the constant custom to retain the policy until the premium is paid, or a note with a good endorser given, and then it is delivered out.

Mr. Hallowell, for plaintiff, argued to the jury, that the printed acknowledgment in the policy that the premium was paid, is prima facie evidence of the fact. This, together with the circumstance of the plaintiff's being in possession of the policy which he could not be unless he had paid the premium, is sufficient to establish the fact.

THE COURT expressed an opinion, that better evidence could be given of the payment of the premium. That inferior evidence ought not to be left to the jury, when it appeared that there existed better in the power of the plaintiff. If he has paid the note he gave for the premium, he ought to produce it, or prove it to have been paid by other evidence. But on recommendation of the court, a juror was withdrawn.

NOTE. The insurer may recover the premium, notwithstanding the formal receipt in the policy, which is not inserted as conclusive evidence, but to preclude the necessity of proving it in case of loss. 1 Marsh. Ins. 240.

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

Case No. 9,602.

MILLIGAN v. The B. F. BRUCE.

[Newb. 539.] [1]

District Court, D. Michigan. Jan., 1857.

SEAMEN—WAGES—AGREEMENT NOT IN WRITING—STATUTORY PROVISION—TUG BOATS—PREVIOUS WAGES—EVIDENCE—BOOK OF PAYMENTS.

1. The act of July 20, 1790 [1 Stat. 131], for the government and regulation of seamen in the merchant service, providing that if an agreement in writing be not made, &c., with seamen, they shall be entitled to the highest rate of wages that shall have been paid for a similar voyage within three months preceding the shipping, does not apply to seamen upon tug boats. [Cited in Worth v. Steamboat Lioness No. 2, 3 Fed. 925.]

2. Where a seaman was proved to have served the year previous for a particular rate of wages, and shipped with no agreed rate; *Held*, that in the absence of contrary proof, the last year's wages would be presumed right, and taken as the measure of wages for the present.

3. A book of original entries, kept by the captain of the propeller, who was also part owner, is inadmissible to prove cash payments, there being no other proof of these payments.

[This was a proceeding in admiralty by Thomas Milligan against the propeller B. F. Bruce for wages due the plaintiff for services rendered.]

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

Jerome & Swift, for libelant.
Towle, Hunt & Newberry, for respondents.

WILKINS, District Judge. Libel for mariner's wages as engineer of the propeller, employed as a tug boat from the mouth of the river Detroit to Port Huron. The libelant claims at the rate of $70 per month, the highest rate of wages given to engineers. The answer does not deny that he was employed as engineer, but alleges his incompetency to act in that capacity, and that, in consequence of his incapacity and ignorance the propeller suffered great damage, which, as a pecuniary loss, covers more than the wages to which he would be entitled. The libelant alleges that he was employed as engineer, at no particular rate of wages, and that, as no agreement was made in writing, he is entitled, by the act of 1790, to the highest wages paid for such services. The law cited does not apply to this case, the propeller not being engaged in foreign commerce. The libelant has attached to his bill an account stated, claiming $70 per month, for six months and twenty-eight days, and giving credit for sundry payments, amounting, in all, to $68, specifically enumerated, item by item. The answer responds that the claimant is ignorant of the actual time the said libelant worked, and leaves him to the proof of the same. The proofs are, that the libelant went on board of the propeller on the 10th of February last, and left on the 28th of August; and that the vessel commenced running on the 1st of May: that he was engaged about forty-seven days in February and March in fitting up the engine and preparing it for use in the approaching season: that he had served the previous season as engineer, and was continued in that capacity, and that he had got the last year the sum of $45 per month. The court will allow now no more than that sum, and will allow him at that rate from the 10th of February, the period fixed by the witness Donevan as the time when he commenced his labor as engineer. He was acting in that relation when he was thus employed, and in the absence of satisfactory proof to the contrary, or that he was working by the day, the court must allow the usual wages per month, which he received the seasons previous. A book has been introduced in evidence, as a book of original entries, kept by the captain, showing that the libelant commenced "fitting out" on the 7th of February, and that the boat commenced running on the 1st of May. This book exhibits certain cash payments made by the captain, who is part owner of the vessel, which are not admitted by the libelant. These charges are inadmissible, there being no other proof of these payments. To admit such evidence as conclusive against the mariner would subject seamen to great injustice. There is no necessity existing why the old rule should be modified in this respect. Cash payments should be accompanied by corresponding receipts; and where a seaman cannot write, his mark should be taken in the presence of the witness. To adjudge otherwise, would make the party interested competent proof of payment. Moreover, in this case the entries are not of such a character as to entitle them to implicit credit. The libel specif ically set forth the payments made, and the answer should as specifically have denied the exhibit, and directed attention to the other payments if they actually existed. Otherwise, we are called upon to reject the positive oath of the libelant, and admit the statement of the respondent without oath.

The court, therefore, decree that the libelant shall be paid for six months and twenty-eight days, at the rate of $45 per month, amounting to $308.48, deducting therefrom the payments which he has admitted in his libel, of $68, with the $16 admitted on trial to Mr. Towle, making in all a credit of $84, and adjudicating the balance at $222.48. The cash paid by Mr. Carey was neither proved nor admitted.

As to the tender alleged, the court is of opinion that no legal tender was proved; $45 per month was offered to the proctor, but leaving the time still a subject of controversy. A positive sum, covering the whole controversy, should have been offered.

Decree for $222.48, with costs.

MILLIGAN (CRAWFORD v.). See Case No. 3,370.

Case No. 9,603.

MILLIGAN & DICKSON et al.

[Pet. C. C. 433.] [1]

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

ACKNOWLEDGMENT — POWER OF ATTORNEY — PENNSYLVANIA ACT—EVIDENCE OF EXECUTION.

1. A deed for land, made under a power of attorney acknowledged before a mayor or other chief magistrate of a city, instead of being proved before him by the witnesses, and certified by him under the public seal, is evidence under the common law of Pennsylvania, notwithstanding the act of 1705.

2. The provisions of the act of 1705, apply to a power of attorney, proved by the attesting witnesses, but they do not exclude other evidence of the execution of such power.

[See Case No. 9,604.]

[Cited in brief in Garrett v. Crosson, 32 Pa. St. 376.]

This cause, which had been removed into the supreme court, upon a division in the opinion of the judges, as to the admissibility of the power of attorney from Christie to Milligan, was sent back to this court, under an agreement of the parties, that this should be the single question to be decided. It came on now, to be again tried, when the plaintiff examined a number of witnesses, including lawyers, conveyancers, and a clerk in

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

the office of the master of rolls, and for recording of deeds; all of whom concurred in proving, that the universal practice of this state has been, to make conveyances under powers of attorney, acknowledged before a mayor, or other chief magistrate or officer of the city, &c. where such power was executed, and certified under the common or public seal of the said city, in like manner as if the same had been proved by the attesting witnesses. That powers of attorney thus certified, have uniformly been admitted to be recorded in this state, copies whereof have always been given in evidence; and that an objection to such evidence, never was heard of, until it was made on the first trial of this case. That an immense portion of the landed property in this state, is held under deeds executed by the attorneys of the proprietors and others, in virtue of powers, acknowledged and certified as this was.

Some of the witnesses stated it as their opinion, from an examination of the records, and from their recollection of the deeds which had been drawn in their respective offices, that a very great majority of the powers of attorney for conveying real property in this state, have been of this description. That the most eminent lawyers and conveyancers in the state, had uniformly acted in conformity with this opinion. The evidence of some of the witnesses, traced their knowledge of this practice as far back as fifty or sixty years ago; at which time, they found the practice established and in use in the offices in which they entered as apprentices or assistants. The testimony of the witnesses, as to this practice or usage, its antiquity, uniformity, and extent, was uncontroverted. Only one witness was examined by the defendants' counsel, namely, Mr. Chief Justice Tilghman, who stated, that he had received powers of attorney from Andrew Allen, in London, chief justice of this state, before the Revolution, and from other members of that family, for the sale of their real property in this state, all of which were acknowledged and certified like the present. This was in the year 1809. That, after examining the act of 1705, he returned those powers to his constituents, and directed them to have them proved before the mayor or magistrate. But, the chief justice stated nothing, in opposition to the practice proved by the other witnesses. He further stated, that although the law requires the certificate of the magistrate of the proof of deeds before him, to be authenticated under the common or public seal of the city, yet a long usage of certifying the proof without such seal, had grown up, and had received the sanction of the supreme court of the state, on the ground of such usage.

The plaintiff proved the loss of the original power of attorney; the paper now offered in evidence, was a copy of the exemplification of the power, from the office for recording deeds, where the exemplification was recorded. [Davey v. Turner] 1 Dall. [1 U. S.] 11; [Lloyd v. Taylor] Id. 17; [Morris v. Vanderen] Id. 66.

WASHINGTON, Circuit Justice. When this cause was formerly tried, the only question which I could judicially decide, was, whether under the words of the act of 1705, a power of attorney acknowledged before the mayor or chief magistrate of a city, and certified under the public or common seal, could be given in evidence. That act declares, that all sales or conveyances of lands thereafter to be made, by virtue of any letters of attorney, duly executed, and expressly giving a power to sell lands or other estates, certified to have been proved by two or more of the witnesses thereunto, before any mayor or chief magistrate of a city, &c. under the common seal, &c., or proved in Pennsylvania before any justice of the peace, by one or more of the witnesses thereto, &c. shall be good and effectual in law, to all intents and purposes, whatsoever, as if the said constituent had by his deed conveyed the same.

Upon the construction of this law, it appeared to me there could scarcely be two opinions. It allowed powers of attorney, proved as the law directs, by the attesting witnesses, to be given in evidence; but it did not extend the same privilege to powers acknowledged by the party. The former case, therefore, was no longer open to the common law objection, that a deed must be proved upon the trial of a cause in which it is offered, by the attesting witnesses, if they can be produced, subject to the legal exceptions and qualifications of the rule. The latter case was left exposed to the full operation of that principle, as it was not provided for by this statute. There was no testimony given of a practice and usage like that which has been proved in this case. It is true, Judge Peters stated to me the general understanding of legal and other men, upon this subject, substantially, as he has now testified. But no proof of such a practice was given, so that I could act judicially upon it, or to enable the supreme court to judge how far such practice had controlled or affected the principle of the common law. I could not therefore, give any other opinion than the one I did, which was unfavourable to this evidence.

This trial presents a perfectly new case, upon the evidence which has been given.

It is contended by the defendants' counsel, that no practice or usage can repeal or control an express statute; and that for this reason the cases of Davey v. Turner, 1 Dall. [1 U. S.] 11, and the lessee of Lloyd v. Taylor, Id. 17, in which it was decided, that a feme covert had legally parted with her estate by being privily examined without a fine being levied, and even by the mere joining her husband in the deed, are no authority in this case; because, the long and uniform practice, which, by those decisions, sanctions this mode of disposing of her estate, violated no statute of this state, but merely a rule of the

common law, which required a fine to be levied, in order to bind the estate of a feme covert. Now, admit for a moment, that a usage, however ancient, cannot control or vary the plain interpretation of a statute; still it is obvious, that the error of the argument consists in supposing that the usage set up in this case, is at variance with the provisions of the act of 1705. That act provides merely for the case of powers of attorney, proved by the attesting witness, but it does not exclude other modes of proof. It does not declare that the acknowledgment of the party shall not be sufficient, or that the certificate of the magistrate shall be sufficient to authenticate the instrument in no instance, but where the execution of it is proved by the witnesses thereto. All that can be said is, that the acknowledgment before the magistrate is not provided for; and therefore, upon common law rules, the certificate of the acknowledgment could not be received as evidence of the execution. Here, then, the practice, coeval, it is probable, with the act of 1705, and certainly extending beyond the memory of man, steps in and supplies the omission in the law to provide for the case. This practice originated, no doubt, in the opinion, that the acknowledgment of a deed is equivalent to proof by witnesses, and that, therefore, it was within the equity of the statute. This opinion became practically embodied into the land titles of this state; insomuch that we find, as far back as the recollection of the oldest witness, who has been examined extends, foreign powers of attorney were certified upon the acknowledgment of the party who gave them, and that this mode of proving the execution was much more practised than the other. What is this, then, but a usage or common law of the state, controlling the common law of England; supplying an omission in the statute law of the state, not violating any one of its provisions? In this view of the subject, then, it is plain that the cases cited from 1 Dall. [1 U. S.] have settled a principle which is strictly applicable to this case.

The witnesses who have been examined as to the usage asserted in this case, do not recollect that this question has ever been directly decided in the courts of this state; if it had, I presume it would not now be contested. But, I would ask, what stronger evidence can we have that the usage has become incorporated into the law of this state, than the uniform admission of deeds, executed under powers of attorney so acknowledged and certified as evidence of their execution, by all the courts, without an objection having been made, either at the bar or on the bench? If the objection was never taken, it must have been because the law was understood to be too plain to be controverted.

This usage, then, forms one of the great and essential land marks of real property in this state; and if the titles depending upon it are to be uprooted at this day, I will not be the judge to commence this work of devastation. Never was there a case where the principle communis error facit jus, was more strictly, and necessarily applicable.

It is therefore the opinion of the court, that the evidence which has been offered ought to go to the jury; and if, upon the evidence which has been given, they are satisfied that the usage as I have stated it, has been proved, their verdict ought to be for the plaintiff.

Verdict for plaintiff.

Case No. 9,604.

MILLIGAN v. DICKSON et al.

[2 Wash. C. C. 258; Pet. C. C. 433, note.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

EJECTMENT—PUBLIC LAND—PLAINTIFF'S TITLE—PAYMENT OF PURCHASE MONEY—RIGHT OF ENTRY.

The plaintiff claimed under a warrant and survey in 1769; but produced no proof of the payment of the purchase money to the proprietors or to the state. Such a title is not sufficient to recover in ejectment, as it does not give a right of entry.

The title of the plaintiff [the lessee of Milligan] was as follows: On the 1st of April, 1769, a special application, (No. 39,) for three hundred acres, was made for John Campbell, at Ligonier, near the fort on the Conemaugh, and a small creek running into the same, joining Samuel Duncan, called "M'Gee's Hunting Cabin." On the 5th of June a survey was returned, in pursuance of order No. 39, dated the 24th of May, 1769, for John Campbell, situated near the fort on the Conemaugh, and on a small creek called "M'Gee's Run," at his hunting cabin. The surveyor states, that "at the time of making the survey, T. Armstrong made pretensions to the land, under an order No. 64, but the special order, on which I returned the survey, was not then come to hand." Campbell died; and his widow and administratrix, by order of the orphan's court, legally sold the above land to James Christie, in 1773, which she regularly conveyed to him. In 1796, Robert Milligan was appointed attorney in fact by Christie, to sell this land, and in the year 1800, he sold and conveyed it to the lessor of the plaintiff. It appeared in evidence, that when Christie purchased the land, in 1773, he placed upon it a servant man and his wife, indentured for five years, in order to retain the possession, and take care of the land. The servant man died before the expiration of the five years, and his widow married one Hadabaugh who continued to live on the land, without paying rent, till about six years ago, when he left it, and the defendants [Dickson and others] took possession. In 1796, Hadabaugh came to the

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

attorney of Christie, in order to buy this land, and offered as much for it as it was afterwards sold for, but it was not then accepted. The defendants claimed under a lottery order, dated April 3d, 1769, No. 64, for three hundred acres, on the forks of the Conemaugh and M'Gee's run, to include a spring. The defendants proved a settlement, near twelve months prior to April, 1769; in March of that year, Campbell disseized him, and made improvements, and continued to hold it, before and after his survey. It was proved that the land in question is fifteen miles from Ligonier, and that there was no fort at all on the Conemaugh in 1769, nor does the land join Samuel Duncan; in all other respects, the survey fits the order of April 1st, 1769. It was also proved, that no such order as the one recited in the survey of May 24th, 1769, was to be found on the books of the land office, or amongst the papers. That of the 1st of April, was found duly recorded. It did not appear, that either of the parties had paid any thing to the state for this land. The power of attorney from Christie to Milligan, or rather an exemplificatilon of it, was certified by the lord provost and chief magistrate of Edinburgh, to have been acknowledged by Christie before him, and was certified under the city seal.

This was objected to, by Dallas for defendant, because it is only an exemplification, and there is no proof that the original is lost; and it is certified, as having been merely acknowledged, whereas the act of assembly, passed in 1705, declares, that "letters of attorney, the execution whereof shall have been proved by two of the witnesses thereto, before any mayor or chief magistrate of any city, &c. where the same was made, and certified under the public seal of such city, &c., shall be good; and all deeds for lands, made by virtue of powers so proved and certified, shall be effectual." This power is not proved, but is acknowledged, and therefore it is not authenticated under the law.

Tilghman, for plaintiff, admitted that the words of the law were against him, but contended, that the uniform practice in this state had been otherwise, and that powers, proved and certified as this is, have without objection been regularly admitted.

PETERS, District Judge, was for admitting the evidence upon the principle that communis error facit jus.

WASHINGTON, Circuit Justice, contra. The law is plain. I know nothing of a contrary practice. The court being divided, the evidence was admitted.

Dallas offered a paper, signed Richard Wallace, proved to be in the handwriting (except the signature) of Kennedy, secretary of the land office, purporting to be the application of John Campbell of April 1st 1769, but differing from it. The original is lost, and Kennedy is dead.

THE COURT thought it improper to admit the evidence, against a certified copy of the application, from the records of the land office.

The objections to the plaintiff's recovery were—First; that the survey is not a location of the application of April 1st, 1769, as it refers to an application differing in date—is not at Ligonier, nor near to any fort—and does not adjoin Samuel Duncan. Second; the lessor of the plaintiff, having only a survey, without payment of the consideration to the proprietors or to the state, has not obtained a legal title to authorize a recovery in ejectment. Third; the plaintiff has not a right of entry by possession, because it does not appear that those who held the possession, held under Christie; nor did they pay rent; which were necessary, in order to make their possession the possession of Christie. Run. Eject. 15, 58, 60, 292, 289; 2 Bac. Abr. 423; 2 Strange, 1128; 1 Wils. 176.

The plaintiff insisted upon an uninterrupted possession from 1769, till about six years ago, when the defendants gained it; but if otherwise, the plaintiff may recover, upon priority of possession, against a disseizor. Cro. Eliz. 438, V.

The other points were also controverted.

WASHINGTON, Circuit Justice (charging jury). Whether the survey for Campbell does or does not fit the application, is a question of some difficulty, but you may discharge your minds from this subject, since the plaintiff places his chief reliance upon his possessory title; and if that will not support him, he cannot recover in the present action upon his paper title, for that does not give him a legal title. The question, then, for your consideration, is, whether the plaintiff has shown a right of entry? From 1769 to 1778, it is clear, that the premises were in the possession of Campbell, under whom the lessor claims; or of Christie, by his servants. It does not appear that Hadabaugh paid rent to Christie; nor, from any positive declarations from him, whether he held under or adversely to Christie. Whether you will consider his offer, in 1796, to purchase the land, and his subsequent abandonment of it, as evidence of the former, or not, is the question. If you are of opinion that he held under Christie, then it is unimportant whether he paid rent or not; and in that case, you should find for the plaintiff. If you think that he held in opposition to the title of Christie, then your verdict should be for the defendants, since an order and survey, without payment of the consideration, does not give a legal right of entry.

Verdict for defendants.

[NOTE. The case was removed to the supreme court upon a division of opinion of the judges as to the admissibility of the power of attorney from Christie to Milligan, but the case was sent back under an agreement of the parties that this single question should be decided. Evidence was introduced as to the practice in the state. There was a verdict for the plaintiffs. Case No. 9,603.]

Case No. 9,605.

MILLIGAN v. HOVEY.

[3 Biss. 13; [1] 14 Int. Rev. Rec. 20; 3 Chi. Leg. News, 321; 4 Am. Law T. Rep. U. S. Cts. 136.]

Circuit Court, D. Indiana. May, 1871.

ARMY AND NAVY—MILITARY COMMISSIONS—WHEN UNCONSTITUTIONAL—LIABILITY OF MEMBERS—LIMITATION OF ACTION—DAMAGES.

1. Military commissions and their acts, in the trial of persons not in the military service, during the late civil war, in states where the courts were undisturbed, were unconstitutional.

2. The members of such commissions, and officers of the United States army, are liable for arrest and imprisonment ordered by them in such states, even though ratified and approved by the executive department of the government.

3. They are also liable for imprisonment suffered beyond their jurisdiction, if such imprisonment was the natural and necessary result of the sentence pronounced by them.

4. The limitation imposed by the act of congress of March 3, 1863 [12 Stat. 756], was within the power of congress, and binding upon state tribunals.

5. The defendants are not liable for any acts, nor any portion of the term of imprisonment, prior to two years before the commencement of the action: the statute begins to run notwithstanding that the imprisonment was a continued act.

6. It seems that an act of congress would not be complete justification, if the trial by a military commission was forbidden by the constitution.

7. The damages to be allowed should be compensatory, and not exemplary or punitive.

8. The action of military commissions, and duties of army officers, commented on.

This was an action of trespass, by Lambin P. Milligan, for an alleged wrongful arrest and imprisonment. The principal facts which gave rise to the controversy were undisputed. On the 5th of October, 1864, during the Rebellion, the plaintiff was a citizen of Indiana, residing in the county of Huntington, and not engaged in the military or naval service of the United States. General Hovey, one of the defendants, was the military commander of the district of Indiana, duly appointed by the president. On that day General Hovey, as such commander, ordered an officer and some soldiers to proceed to Huntington and arrest the plaintiff. He was accordingly arrested at his house there and brought to Indianapolis, and confined in prison. He was shortly after tried before a military commission on certain charges brought against him for conspiring against the government, affording aid and comfort to the enemy, inciting insurrection, disloyal practices, and violation of the usages of war. The commission convicted him and sentenced him to be hanged. His imprisonment was continued under this sentence at Indianapolis till the 2d day of June, 1865, when, a commutation having been made in the sentence by the president, General Hovey ordered the plaintiff to be removed to the penitentiary of Ohio, at Columbus, in compliance with instructions from the war department, where he remained till the 10th of April, 1866, when he was liberated. In the meantime, on the 10th of May, 1865, the plaintiff had made application to this court for a writ of habeas corpus, upon which the opinions of the judges were divided, and the questions certified to the supreme court, under the act of congress of April 29th, 1802. That court, after elaborate argument and consideration, held that the military commission had no jurisdiction to try and sentence the petitioner, and ordered the writ to issue according to the prayer of the petitioner, and that he be discharged from custody. Ex parte Milligan, 4 Wall. [71 U. S.] 2. It was for these acts thus done by General Hovey as military commander, by other defendants as members of the military commission, and by others as having some agency in his arrest, trial and imprisonment, that the action was brought, although the plaintiff simply set them out as a wrongful arrest and imprisonment, without stating the reasons which influenced the defendants. The defendants pleaded: (1) not guilty; (2) that the arrest and imprisonment grew out of the plaintiff's participation in the offenses charged against him before the military commission; that he was guilty thereof, and that the defendants were acting as officers in the army of the United States, under the authority of the president, without malice, and with no more force than necessary; (3) that for all acts done prior to the 13th of March, 1866, the limitation of two years prescribed by the seventh section of the habeas corpus act of congress of March 3, 1863, applies, the suit having been brought on the 13th of March, 1868; and the defendants say as to the imprisonment after March 13, 1866, they are not guilty.

T. A. Hendricks, for plaintiff.

J. W. Gordon and Benjamin Harrison, for defendants.

DRUMMOND, Circuit Judge (charging jury). The agency of most of the defendants in the arrest and imprisonment of the plaintiff is not seriously controverted. The arrest was made on the order of General Hovey, and by him he was held for military trial.

The defendants Spooner, Dehart, Bennett, Murray, and Williams, were members of the military commission that tried and convicted him, and it was in consequence of their action that he was still retained in prison. If they had acquitted him it is a fair inference he would have been released, unless, indeed, other charges were preferred against him. This being the case on the part of the plaintiff, we now proceed to consider the defense.

However it may have been before the arrest and trial, there is no doubt that the acts of General Hovey and his brother officers, in the seizure, trial and sentence of the plaintiff, were ratified and approved by the executive

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

department of the government. The legislation of congress has also been to the same effect. Act March 3, 1863, § 4 (12 Stat. 756); Act May 11, 1866, § 1 (14 Stat. 46); Act March 2, 1867 (14 Stat. 432); 3 Davis' Supp. Ind. St. 570.

The first question, therefore, is whether this constitutes a good defense. The supreme court of the United States decided upon the facts then before it that the action of the military commission in the trial and sentence of the plaintiff was null and void. [Ex parte Milligan] 4 Wall. [71 U. S.] 2. The court also decided that in the trial and sentence the constitutional rights of the plaintiff were invaded; that is, the act done was prohibited by the constitution of the United States. A majority of the court held that even congress could not authorize the act. If an act is prohibited by the constitution, and it is beyond the power of congress to authorize it, then it may be said the wrong done by the act is not subject to complete indemnity by congress, because then the prohibition of the constitution to protect private rights would be without effect. Id. 136. As the minority of the judges of the supreme court in the Milligan Case held that the trial and sentence might have been legal if congress had authorized military commissions, then I think it is fairly to be inferred that in their opinion congress could give indemnity for the same, although the trial was illegal at the time for want of an act of congress. I have preferred to rule, for the purposes of this trial, that an act of congress would not be a complete justification if the military trial was forbidden by the constitution.

This question is undoubtedly of great importance, and it has been reserved for future consideration. It is for this reason that the second defense is placed on the ground that there was martial law, suspension of the privilege of the writ of habeas corpus, and war and military operations in Indiana at the time of arrest. Under the present ruling of the court, proof of this last averment is essential to the validity of the defense. In the case presented to the supreme court it was assumed that there was at the time no war in Indiana, and it was declared that no usage of war could sanction a military trial there for any offense of a citizen not connected with the military service. But in this case the defendants have been permitted to aver and give evidence touching a state of war before, at and after the arrest of the plaintiff. Under what condition of affairs would the law have given validity to the commission that tried the plaintiff? This question is answered by the supreme court of the United States in the case so often referred to. These are some of the principles stated by that court: "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."

"There are occasions when martial law can be properly applied. If in foreign invasion or civil war the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown. * * * As necessity creates the rule, so it limits its duration, for if this (military) government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction; it is also confined to the locality of actual war."

Does the evidence before the jury bring this case within the conditions named? We know judicially, and therefore it is proved, that the federal courts of Indiana were open during the time the events occurred which have given rise to this controversy. Cases, both civil and criminal, were tried, and rights of person and property determined. A part of the state had been invaded in July, 1863, but that had passed away. There were occasional disturbances, the draft was sometimes opposed, the arrest of deserters resisted, rendering necessary the aid of soldiers. A few were killed in these collisions, but the civil administration of the state was in full vigor. It was not impossible to administer criminal justice according to law in the federal courts. A single instance only is specified where military assistance was required to enforce the process of the federal court, and that was merely preventive. It is impossible to doubt that if the facts as established now had been before the supreme court of the United States in the Case of Milligan, the result would have been the same. It is claimed that there was a great conspiracy pervading the state, having for its end a revolution, civil and military, in the interest of the enemies of the government. But, in fact, a few only were arrested and tried before the military commission, and it cannot admit of question that the plaintiff could have been taken by civil officers before the courts, and there tried for any offenses of which he had been guilty.

I do not wish to withdraw from your consideration the facts on which you are to decide, but if the case of Ex parte Milligan, reported in 4 Wall. [supra], is to stand as the rule of his trial before the military commission and the test of its validity, then I am impelled to say that no fair construction of the evidence presented to you has changed that rule, or protected with the forms of constitutional law that which the supreme court then pronounced null and void.

It is insisted that the act of congress of March 3, 1863 (12 Stat. 755), in relation to the writ of habeas corpus, recognized the authority of the military to arrest and to hold the plaintiff in custody until a grand jury met, and that did not occur till May, 1865. If General Hovey and those whom he obeyed

had followed the directions of that act, it is probable no controversy would have arisen upon the subject. The act of 1863 intended that a man in the condition of Milligan, a citizen of the state, not connected with the land or naval service, should be tried by the civil courts; that his alleged offenses should be investigated by a grand jury, and, if indicted, that he should be tried before the civil courts of the United States, with a jury to settle disputed facts, and a judge to expound the law. But it is too clear for debate, that the act of congress of 1863 was not considered as ruling the case. Those who ordered and confirmed the trial of the plaintiff by military commission claimed and exercised the power as a law of the army above and beyond the authority of the civil courts. If it be conceded, therefore, that he could have been taken by a company of soldiers instead of by the process of a civil court, those who made the arrest should, in good faith, have submitted to the law of 1863, and brought the plaintiff before the proper court on the charges made against him. The military trial, sentence, and subsequent imprisonment of the plaintiff find, therefore, no justification in the act of 1863.

The third defense, which may have a great influence in the case, is the statute of limitations of 1863 (12 Stat. 757). The seventh section of that statute declares that no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made or other trespasses or wrongs committed at any time during the Rebellion, by virtue or under color of any authority derived from or exercised by or under the president of the United States, or by or under any act of congress, unless the same shall be commenced within two years next after the arrest, imprisonment, trespass or wrongs complained of.

At the time this statute was passed we were engaged in a great civil war. In such a war, perhaps, more than any other, under the influence of the passions created by the conflict, and the zeal of even the officers and soldiers who combatted for the maintenance of the government, it was foreseen that private rights, both of person and property, might be invaded; that wrongs might be committed for which, under the constitution and laws, the person committing them might be called to answer before the courts of the country. If we concede that there might be wrongs for which there could not be absolute indemnity, still it was but an act of justice to those thus subject to prosecutions to declare that remedies should be sought for through the courts within a certain time, provided it were not so short as, in effect, to destroy the remedy itself. The acts for which actions were to be brought within a limited time were those done under the authority of the chief magistrate of the nation—the commander-in-chief of its armies. I cannot doubt, therefore, that it was competent for congress to enact that all such actions should be commenced within a reasonable time after the wrong was committed. The limitation prescribed by congress was two years, thus giving ample opportunity for the enforcement of any rights created or protected by the constitution or laws. It has always been decided that this is a matter resting with the legislature, and the only question is whether the limitation is within the control of congress, this action having been originally brought in one of the courts of the state. But states might take different views of the subject, and in some, where rebellious sentiments were paramount, the legislatures might leave such actions against the agents of the government without limitation. There must, therefore, be an authority coextensive with the nation which could create a uniform rule, and to congress only is such power given from the nature of the case. Even if it be true that the states may be able, subject to certain qualifications, to create rules for their own courts, which is not here intended to be questioned, yet, in the absence of any such binding rules, the legislation of congress, in the cases named, must be a law to a state as well as to a federal court. I think, therefore, that the statute of limitation of 1863 is obligatory in this case.

The action was commenced on the 13th of March, 1868. Two years would go back to the 13th of March, 1866. The plaintiff was released on the 10th April, 1866, and whatever may be said of his ability to commence a suit prior to that time, afterwards his power was complete. He waited till the 13th of March, 1868. It is said that the imprisonment was one continued act, and consequently that two years not having passed from its termination to the commencement of the suit, the action included the whole term, notwithstanding a part of the imprisonment occurred more than two years before; but it seems to me that the act of congress was intended to say to any one who delayed his action it should be at his own risk. There is no saving in the statute, for imprisonment or any other cause. It was the design that whatever was done by way of suit should be done quickly, and not to leave officers and soldiers at a distant day to be harassed by litigation. In any event, therefore, the defendants would not be liable for any acts done prior to March 13, 1866. Are General Hovey and the officers of the military court responsible for any portion of the imprisonment in Ohio? The facts bearing on this part of the case are not disputed. The plaintiff, after the commutation of his sentence, and while the federal court and its grand jury were in session in this district, by order of General Hovey, was on the 2d of June, 1865, sent to the penitentiary of Ohio, at Columbus, and there received by the warden. General Hovey made this order pursuant to instructions from the president, and, therefore, can claim the same exemption as for previous action, and no more. The members of the military court had no further agency in his transfer and imprisonment in

Ohio than what grew out of the trial and sentence, and the only question is whether that was not the necessary and natural result of the sentence pronounced on the plaintiff. On the theory that the military court had jurisdiction of the case, the president could order the sentence to be carried into execution, or commute it. Whatever, therefore, was done to the plaintiff in Ohio was in consequence of his trial and conviction by the military commission; and if that fail as a justification to those who gave the instructions to General Hovey, it must also fail to those through whose action or instrumentality the transfer to Ohio was made.

The only remaining question, if the jury shall find a verdict for the plaintiff, is, what amount of compensation shall be allowed. That rests exclusively with the jury. At the same time a few remarks by the court on this point may not be out of place. It is conceded by the plaintiff's counsel that the damages should be only compensatory, and not exemplary or punitive.

The principal defendants were officers in the army, acting under the president of the United States and his military subordinates. The members of the military commission were detailed as such by their official superior. All were of a profession where obedience was exacted as a rule of their conduct. It was at a crisis when much alarm was felt by the public. For the purpose of showing the reasons for their action, evidence has been introduced by the defendants tending to prove that there was a conspiracy of some persons, the aim of which was aid and comfort to the rebels, and hostility to the government. There was in Indiana, in 1863, a secret society known as the "Sons of Liberty." There can be no doubt that some of the members of that society—how many does not appear—were engaged in a treasonable design against the government, and that their purpose was to involve the whole of the society, if possible; if not, then all whom they could influence in that design. The military authorities here at the time had knowledge of this scheme, and under the belief that it was indispensable to thwart it at once, arrested some of the supposed leaders, and among the rest the plaintiff. Under the convictions produced by this state of things the defendants arrested, tried and condemned the plaintiff upon the evidence before them. Whether the evidence or what might have been produced would have warranted his conviction before a civil court need not be decided. It is clear that the defendants were performing what they considered a military duty.

It should also be borne in mind that the conduct of the defendants in relation to the plaintiff was approved by those whose judgment and opinion they would regard with the greatest respect—the highest officers of the nation. All the circumstances should be regarded in weighing the acts of the defendants. If you should believe there is any evidence connecting the plaintiff with a conspiracy against the government, though it would not justify his trial by a military commission, yet it would undoubtedly affect your conclusions upon the question of damages; so, too, if you should believe the acts of the defendants were done without sufficient excuse, and the plaintiff was an innocent man.

As the court reviews the law and evidence the plaintiff can recover damages only for the imprisonment from the 13th March, 1866—for that he is entitled to compensation. That would include certainly any pecuniary loss thereby sustained, as well directly as indirectly. If you believe there is no evidence connecting the defendants, Zumro and Bratton, with the imprisonment of the plaintiff, then as to them you will find a verdict of not guilty.

It will be observed that the charge of the court has been rather an exposition of the law than a commentary on the facts, and that has necessarily been so. The material facts are not in controversy, and the question is, what is the law upon these facts? The facts in dispute the court leaves to you. The law you will take from the court. I commend the case to your careful, candid, and intelligent consideration.

The jury found a verdict for the plaintiff, with nominal damages.

Case No. 9,606.

MILLIGAN v. MAYNE.

[2 Cranch, C. C. 210.] [1]

Circuit Court, District of Columbia. June Term, 1820.

DEEDS—WHEN ACKNOWLEDGED—RECORDATION—CERTIFICATE OF CLERK—EVIDENCE—RECEIPT.

1. A deed of land in Maryland, acknowledged by the grantor, before two justices of the peace of the county in Maryland in which the grantor then resided, not being the county in which the land laid, is not properly recorded under the act of 1766 (chapter 14), unless there were indorsed on the deed a certificate of the clerk of the county under the seal of the court that the two justices were, at the time, justices of the peace of that county, and such certificate recorded with the deed.

2. A receipt at the bottom of a collector's certificate of a tax-sale, to which certificate there is a subscribing witness, may be given in evidence, without proving the certificate of sale by the subscribing witness.

3. The receipts of the collector are not evidence upon proof of his handwriting if he be within the jurisdiction of the court, and not a party in the cause.

Trespass quare clausum fregit.

THE COURT (THRUSTON, Circuit Judge, absent,) decided, under the Maryland Act 1766 (chapter 14), that when a deed of land in Maryland is acknowledged before two justices of the peace in the county where the grantor resides (not being the county in which

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

the land lies) such deed is not properly recorded, unless there were indorsed on the deed, a certificate of the clerk of the county, under the seal of the court, that the two justices were, at the time, justices of the peace of that county, and such certificate recorded with the deed.

On the trial, the plaintiff's counsel, Mr. Jones, offered in evidence a receipt signed by the defendant at the bottom of a certificate of sale signed and sealed by Joseph Bromley, collector of taxes, which receipt purported that the defendant had received from Stephen McDade, under whom the plaintiff claimed title, the amount of taxes for which the lot had been sold by Bromley to the defendant according to the terms of the sale. To the collector's certificate there was a subscribing witness, who was not present. The receipt was dated some months after the collector's certificate. The plaintiff proved the defendant's handwriting to the receipt.

THE COURT permitted it to be given in evidence, but refused to admit the collector's receipts in evidence upon proof of his handwriting, he himself being within the jurisdiction of the court.

MILLIGAN (THOMPSON v.). See Case No. 13,969.

Case No. 9,607.

MILLIGAN & HIGGINS GLUE CO. v. UPTON.

[1 Ban. & A. 497; 4 Cliff. 237; 6 O. G. 837; Merw. Pat. Inv. 267.] [1]

Circuit Court, D. Massachusetts. Oct., 1874.[2]

PATENTS — REISSUE — JURISDICTION OF COMMISSIONER—NOVELTY—INVENTION—COMMINUTED GLUE.

1. Jurisdiction to reissue patents is vested in the commissioner, and his decision, upon an application for a reissue, is final and conclusive, and not re-examinable in a suit for infringement, in the circuit court, unless it is apparent, upon the face of the patent, that the commissioner has exceeded his authority, or there is such a repugnancy, between the old and the new patent, that it must be held, as matter of legal construction, that the new patent is not for the same invention as was embraced and secured in the original.

[Cited in Thomas v. Shoe Machinery Manuf'g Co., Case No. 13,911.]

2. The principles, governing the awarding and granting of reissues of patents, examined.

3. Articles of manufacture may be new in a commercial sense, when they are not new in the sense of the patent law; and the mere reduction of an article of bulk, to one of a smaller size, is not, in general, the subject of a patent as a new manufacture, unless the properties of the article are improved by the introduction of some new ingredients, or by the subtraction of one or more of the ingredients of the original article, by which the new product is improved and made more useful.

4. The rule that new articles of commerce are not patentable as new manufactures, unless it appears, that the production of the new article involved the exercise of invention or discovery, beyond what was necessary to construct the apparatus for its manufacture or production, reaffirmed, and the authorities, sustaining it, examined and approved.

[Cited in Union Paper Collar Co. v. Van Deusen, 23 Wall. (90 U. S.) 563; Dunbar v. Myers, 94 U. S. 199; Lalance & Grosjean Manuf'g Co. v. Haberman Manuf'g Co., 5 C. C. A. 111, 55 Fed. 297; Campbell v. Bayley, 11 C. C. A. 284, 63 Fed. 465.]

5. A reissued patent, claimed comminuted glue as a new article of manufacture. The patented glue was made by cutting or rasping the common commercial glue, so that its large flakes were reduced to small particles. The mechanism, by which this result was accomplished, was not claimed in the patent. The advantages of the patented glue, over the glue in its commercial form, were said to be: 1st, that the particles of the glue being smaller, presented a greater surface to the soluble action of water, and thereby insured its more speedy solution; 2d, that the patented glue could be more conveniently put up in small packages, for domestic use and for the retail trade, than the glue in flakes, and with less danger of loss. Unimpeached proof was exhibited in the record, showing that flake or commercial glue had been ground into small particles, long before the alleged invention, and that the glue comminuted by this and other means than those described in the specification, is as readily dissolved and prepared for practical use, as the patented glue: *Held*, that the reduction of the glue as manufactured in flakes, to small particles, as described in the specification of the complainant's patent, does not involve the exercise of invention or discovery, without which, the product of the described process or apparatus, cannot be regarded as a patentable improvement.

[Cited in Alcott v. Young, Case No. 149; Snow v. Taylor, Id. 13,148.]

[Bill in equity for the infringement of reissued letters-patent No. 4,072, July 12, 1870, for improvement in the manufacture of glue. Complainants charged infringement, and prayed for an account of all such gains and profits as the respondent (George Upton) has thereby made, and for an injunction. Respondent denied the charge of infringement, and set up several other defences upon the merits, as follows: 1. That the original patent was not the proper subject of a surrender, as it was neither inoperative nor invalid, and that it was not lawfully reissued, as the reissued patent was not for the same invention as was the original patent. 2. That the alleged improvement was not, at the date of the assumed invention thereof, the proper subject of invention, nor a novelty proper to be secured by the grant of valid letters-patent. 3. That the alleged invention, before the alleged making or discovery thereof, was known to and used by the several persons named in the answer, and was described in the several mechanical and scientific works therein mentioned. 4. That neither the patentee nor the complainants ever used or employed the pro-

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by William Henry Clifford, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Ban. & A. 497, and the statement is from 4 Cliff. 237. Merw. Pat. Inv. 267, contains only a partial report.]

[2] [Affirmed in 97 U. S. 3.]

cess, or the mechanical instrumentalities, or the mode of operation, described in the specification.] [3]

Walter Curtis, for complainant.
G. L. Roberts, for defendant.

CLIFFORD, Circuit Justice. 1. Patentees, whenever their patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention more than he had a right to claim, as new, may surrender such patent, if the error arose by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention; and, in that event, it is made the duty of the commissioner, on payment of the duty required by law, to cause a new patent to be issued to the patentee for the same invention, and in accordance with the corrected specification. 16 Stat. 206.

Neither reissued nor extended patents can be abrogated by an infringer, in a suit against him to recover damages for unlawfully making, using or selling a patented invention, upon the ground that the letters patent were procured by fraud in prosecuting the application for the same before the commissioner. Jurisdiction to reissue patents, is vested in the commissioner, and his decision, in such an application, is final and conclusive, and not re-examinable in a suit in the circuit court, unless it is apparent, upon the face of the patent, that the commissioner has exceeded his authority, or that there is such a repugnancy between the old and the new patent, that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent. Seymour v. Osborne, 11 Wall. [78 U. S.] 516. Power to surrender patents, for the purposes suggested in the act of congress, implies that the specification may be corrected, to cure the defect and to supply the deficiency; but interpolations, in a reissued patent, of new features, or ingredients, or devices, which were neither described, suggested nor substantially indicated in the original specification, drawings or patent office model, are not allowed. Battin v. Taggert, 17 How. [58 U. S.] 74; O'Reilly v. Morse, 15 How. [56 U. S.] 62; Sickles v. Evans [Case No. 12,839]; Cahart v. Austin [Id. 2,288]. Nor is parol testimony admissible, in an application for a reissue, to enlarge the scope and nature of the invention, beyond what was described, suggested or substantially indicated in the original specification, drawings or patent office model, as the purpose of a surrender and reissue is not to introduce new features, ingredients nor devices into the patent, but to render effectual the actual invention for which the original patent should have been granted. Whether a reissued patent is, or is not, for the same invention as the surrendered original, cannot be satisfactorily determined, without a comparison of the two, as the decision must necessarily depend very largely upon the question, whether the specification and drawings of the reissued patent are, or are not, substantially the same as those of the original; and, if not, whether the changes or alterations are, or are not, greater than the act of congress, granting the power of surrender and reissue, allows.

Attention will first be called to the original patent, in the specification of which, the patentee states that, he has invented a new and useful article of manufacture, which he therein denominates instantaneous glue. He then points out certain objections to the glue of commerce found in the market at that date, as follows: (1) That a long time is required to prepare the glue for use, first by soaking it in cold water, and afterward in heating it in a hot-water bath. (2) That the glue, when thus prepared, is still often imperfectly dissolved. (3) That dry glue and gelatine, prepared in that way, are frequently rendered unfit for adhesive or dietetic purposes, or for any domestic use. (4) That it is difficult to make up small packages of such glue for retail, as the flakes have sharp angular edges, and would cut the wrappers, occasioning much waste of time and stock. His invention, as he states, obviates all those objections to the common glue, and consists in an article of glue which does not require to be prepared for solution by soaking; that it can be dissolved in large quantities, so as to be ready for mechanical use in less than five minutes, and in small quantities, for domestic use, in less than one minute; and can be put up in small packages, by machinery, or by hand, of uniform size and of regular form and weight, similar to those in which ground spices and other like articles are put up for domestic use, and to be sold by retail merchants. Its whole substance, and all of the ingredients of the patented glue, are the same as the common glue, nor does the patentee set up any different pretence. But he does state that, the patented product is superior to the glue of commerce, in that it has an appearance more pleasing to the eye; and that glues of the same grade, if subjected to his process, have apparently a whiter color, and are, therefore, more marketable, and will bring a higher price. Minute description is then given of the process of making the patented glue, and of the mechanical means employed to accomplish the object, which consists, as represented in the specifications, of a hopper, into which is mounted two sawrolls, resting in suitable bearings, and running as indicated in drawings, and are propelled by power-pulleys, gears or other suitable mechanism. Particular description is also given of certain devices, such as are shown in the drawings, to crush the flakes of glue deposited in the hopper, and of other devices to prevent the contents of the hopper from falling out through the openings be-

[3] [From 4 Cliff. 237.]

tween the saws, and to prevent the saws from fouling by means of any foreign matter during their revolution. Flakes of glue, of the ordinary kind, are put into the hopper, and, by the rotation of the toothed saw-rolls, the flakes of glue are crushed into small and quite uniform pieces, about half the size of a barley-corn. Figure 3 of the drawings also shows another apparatus, which is a finer cutting machine, to which, as the representation is, the coarse product of the prior machine is subsequently to be subjected. Briefly described, it also consists of a hopper, to be used to receive the product of the prior operation, in the lower part of which run two rasping-rolls, by the rotation of which, in connection with the ancillary-described devices, the glue stock is cut as fine as required, when the new product passes off to a receptacle beneath the machine. Separate description of the different devices is given, which shows, beyond all doubt, that the fine cutting, as there represented, is done by rasping-rolls, or rolls with rasping faces. Conclusive support of that theory is derived from the description given of the particles composing the product of the second apparatus, which is, that they are of a "curved, scale-like form, which renders the rasped glue a loose, light, open. incompact mass," and of a character to remain so, until quite dissolved.

What the patentee claimed, in that patent, is "instantaneous glue," in which claim he expressly includes gelatinous or grutinous substances, called glue, produced by the process of disintegrational fine cutting, akin to rasping, by which the particles are made thin, scale-like, curling, and are thoroughly fractured, so that they form a loose, incompact mass, readily permeable to and solvent in, hot water. Alterations, consisting of omissions, and, in some cases, of additions, as well as obvious change of phraseology, are unmistakably noticeable in the specifications of the reissued patent, as compared with the specification of the original patent; but, inasmuch, as the legal purpose of a surrender and reissue, is, that a patent, which was before inoperative or invalid, by reason of a defective or insufficient specification, may be replaced by one which is operative and valid, it becomes necessary to look with care into the nature and scope of the actual alterations made in any given case, before deciding whether they are such as are allowable under the power conferred by the act of congress, or whether they are such that it must be held that the invention, secured by the reissued patent, is not the same as that embodied in the surrendered patent. Mere changes of phraseology will not be noticed, as it may be assumed that they are not of a character to affect the rights of the parties in the case. Material omissions and additions will be noticed, of which the following are the most important: (1) Two passages in the specification of the original patent are entirely omitted in the reissue patent, as follows: (a.) That "the form of each tooth" (referring to the teeth in the rasping-rolls of the fine cutting machine), "should be such as to give to each particle of glue cut off, a curved, scale-like form, which renders the rasped glue a loose, light, open, incompact mass," etc. (b.) That passage preceding the technical claim, in which the patentee states that what he desires to secure by letters patent is any of the gelatinous or glutinous substances commonly called glue, produced by the process of disintegrational fine cutting, akin to rasping, by which the particles are made thin, scale-like, curling, and are thoroughly fractured, so that they form a loose incompact mass, readily permeable to, and solvent in, hot water. (2) Important words are also omitted in several other parts of the specification, such as "fine cut," "fine cutting," and the words "cut" and "cutting" in several places, when used to describe the action of the rasping machine, or the second apparatus to cut finer the product of the first described operation. (3) Additions, suited to support a corresponding theory, are also made in the claim and in the disclaimer of the reissued patent. "Comminuted" is substituted for "instantaneous," in the claims, as the prefix of "glue"; but the change in the disclaimer is much greater, as the language employed tends strongly to support the theory that the patentee, instead of regarding his means or apparatus as one designed to reduce the flakes of glue by a rasping process, intends to claim for it the function of a crushing machine, which is evidenced by the fact that he omits the introductory sentence of the disclaimer of the original specification, in which he describes his process as one akin to rasping, and also, from the language of the disclaimer itself, as exhibited in the reissued patent. Material alterations are also made in the body of the new specification, as compared with the old, of which the following is, perhaps, the most material. "My invention," says the patentee in the original patent, "consists in an article of glue, which does not require to be prepared for solution by soaking;" but, in the reissued patent, he says, it consists of glue comminuted to small particles of practically uniform size, as distinguished from the glue in angular flakes, hitherto known.

Based upon these, and other differences between the two patents, it is insisted by the respondent, that they show that the issued patent is not for the same invention as that secured by the original patent; and it must be admitted that the changes made, including omissions and additions, tend pretty strongly to support the proposition. But the question of construction is still open, which must first be determined, before any conclusion can be formed, whether the invention described in the reissued patent is or is not substantially the same as that secured by the

original patent. Alterations of the kind may or may not have the effect to change the character of the invention, as matter of legal construction; and, if they do introduce new features into the improvement, and materially enlarge the scope and operation of the patent, beyond what was described, suggested, or substantially indicated in the original specifications, drawings, or patent office model, it follows, that the defence that the reissued patent is not for the same invention as the original, must prevail, and it becomes the duty of the court to declare the reissued patent void.

Courts of justice will avoid such a result, if they can reasonably do so, by a liberal application of the maxim, that letters patent are to receive a liberal construction, and, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor. Turrill v. Railroad, 1 Wall. [68 U. S.] 491; Ames v. Howard [Case No. 326]; Blanchard v. Sprague [Id. 1,518]. Slight changes will not sustain such a defence, nor will the court, in any case, declare the patent void on that account, if by the true construction of the two instruments, each being taken as a whole, the invention, secured by a reissued patent, is not substantially different from that embodied in the original patent.

Flakes of glue, reduced to small particles, may be called "comminuted glue," whether the change is effected by breaking, pounding, rasping or grinding, or by any other known means of pulverizing or of reducing the common flakes to small particles, so that there is not necessarily any substantial repugnance between the claims of the respective specifications. Exactly the same description is given of the apparatus or machinery, and the process used, or represented as used, in making the alleged new manufacture, in the new patent, as in the old; and the description there given, taken as a whole, is equally full, to show that, the new manufacture, as described in both specifications, is the product of the rasping or fine cutting machine, to the action of which, the coarse stock, so called, is subjected, after it is discharged from the first described apparatus; which alleged new manufacture consists of particles of glue, first broken from flakes, into what is called coarse stock, and then rasped or cut from the coarse stock by the rasping or fine cutting machine, which latter product is minutely described, in the specification of the original patent, as particles of glue of a curved, scale-like form, constituting a loose, light, open, incompact mass, which, during the course of solution, will remain thus loose, light, open, and incompact, until quite dissolved. Taken as a whole, it is quite clear, that the patentee, in the original patent, never intended to claim, as his invention, anything, except the glue produced, as therein described, by the process of disintegrational fine cutting, akin to rasping, by which the particles are made thin, scale-like, and curling, so that they will form a loose, incompact mass, readily permeable to, and solvent in, hot water. Nothing more than that is either described or suggested in the original patent, nor is anything more substantially indicated, either in the drawings or the samples of the alleged new manufacture sent to the patent office, at the time he applied for a patent. More than that, he did not pretend to claim, nor would the patent have been valid if more had been granted, as the specification, filed, would not have been a compliance with the terms of the act of congress, which require the applicant for a patent to file in the patent office a written description of the invention and of the manner and process of making and using the same, in such full, clear, concise and exact terms, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make and use the patented improvement. Expressions undoubtedly, are contained in the specification of the reissued patent, which indicate, pretty strongly, an intent to give it a broader scope and effect; but it is a sufficient answer to everything of the kind to say, that the apparatus and process described for making and using the alleged new manufacture are precisely the same in the reissued patent, as in the specification of the original patent, and it is plain, as anything in the principles of mechanics can be, that the described process and apparatus are not suited to produce any other product, than that for which the original patent was granted. Attempts are now made, in argument, to expand the reissued patent, so as to cover the product of glue flakes when reduced to small particles, whether the reduction is effected by breaking the flakes, or by pounding, rasping or grinding the same, or by any other known means of reducing the ordinary glue flakes from their usual size and form to small particles, in order that the mass of particles may be more readily soluble in water, and be more conveniently put up in small packages for the retail trade. Sufficient has already been remarked to show that such a theory cannot be sustained, as the description of the apparatus and process of making and using the alleged new manufacture, is repugnant to any such conclusion. Strong support to the opposite conclusion, is also derived, from the description of the product or alleged new manufacture, as twice given in the specification of the original patent. Confirmation of the same view, of a conclusive nature, if any more be needed, is also found in the disclaimer, contained in the specification of the reissued patent, in which the patentee states, that he does not claim the mechanism or process by which his alleged new article of manufacture is produced, and in which he admits, in express terms, that other means of

crushing or reducing the glue flakes may be used to manufacture the alleged new article, without infringing his alleged invention, which, is entirely obvious, unless the whole description of his process and apparatus, as given, both in the original and reissued patents, be altogether rejected, as without meaning. Viewed in the light of these suggestions, as the case should be, I am of the opinion, that the defence, that the reissued patent is not for the same invention as the original patent, is not sustained; but that conclusion, it must be understood, is based upon the theory, that the reissued patent, when properly construed and defined, covers only the alleged new manufacture produced by the process and apparatus described in the specification of both patents.

2. All the other defences set up in the answer are still open, and the respondent contends, in the second place, that the supposed improvement is not the proper subject of invention, and that it was not a novelty, at that date, which could properly be secured by the grant of valid letters patent. Persons who invent or discover new and useful manufactures, are as much entitled to patents, as those who invent or discover new and useful arts, machinery, or compositions of matter; but the right to a patent for such an invention or discovery, is subject to the same conditions, as are annexed by law to the right to a patent for any one of the other classes; consequently, the manufacture must be new and useful, and it must be one not before known or used by others in this country, and one not before patented nor previously described in any printed publication in this or any other country, nor have been in public use or on sale for more than two years prior to the application for a patent. Instruments of this kind usually contain allegations averring a compliance with those several conditions, but all such allegations are open to review by the courts, when properly presented as a defence. Patents in certain cases may, doubtless, be granted, both for the manufacture, and for the process or method of producing the same, if both are new and useful; and no doubt is entertained, that the two inventions or discoveries may be secured by separate patents, or that they may both be included in the same original patent, if made the subject of separate and distinct claims. Goodyear v. Providence Rubber Co. [Case No. 5 583]; Providence Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 796. Articles of manufacture may be new, in the commercial sense, when they are not new, in the sense of the patent law, as, in the case of the reduction of a substance from a larger to a smaller size, where the properties remain the same, as they were, before the reduction was effected. Old substances may be converted into new ones by being compounded with other ingredients, where such other ingredients have the effect to render the compound more effective or efficacious, or to change the properties of the original substance, if the compound produced, involves the exercise of invention or discovery, and is both new and useful. New composition of matter is expressly embraced in the category of patentable improvements, and the very term implies, that the product differs materially in its properties from what was previously in common use; but the mere reduction of an article of bulk to one of a smaller size, is not, in general, the subject of a patent as a new manufacture, unless the properties of the article are improved by the introduction of some new ingredients, or by the subtraction of one or more of the ingredients of the original article, by which the new product is improved and made more useful.

Ground gypsum, or plaster, is comparatively a new article of commerce, but it was never patentable as a new manufacture, as wheat and other grain were ground at a much earlier period in the history of civilization. Refined sugar was formerly put up and sold in the lump, or in loaves. Since that time, the refined sugar is pulverized and sold, in the market, in that form. Such pulverized sugar is comparatively a new article of commerce, but it was never patentable as a new manufacture, as, at the time it was introduced, it was matter of common knowledge that it could be pulverized in the mortar, or by other well known means in common use. Spices are now ground, instead of being pounded in the mortar, and in that form they are sold for general use. Such an article is comparatively new, in the commercial sense, but was never patentable, as the ground spice possesses no different properties from the unground spice, or such as is pounded in a mortar, or from that which is comminuted by any process.

Machines for grinding gypsum, spices or coffee, or for pulverizing refined sugar, if new and useful, may be the proper subjects of valid letters patent, but the article of commerce produced by such machines was never patentable, as the grinding did not produce any change in the properties of the unground article, nor did the work of grinding involve the exercise of any invention or discovery, beyond what was necessary in preparing the apparatus to accomplish the work. Small manufactures of iron, such as nails, were formerly, within the memory of man, made from iron in the bar, by heating the bar in a forge and by drawing the iron out into a rod, on the anvil, by the hammer and sledge, or by first cutting the heated bar into rods by means of a chisel. Subsequently, rolling machines were constructed, by which the bars of iron were flattened, and machinery was also devised, by which the flattened bars were cut into strips, called nail rods. Nail rods immediately became an article of commerce; but the article was never patentable as a new manufacture, as its properties were not changed, and it was matter of common knowledge, that similar rods had, for a long

period. been made in the manner already described.

Two principal suggestions are made, to show that the comminuted glue may be patentable, as a new manufacture: (1) That the mass of particles are more soluble, when wanted for practical use, than the glue in flakes, as purchased in the market before the flakes are subjected to the patented process. (2) That the patented product may be more conveniently put up in small packages for domestic use and for the retail trade, than the glue in flakes, and with less danger of loss. Grant all that, still the suggestions are not sufficient to show that the comminuted glue is patentable, as a new manufacture, as the properties of the glue, in flakes, are not improved, and for the reason, that the change, effected by the described process, does not involve the exercise of any invention or discovery. Refined sugar, when pulverized, is more readily soluble in water, than when in the lump or loaf, and it is a matter of common knowledge, that small particles of any soluble substance are more readily dissolved in liquids, than large lumps or loaves of the same substance. Like many other substances, glue, when comminuted into small particles, whether the operation is effected by breaking, pounding, rasping, grating or grinding, is more readily soluble in water, than when the attempt is made to dissolve it in the flakes or other large bodies. Common experience is sufficient to verify that proposition, and the remark applies, with equal truth and potency, to many other articles, such as salt, refined sugar, gypsum, alum, camphor, gums of various kinds, and to many other substances in common use. Small particles present comparatively a larger proportion of surface to the liquid, into which they are put, than more bulky ones, in consequence of which, the substance, if permeable to liquids and soluble, will be more readily dissolved. Beyond doubt, glue, comminuted, is more readily soluble than glue in flakes, but the admission affords no support to the theory that comminuted glue is patentable, as the fact, that small particles of soluble substances are more readily dissolved in liquids than larger ones, is matter of common knowledge, and has been known for ages, whereof the memory of man runneth not to the contrary. Mere additional convenience in packing the comminuted article, as compared with the flake glue, proves nothing to support the theory of the complainant, as the fact has been matter of common knowledge for centuries. Much aid is derived in the investigation of the matters in controversy in the case, from the recent decisions of the patent office. Patents of the kind, it seems, were formerly granted without much consideration or scrutiny; but the recent decisions of the office, afford evidence of a more thorough and rigid investigation, and they appear to recognize, fully, the well-founded distinction between a new article of commerce, and a new manufacture, in the sense of the patent law, and, appear to fully comprehend the rule, that new articles of commerce are not patentable, as new manufactures, unless it appears, in the given case, that the production of the new article, involved the exercise of invention or discovery, beyond what was necessary to construct the apparatus for its manufacture or production. Six years ago, Commissioner Fisher, adopted that rule in a well-considered opinion, which it appears the patent office, for the most part, has since followed. Ex parte Ackerson, Com. Dec. 1869, p. 75. Commissioner Leggett applied the same rule in Ex parte Chatillon, 2 O. G. 115, in which he says, that invention is an essential prerequisite to a patent; and, it appears, that he rejected the application in the case, upon the ground that the applicant had simply substituted one device for another, without overcoming any obstacle, or making any discovery, or manifesting any invention. Acting Commissioner Thacher, also ruled in the same way, in a case which came before him, and in the course of his opinion, he censures the practice of granting patents, in such cases, where there is no invention, and pronounces it a fraud upon the public, to be condemned in the strongest terms. Bates v. Seeger, 2 O. G. 493. Views equally explicit, are expressed by Commissioner Leggett, in a more recent case. Ex parte Jerome, 3 O. G. 64. Great reliance was placed, in that case, by the applicant, upon the words "new article of manufacture," as sufficient to show, that the alleged improvement was patentable; but the commissioner decided, that those words will not have any such effect, and, he accordingly rejected the application. Repeated rulings, to that effect, have been made in the patent office, within the last two or three years, of which the following are referred to as examples: Ex parte Adams, 3 O. G. 150, where, it is pointedly stated, that the same rules apply, in determining the patentability of an article of manufacture, as in any other case, and that, in such a case, there must be evidence of novelty, and of invention. Proof of novelty and of invention, were also required in the case Ex parte Wattles, 3 O. G. 291, and the applicant failing to produce such proof, his application was refused. Ex parte Leggett, 2 O. G. 199; Ex parte Baxter, Id. 470; Ex parte Beach, 3 O. G. 607.

Circuit judges, in this and other circuits, have made similar decisions, as will be seen from the following brief summary: Judge Shepley ruled expressly, in the case of Draper v. Hudson [Case No. 4,069], that a patent, for an article of manufacture, cannot be sustained, on the ground that it was fabricated by new and improved machinery; on the contrary, that the manufacture must be a new and improved thing in itself, possessing novelty of its own, independent of the devices, processes, or arts, by which it was produced. Precisely the same conclusion was reached,

by the judges of the circuit court for the second circuit, after full argument. Sawyer v. Bixby [Id. 12,398]. What the patentee claimed, in that case, was a new article of manufacture, called a package or case, which, when made with distributing holes, and filled, was cemented with wax or by wafers. Infringement was admitted, but the respondents set up as a defence, that the alleged invention was not, within the requirement of the patent law, an art, machine, manufacture or composition of matter, and, therefore, that it was not a thing for which a patent could lawfully be granted, as, at most, the patentee had only devised means, by which he could secure a larger sale of a given article, without having changed the article itself, or given it any additional value; and the circuit judge sustained the defence, upon the ground that the production of the article did not involve the exercise of any invention. Nothing short of invention or discovery, will support a patent for a manufacture, any more than for an art, machine or composition of matter, as is clearly illustrated in another case, decided in this circuit, Merrill v. Yeomans [Id. 9,472], where the circuit judge says, that a patentee, who has invented a process in the arts, whereby an article of manufacture is produced, new in kind, and not before known, may separately claim, and patent, both the art and the manufacture, if both are new and useful in the sense of the patent law; and, it is doubtless true, if the thing be new, in and of itself, it is patentable as a new manufacture, and that the patent would be infringed by the unlicensed construction or use of the product, though produced by other means than those described in the specifications of the patent. Inventions of the kind, are rare, as it much more frequently happens, that the process is inseparable from the product, so that the patentee cannot claim the product, if produced by hand tools or by other means substantially different from those employed by the inventor or discoverer. Patentees, in the former case, may claim the new product without qualification, but, in the latter, they should claim the product, only when made by the described means or their equivalent, as the process inheres in the manufacture, and constitutes an element of the invention. Neither claim, however, would be valid, unless supported by proof of invention or discovery, for which proposition, there is abundant authority in the decisions of the supreme court, and in the decisions of English courts. Hotchkiss v. Greenwood, 11 How. [52 U. S.] 265; Phillips v. Page, 24 How. [65 U. S.] 167; Jones v. Morehead, 1 Wall. [68 U. S.] 162; Stimpson v. Woodman, 10 Wall. [77 U. S.] 121; Knight v. Railroad [Case No. 7,882]; Bean v. Smallwood [Id. 1,173]; Winans v. Railroad [Id. 17,858]; Hicks v. Kelsey, 18 Wall. [85 U. S.] 673; Union Paper Collar Co. v. Van Deusen [Case No. 14,395]; Langdon v. De Groot [Id. 8,059]; Le Roy v. Tatham, 14 How. [55 U. S.] 175.

Apply the principle of these cases to the case before the court, and it is clear, that the patent cannot be sustained, as neither the process nor the means of effecting the result, nor the apparatus or its mode of operation, are new or different from what had long been known to those skilled in the art, nor does the operation of comminuting the glue in flakes have the slightest effect to change the properties of the substance, in any respect whatever. Comminuted glue, differs in no respect, from the ordinary glue of commerce from which it is manufactured, except in the degree of its fragmentary condition, as appears by the great body of the evidence in the case. Other substances, of various kinds, it must be conceded, have been mechanically reduced in size, in like manner; and, inasmuch as such articles, or some of them, bear a close resemblance to glue in flakes, which is unchanged in any of its properties, I am of the opinion, that the reduction of the glue, as manufactured in flakes, to small particles, as described in the specifications of the complainant's patent, does not involve the exercise of invention or discovery, without which, it is clear, the product of the described process or apparatus, cannot be regarded as a patentable improvement. Abundant support to that proposition is found in the English decisions, as well as in the decisions made in this country. Penn v. Bibby, 2 Ch. App. 136; Harwood v. Great Northern Ry. Co., 11 H. L. Cas. 667; Jordan v. Moore, L. R. 1 C. P. 635; Kay v. Marshall, 8 Clark & F. 261; Bush v. Fox, 5 H. L. Cas. 716; Ralston v. Smith, 11 H. L. Cas. 255; Tetley v. Easton, 2 C. B. (N. S.) 740; Horton v. Mabon, 12 C. B. (N. S.) 452; Ormson v. Clarke, 13 C. B. (N. S.) 340; Id. 14 C. B. (N. S.) 490; Parkes v. Stevens, 5 Ch. App. 39; Id. L. R. 8 Eq. 368; Patent Bottle Envelope Co. v. Seymer, 5 C. B. (N. S.) 173; White v. Toms, 17 Law T. (N. S.) 349; Losh v. Hague, 1 Webst. Pat. Cas. 208; Saunders v. Aston, 3 Barn. & Adol. 885. Support to the opposite view, it is supposed by the complainant, is drawn from the following cases: Winans v. Denmead, 15 How. [56 U. S.] 343; Young v. Fernie, 10 Law T. (N. S.) 864; Pennsylvania Salt Manuf'g Co. v. Gugenheim [Case No. 10,954]; Davis v. Palmer [Id. 3,645]; Le Roy v. Tatham, 14 How. [55 U. S.] 175, 22 How. [63 U. S.] 137.

But the court is of the opinion, that no one of these cases supports the theory of the complainant, as it satisfactorily appears, in this case, that flake glue, comminuted by other means than those described in the specification, is as readily dissolved and prepared for practical use as when the flake glue is comminuted by the patented process, and, that the ground glue may, with equal convenience, be put up in small packages, for the retail trade. Proof of the most convincing character, is exhibited in the record, showing that flake glue had been ground into small particles at a much earlier period of time, than the date of the alleged invention described in the

original patent; and several parcels of the ground product, together with the machines in which the product was ground, were introduced in evidence, which show, to a demonstration, that, if glue comminuted by grinding is substantially the same product as glue comminuted by the apparatus described in the said specification, the patentee was not the original and first inventor of the patented improvement. But, in the view taken of the case, it will not be necessary to decide that issue in the pleadings, nor whether flake glue, when ground, is substantially the same as flake glue comminuted by the apparatus described in the patent in suit, or substantially different, as will, presently, more fully appear; nor is it necessary to discuss either the third or the fourth propositions submitted by the respondents, as the court is of the opinion, that the complainant fails to show that it is entitled to a decree, for two reasons, other than those submitted in those propositions: (1) Because, the product of the process or apparatus described in the complainant's patent, was not patentable, as the production of it did not, in the sense of the patent law, involve the exercise of any invention or discovery. (2) Because, if the patented product, and the product manufactured by the respondents are substantially the same, then the original patentee was not the original and first inventor of the improvement, as flake glue was ground at a much earlier period than the date of the alleged invention; and, if the patented product is substantially different from the product manufactured by the respondents, then, it is clear, that the charge of infringement is not proved. Testimony was introduced by the complainant, to show that the ordinary glue of commerce is too moist to be conveniently ground, unless it is first dried, and that the process of drying it injures the quality of the article; but the court is of the opinion, that the suggestion is not entitled to weight, as it is a matter of common knowledge that no such difficulty arises, except with the newly-manufactured article, if the glue is deposited and kept from moisture. Grain and corn, in early fall, contain too much moisture for grinding, but they may be sun-dried for the purpose, and no doubt is entertained, that newly-manufactured glue may be dried sufficiently for grinding, without injury, in the same way. Bill dismissed with costs.

[The case was taken by the plaintiffs, on appeal, to the supreme court, where the decree of the circuit court was affirmed. 97 U. S. 3.]

Case No. 9,608.

In re MILLIKEN.

[2 Am. Law Rev. (1868) 359.]

District Court, D. Tennessee.

WAR—PAROLE—TERMINATION OF WAR—HABEAS CORPUS.

Milliken was arrested by Lieutenant Hugo of the army, by order of General Thomas, for "violation of his military parole." The alleged violation consisted of acts done in August last.

TRIGG, District Judge, issued a writ of habeas corpus for Milliken, and on its return discharged him from custody, on the ground that the parole was limited by the duration of the war, and that the war had terminated.

MILLIKEN (GOODENOW v.). See Case No. 5,535.

Case No. 9,609.

The MILLINOCKET.

BETHEL et al. v. The MILLINOCKET.

[4 Adm. Rec. 83.]

District Court, S. D. Florida. Dec. 24, 1848.

SALVAGE—UNMANAGEABLE VESSEL—TOWAGE—HANGING RUDDER.

[Towing an unmanageable vessel into smooth water and there hanging her rudder, thus making it possible to navigate her, is salvage service.]

[This was a libel by Joseph Bethel and others against the brig Millinocket for salvage services rendered by the sloop America.]

S. R. Mallory, for libelants.

Wm. R. Hackley, for respondent.

MARVIN, District Judge. It appears from the libel, answer and proof in this case that the brig Millinocket, Harper, master, while on a voyage from Havana to New York, on the morning of the 11th inst. struck upon that part of the Florida Reef known as the "American Shoal," distant about 18 miles from this port, where she remained about two hours. During the time she thumped off her rudder and her false keel, wore off a considerable portion of her keel, started her stempost and forefoot, and chafed some of her plank nearly through, and she began to leak considerably. She then came off the reef and was anchored by the master. She parted her chain and the captain let go another anchor, which held her until the arrival of the libellant Bethel in the sloop America, she having discovered the brig ashore early in the morning with her ensign flying at that time union down, made sail for her, and on his arrival offered his assistance to Captain Harper. Before the arrival of Captain Bethel, Captain Harper had made several efforts to hang his rudder, but the sea was so rough that he found it impossible to do so. He employed Bethel in the first instance to pilot him into Key West, and six of his men to aid at the pumps. The brig was got under way and the attempt made to steer and navigate her by means of her sails, but it was found upon the experiments being made that the brig would neither stay nor wear and was unmanageable, owing, as the master supposed, to the injury she had sustained in her keel and forefoot. The master says that it was impossible for

him to have hung the rudder either where the brig lay when she first came off the reef or anywhere in the Gulf, into which she was driven on account of the sea. The wind too blew fresh from the north, driving the brig further out into the Gulf Stream towards the Cuba shore. Finding that he could neither hang the brig's rudder nor navigate her without, he engaged Bethel to place his sloop ahead and to tow him into Key West, or inside the reef. This Bethel did. He towed the brig inside the reef into smooth water, anchored her, and sent down divers, who succeeded in hanging the rudder, after which she was navigated into this port. Bethel now libels for salvage for himself, owners and crew. It is impossible to say that the services of Bethel and his crew do not far exceed in value and in real merit mere pilot service. The facts of the case render it by no means improbable that his services have been the means of saving the vessel and cargo from total loss. The master of the brig admits that he could neither have hung his rudder nor navigated his vessel without it while the sea and wind remained as rough and strong as they were during that time, and it is in evidence that the wind continued from that time to blow equally fresh from the north for more than a week. No other means of bringing the brig into a safe port, under the circumstances, have been suggested to the court, and none other than the means adopted now occur to my mind—that of towing her in by the sloop America. If these facts be so, and there is no reason to doubt them, the brig and cargo were in real peril of total loss, and the services of Bethel have been the means of saving them. In regard to the amount of salvage that ought to be allowed little need be said. I have so often discussed such questions from this place, and the great leading principles and motives which govern me in fixing the amounts of salvage in different cases that come before this court are so well understood by the wreckers and others interested on this coast, that I do not deem it necessary at this time to say anything upon this point. The brig and cargo have been appraised at $21,233.80, including duties. These have not been accurately ascertained, nor is it necessary that they should be, for all the purposes of this decision. I think it may fairly be considered that the brig and cargo are worth, exclusive of duties, $15,000. Fifteen per cent. of this sum, or $2,250, I think is a reasonable salvage to be allowed the salvors. This sum, when divided among the salvors, will not make the share of each unreasonably large.

It is ordered, adjudged and decreed that the libellants have, recover and receive in full compensation for their services rendered the brig Millinocket and cargo, as alleged by them in their libel, the sum of twenty-two hundred and fifty dollars and their costs of suit, and that upon the payment thereof to the marshal he restore said brig and cargo to the master thereof, for and on account of whom it may concern.

Case No. 9,609a.

MILLNER v. SCHOFIELD et al.

[4 Hughes, 258.]

Circuit Court, W. D. Virginia. June, 1881.

PATENTS—INFRINGEMENT OF COMBINATION CLAIMS—MANUFACTURE OF PARTS—JURY DISCHARGED.

[The manufacture and sale of pipes, elbows, and sheets of iron, capable of being used in making up certain parts of a combination apparatus, with the intention that they should be so used, is not an infringement, where such pipes, etc., are not useless except in the combined apparatus, but, on the contrary, are adapted for general use for numerous other valuable purposes. Wallace v. Holmes, Case No. 1,700, distinguished.]

[This was an action at law to recover damages for the alleged infringement of plaintiff's patent by Schofield & Co.]

T. S. Flournoy and M. M. Tredway, for plaintiff.

R. W. Peatross, for defendants.

HUGHES, District Judge (charging jury). The question here is not whether the invention under consideration is novel and whether the plaintiff's patent for it is valid and sustainable under the judicial ordeal. It is simply whether the defendants have infringed it. We all sympathize with Mr. Millner, and would be glad to see him richly rewarded for the time and trouble and study he may have devoted to the subject of this controversy. But what we are called to consider is a question of law. The law is very liberal towards inventors, and congress has done much to encourage and stimulate inventions; it has provided for the issuing of letters-patent for their protection and the possessor of a patent right is made a monopolist as to the article or commodity described in his letters-patent. But it is also due to the general public that protection should be afforded to merchants and manufacturers in their business and trade. It is not shown in the evidence that defendants have done more than manufacture and sell pipes, elbows, and sheets of iron of a sort capable of being used in making up in part the tobacco-curing apparatus claimed to have been invented by the plaintiff, and with the intention that they should be so used. The plaintiff's invention consists of short double furnaces in front of the tobacco house; of two or more flues entering the building from these outside furnaces; of a common flue in the back part of the building connecting the other flues; of a return flue leading from the latter to front of the building and discharging into a chimney outside in front; of cut-offs and valves in the flues, for regulating the heat; and of pans on the flues for holding water in evaporation. The complete apparatus is

elaborate, and is doubtless a valuable invention. It consists, however, not of any newly invented material or form of material, but only of a combination of materials in general use. The flues were made of large stove-piping, not of a peculiar manufacture; and the invention consists in combining this large piping into flues and a chimney, and connecting with them the furnaces, valves and pans described in the plaintiff's patent. It is not pretended that the defendants make and sell either the furnaces or the valves, or the pans. It is not pretended that they make all the parts of the apparatus invented by the plaintiff. It is not pretended that besides furnishing piping, elbows and sheet iron suitable for the flues intended to be put up, they put them up for planters in combination with each other, and with furnaces, valves and pans as invented by the plaintiff. All that is pretended is, that the defendants made and sold some of the materials and parts of the plaintiff's apparatus in form suitable to be used in the construction of his tobacco-curer, expecting them to be so used.

Now, the general principle is well settled that the making and selling of the separate materials for a patented combination is not an infringement of the rights of its inventor. The cases of Prouty v. Ruggles, 16 Pet. [41 U. S.] 336; Byam v. Farr [Case No. 2,264]; Foster v. Moore [Id. 4,978]; Vance v. Campbell, 1 Black [66 U. S.] 427; Eanes v. Godfrey, 1 Wall. [68 U. S.] 78,—and numerous subsequent decisions settle that point. True, there is an obvious exception to this general rule. If two or more persons conspire, one to make one part of a patented combination, and another another part, with the intention that the parts should be afterwards put together—this is an infringement. But in order to render one who makes and sells parts of a patented combination liable for infringement, the parts manufactured must be useless in any other machine, and they must be sold and manufactured with the understanding or intention that the remaining parts are to be supplied by another, and the whole then combined for use. Such is the doctrine of the leading case of Wallace v. Holmes [Case No. 17,100], which was the case of a lamp-burner, wholly useless unless combined with the glass chimney intended to be used with it. Now it cannot be pretended that the piping, elbows and sheet-iron which were made and sold by the defendants here were useless except when combined with short furnaces, valves and pans in the combination invented by the plaintiff. They are articles in very general use for numerous valuable purposes other than in the Millner tobacco-curer. It would be too violent an interference with trade and the rights of merchants and manufacturers, to confine the right of making and selling such articles to the plaintiff and his agents; and so if the jury on the evidence before them in this case should find a verdict for the plaintiff, I should feel constrained to set the verdict aside. It is useless for the trial to proceed further.

The verdict of the jury was then written, finding for the defendants, and signed by the foreman. After which it was entered as having been so found by instruction of the court.

MILL RIVER WOOLEN MANUF'G CO. (HARWOOD v.). See Case No. 6,187.

Case No. 9,610.

In re MILLS.

[7 Ben. 452; [1] 11 N. B. R. 117.]

District Court, S. D. New York. Oct., 1874.

BANKRUPTCY—NOTICE OF SECOND MEETING—DECLARING DIVIDEND.

1. The notice of the second meeting of creditors, under the 27th section of the bankruptcy act [of 1867 (14 Stat. 529)], and the order (form No. 28), is to be sent to all known creditors, whether they have proved their debts or not.

2. At such meeting, when due notice has been given, the whole fund in the hands of the assignee may be distributed, less the necessary amount for expenses and contingencies, unless good cause is shown to the contrary.

In this case, Welsh Brothers, who were named as creditors in the schedules of the bankrupt [William Mills], and to whom notice had been sent as directed by the warrant, failed to prove their debt before the second meeting of creditors. No notice of such meeting was sent to them. At the second meeting a dividend was to be declared. The assignee desired that a portion of the estate should be reserved to provide for the claim of Welsh Brothers, in case it should be proved before the third meeting. The creditors present at such meeting objected to such reservation, and the register decided that it was not a proper case for such a reservation. On request of the assignee, he certified the question to the court.

By I. T. WILLIAMS, Register:

[2] [I, the undersigned register, in charge of the above-entitled matter, do hereby certify that on the 19th day of October, 1874, at an adjourned second meeting of creditors, a majority in number and amount of all the creditors who had proved their claims against said estate being present, and having voted a dividend of seventy-five per cent. upon the claims so proved, thereby dividing about the sum of nine thousand six hundred and thirty-two dollars and ninety cents, and leaving in the hands of the assignee only about the sum of two thousand dollars, Mr. Scott, of counsel for the assignee, objected to such distribution of said assets—claiming that, as it appeared from the schedules filed by the bankrupt, and the proceedings herein, that debts of said bankrupt amounting to about twenty thou-

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

[2] [From 11 N. B. R. 117.]

sand dollars had not been proven, it was not competent at a second meeting to distribute a greater proportion of the assets, or pay a larger percentage than the fund in hand would be sufficient to pay upon all debts set forth in the said schedules, whether proven or not. I overruled the objection, and proceeded to order the dividend pursuant to said vote. But upon application of Mr. Scott, and with the consent of the creditors present, I directed that the dividend warrants should not be delivered till the foregoing question should be decided by the district judge. Wherefore I now certify the question aforesaid, to wit: Is it competent under the provisions of the 27th section of the act, at a second meeting of creditors to dispose of the funds to creditors who have proved their claims, without leaving in the hands of the assignee a sum sufficient to pay a similar percentage upon claims set forth in the schedules of the bankrupt, but which have not been proved, and thereby put it out of the power of the assignee to make a similar dividend upon such unproved claims in case they should be proved before the third meeting?

[The force of the precedent, should the objection prevail, would be to the effect, that in all cases in which a dividend meeting was held under the 27th section of the act, it would be the duty of the register to set apart a certain amount or portion of the assets in the hands of the assignee and ready for distribution, sufficient to pay a similar percentage upon all claims mentioned in the bankrupt's schedules which had not been proven. If this had been the intent of the act, I think it would have been more clearly expressed. The language of section 27 is as follows: "At such meeting, the majority in value of the creditors present shall determine whether any, and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims, which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors, etc." No doubt is entertained that it is the duty of the register to so deduct and retain in the hands of the assignee a sum sufficient to provide for undetermined claims, when in controversy, and for unproven claims when it shall be made to appear probable that, by reason of the distance, or for any other good cause, they have not been proved. That this should be done in a proper case by the register, without the vote, and perhaps in spite of the expressed wishes of the creditors present, is clear from the fact that it is the duty of the court, and not of the creditors, to guard the rights of the absent, nor could the act reasonably be construed to permit the creditors present, by their vote, to divide among themselves the entire fund, to the wrong and injury of such absent creditors as by reason of distance, or for other good cause, had been unable to prove or otherwise establish their claims—especially as the act provides, in effect (section 28), that moneys so paid over to creditors shall not be recalled for the purpose of paying claims of those who should thereafter prove or otherwise establish their claims. The provision above referred to in section 28, seems to interpret the provision above quoted from section 27. It is as follows: "No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter." If section 27 requires the court at the second meeting to retain a sum sufficient to pay an equal amount upon all debts mentioned in the bankrupt's schedules, the exigency referred to in the 28th section, above quoted, could never arise; and hence this provision would be altogether nugatory. This would be construing the act in the very teeth of well-settled principles of judicial interpretation. On the other hand, the provisions of the two sections taken together, indicate, with sufficient clearness, that the whole fund in the hands of the assignee—less such sum as should be retained for expenses and contingencies—should, unless good cause be shown, be distributed at the second meeting. But the case before me does not, in my judgment, come within the rule above suggested. The presumption is, that Messrs. Welsh Brothers, the creditors referred to by the counsel for the assignee, received the notice sent them by the marshal on the 30th day of August, 1873—nothing to the contrary is shown or suggested—as well as the notice of the said adjourned second meeting, which was duly mailed to them at their residence on the 8th day of September, 1874; at all events they have had all such notices as the act provides for. To adjudge this insufficient (without any cause shown) would be to impeach the provisions of the act.][2]

BLATCHFORD, District Judge. The 27th section of the act provides that the second meeting of creditors, which is the one held in this case, shall be, "a general meeting of the creditors, of which due notice shall be given." The order for the second meeting of the creditors, prescribed by form No. 28, directs that the assignee shall give notice of the meeting, "by sending written or printed notices by mail, post paid, of the time and place of said meeting, to all known creditors of said bankrupt," and shall also publish notice of the time and place of said meeting. The notice to be given by mail is not confined to a notice to be sent to all creditors who have proved their debts. Notices must be sent by mail to all known creditors. Creditors who have proved their debts are not all the creditors who are known creditors. Many

[2] [From 11 N. B. R. 117.]

creditors refrain from proving their debts until they learn that there is to be a dividend, and that information ordinarily comes when notice of a second meeting comes. The claim of Welsh Brothers, at the amount of $21,024.46, is set forth in the bankrupt's schedules. They are, therefore, known creditors, and entitled to notice of the second meeting, to be given to them by mail, in order that they may prove their debt. Such notice would naturally be notice to them that there was to be a dividend. I understand the certificate of the register to import that no notice has been sent to them by mail, of the time and place of the second meeting. Because of this defect the second meeting is irregular, and it must be adjourned until the defect can be remedied by sending notice to them, and giving them a sufficient time and proper opportunity to prove their debt.

In accordance with this decision, the adjourned second meeting was held, of which due notice was sent to Welsh Brothers, who, however, did not prove their claim. The creditors thereupon, at the adjourned meeting, voted a dividend of seventy-five per cent. on the debts proved. The assignee objected to this distribution of the assets, claiming that it was not competent, at the second meeting to pay a larger percentage than the fund in hand would be sufficient to pay on all the debts, whether proven or not.

The register overruled the objection, holding that, under the 27th and 28th sections of the bankruptcy act, the whole fund in the hands of the assignee should be distributed at the second meeting, less such sum as should be retained for expenses and contingencies, unless good cause were shown to the contrary, and that here no such cause was shown. On request of the assignee, the question was certified to the court.

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

Case No. 9,611.

In re MILLS.

[11 N. B. R. (1875) 74.] [1]

District Court, S. D. New York.

BANKRUPTCY—PARTNERSHIP—DECEASE OF ONE—RIGHTS OF CREDITORS.

1. B. & M. were partners in business under the firm-name of B. & Co. B. died, and after his death M. carried on the business with the consent of B.'s administrators, the property and assets of the firm remaining in his possession and under his control. He was subsequently adjudged a bankrupt, and an assignee was appointed who took charge of the property. *Held*, that the creditors were entitled to be paid pro rata out of the funds in the hands of the assignee without regard to the fact whether the debts were contracted before or after the death of B.

[Cited in Vetterlein v. Barnes, 6 Fed. 705.]

2. M. was carrying on business on his sole account, having converted the property of his deceased partner to his own use with the knowledge and consent of B.'s administrators.

3. The fact that a creditor may have recourse to the estate of B. for any unpaid balance, does not affect his right to an equal participation in the fund in the hands of the assignee.

4. The administrators may prove in bankruptcy against the estate of M. for any claim they may have, for the interest of B. in the copartnership.

By I. T. WILLIAMS, Register:

I, the undersigned register, in charge of the above entitled matter, do hereby certify and report, pursuant to the order of this honorable court made in this matter, bearing date the 5th day of May, 1874, that I have been attended by counsel for the respective parties, to wit: by Mr. Abbott and Mr. Hodges, for James Bown and Elizabeth M. Mills, and by Mr. Lewis, for Elizabeth Anne Bate, Mary E. Denike, and Thomas Henry Bate. That I have taken all the testimony offered by each and all of said parties, which said testimony is herewith handed up. I am of opinion that the business of the late firm of Thomas H. Bate & Co. was not continued or carried on after the death of said Bate, in March, 1870, by the said [William] Mills, jointly with the administrator and administratrix, or by the legal representatives of the said Bate. The evidence does not satisfy me that there was any contract of copartnership, either expressed or implied, entered into between those parties. The property of the firm was permitted to remain in the possession of Mills, the surviving partner, who, although he continued to carry on the business in the name of the late firm, used and disposed of the property as if it had been his individual property, until it had so far changed its character or become confused with goods acquired by him after the decease of Bate, as to render it inseparable therefrom. It is not necessary here to decide what may be the rights of the administrator and administratrix of Bate in the premises upon an accounting with the surviving partner or otherwise. It is clear that creditors whose debts were contracted in the course of the business since the death of Bate, are entitled to be paid out of the funds in the hands of the assignee. It is equally clear that debts contracted by the firm prior to the death of Bate, are alike entitled to be paid out of this fund. But were it otherwise—were it true, as it is contended, that after the decease of Bate, his administrator and administratrix entered into a contract of copartnership with Mills, and put in all the property that had come to them from the estate of Bate, and had carried on that business jointly with Mills up to the time of the bankruptcy, it is not perceived how that would change the result. It could not in that case be doubted that moneys which had come to the hands of the assignee from the sale of the assets of the firm, would be liable

[1] [Reprinted by permission.]

for all the debts contracted in the business since the commencement of the copartnership between the administrator and administratrix and Mills. It is true that in that case it would be necessary to adjudge the other members of the firm—the administrator and administratrix—bankrupt, in order to get jurisdiction over their interests in the partnership property. But the whole partnership property would nevertheless then, as now, be subject to the payment of the partnership debts contracted since the commencement of such partnership. It would also, in like manner, be subject—in equity—to the debts contracted by the firm of Thomas H. Bate & Co. before the death of said Bate, for it is the same property now, in equity, that it was during the life of Bate, when such debts were contracted; the administrator and administratrix having added nothing to it. But I base my opinion upon the former ground, and hold that Mills has been, since the death of Bate, carrying on business on his sole account. He has converted the property of his deceased partner to his own use; but this has been with the knowledge and consent of the administrator and administratrix, so that the liability of Mills to the administrator and administratrix for this property, or rather the claim of the administrator and administratrix against him for the interest of the intestate in the partnership property, would sound in contract and not in tort—thus vesting in Mills, at law, the entire title to all the partnership property of the late firm of Thomas H. Bate & Co. If, then, the entire assets in the hands of the assignee pertain to the separate estate of the bankrupt Mills, and the estate of Mills as surviving partner of the late firm of Thomas H. Bate & Co. has contributed nothing to this fund, it is clear that it is subject to distribution among the creditors of Mills of an equal degree. It is not material whether the debts proven against this estate are owing by Mills alone, or by Mills jointly with the estate of Thomas H. Bate—in either case Mills is liable for the whole of such claims—and the fact that a creditor may have recourse to the estate of Bate for any unpaid balance, does not affect his right to an equal participation in the fund, in the present state of the case. Should such creditor, after receiving a proportion of his claim from the assets of Mills, afterward receive the balance, or any part of the balance, of his claim from the estate of Bate, that would be his good fortune, and the individual creditors of Mills could not be heard to complain of it, as the assignee would have the usual right of joint debtors to claim from that estate a contribution, in case the creditor should have got more than the half part of his claim out of the estate in bankruptcy, which sum so received, by way of contribution, would come into the fund in bankruptcy for distribution among the creditors. Nor can the creditors who have established claims against the late firm of Thomas H. Bate & Co. claim any preference over the creditors of the individual estate of Mills, as the late firm has contributed nothing toward the fund in the hands of the assignee; the bankrupt Mills, having acquired a legal title to all the interest Bate had in the copartnership property at the time of his death, must be considered to have contributed this whole fund from his personal estate. Whatever claim the administrator and administratrix may have against Mills for the interest of Bate so acquired, they are at liberty to prove in bankruptcy and participate in the dividend.

The testimony of Mills and others going to establish what counsel have called a continuation of the partnership after the death of Bate, has not been overlooked, nor is any distrust intended to be thrown upon the good faith of Mills. But a close analysis of this testimony will show that he had conceived the impossible thing of a partnership with a dead man. I don't understand him to mean to testify that he was in partnership with the administrator and administratrix personally. He seems to think that with their consent he could continue the partnership with his deceased partner. But it is obvious that no such partnership could by any legal possibility exist.

Having come to the conclusion that all the claims for which Mills is liable—whether individually or jointly with the estate of Bate—are payable ratably in their statutory order out of the funds in the hands of the assignee, I proceeded to examine the respective claims, pursuant to the directions of the order aforesaid. Touching the claims referred to in the petition, being the only disputed claims, I see no good reason to doubt the validity and justness of the claim of James Bown for two thousand six hundred and nine dollars and fifty-two cents, and interest up to the day of the adjudication of bankruptcy. It is a claim that accrued after the death of Bate, for which Mills only is liable, and it is properly proven in bankruptcy. The claim of Elizabeth M. Mills, the wife of the bankrupt, for one thousand and fifty-seven dollars and three cents, and interest up to the day of the adjudication of bankruptcy, is properly proven, and there is no evidence that should invalidate it or throw any suspicion upon its justness. It accrued after the death of Bate, and it is a claim against Mills alone. The claims of Mary E. Denike and Thomas Henry Bate for two thousand nine hundred and fifty-seven dollars and forty-one cents each, and interest up to the day of the adjudication of bankruptcy, rest upon a joint judgment in their favor against Mills as surviving partner of Thomas H. Bate & Co. The claims accrued during the lifetime of Bate, and were prosecuted to judgment after his death. These claims are properly proven, and I see nothing in the testimony or proceedings before me that should invalidate or

cast suspicion upon them. The claim of Elizabeth Anne Bate, widow of the said Thomas H. Bate, deceased, for three thousand two hundred and sixty-two dollars and thirty-seven cents, and interest up to the day of the adjudication of bankruptcy, has been attacked by other creditors and considerable suspicion has been thrown upon it by the testimony. It is claimed to have accrued in 1861 or 1862, during the existence of the firm of T. H. Bate & Co., from a loan of money made by her to the firm through the agency of the executor of her father's estate. This attack is made principally by the counsel for Mrs. Mills, who was also solicitor for the bankrupt, who filed the schedules in bankruptcy which specify this claim among the liabilities of the bankrupt. Mills, when upon the stand, is not interrogated concerning this claim by either counsel. It appears that prior to the bankruptcy, to wit, in July, 1873, a judgment in the supreme court of this state was obtained by default against Mills alone for this claim, which judgment was, after the first proof thereof had been filed in bankruptcy by an ex parte order of that court, amended so as to be now against Mills as surviving partner, etc. If this claim be invalid, there must have been collusion between Mrs. Bate and the bankrupt as long ago as July, 1873. But there is no proof before me of any such collusion, and the testimony as well as all the proceedings before me render any such collusion quite improbable. I am therefore of opinion that her claim should be sustained and allowed, and that she should be paid ratably out of the fund.

The whole amount of the assets that have come to the hands of the assignee, appears to be fourteen thousand five hundred and thirty-six dollars and fifty-seven cents ($14,536.57), all of which I am of opinion are the individual assets of William Mills. I therefore recommend the entry of an order accordingly.

BLATCHFORD, District Judge. Let an order be entered according to the recommendation of the register.

Case No. 9,612.

In re MILLS.

[17 N. B. R. 472.] [1]

Circuit Court, S. D. New York. April 6, 1878.

BANKRUPTCY—RECEIVER OF CREDITOR—RIGHT TO PROVE DEBT—DEPOSITION.

A receiver of the property of a creditor of the bankrupt is an assignee of the debt due to such creditor and may prove it in the bankruptcy proceedings; but the proof must be supported by the deposition required by general order No. 34. The deposition may, in the first instance, be ex parte, as in form No. 22.

Hearing upon petition for re-examination of proof of B. Reilly, receiver. The assignee claims the examination of the original creditor. The receiver declares himself ready to submit to an examination. The assignee contends that the original creditor is the person to whom the bankrupt [William Mills] owed the debt at the time of the adjudication. The assignee claims, secondly, that the proof should be supported by the deposition of the original creditor under rule 34. The receiver holds that the claim, having been transferred to him by operation of law, is not within rule 34. The assignee also contends that Reilly, receiver, is not entitled by law to prove the debt in this bankruptcy. It is admitted that the original claimant resides in England. The assignee moves to expunge the claim. The register asks if there is any objection to his making such order as he may see fit in the matter. Mr. Whitney declines to answer, upon the ground that the register has no authority to require an issue till he decides the claim should be expunged, and that the question of the register is not pertinent until his ruling is made. The assignee objects to the register making any order except to expunge or diminish the claim. The register says he will reserve his decision.

By J. W. LITTLE, Register:

I think, in the re-examination of the claim filed by Reilly, receiver, in the above matter, that the motion that I should require the original claimant to present himself for examination or cross-examination by the assignee should be denied. And, further, I do not think this is a case where a deposition should be required by owner of claim at time of commencement of proceedings, according to G. O. No. 34.

W. F. Scott, for assignee.

Mr. Whitney, for receiver.

BLATCHFORD, Circuit Judge. I think that Reilly, as receiver, is an assignee of the debt, and as such assignee may prove it. But, as it was assigned before proof, the proof must, and to make it receivable at all, be supported by the deposition required in general order No. 34. The deposition may in the first instance be ex parte, as in form No. 22. The proof was irregular because not supported by such deposition, and should on that ground be expunged.

[1] [Reprinted by permission.]

Case No. 9,612a.

MILLS v. The BAY STATE.

[See Case No. 1,148.]

Case No. 9,612b.

MILLS v. CHAPMAN et ux. (two cases).[1]

Circuit Court, D. Connecticut. Dec. 7, 1876.

HUSBAND AND WIFE — PURCHASE OF LAND BY WIFE—JOINT NOTE—HOW PAID.

[The mere giving of a joint note by husband and wife in part payment for land purchased by

[1] [Not previously reported.]

the wife does not subject such land to liability for the husband's debts if the note is afterwards satisfied out of the wife's separate estate, which the husband has never assumed to control.]

[This was a bill in equity before the superior court of Hartford county, Connecticut, by Elihu Mills against Samuel J. Chapman and wife, to set aside as in fraud of creditors an alleged conveyance of certain real property by Chapman to his wife. The cause was removed to this court, and respondents Chapman and wife filed their bill to set aside an execution levied upon said real property in satisfaction of a judgment at law in the said superior court.]

SHIPMAN, District Judge. On July 23, 1866, Elihu Mills, of Bloomfield, in the county of Hartford, in this state, brought a suit before the superior court for said Hartford county against Samuel J. Chapman, now of Springfield, in the state of Massachusetts, upon a note of said Chapman to the order of G. F. Filley, dated July 19, 1859, for the sum of $700, payable on demand, with interest, and endorsed by the said Filley to the said Mills. Upon this suit the real estate in said Bloomfield, hereafter described, standing in the name of Jennette F. Chapman, wife of said Samuel J. Chapman, was attached as the property of the defendant. On Nov. 15, 1870, judgment was rendered for the plaintiff for the sum of $1,175.53 damages and $175.26 costs, to be recovered only against the property which had been attached. Execution was issued upon this judgment and levied upon said real estate, and the same was set off to said Mills in part satisfaction of said execution. The value of said land is $1,200. Said Mills thereafter brought his bill in equity against said Chapman and wife before the superior court for Hartford county, alleging in substance that said real estate was purchased in fact by said Samuel J. Chapman, being insolvent, and was conveyed to his wife in fraud of his creditors, and was as against his creditors the proper estate of the husband, and praying that the title to said land should be vested by proper decree in the said Mills, the execution creditor, who had obtained a valid title thereto by virtue of the levy of said execution. This bill was served July 11, 1873, and was removed to this court. On July 23, 1873, Samuel J. Chapman and wife brought their bill in equity before this court, alleging that said property was the proper estate of said Jennette F., that the levy of said execution created a cloud upon her valid title, and praying that the cloud created thereby might be removed by decree of this court. Both suits have been heard at the same time by agreement. On April 10, 1858, J. Seymour Brown, as executor, conveyed to the said Jennette F. Chapman, for the sum of $900, then paid to said grantor, a piece of land in said Bloomfield, containing 14 acres, bounded north on land of T. B. Filley, east on land of Anson Porter, south on land of Eli Brown, and west partly on land of said Jennette F. and partly on the highway, which piece adjoined and partly surrounded other land which she previously owned. At the time of the purchase, Mrs. Chapman was desirous that it should be purchased, as it adjoined her own land, and intended to have the title and control of the whole land in her own name. At this time Samuel J. Chapman was in business in Chicopee, was pecuniarily embarrassed, and shortly thereafter failed. Seven hundred dollars of the $900 which were paid to the grantor for the land were borrowed of William H. Chapman, a brother of Samuel J. Chapman, upon his and his wife's joint note. It did not appear from what source the other $200 were paid. The $700 note was paid in May, 1865, by Jennette F. Chapman, from her sole and separate estate. The money, note, and bonds which went to pay this $700 note were obtained by Mrs. Chapman from personal property which she obtained by inheritance from her father and mother, who died respectively in 1856 and 186–. The bulk of her property came from her father's estate. This property was never taken possession of by Samuel J. Chapman as husband or as trustee for his wife. He never assumed any control of his wife's personal estate, or of the dividends thereon, but all his interest and title thereto was by clear and unequivocal acts voluntarily given and relinquished to his wife, and became her sole and separate estate. I do not find that this land was purchased in fact by the husband at the time of the execution of the deed, and settled upon his wife to defraud existing or future creditors, or that the conveyance to the wife was to delay, hinder, and defraud creditors of the husband. There were suspicious circumstances at the time the purchase was effected, and subsequently thereto, which, if they could have been fortified by more proof, might have brought me to the conclusion that the property was in fact purchased by the husband and settled upon the wife in fraud of present and future creditors, and that the signature by the wife of said $700 note was a mere security to her brother-in-law for the payment of his debt. But, in view of all the facts, I cannot find affirmatively such a conclusion, and therefore find that the material allegation in the bill of Elihu Mills is not true. The result is that the record title of the land, which was and is in Jennette F. Chapman, is not found to have been invalid as against the creditors of her husband. The statutes of the state of Connecticut in regard to the property of married women are hereby made part of this finding. The bill of Elihu Mills is dismissed, without costs. Let there be a decree without costs, upon the bill of Samuel J. Chapman and wife that Elihu Mills execute a quitclaim deed of said premises to said Jennette F. Chapman.

MILLS (ISH v.). See Case No. 7,104.

MILLS (MAIN v.). See Case No. 8,974.

MILLS v. The MARY E. PEREW. See Case No. 9,207.

Case No. 9,613.

MILLS et al. v. The NATHANIEL HOLMES.

[1 Bond, 352.] [1]

District Court, S. D. Ohio. April Term, 1860.

COLLISION — LYING AT WHARF — PRESUMPTION — ORDINARY CARE—PROPER SKILL AND CARE—PROXIMATE CAUSE OF INJURY.

1. Where damage is done by a boat in motion to one lying at a wharf, the presumption of wrong is against the moving boat, and to avoid liability it must appear that the greatest caution and vigilance were observed.

[Cited in The Scotia, 10 Fed. 687.]

2. Ordinary care under such circumstances will not protect the boat which commits the injury from responsibility.

3. No inference of negligence can be deduced from the fact that a steamboat lying at a wharf has a loaded barge alongside of her.

4. It is a paramount law of navigation that collisions are always to be avoided when it is practicable to do so, and the fact that one boat is in fault, will not justify another in the infliction of an injury that could have been avoided by the observance of proper skill and care.

5. In determining the question of fault with the view to the ascertainment of liability for an injury, the proximate cause of the injury must be regarded.

[Cited in Pope v. Seckworth, 47 Fed. 832.]

[This was a libel by James W. Mills and others against the steamboat Nathaniel Holmes, for damages sustained in a collision alleged to have been due to the negligence of the respondents.]

Lincoln, Smith & Warnock, for libellants.

E. Mills, for respondents.

OPINION OF THE COURT. This suit is prosecuted by the libellants, the owners of the steamboat Cuba, against the owners of the steamboat Nathaniel Holmes, to recover damages for a collision, caused as alleged by the sole fault of those having charge of the Holmes. It is not the usual case of an injury produced by colliding boats in motion, in which truth is often buried deep in a mass of conflicting evidence, and in which it is a hopeless task to ascertain where the fault lies. There is, in fact, very little difficulty in coming to a conclusion upon the evidence, and the main duty of the court is to determine the legal liability of the respondents upon the state of facts as proved. In this aspect of the case, it will not be necessary to notice specially the allegations of the parties in their pleadings, or to attempt an analysis of the great mass of depositions which have been submitted by the parties.

The material facts involved in the case, and which it may be assumed are substantially proved by the evidence, are that about nine o'clock in the evening of December 4, 1856, the Cuba, a stern-wheel boat, then one of a line of packets running between Louisville and Nashville, in an upward trip, reached the landing at Smithland, on the Ohio river, a short distance below the mouth of the Cumberland, and was lying at the wharf-boat, its bow being on a line with the upper end of the wharf-boat, in the act of receiving freight for Nashville and other points on the Cumberland. A barge laden with coal, belonging to the owners of the Cuba, was lashed to the outer or larboard side of the steamer and in close proximity to it. The wharf-boat was two hundred and thirty-seven feet in length, and the Cuba with its wheel about one hundred and seventy feet, thus leaving an unoccupied space at the lower portion of the wharf-boat, including a gangway, of about sixty-seven feet. The Cumberland river was at a high stage and there was sufficient depth of water along the whole line of the larboard side of the wharf-boat to enable a steamer of the largest size to land without danger of getting aground. It was a clear starlight night, the wind blowing somewhat fresh, but not with such violence as to render navigation difficult or dangerous. There were lights on the wharf-boat, and also the usual lights on the Cuba. The steamer Holmes in passing up the Ohio between ten and twelve o'clock in the night mentioned, had occasion to land at Smithland for the purpose of putting out some passengers. The object of the pilot or master was to bring the Holmes in contact with the barge lying alongside of the Cuba, and thus enable the passengers to get ashore. In this attempt the bow of the Holmes first struck the barge, but was carried out into the stream by the action of the current or some other cause and swung round, and the boat was again brought "head on" against the barge. The passengers were landed and the Holmes proceeded immediately up the river.

It appears very satisfactorily from the testimony, that some pieces of timber or scantling, which had formed a part of the frame work of a flat-boat some five or six feet in length, had been carried by the current and were lodged under the larboard guard of the Cuba and at a right angle with it, and were thus lying between the steamer and the barge. By the force of the blow of the Holmes in striking the barge, the ends of these timbers or scantling, which were some four or five inches square, were driven with such force against the hull of the Cuba that they penetrated the planks, which were two and a half inches in thickness, thereby making three separate holes or openings between the knuckle keelson and the binding streaks and the upright ribs or timbers of the hull of the boat. Through these openings the water entered freely and with great force.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

The proof establishes the fact, that all reasonable efforts were made by the officers and crew of the Cuba to stop the inflow of the water, but in this they were unsuccessful. And the boat, having broken the lines by which it was made fast to the shore, floated from the wharf, and sunk in deep water some distance below. The cargo of the Cuba, it seems, was nearly all transferred to the barge before the boat sunk, and what remained in the boat was reclaimed without material injury. There is, therefore, no claim in this action for damages in the loss of cargo. The boat was raised some time after the collision at an expense of $2,800, and was subsequently sold for $3,630, leaving to the owners, after deducting incidental expenses, the sum of $534. They claim as damages the value of the boat at the time of the injury, subject to the deduction of the net proceeds of sale. The answer of the respondents denies that there was any fault or negligence in landing the Holmes, and affirms that they were in no way responsible for the injury sustained by the Cuba. The outline of the case, thus briefly presented, is sufficient to indicate the only points for the decision of the court. That a serious injury has been sustained by the libellants there can be no doubt; and the inquiry is whether the law applied to the facts will give redress for such injury.

The Cuba, at the time this injury was inflicted in the prosecution of its lawful business, was lying in its proper place at the Smithland wharf. And the decisions are numerous to the effect, that where damage is done by a boat in motion to one thus at rest, the presumption of wrong is against the moving boat; and to avoid liability it must appear that the greatest caution and vigilance was observed. Ordinary care under such circumstances will not protect the boat which commits the injury from responsibility. This principle is well illustrated in the case of Culbertson v. Shaw, 18 How. [59 U. S.] 385. The action was brought to recover the value of a flat-boat and its cargo lost by a steamer coming in collision with it. The flat-boat was moored at the shore in a proper place when the injury was inflicted. The supreme court held, that the steamer was liable for the damage. Judge McLean, who delivered the opinion of the court, says: "When a steamer is about to enter a harbor, great caution is required. There being no usage as to an open way, the vigilance is thrown upon the entering vessel. Ordinary care under such circumstances will not excuse a steamer for a wrong done. A vessel tied to the shore is helpless. No movement can be made by it to avoid an entering boat; therefore the whole responsibility rests on such boat." In the case of Vantine v. The Lake [Case No. 16,878], Judge Grier held, "that a vessel which moves alongside of another at a wharf or elsewhere, becomes responsible to the other for all injuries resulting from her proximity, which human skill or precaution could have guarded against."

Judge Parsons, in his treatise on Maritime Law, recently published, says: "If a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been. The rule of law would seem to be the same where a vessel aground is run into." 1 Pars. Mar. Law, 201. And in the case of The Lochlibo, 3 W. Rob. Adm. 310, Dr. Lushington says: "As the Lochlibo ran into a vessel (at anchor), which was incapable of helping herself, it is her duty to prove, in order to exonerate her from blame, that the collision arose from circumstances which it was utterly out of her power to prevent, or that it was the fault of the pilot on board, or that it arose from the default of those on board the Aberfoyle." There are numerous other cases and authorities in support of the doctrine stated, which it is unnecessary specially to notice. I pass, therefore, to the inquiry, whether the present case falls within the operation of this principle; in other words, was every possible precaution used by those in charge of the respondents' boat to avoid a collision.

That the Holmes was in fault, under the circumstances of the case, in attempting a landing against the barge of the Cuba, seems to admit of no doubt. As before stated, there was an unoccupied space of sixty-seven feet in the lower part of the wharf-boat, within which a landing could have been effected by the Holmes without the danger of coming in collision with the Cuba or the barge attached to it. There is some evidence to the effect that it was proper and according to the usages of navigation for the Holmes to land at the barge for the purpose of discharging passengers, but the weight of the evidence is, that it was not only practicable, but safer to have landed on the wharf-boat. There was ample room for this purpose, and there is not the remotest probability that any injury would have resulted if this course had been pursued. That it was practicable, as well as safe, is proved by the fact that the steamer Winnifrede came up immediately after the Holmes, and made a landing on the wharf-boat without difficulty and without injury. But the Holmes was guilty of a still more inexcusable fault in not observing due care and caution in the manner in which the landing was effected. On this point, much testimony has been taken by the parties, and there is some apparent conflict in their statements. The witnesses for the libellants state strongly and without hesitation, that the Holmes in landing struck the barge with unusual force. A large proportion of these witnesses were either passengers on the Cuba, or employed on the wharf-boat, having no connection with the Cuba, and with the most favorable oppor-

tunity of knowing the character of the landing made by the Holmes. There is no ground for the supposition that these witnesses were under any mistake as to the facts to which they have testified, or that they have not stated those facts with fairness and candor. Nor does it follow, as a necessary inference, that the witnesses for the respondents who state that the landing of the Holmes was not with unusual force have corruptly falsified the facts. They were on the moving boat at the time, and the shock of the collision would not be so sensibly felt by them as by those who were on the boat which received the blow. But apart from the evidence of the witnesses referred to, as to the landing of the Holmes, there are other facts showing conclusively the great force with which that boat struck the barge of the Cuba. It is in evidence that the lower end of one of the fenders on the Cuba was broken off by the force of the blow, and, moreover, that several of the stanchions of the Holmes were shattered. But more conclusive still is the fact before referred to, that the timbers or scantlings were driven through the planks of the Cuba. No supposition is reconcilable with this result, than that the Holmes came against the Cuba's barge with very unusual force. Nor can the conclusion be avoided, that there was a want of caution and vigilance in making the landing, that throws upon the Holmes the responsibility resulting from the collision.

An attempt has been made by the respondents to prove negligence or want of due caution on the part of the Cuba, to protect them from liability. But the evidence fails entirely to sustain this point. It is insisted that the Cuba was in fault in having a loaded barge alongside at the Smithland wharf. The proof, however, does not show that this was a violation of any of the usages of navigation; nor can the court see anything in the fact from which any inference of negligence can be deduced. The respondents also insist that the libellants' boat was not provided with a sufficient number of fenders for protection against collision, and other accidents of that character. The proof is not clear that the Cuba had more than three fenders on the larboard side, at the time of the collision, but in this connection it is proved that fenders are not regarded as necessary on boats navigating the Cumberland river. This, however, can not be viewed as material in this case, as fenders are used for the protection of the guards of the boat, and are of no avail for the protection of that part of the hull of a steamer in which the injury in question was sustained. Equally unavailing is the defense set up, that the Cuba was deficient in strength to meet the perils of the navigation in which it was employed. The evidence, however, is, that the boat had been thoroughly overhauled and repaired a few weeks only before the collision, and was then as staunch and sound as boats of the same class usually are in that trade.

But the defenses indicated, if fully sustained by the facts, are not available to the respondents in this action. It is a paramount law of navigation, that collisions are always to be avoided when it is practicable to do so; and the fact that one boat is in fault will not justify another in the infliction of an injury that could have been avoided by the observance of proper skill and care. The Cuba was entitled to protection from a wrongful act on the part of the Holmes, even if fault or negligence could be imputed to the former. If it be conceded that the barge was improperly at the side of the Cuba, or that there was a deficiency of fenders, or that the boat was weak and frail in its structure, no one or all of these facts would afford a justification for the wrong-doing of the Holmes. The law is well settled that in determining the question of fault with a view to the ascertainment of liability for an injury, the proximate cause of the injury must be regarded. And, in this case, if that proximate cause is found in the improper attempt of the Holmes to land at the Cuba's barge, instead of the wharf-boat, or the inexcusable violence with which it was landed agains the barge, the respondents are not shielded from liability by proof of negligence or fault on the part of the other boat which had no connection with the act which produced the injury. The law on this subject is well stated by the supreme court of Vermont in the case of Trow v. Central R. Co., 24 Vt. 487, in these words: "Therefore, if there be negligence on the part of the plaintiff, yet, if at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury." There are many other cases which sustain this view of the law, to which I will merely refer, without specially noticing them. 27 Mo. 95; 4 Ohio St. 476; 3 Ohio St. 195.

Upon the whole, I can see nothing in the facts or the law of this case to shield the respondents from liability for the injury sustained by the libellants in the loss of their boat. There was certainly great fault, if not positive recklessness in the landing made by the Holmes, which was the immediate cause of the injury. And it is equally clear, that no negligence is attributable to the Cuba, which can justify the misconduct of the other boat, or which calls for a division of the damages on the ground of mutual fault. The weight of the testimony on that point shows the value of the Cuba to have been $10,000. The net proceeds of the sale of the boat being deducted from this sum, a decree will be entered for the balance, with interest at six per cent. from December 4, 1856.

Case No. 9,614.

MILLS v. RUSSELL.

[The case reported under above title in 18 Int. Rev. Rec. 203, is the same as Case No. 17,247.]

Case No. 9,615.

MILLS et al. v. SMITH.

[4 Biss. 442.] [1]

Circuit Court, N. D. Illinois. May, 1865.[2]

EJECTMENT—BONA FIDE PURCHASER—RECITALS—NOTICE.

1. A party can protect himself as a bona fide purchaser, either by showing payment by himself without notice, or that he took through some bona fide purchaser without notice.

2. A recital in a recorded deed, the grantor in which had no record title to the property, does not operate as constructive notice; it is different where the party sees or has actual notice of such recital.

Action of ejectment for land in Cook county.

J. H. Knowlton, for plaintiff.

DRUMMOND, District Judge (charging jury). The land in controversy was patented originally to Zeba Parmlee. The plaintiffs claim title by a deed from Zeba Parmlee to Edwin A. Lacey in February, 1837, which deed, however, has never been recorded. It is shown by the evidence that the land descended to Andrew H. Lacey as the heir of Edwin A. Lacey, and he devised the property to one of the plaintiffs, Flora M. Mills, wife of Josiah M. Mills. This is the title of the plaintiff, and, independent of all questions connected with the recording laws, of course it would be a valid title.

The defendant's title consists of a deed from Zeba Parmlee to James Lombard, dated the 14th of August, 1854, and recorded the 28th of that month and year, and a deed from James Lombard to defendant, dated December 7, 1855. The deed from Parmlee to Lacey not being recorded at the time that the deed was made by Parmlee to Lombard, the first question to be determined is, was Lombard a purchaser protected by the recording laws?

They provide that every deed shall take effect from the time it is filed for record, as against subsequent purchasers without notice. This deed from Parmlee to Lacey not having been recorded in August, 1854, the first question to determine is, was James Lombard, the grantee in this deed, a purchaser without notice of the previous conveyance made to E. A. Lacey, and did he pay for the land without knowledge of the existence of the previous transfer?

You will bear in mind that as Benjamin Lombard was the agent of James Lombard in the purchase, notice to Benjamin is notice to James Lombard, because notice to the agent is notice to the principal. It is necessary that Benjamin Lombard should have had notice of the previous conveyance, or of some fact which satisfied him that there had been a valid transfer of the land, or a valid incumbrance,—some fact sufficient to put a prudent man upon inquiry; in other words, there must have been good faith on his part when he made the purchase.

If he was a purchaser in good faith, then it makes no difference whether [Nathaniel] Smith was or not, because his purchase would protect Smith, the latter having purchased from him. But if he was not a purchaser in good faith, the next question is, did Smith purchase in good faith? and the same rule is applicable substantially to him as to Benjamin Lombard, the agent of James Lombard. It is necessary that he should have purchased the land and paid the money for it without knowledge of this previous deed. If he knew of the existence of this deed, or had knowledge of any fact which would satisfy a prudent man or put him upon inquiry that there was a valid sale made to Edwin A. Lacey before he paid the purchase money, then he could not be considered a purchaser in good faith.

But it is contended on the part of the plaintiff that as there was a deed from Zeba Parmlee to Andrew H. Lacey on record on the 25th of November, 1854, and as that recited that he had made a conveyance or transfer of the land to E. A. Lacey many years before, it was constructive notice to the defendant of the conveyance.

I am not prepared to admit that as a rule of law. If he had read this deed or the record of it, or had seen it,—if, in other words, he had actual notice;—then, of course, he would be bound by it; but I hardly think that the fact that it was simply on record, though he never saw it, would be constructive notice to him so as to prevent him from being a bona fide purchaser. At the time this deed was made Mr. Parmlee really had no title to the land, even upon the record, because the deed to James Lombard was recorded the 28th of August, 1854, before the deed was made to A. H. Lacey, and it would be a hard rule, it seems to me, to hold that a recital in a deed attempting to convey land, which a man had no right to convey should operate as constructive notice to a third party. I do not understand any of the cases have gone thus far; therefore, the court will instruct you that it was necessary that Mr. Smith should have had actual notice of the previous deed, or of some fact which would satisfy a prudent man that there had been a transfer of the land, before he paid the purchase money, bearing in mind that the defendant can protect himself either by showing that Lombard is a bona fide purchaser

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

[2] [Affirmed in 8 Wall. (75 U. S.) 27.]

without notice, or that he himself is a bona fide purchaser without notice.

Verdict for defendant.

NOTE. The general rule is that a purchaser has constructive notice only of such facts relating to the land as appear in the muniments of title, which it is necessary for him to inspect, in order to ascertain the sufficiency of such title. 3 Washb. Real Prop. 596, and a large collection of authorities in note 4. As where a prior unrecorded mortgage is recited in a second mortgage, the grantee takes subject to same. Baker v. Mather, 25 Mich. 51. See, also, Polk v. Cosgrove [Case No. 11,248.]

[A writ of error was sued out in the supreme court, where the judgment of the court below was affirmed. 8 Wall. (75 U. S.) 27.]

MILLS (STOBAUGH v.). See Case No. 13,461.

MILLS (UNITED STATES v.). See Case No. 15,777.

Case No. 9,616.

MILLS v. WILSON

[2 Cranch, C. C. 216.] [1]

Circuit Court, District of Columbia. Nov. Term, 1820.

ATTACHMENT—AFFIDAVIT—NOTE INDORSED—PRODUCTION OF NOTE.

Upon an attachment, issued by a justice of the peace, under the Virginia act of 26th December, 1792 (section 6), if the plaintiff's claim arise, in part, upon a note of the defendant, taken up by the plaintiff, who was the indorser, the plaintiff's own affidavit is not sufficient evidence of the debt, without producing the note.

This was an attachment issued by a justice of the peace, under the act of Virginia of the 26th of December, 1792 (section 6). The plaintiff [W. N. Mills] offered his own oath as to the debt, stating that it arose, in part, upon the defendant's note, which had been indorsed by the plaintiff, and by him taken up; but did not produce the note. His affidavit stated that the defendant [William Wilson] was indebted to him in, at least, the sum of $1,000.

THE COURT (nem. con.) required the plaintiff to produce further evidence of his claim, not being satisfied with the affidavit.

MILLS, The AROMA. See Case No. 2,041.

MILLS COUNTY (BROOKS v.). See Case No. 1,955.

MILLS, The LILLIE. See Case No. 8,352.

MILLWARD (HODGSON v.). See Case No. 6,568.

MILLWARD (SEDGWICK v.). See Case No. 12,618.

MILN (SMITH v.). See Case No. 13,081.

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

Case No. 9,617.

MILNE et al. v. HUBER et al.

[3 McLean, 212.] [1]

Circuit Court, D. Ohio. July Term, 1843.

STATUTES—REPEAL—REPEAL OF REPEALING ACT—SPECIAL ACT—CONTRACTS—PROHIBITED BY LAW—REMEDY—CONSTITUTIONAL LAW—EX POST FACTO—RECOVERY—SEVERAL DEFENDANTS—EX DELICTO—EX CONTRACTU.

1. An act, in so far as it is repugnant to a prior act, repeals it.

[Cited in State v. Mines, 38 W. Va. 131, 18 S. E. 470.]

2. But the repeal of the last act, does not give vitality to the first act.

3. An express statute declares the repeal of the repealing act, shall not give force to the act repealed.

4. And this statute applies equally to repealed acts, whether repealed expressly or by a subsequent and repugnant act.

5. A contract growing out of an illegal transaction, or which is connected therewith, cannot be enforced.

6. The repeal of a prohibitory act does not make valid contracts entered into against law.

[Cited in Banchor v. Mansel, 47 Me. 62; Nichols v. Poulson, 6 Ohio, 309.]

7. But the legislature may give a remedy on a contract founded on a valuable consideration, where no remedy exists.

8. It may not only remove the prohibition, but where justice and good conscience require, suit may be authorised.

9. Such a law does not impair the obligation of the contract—is not an ex post facto law, nor does it in any respect conflict with the federal constitution.

10. That such a law is special is no more objectionable than every special law which gives corporate powers to an association of individuals.

11. In an action of tort, a recovery may be had against a part of the defendants.

12. But in an action ex contractu, the recovery must be against all or none.

[Cited in brief in Shapleigh v. Abbott, 41 Me. 174.]

[This was an action by Milne & Co. against Huber and others.]

Chase & Miner, for plaintiffs.

Fox & Schenck, for defendants.

OPINION OF THE COURT. This action is brought under the statute against the defendants as stockholders of the Washington Library Association, which was engaged in unlawful banking. Four thousand dollars of the notes in circulation, issued by said institution, and held as collateral security for the payment of three thousand dollars, were given in evidence. Also the following bill of exchange: "$3000.00 Gentlemen, Cincinnati, August 5th, 1840. Sixty days after date pay to the order of E. L. Jones, cashier, three thousand dollars, and charge to account of your ob't ser't. John Phillips. Directed to Messrs. Sylvester & Co. Indorsed, E. L. Jones, cashier, G. J. Slocum."

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

By the 9th section of the act to prohibit the issuing and circulating of unauthorised bank paper, passed 27th January, 1816 [Laws 1816, p. 10], it is declared, "that all bonds, bills, notes, or written contracts, given to an unauthorised bank, or given to any person or persons, for the use of such bank, &c. shall be void," &c. The 10th section provides, "that every stockholder, shareholder, or partner, hereafter interested in any such bank, shall be jointly and severally answerable, in their individual capacity, for the whole amount of the bonds, bills, notes and contracts of such bank," &c. The 12th section authorises suit and judgment against any part or the whole of the persons interested in the bank. By the 23d section of the act of 28th January, 1824 [Laws 1824, p. 358], it is provided, "that no action shall be brought upon any notes or bills, hereafter issued by any bank, banker, or bankers, intended for circulation, or upon any note, &c. made payable to the bank, unless such bank, &c. shall be incorporated, &c. but that all such notes shall be held and taken in all courts as absolutely void." The 8th section of the act of the 23d of March, 1840 [38 Ohio Laws, p. 117], repeals so much of the above section, "as prohibits actions to be brought upon any notes or bills, issued after the passage of said act, by any bank, &c. unless it shall be incorporated, &c., and which declares that such notes shall be void." So far as the act of 1824 was repugnant to that of 1816, it was repealed. The repugnancy consists in the latter act taking away the right of action given against the stockholders, &c. by the act of 1816. And the question here arises whether the repeal of the act of 1824 revives that part of the act of 1816 which was repealed by it.

By a general act, passed 14th of February, 1809 [Laws 1809, p. 162], it is provided, "that whenever a law shall be repealed, which repealed a former law, the former law shall not thereby be revived unless specially provided for." This provision, it is contended, applies only to laws expressly repealed, and not to an appeal by the repugnancy of the latter act. That the repugnancy does not repeal, but suspends the prior act, which is restored to its full vigor on the repeal of the repugnant act. This distinction seems not to be sustained. Whether the repeal be express or by reason of a repugnant act, subsequently passed, cannot be material in regard to this question. If the repealing act be repealed, it cannot, under the statute cited, give life to the act first repealed. So much of the act of 1824 as prohibited actions on the notes or bills of unauthorised banks, and which declares such notes and bills void, having been repealed by the act of 1840, and such repeal not having given vitality to such parts of the act of 1816 which were repugnant to the act of 1824, we must construe the act of 1816 as it now stands. In this view, sections 11, 12, 13 and 14, of the act of 1816, which regulate suits against the stockholders of an unincorporated bank by the bill-holders, are repealed; and we are to inquire whether, under other sections of the act, the bill-holders, or the holder of the bill of exchange, set out in the declaration, can maintain an action.

There is no express prohibition of an action by the bill-holders; but the act inflicts a penalty for issuing such bills, and for receiving or offering them in payment. This makes the whole transaction unlawful, and this is a fatal objection to the action. If the contract arises out of an illegal act, or is connected therewith, there can be no recovery upon it. Looking only to the act of 1816, the bank organization was against law, the issuing of the notes was prohibited under a penalty, and the receiving and offering such bills in payment subjects an individual to a penalty. Now every step taken in the creation and circulation of these notes or bills, was unlawful, and consequently no action can be brought on them. The act of 1816 was a public act, and the plaintiffs, when they received the bills in question, had notice that they were created and put in circulation in violation of law. The same objection applies to the bill of exchange. The act of the 23d of March, 1840, repealed the act establishing "The Washington Library Association," and in the second section of the repealing act, enacted "that each and every stockholder in, or member of, said company, is hereby declared to be jointly and individually liable for all bills, notes or other property issued or outstanding against said company; and also for any other liability or debt of said company. And the said company is vested with power to collect and receive such assets and valid claims as it may hold against any individual or company, in order to close up and settle the affairs of said company, but for no other purpose whatever."

The effect of this act is now to be considered. Whether the legislature had the power to repeal the charter of "The Library Association," is not necessarily involved in this inquiry. Nor can the decision of it, either way, materially affect the question between the parties on the record. But the charter involved private interests, although the power of banking might not have been given, which no act of the legislature could divest. Such interests are as well secured, and on the same principle, as a deed secures to the grantee a title to his land. If there was an abuse of the charter, by which it became liable to forfeiture, the inquiry should have been made, and the forfeiture enforced by a judicial procedure. But, if that part of the act which purports to repeal the charter, be unconstitutional and void, it does in no respect affect the validity of the second section of the act. An act may be void in part and good in part. Where a contract is made in express violation of law, a repeal of the prohibitory act does not impart validity to the contract. But this principle does not apply to the case under consideration.

The bill of exchange bears date the 5th of August, 1840, and at that time the notes or bills of the bank were received by the plaintiffs. The dates of those bills are not material, as the dates do not show the time they were put into circulation. This transaction took place five months after the act giving a remedy to the creditors of the association, in order to close its business. Now the bill of exchange may have been given to close the concerns of the bank, within the meaning of the act. A large amount of the bills of the institution being in the hands of the plaintiffs, they took the bill of exchange, and retained the notes of the institution as collateral security. Had the legislature power to make this provision? It will be observed that, in the act of 1816, the organization of the bank and the issuing of the bills were expressly prohibited, and a penalty was annexed for doing any of the prohibited acts; still, in the same law, a remedy was given against the stockholders by the bill-holders. That the prohibitory parts of the act, above referred to, took away all legal remedy against the bank on its bills has been decided; and yet, no one has doubted that the remedy given on these bills in the subsequent sections was effectual. Had these provisions been contained in separate acts, it is not perceived that a different effect could have been given to them. They must have been construed as the act of 1816 was construed. Indeed this is a general principle. All laws on the same subject shall be considered, so far as effect can be given to them, as one law. The negotiation between the parties before us took place several months after the remedy was given to and against the bank, and unless the contrary be made to appear, the court will presume that it is within the policy of the act. Such appears to have been its character. The argument that the law only embraced outstanding notes and debts of the company, at the time of its passage, is not sustainable, as the giving of a new note or bill may be as necessary in winding up the business of the bank as the payment, in cash, of an old debt.

At the time the contract was made with the plaintiffs, the disabilities of the bank were removed, and a power was given to it to collect its debts, and all its creditors were authorised to bring suit against it; and the members of the company were declared to be jointly liable. This is placing the bank, for the purpose of closing its business, on the legal ground it would have stood on, had there been no legal inhibition to its organization and business. That this law will operate upon all subsequent transactions, there can be no doubt, and no objection in principle is perceived to giving effect to it on all the open transactions of the bank.

Admit that the mere repeal of a prohibitory law would not give force to a contract made void by such law, yet it does not follow that the legislature may not remove a prohibition, and authorise a recovery, on a valuable consideration. The legislature cannot make contracts for individuals, and they cannot impose an obligation which does not equitably arise out of the transaction. But they may give a remedy where there is none, and where in good conscience there should be one. A remedy being general, applies to previous as well as subsequent cases.

In Matthewson v. Saterlee, 2 Pet. [27 U. S.] 407, speaking of a statute, the court say: "It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of ex post facto laws, are not condemned nor forbidden by any part of the constitution. The courts in Pennsylvania having decided that the relation of landlord and tenant did not exist under certain titles, the legislature passed a law that such relation should exist under those titles, and the court held the law valid and carried it into effect. The case being removed by a writ of error, from the supreme court of Pennsylvania to the supreme court of the United States, the judgment was affirmed. The "Washington Library Association," having assumed banking powers, issued its bills, which circulated as bank paper. Every principle of justice would hold the association liable to pay these bills; and by the common law, the holders of the bills could, by an action at law, recover from the association their amount. But the statute declared unauthorised banking unlawful, and consequently no action could be sustained on these bills. But the act of 1840 provides expressly that the holders of these bills may maintain an action on them. And if this can be done, each member of the association is responsible, the same as in an ordinary co-partnership. Every one must pronounce this remedy a just one, and it is clear that it does in no sense conflict with the constitution of the United States. The same rule applies, and with equal force, in behalf of the bank and against its debtors. We think, therefore, that on this ground the action is sustainable on debts contracted prior to the act of 1840. But, the court, in sustaining this action, need not decide this point. The contract on which this suit is founded was long after the act of 1840, giving this remedy.

The above views were given to the jury, who found for the plaintiffs, against a part of the defendants.

On a subsequent day of the term, a motion in arrest of judgment was made on two grounds: (1) Because it does not appear from the declaration that the plaintiffs are aliens. (2) Because the verdict is against a part only of the defendants.

The plaintiffs, in their declaration, state that they are subjects of the queen of Great Britain and Ireland. This, we think, is a sufficient averment. If the plaintiffs are sub-

jects, as averred, they are aliens. And the act of 1789 declares, that the circuit court shall have jurisdiction where the matter in dispute exceeds five hundred dollars, "where an alien is a party," &c. An alien means nothing more than a citizen or subject of a foreign state. An alien is defined to be by Bouvier, "one born out of the United States, who has not since been naturalized under the constitution and laws."

As to the second ground, in actions of tort, a jury may find a part of the defendants guilty, and the others not guilty. And the same rule may apply in an action founded on a statute, with special provisions to that effect.

It was held in Govett v. Radnidge, 3 East, 62, that where the defendants so negligently conducted themselves in the loading, &c., that the hogshead was damaged, the gist of the action was the tort, and not the contract out of which it arose; and therefore, that on the plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty. This case seems to be brought into doubt, if not overruled, in the case of Weall v. King, 12 East, 452. A different decision was given in Powell v. Layton, 2 Bos. & P. (N. R.) 365, and in Max v. Roberts, Id. 454.

In actions ex contractu against several, it must appear on the face of the pleadings that their contract was joint, and that fact must be proved on the trial. 1 Chit. Pl. 50. This is otherwise against a common carrier and executors. If one executor plead plene administravit, the plaintiff may recover against the other. 1 Saund. 207a, 207b, note. Where by bankruptcy one of the defendants is discharged, and he plead it, it will not defeat the action, but the plaintiff may enter a nolle prosequi as to him, and go on against the others. But this cannot be done in case of an infant or feme covert. 1 Chit. Pl. 50. But if the special counts in the declaration could, under the special provisions of the statute, authorise a recovery against a part of the defendants; yet it is clear that the verdict cannot be sustained under the general count. This count is for money had and received, consequently the proof and finding of the jury must correspond with the joint liability set out in this count.

The jury have found generally only against a part of the defendants, and on such a finding the judgment cannot be entered, but must be arrested. In Bac. Abr. tit. "Verdict," L. it is said: "If part of the issue which is sensible, be insufficient in law, and the verdict be a general one, it is bad; for the court cannot in such a case but intend that part of the damages were given for a matter insufficient in law."

After the business of the court was closed, but, before the minutes were signed, an application was made to the judges, out of court, and a brief furnished, to amend the verdict, so as to apply to the good counts; but the motion being made too late, was not taken up and considered.

Case No. 9,617a.

MILNE v. The JOHN COOK.

[4 Betts, D. C. MS. 39.]

District Court, S. D. New York. Feb. 14, 1844.

SEAMEN—WAGES—COPARTNERSHIP.

[A contract to sail a vessel in copartnership for a share of the earnings affords no remedy in rem for wages.]

[This was a libel for wages by John Milne against the sloop John Cook.]

Before BETTS, District Judge.

This cause being heard upon the proofs and allegations of the parties, and the premises having been duly considered, and it appearing to the court that the libellant and the owner of the said vessel agreed to sail the said vessel in copartnership for equal shares of her earnings, and that the said agreement was not afterwards revoked or substituted by a contract of hiring with the libellant on wages, and it being considered by the court that the violation of the said agreement of copartnership by the owner of the said vessel, and transferring possession of her to another party, does not give the libellant a right of action in rem against the said vessel for such breach of contract, it is therefore ordered, adjudged, and decreed that the said libel be dismissed with costs to be taxed.

MILNE (MANCHESTER v.). See Cases Nos. 9,006 and 9,007.

Case No. 9,618.

MILNE ads. NEW YORK.

[2 Paine, 429.] [1]

Circuit Court, New York.[2]

SHIPPING—PENAL ACTION—NEGLECTING TO REPORT PASSENGERS—CONSTITUTIONAL LAW—STATE POLICE REGULATIONS.

1. The act of New York of February 11, 1824 [Laws 1824, p. 27], imposing penalties for neglecting to report passengers brought from foreign countries into the port of New York, contemplates two distinct offences: the one where the vessel comes directly from the foreign country to New York, or circuitously, having touched at some other port in the United States; the other, where the passengers have been landed at some other place, or put on board some other vessel, with the intention of proceeding to the city of New York; and a count embracing the whole of the first branch of the act is not in the alternative.

2. The foregoing law is not unconstitutional. It relates to the internal police of the state, and is, therefore, properly within the scope of state

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

[2] [District and date not given. 2 Paine includes cases decided from 1827 to 1840.]

legislation. Neither does it conflict with any existing act of congress.

[This was a suit by the mayor, aldermen, and commonalty of the city of New York against George Milne.]

THOMPSON, Circuit Justice. This is an action to recover certain penalties given by a statute of the state of New York, passed in the year 1824, concerning passengers in vessels brought from foreign countries into the port of New York, and founded on the neglect to report his passengers, according to the provisions of the act.

The declaration contains two counts: The first is special, setting out the act and its provisions so far as it relates to this case, and averring the facts which are supposed to bring the case within the act. The main objection relied upon to the form of this count, is, that the offence is laid in the alternative. This objection we think not well founded. The objection seems to be founded on a mistaken view of the act. The act contemplates two distinct offences: the one where the vessel arrives with the passengers in the port of New York, and the other is where the passengers have been landed at some other place, or put on board some other vessel, with the intention of proceeding to the city of New York. Under the first branch of the act, the penalty is incurred by coming directly from the foreign country to New York, or circuitously, having touched at some other port in the United States. The offence alleged to have been committed in this case, falls under this first branch of the act; and the manner in which the offence is alleged, is not in the alternative, looking to one or the other of two offences. The offence is the coming into the port of New York, and whether directly from the foreign port, or circuitously, by the way of some other port in the United States, is immaterial.

The second count is according to the form prescribed by the late revision of the laws of this state, and we see no objection to it. But the great objection relied upon is, that the act is unconstitutional, on the ground of its interfering with powers of congress to regulate commerce. A full answer to this objection is contained in the doctrine of the supreme court of the United States, in the case of Wilson v. Black Bird Creek Marsh Co., 2 Pet. [27 U. S.] 252. This act does not conflict with any existing act of congress; and if should be admitted that the subject of this law comes under the cognizance of the general government under the power to regulate commerce, until that power is exercised it does not conflict with state legislation. But we think the subject-matter of this law is properly within the scope of state legislation; it relates entirely to the internal police of the state, and falls within that class of subjects which the supreme court says in Gibbons v. Ogden, 9 Wheat. [22 U. S.] 203, forms a portion of that immense mass of legislation which embraces everything within a state not surrendered to the general government, viz., inspection laws, quarantine laws of every description, and laws regulating the internal commerce of a state; also, to regulate its own police.

[NOTE. This case was taken to the supreme court on certificate of division of opinion, the following point being certified for the decision of the supreme court: "That the act of the legislature of New York, mentioned in the plaintiff's declaration, assuming to regulate trade and commerce between the port of New York and foreign ports, is unconstitutional and void." Opinions were filed by Mr. Justice Barbour and Mr. Justice Thompson, Mr. Justice Story filing a dissenting opinion. The conclusion of the court was that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the declaration does not assume to regulate commerce between the port of New York and foreign ports, and that so much of said section is constitutional. 11 Pet. (36 U. S.) 102.]

MILNER, In re. See Case No. 740.

MILNER (BAILEY v.). See Case No. 740.

Case No. 9,619.

MILNER v. PENSACOLA.

[2 Woods, 632; [1] 2 Am. Law T. Rep. (N. S.) 186.]

Circuit Court, N. D. Florida. March Term, 1875.

RAILROAD COMPANIES—MUNICIPAL BONDS IN AID OF—LEGISLATIVE ACT—CONSENT OF VOTERS—REPEAL OF MUNICIPAL CHARTER—CONSTITUTIONAL LAW.

1. Where an act of the legislature authorized the mayor and aldermen of a city, "with the consent of a majority of the corporation comprising said city," to subscribe money to any railroad leading from the city, and to borrow money to pay the same: *Held*, that there was thereby conferred upon the municipal officers power to issue bonds to pay the subscription.

2. Under authority of such a law, the mayor and aldermen of the city of Pensacola subscribed a large sum to aid the construction of a railroad from the city of Pensacola, and, in payment thereof, issued negotiable bonds payable to bearer in twenty years, which, on their face, stated that they were issued in conformity with the law. In a suit brought by an innocent holder for value on the coupons belonging to said bonds, it was *held* to be no defense to the action; that at the election to obtain the "consent of a majority of the corporation comprising said city" to such subscription, only a minority of the citizens voted; nor that the question submitted to the citizens was whether the subscription should be made to construct a railroad from Pensacola to Montgomery, and the subscription was actually made to construct a railroad from Pensacola to the state line.

3. A construction of a law which would impute to the legislature a design to perpetrate an unconscionable and barefaced fraud ought to be avoided, if it can be fairly and reasonably done.

4. This rule applied to the acts of the legislature of Florida providing for the incorporation of cities and towns, approved August 6, 1868, and February 4, 1869.

[Approved in Broughton v. Pensacola, 93 U. S. 270.]

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

5. It is not within the power of a legislature, by a repeal of the charter of a municipal corporation, to invade the rights of its creditors and cancel its indebtedness. Such legislation impairs the obligation of contracts and is unconstitutional.

[Cited in State v. Natal (La.) 1 South. 926; Bates v. Gregory, 89 Cal. 397, 26 Pac. 894.]

This cause was heard upon demurrer to the pleas. The action was brought to recover the amount due on a large number of interest coupons attached to bonds issued by the city of Pensacola. The following is a copy of one of the bonds: "Issued in conformity with the 2d section of an act amendatory of an act to amend the act incorporating the city of Pensacola, passed by the legislature of the state, December 29, 1852, and approved by the governor, January 3, 1853. City of Pensacola, State of Florida: Know all men by these presents, that the city of Pensacola is indebted to the Alabama & Florida Railroad Company of Florida, or bearer, in the sum of five hundred dollars; which sum, the said city engages to pay in current money of the United States at the office of the city treasurer, to the said Alabama & Florida Railroad Company of Florida, or bearer, in twenty years from the date hereof, with interest at the rate of seven per cent. per annum, payable semiannually on the first day of July and the first day of January in each year, on the delivery of the interest coupons attached, in the city of New York, at such bank as the treasurer of the city of Pensacola shall direct. Pensacola, January 1, 1858. Francis B. Bobé, Mayor. F. E. de la Rua, Treasurer." The following is a copy of one of the coupons sued on: "$17.50. City of Pensacola. $17.50. City Bond No. 38, for $500. Interest coupon for seventeen $^{50}/_{100}$ dollars, due in New York, July 1, 1872. No. 29. F. E. de la Rua, Treasurer." The other bonds are of the same tenor save as to letter and number; and the coupons, save as to number and date of payment.

The plaintiff averred that, as the administrator of Willis J. Milner, he was the owner and bearer of one hundred and eight of these bonds, and of interest coupons cut therefrom and past maturity, which amounted to $36,662.50, and for this amount he asked judgment.

The second section of the act, approved January 3, 1853, referred to upon the face of the bonds as the authority for their issue, is as follows:

"Sec. 2. Be it further enacted, that the mayor and board of aldermen of the city of Pensacola, with the consent of a majority of the corporation composing said city, be and they are hereby authorized to subscribe in the name of the city of Pensacola any amount of money which they may deem necessary to any plankroad or railroad leading from the city of Pensacola; and for the purpose of procuring the amount of subscription, the said city of Pensacola shall have power to borrow the same and shall have power to impose a tax on real estate in said city at a rate not exceeding two per centum on the assessed value of such property."

Pensacola was incorporated as a town by a special but public act of the legislature, passed in 1839. By another special act, passed in 1836, it was incorporated as the city of Pensacola. Prior to the adoption of the constitution of 1868, all the cities and towns of the state were incorporated by special act. The constitution of 1868, provided (article 4, § 21) that "the legislature shall establish a uniform system of county, township and municipal government." To carry out, as it is presumed, this provision of the constitution, an act was passed by the legislature, and approved August 6, 1868, entitled "An act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state." [Laws 1868, p. 111.] This act provided that the male inhabitants of any hamlet, village, or town in the state, not less than one hundred in number, might establish for themselves, a municipal government, with corporate powers and privileges under the provisions of the act. It then proceeded to declare how such municipal governments might be organized, and what should be their powers and liabilities; in short, to provide for a general system of municipal government. Section 30 of the act was as follows: "That all the powers and privileges conferred in and by this act may be exercised by any city or town within the limits of this state heretofore incorporated; and it shall be lawful for any previously incorporated city or town to reorganize their municipal government under the provisions thereof by a voluntary surrender of their charters and privileges, and by an organization under this act; and upon a failure on the part of any incorporated town or city to accept the provisions of this act within six months after its approval, all the acts vesting such city or town with power are hereby repealed."

Afterwards the legislature passed an act, which was approved February 4, 1869 [Laws 1869, p. 22], having the same title as the act just referred to, and having in view the same general purpose. The 30th section of this act is identical with the 30th section of the act of August 6, 1868, save that nine months instead of six months were prescribed as the time within which cities and towns were to accept the provisions of the act; and in default of which, all acts vesting such city or town with corporate power were repealed. The act approved February 4, 1869, repealed the act of August 6, 1868.

It appears from the pleas that the city of Pensacola, within six months after the passage of the act of 1868, surrendered its original charter and privileges, and reorganized its municipal government under that act. But that city failed to surrender its charter and privileges within nine months after the approval of the act of 1869, and to reorganize under that act, but that the same city of Pen-

sacola with the same territorial limits, immediately after the expiration of said nine months, organized under the provisions of the first six sections of the act of 1869, which prescribe how the inhabitants of any hamlet, village, or town in the state, not less than fifty in number, may establish for themselves a municipal government.

On the 3d of February, 1870, the following act of the legislature was approved and became a law [Laws 1870, p. 41]:

"An Act Relating to Cities.

"Whereas, the legislature of this state, by the passage of an act entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state, approved February 4, 1869, did not intend said act to affect the organization of any city or town made under or by virtue of an act entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state, approved August 4, 1868; therefore the people of the state of Florida, represented in senate and assembly, do enact as follows:

"Section 1. That all acts, doings, and proceedings made and had, or hereafter to be made and had, by any mayor, board of councilmen, or any other city officer in any city of this state, organized in pursuance of an act entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state, approved August 4, 1868, and while in the performance of their duties under said organization, are hereby declared legal and valid."

H. A. Herbert and E. A. Perry, for plaintiff.

A. E. Maxwell and G. A. Stanley, for defendant.

WOODS, Circuit Judge. The defendant pleads the general issue and six special pleas, which, however, set up but two substantial defenses to the action.

The first of these special defenses is in effect as follows: That the authority to incur the indebtedness for which the bonds were issued was dependent upon the consent of a majority of the corporation composing said city, and that at the election held to decide whether the city would incur said indebtedness, only ninety-five votes were cast, which was not a majority of said corporation; and the question submitted to the voters was whether the city should subscribe to the stock of a railroad leading from Pensacola to Montgomery, in the state of Alabama, and not to a railroad leading from Pensacola to the Alabama state line. The plea which sets up this defense fails to present one of the questions which the pleader intended to present, by neglecting to aver that the subscription stock was actually made in a company which was only authorized to build, and only did build a railroad from Pensacola to the Alabama state line. We will, however, consider the plea as if such averment were made. The evident meaning of the second section of the act approved January 8, 1853, above quoted, is that the city of Pensacola may, upon a condition therein named, subscribe to the capital stock of any plankroad leading from the city of Pensacola, and may borrow the money to pay the amount of its subscription, and may levy a tax on the real estate of the city to pay the sum so borrowed, principal and interest. The authority given by this enactment is ample to cover the acts done by the mayor and aldermen of the city. They subscribed the stock in a railroad leading from Pensacola, and, to raise the money to pay for it, issued the bonds, a portion of which are in controversy in this action.

The power to borrow money conferred upon a municipal corporation implies the power to issue bonds and interest coupons on which to negotiate the loan. Rogers v. Burlington, 3 Wall. [70 U. S.] 654. But the defendant insists that a majority of the voters of the city did not vote for the subscription of money to the railroad, and that the railroad in behalf of which the vote was taken was a road leading from Pensacola to Montgomery, and not a road from Pensacola to the Alabama state line. Do these facts constitute a defense to these bonds and coupons in the hands of a bona fide holder? The authorities are adverse.

"When a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." See Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 203, and numerous cases there cited. See, also, Moran v. Miami Co., 2 Black [67 U. S.] 722; Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 83; Van Hostrup v. Madison City, Id. 291; Meyer v. Muscatine, Id. 384; Mygatt v. Green Bay [Case No. 9,998]; Seeling v. City of Racine [Id. 12,631]; Supervisors v. Schenck, 5 Wall. [72 U. S.] 772.

In the case of Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 545, it was held that "when the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question."

The case of Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676, is relied on to support the defense under consideration. All that was

decided in that case was, that where the commissioners of a county are authorized to subscribe to the capital stock of a particular corporate body, that does not authorize a subscription to the stock of another corporation, and that the bonds issued to pay for such stock are issued without authority, and are therefore void. That is not this case. Here the city was authorized to subscribe to any plankroad or railroad leading from the city of Pensacola. The pleas show that the subscription was made to such a railroad. The subscription was therefore covered by the authority of the law. If there was any informality in the election by which the consent of the citizens of Pensacola was to be obtained to the subscription, that brings the case precisely within the authorities above cited. I am of opinion, therefore, that the defense under consideration is no answer to the action.

The defense mainly relied on is the second. This may be thus stated: After the bonds and coupons named in the declaration were issued by the city of Pensacola, the charter under which it was organized was repealed, and the municipal body known as the city of Pensacola ceased to exist, and the present city of Pensacola was organized under another law, and is a distinct and different municipal corporation from that which issued the bonds. Therefore, the present city of Pensacola is not liable on these bonds and coupons. In other words, it is claimed that the city of Pensacola, as a municipal corporation, ceased to exist, by its failure to adopt the provisions of the act of February 4, 1869, within nine months after the approval of that act; that as a consequence, all the debts and obligations incurred by the city prior to February 4, 1869, were canceled and destroyed; and that the present city of Pensacola having been organized under the act of 1869, though by the same inhabitants, and covering the same territory, and with substantially the same powers, is relieved of any obligation to pay the debts of the city incurred prior to February 4, 1869. The legislation which produces such effects ought to be clear and explicit. To ascribe a purpose to accomplish such results, to the legislature of Florida, would be to charge it with an attempt to perpetrate a most unconscionable and barefaced fraud. I do not believe that the legislature of Florida had any such purpose, or that its legislation, fairly construed, can have any such result. A construction of the law which sustains such a purpose ought to be avoided, if it can be fairly and reasonably done, consistently with the terms of the act.

A careful reading of the acts of 1868 and 1869 shows that the purpose of those acts was not to destroy the municipal corporations already existing in the state, but to carry out the requirements of the constitution by establishing a uniform system of municipal government in the state, and to rehabilitate the existing municipal bodies with new and uniform privileges and powers. The language of section 30 of both the acts carries this idea: "All the powers and privileges conferred in and by this act may be exercised by any city or town within the limits of this state heretofore incorporated." Had the section stopped here, there could be no pretense that its effect was to create new corporate entities. But it proceeds to declare that "it shall be lawful for any previously incorporated city or town to reorganize their municipal government under the provisions thereof, by a voluntary surrender of their charters and privileges, and by an organization under this act." This clause provides for the "reorganization," not the destruction, of municipal corporations. It does not provide for a new corporate entity. If it did, it would follow that every time a city or town received a new charter, it became a new corporate body, which is not the case. Mayor, etc., of Colchester v. Seaber, 3 Burrows, 1866. The language of the section thus far seems to recognize the continued and unbroken life of the cities and towns reorganized under the act. The last clause of the section which, upon a failure of an incorporated town or city to accept the provisions of the act within nine months, repeals the acts vesting such city or town with corporate powers, does not necessarily destroy the corporate existence of such city or town.

Dillon, in his learned work on Municipal Corporations, says (volume 1, § 116): "Where the functions of an old corporation are suspended, or where the corporation by loss of all its members, or of an integral part, is dissolved as to certain purposes, it may be revived by a new charter, and the rights of the old corporation granted over to the same or a new set of corporators, who in such case take all the rights and are subject to all the liabilities of the old corporation of which it is but a continuation." The text is sustained by the citation of the following, among other authorities: Rex v. Pasmore, 3 Term R. 199, 247; Reg. v. Ballivos, 1 P. Wms. 207; Mayor, etc., of Colchester v. Brooke, 7 Q. B. 383. My construction of the latter part of section 30 is, that it provided merely for a suspension of the powers of the municipal corporations failing to reorganize under the act, and not for a dissolution of the corporation itself.

As soon, therefore, as the city of Pensacola organized under the first six sections of the act, it was simply the assumption by the city of the new powers and privileges which the act conferred, and was not the creation of a new corporation. That it was not the purpose of the legislature to give the effect to the act of 1869, claimed by defendant, is apparent from the enactment of the legislature of Florida, approved February 3, 1870, entitled "An act relating to cities," and copied at large in the statement of the case. I am of opinion, therefore, that the failure

of the city to reorganize under the act of 1869, within nine months after its passage, did not put an end to the corporate existence of the city of Pensacola, and that its subsequent reorganization under the first six sections of the act did not create a new, but was merely the rehabilitation of an old corporate body.

But conceding that the effect of the acts of August 6, 1868, and February 4, 1869, and of the failure of the city of Pensacola to reorganize under the latter act, was what the defendant claims, and that it was the purpose of the legislature to accomplish that result, the question remains, was it competent for the legislature to destroy a municipal corporation, or to put it in its power to destroy itself, so as to cancel and wipe out its debts and liabilities?

It was held by Judge Story, in Mumma v. Potomac Co., 8 Pet. [33 U. S.] 281, that a private corporation might be dissolved by the legislature, or by judicial sentence, and that such dissolution did not impair the obligation of a contract any more than the death of an individual impairs the obligation of his contract. He placed this view on two grounds: (1) Because the obligation survives and the creditors may enforce their claims against any property belonging to the corporation; and (2) because every creditor is presumed to contract with reference to the possibility of the dissolution of the corporate body. The case is different with a municipal corporation. The main, and in most cases the only source from which creditors of a municipal corporation can expect to receive payment of their claims is found in the power of taxation. The dissolution of the corporation of course puts an end to its power of taxation, and renders the collection of debts owing by it an impossibility.

Now, in the case of these bonds, the act which authorized the indebtedness for which they were issued also provided for the levy of a tax to pay the indebtedness. That provision for taxation was as much a part of the contract between the city of Pensacola and the bondholder as if it had been inserted in the body of the bond. A repeal of the tax provision would have impaired the obligation of the contract, and would have been a violation of the constitution of the United States.

In the case of Von Hoffman v. Quincy, 4 Wall. [71 U. S.] 535, the result of the decision of the court was, that when a statute authorized a municipal corporation to issue bonds and to exercise the power of local taxation to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract within the meaning of the constitution, and cannot be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. See, also, Butz v. Muscatine, 8 Wall. [75 U. S.] 583; Welch v. St. Genevieve [Case No. 17,372]; U. S. v. Treasurer of Muscatine Co. [Id. 16,538]. If the legislature cannot take from a municipal corporation the power of taxation conferred contemporaneously with the power to borrow money, and for the purpose of repaying the money borrowed, it would seem to follow a fortiori that it could not utterly destroy the municipal corporation which had issued the bonds on the faith of a law authorizing taxation to pay them; thus, not only repealing the power of taxation, but leaving no corporate entity in existence against which suit might be brought. How the obligation of a contract, made by a municipal corporation for the payment of money, could be more effectually impaired, it is difficult to conceive.

Upon this question, Dillon, in his work on Municipal Corporations (volume 1, § 114), says: "As respects creditors of a municipal corporation, their rights are protected from legislative invasion by the constitution of the United States, and no repeal of a charter of a municipal corporation can so dissolve it as to impair the obligation of the contract, or, it may probably be safely added, preclude the creditor from recovering his debt." In support of this view the learned author cites the following authorities: Cooley, Const. Lim. 290, 292; Curran v. Arkansas, 15 How. [56 U. S.] 312; Thompson v. Lee Co., 3 Wall. [70 U. S.] 327; Havemeyer v. Iowa Co., Id. 294; 2 Kent, Comm. 307, note; Board of Com'rs of Tippecanoe Co. v. Cox, 6 Ind. 403; Coulter v. Robertson, 24 Miss. 278; State v. Common Council of City of Madison, 15 Wis. 30; Blake v. Portsmouth & C. R. R., 39 N. H. 435.

My conclusion is, therefore, that no legislation of the state of Florida could so destroy the city of Pensacola as to relieve it from the obligation to pay the bonds issued by it; that the present city of Pensacola is the same corporate body as that by which the bonds were issued, reorganized and clothed with a new charter, and with new powers and privileges, it is true, but still the same municipal corporation, and liable to pay the bonds and coupons in controversy in this suit. Any other conclusion would produce the most monstrous results. It would put it in the power of every city and town in Florida to cancel all its indebtedness incurred prior to February 4, 1869, amounting to many hundred thousand dollars, and to set their creditors at defiance. It would enable every city which receives a new charter to repudiate all indebtedness contracted under its old one, and leave the holders of its bonds utterly without remedy. In my judgment, neither of the defenses set up by the special pleas is good in law.

The demurrer to the pleas must, therefore, be sustained.

MILNOR v. NEWARK PLANK ROAD CO.
See Case No. 9,620.

Case No. 9,620.

MILNOR v. NEW JERSEY R. CO. et al. SHARDLOW v. SAME. BIGELOW v. SAME. MILNOR v. NEWARK PLANK ROAD CO. et al. SHARDLOW v. SAME.

[6 Am. Law Reg. 6; 3 Wall. (70 U. S.) Append. 782; 16 Lawy. Ed. U. S. Sup. Ct. Rep. Append. 1.]

Circuit Court, D. New Jersey. Sept. 22, 1857.[1]

BRIDGES—NAVIGABLE RIVER—POWER TO ENJOIN—ACT OF LEGISLATURE—EXCLUSIVE PRIVILEGE—EMINENT DOMAIN—CHANGING DIRECTION AND POSITION.

1. A court of the United States has no jurisdiction to restrain by injunction the erection of a bridge over a navigable river lying wholly within the limits of a particular state, where such erection is authorized by the legislature of the state, though a port of entry has been created by congress above the bridge. Dicta in Devoe v. Penrose Ferry Bridge Co. [Case No. 3,845], overruled; and in Pennsylvania v. Wheeling Bridge Co. 13 How. [54 U. S.] 579, explained.

[Cited in Woodman v. Kilbourn Manuf'g Co., Case No. 17,978; Silliman v. Hudson River Bridge Co., Id. 12,852; Same v. Troy & W. T. Bridge Co., Id. 12,853; Miller v. New York, Id. 9,585.]

2. Construction of acts of the legislature of New Jersey with regard to the proprietors of the bridges over the rivers Passaic and Hackensack, and the agreements made thereunder with respect to these rivers.

3. If such acts and agreements give to the corporation a franchise or exclusive privilege of taking toll, and erecting a bridge on these rivers, that franchise or privilege may be taken by the legislature of the state, under its right of eminent domain, on providing compensation.

4. Such franchise or exclusive privilege, if it exists, is vested in the corporation at large and not in the individual members, and may be waived or relinquished by the action of a majority of the corporators.

5. The mere establishment of a particular line of road, and erection of a bridge in a particular location, in a town, by a railroad company, after a controversy with the inhabitants with respect thereto, does not amount to a contract so as to preclude the company, after a lapse of time, from changing the direction of their line and the position of the bridge.

These were several bills in equity, [by Charles E. Milnor against the New Jersey Railroad Company and others; William L. Shardlow against the same; David Bigelow against the same; Charles E. Milnor against the Newark Plank Road Company and others and William L. Shardlow against the same,] for injunctions and other relief, upon the facts and for the purposes set forth in the opinion below. Interlocutory injunctions had been granted, and is now upon final hearing.

[2] [The constitution gives to congress power "to regulate commerce with foreign nations, and among the several states." With this clause in force, as the supreme law of the land, Milnor and others, citizens of New York, and owning wharves in the city of Newark, New Jersey, but not navigators, pilots or anything of that sort, filed their bills in the circuit court of the state just named to restrain the New Jersey Railroad Company and others from erecting two certain bridges over the Passaic, one in the city of Newark, at a point called the "Commercial Dock," the other at a point about two and a half miles below the wharves of the town. This company's road forms a link in the chain of roads which connect New York with Philadelphia, and so the North and South. The company had been for many years running its trains over a bridge at the upper end of the town; but in crossing the river at that point they were obliged to make their road describe a curve, much in the shape of an S, carrying it, moreover, through populous parts of the city, and causing as they said, delays and dangers. The purpose of the new bridges was, therefore, to shorten and straighten the road.

[The bridges in controversy were authorized to be erected by statute of the state of New Jersey. They were required by this statute to have pivot-draws, leaving two passages of sixty-five feet each for the passage of vessels navigating the river. As to their effects on the navigation, the complainants brought a large number of wharf owners, captains of sloops, schooners, and of little steamboats, who gave it as their "opinion," that the bridges could not be erected without obstructing the navigation by the detention of ice, and by causing bars and shoals in the river, and without subjecting sailing vessels, especially, to a detention for a change of tide and wind, or for daylight and to inconveniences and hazards generally; while it would probably subject wharf property above the bridges to a depreciation of from twenty-five to fifty per cent., break up a system of tow-boats that had got established in that river, and raise the price of freights; since "you can't get no man to go through these bridges without extra pay; they all have such a dread of bridges, which, if there are currents, frequently break sails and rigging, and sometimes injure their hulls." But the case did not thus strike everybody. The railroad company proved, or brought witnesses to prove that "not only would the proposed bridge offer no material obstruction to navigation, but by replacing the present bridge at Centre street, would actually improve the general navigation of the river, and enhance the general value of wharf property on the river, and by effecting the removal of the railroad track now running in rear of the intermediate wharves, would result in very little, if any, damage to any of them." As respected the advantages to the railroad, and the improved safety to travellers, while the complainants admitted that the road was a great thoroughfare, and that crossing on the old bridge obliged the trains to

[1] [Affirmed by supreme court. See 16 Lawy. Ed. U. S. Sup. Ct. Rep. Append. 1.]

[2] [From 3 Wall. (70 U. S.) 782.]

make a curve, they denied that the curve caused delay or danger to the road, or that any new track was necessary. They showed that the road had been very profitable, making for years dividends of not less than ten to fifteen per cent. while, on the subject of accident, they cited the report of the directors to the stock-holders for 1853 and 1854, in the former of which the directors say, with a spirit of piety which left no doubt that they spoke the truth: "It is a subject for thankfulness and praise to the Almighty Governor of the Universe, that on the 21st anniversary, the board are enabled to announce the fact, that although—including commuters and others—more than 13,000,000 of persons have been transported on the road, no person within the cars has suffered in life or limb." While in the latter they continue in the same strain of gratitude and sense of obligation: "The exemption from serious accidents which has attended the operations of the company during the past year is cause of sincere thankfulness. The gratifying record that no person transported on the road has been injured in life or limb, while in the cars, is still true, though the whole number of passengers since the opening of the road exceeds 15,000,000. Such favorable results, while they entitle those having charge of the condition of the road and the running of the trains to high commendation for their vigilance and care, also increase our obligations to a kind, protecting providence. No doubt is entertained that the net earnings will be ample for the cash dividend of ten per cent. per annum, and a handsome surplus applicable to such construction as shall increase the value and usefulness of our work."

[For the complainants: The case of Pennsylvania v. Wheeling Bridge, 13 How. [54 U. S.] 519, governs this. In that case the bridge company, under authority from the legislature of Virginia, undertook to erect a bridge over the Ohio at Wheeling. The Ohio at this point was wholly in her own state. She erected the bridge. When erected it did not destroy the navigation at all, though it impeded it somewhat, rendering it less free. The state of Pennsylvania, having large canals and railways terminating on the Ohio, and which she represented, had been built with direct reference to free navigation of that river, filed her bill to abate the bridge as a nuisance. Her allegation was, indeed, that the bridge had been built "under color of an act of the legislature of Virginia, but in direct violation of its terms." The legislature of Virginia, however, passed at once an act declaring that the bridge as constructed was constructed "in conformity with the intent and meaning of the charter." The bridge as erected existed therefore, under the authority of the state. It was constructed under skilful engineers, and no otherwise impeded navigation probably than any bridge in any large river generally impedes navigation; rendering it less free. Most steamers with stiff smoke-pipes would have been able to pass as it was; any steamer with flexible pipes—pipes on hinges—could certainly have done so. The court, however, declared that the bridge was a nuisance, and directed it to be abated, unless so raised and altered as to leave the navigation wholly free. Yet this bridge was a connecting bond of a great highway; it was, itself, a highway, at once intra-territorial, and leading to intercourse between the states. But the fact that it was below a port of entry, Pittsburgh, was fatal to it.

[McLean, J., giving the opinion of the court, in which he places reliance on the fact that the bridge was erected below a port of entry, says: "The fact that the bridge constitutes a nuisance is ascertained by measurement. If obstruction exists, it is a nuisance. An indictment at common law could not be sustained in the federal courts by the United States against the bridge as a nuisance, as no such procedure has been authorized by congress; but a proceeding on the ground of a private and irreparable injury may be sustained against it by an individual or a corporation. Such a proceeding is common to the federal courts, and also to the courts of the state. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. * * * The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named." In Devoe v. Penrose Ferry Bridge Co. [Case No. 3,845], which was a bill to enjoin a bridge below Philadelphia, over the Schuylkill, a river much smaller and shallower than this—like it, wholly in one state—far more than it, in its history the subject of regulation by the state in which it lies—a stream eminent for the finny tribes which haunt the sedge and ooze, but not whitened in its muddy sloth by sails of commerce—a stream bridged everywhere at the city—in regard to which congress may be said never to have legislated—Greer, J., granted an injunction to stay a bridge about to be erected under the authority of the commonwealth of Pennsylvania. The court there said: "The jurisdiction in cases like the present has been fully considered and decided in State v. Wheeling Bridge [13 How. (54 U. S.) 519]. The court is not at liberty, even if so disposed, to disregard the authority of that case. It is there decided that although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a state, yet that, as courts of chancery, they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a state." And the court even went out of its way to add, on the authority

of the Wheeling Bridge Case, that the commerce on the Schuylkill below the port of Philadelphia was entitled to as much protection as that of the Ohio, Mississippi, Delaware, or the Hudson.

[For the defendants: Granting to the Wheeling Bridge Case [supra] the fullest weight, it is no precedent for this. The jurisdiction there exercised was invoked upon the proposition that "the river Ohio is a highway of commerce, regulated by congress." That river is an enormous river, forms the boundary of six states, and is navigable through them and four other states for a thousand miles. State laws had not regulated it at any time, except to make it free, while it had been regulated by congress in every way. By the ordinance of 1787, its waters had been declared to be common highways, and forever "free." Virginia had, in 1789, when desiring that Kentucky should be admitted into the Union, declared that its navigation should be "free and common to all citizens of the United States," to which act congress assented; and it thenceforth became a compact between Virginia and all other states. Successive appropriations were made by congress for the removal of obstructions to its navigation; and, finally, when Virginia applied in four several instances—1836, '37, '38, and '43—for the passage of a law to authorize the construction of a bridge at Wheeling, she met in each case with refusal. We refer to these facts being public ones. The "regulation" by congress had, therefore, been made, as we have said, "in every way"—by what that body did, and by what it prevented—made affirmatively, and made negatively. Now as respects the Passaic, in the first place its character and geographical position are wholly different from that of the Ohio. It is a very small stream; it rises, flows, and discharges itself within one state—a small one. No question can arise from its flowing through or past any other state. Then, no regulation of congress worth naming has ever touched it, while the state in which it lies, and whose river it is, has exercised an early and continued control over it.

[The remarks about nuisance made by McLean, J., in giving the opinion of the court, are extra-judicial. They have tended perhaps to mislead the professional mind; certainly, they were unnecessary to the decision of the cause, and if meant to be applied to the case of a bridge authorized by statute, and built according to the statute, are not well founded in law. The fact that a bridge is below a port of entry does not necessarily make it a nuisance; nor was that the point adjudged in the Wheeling Bridge Case. The case before the court bears far greater, and indeed a close, analogy to Wilson v. Blackbird Creek Company, 2 Pet. [27 U. S.] 257. Blackbird creek was "one of those many creeks passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance." Under incorporation from the state of Delaware, certain persons to increase the value of property along its banks, and to improve the health of the region by draining the marsh, erected a dam. This dam Wilson broke down; and on trespass brought against him by the company, the question was, whether the authorization of the dam was void as repugnant to the constitution, the counsel for the company arguing that it came in conflict with the power of the United States "to regulate commerce with foreign nations and among the several states." The court held, unanimously, that it was not repugnant to the constitution. Marshall, C. J., giving his opinion, says: "The value of property on the banks of the creek must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the constitution, or a law of the United States, is an affair between the government of the state and its citizens, of which this court can take no cognizance. If congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern states, we should not feel much difficulty in saying that a state law coming in conflict with such an act would be void; but congress has passed no such act. We do not think that the act can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." This great chief justice does here admit that it is not every obstruction of every navigable stream by the state, nor even the complete stoppage by it of some navigable streams, which will constitute an interference with the constitutional power of congress to regulate commerce. He speaks of the matter as a relative question, and says, that, "under all the circumstances of the case," the act of the state could not be considered as such an interference. This relative character of this class of questions is what we maintain. He admits, impliedly, too, that it is not every act of congress legislating about a stream which will be a regulation of commerce in regard to it. "Had congress passed an act the object of which was to control state legislation over these small navigable creeks, such an act," he says, "would have made the state legislation void." We invoke, then, his high authority. When Mr. Burke, on the out break of the French

Revolution, was charged, for some expressions which he uttered, with deserting Whig politics, after showing, as he did, that the expressions used by him were nearly identical with many found in the writings of the great Whig statesman of the Revolution of 1688, he said, that he did not desire to be thought "a better Whig than Lord Somers." Nor do we—happy if we can rightly follow him—desire to assert the powers of the federal government further than they were asserted by John Marshall. We say, as he did, that the question is one of circumstances—circumstances which every wise judge, as every practical statesman must regard, and in some degree be governed by. Here is a river, on the one hand, having a commerce not vast; and there, too, on the other hand, is a road which is the great line of communication between Boston, New York, Philadelphia, Baltimore, Washington and all the South—a road which has a greater travel upon it perhaps than any road of the world, and which, somewhere, must cross this stream. A principle of law designed to protect commerce between the states must not be so construed as practically grievously to injure it.

[In Devoe v. Penrose Ferry Bridge Co., cited on the other side [supra], and much misunderstood, this court (Grier, J.) said: "At common law every obstruction, however small, to the free navigation of a public river might, in strictness, be styled a nuisance; but the application of this definition to every bridge over every creek where the tide ebbs and flows, or which a chance sloop might occasionally visit, would be absurd, and highly injurious to public interests. Intercourse by means of turnpikes, canals, railroads, and bridges is a public necessity. A railroad constructed by the authority of a state is often many thousand times more beneficial to the interests of commerce than the unlimited freedom of navigation over unimportant inlets, creeks, or bays, or remote portions of a harbor. It would be unreasonable to insist that the millions who travel on them should be subjected to great delay or annoyance for the convenience of a few sloops or fishing-smacks. Where bridges are constructed with draws or openings for the passage of masted vessels, and high enough to permit others to pass under, if possible, the occasional delay of such vessels for a short time may be a trifling inconvenience in comparison with the public benefit of the bridge. In every investigation of this kind, the question is relative, not absolute. Whether a certain erection be a nuisance must depend upon the peculiar circumstances of each case. When the trade of the channel is of great amount and importance, and that across is trifling, the same rule cannot apply as to a case where the conditions are contrary. If a steam ferry can amply accommodate those who cross the stream, and a bridge with a draw would inflict an injury on commerce, and tax the public by increased freight, there is no sufficient reason why a bridge should be erected because it will be more profitable stock than steamboat or towboat, or better accommodate some small neighborhood or neck of land. The city of Boston is situated on a peninsula. No public necessity could well exist which would justify a bridge compelling all the commerce of her port to pass through a draw, while it might be very reasonable that vessels passing from one part of the port or harbor to another should be compelled to submit to some inconvenience for the sake of a bridge erected for one of the great railroads, so important to the prosperity and wealth of the city. It would be an abuse of the term to call the Schuylkill dam a nuisance because it is below tide water, and converts a few miles of useless sloop navigation into a canal which, under the name of the Schuylkill Navigation Company, annually adds millions to the wealth of the city and state, and whose commerce constitutes the staple of this western portion of the port of Philadelphia. Nor is it any appreciable injury to the commerce of the port that vessels with high masts cannot pass the Market Street bridge. Ample space for those vessels still remains at the wharves below. The great staple of this Western port is coal, and this bridge is built of such a height as not to interfere with the passage of the steamtugs and canal-boats engaged in transporting it. The city of Philadelphia now extends across the Schuylkill, and such a bridge (a great thoroughfare across it at the connecting points), is a public necessity. The same may possibly be said of the Gray's Ferry bridge (far lower down the stream), over which the railroad to Baltimore passes. Vessels with masts, and steamboats with high chimneys, are no doubt put to considerable inconvenience in passing the draw; but the bridge is so built that the immense trade in coal can pass by it without interruption." And the court acted in perfect conformity to these principles when, in order to prevent an outlay while points of law and fact were yet contested, and in the interests, therefore, of all parties to the controversy, it granted a preliminary injunction to stay a bridge far down on the Schuylkill river—almost indeed, as it enters the Delaware—the effect of whose erection the city of Philadelphia, by its select and common councils, represented would be greatly to injure it and the whole line of wharves of the Schuylkill river, without any corresponding public benefit whatever. The judge indeed, in that case, misreading apparently, as the court's adjudication in the Wheeling Bridge Case, the expression (dicta simply) of McLean, J., to which we have referred, may have assumed that federal authority was interfered with where it was not, and have expressed itself too strongly in support of a right of final injunction over such a stream. But the final injunction was never granted; and of what avail are such expressions as are cited on the other side, made, as the court declared, but as it has not been noted, con-

trary to its "desire"; and to guard against "unnecessary fears excited"?—expressions never acted on, but the reverse, and which must be taken merely as an illustration of the way in which, when supporting against a powerful argument at the bar a decree which he is about to make, a judge will sometimes press with strength and earnestness, with all the power of statement and illustration, which he possesses, a doctrine which he seeks to establish, and will go almost as far in one direction as counsel have gone in another, responding to extremes by exuberance. He does not then overlay his opinion by all the limitations, and qualifications, and restrictions which he would use were he inditing an academic lecture. Such expressions are natural, and comprehensible as well, to all except to those who cannot see that they were used responsively, and argumentatively, and hypothetically, and by way of illustration, and to exclude conclusions in a matter not requiring action upon them; and that some qualification and limitation of them when action is required and when all the conditions of the problem may be reversed, argues no inconsistency of principle, but, contrariwise, may be the most intelligent form of principles' assertion.

[Reply: Blackbird creek bore no resemblance to the Passaic. It was a mere sluice, up and down which the Delaware estuated. There was no port of entry at its head. It had few or no inhabitants but those such as its name indicates, and no commerce of any kind. The case cited and relating to it does not apply.][2]

GRIER, Circuit Justice. The object of these five several bills is to obtain injunctions prohibiting the erection of certain bridges over the Passaic river. One of these is proposed to be erected at a point called the "Commercial Dock," in the city of Newark, by the New Jersey Railroad & Transportation Company; the other, by the Newark Plank Road Company, near the mouth of the Passaic river and some two and a half miles below the wharves of the port of Newark. The erection of these bridges is authorized by the legislature of New Jersey. They are required to have pivot draws, leaving two passages of sixty-five feet each for the passage of vessels navigating the river or harbor. The first of these bridges is required in order to avoid certain curves in the railroad where it passes through Newark, and to make it straight; the other, to accommodate the large and increasing commerce between the cities of New York and Newark, on the plank road connecting the lower end of Newark with Jersey City. It will not be necessary to a proper consideration of the several questions affecting the decision of these cases, to give an abstract either of the pleadings or the testimony. Where opinions are received in evidence, there can be no restraint as to quantity. Such testimony is always affected by the feelings, prejudices and interests of the witnesses, and is of course contradictory. A skipper will pronounce every bridge a nuisance, while travelers on plank or railroads will not think it proper that their persons or property should be subject to delay, or risk of destruction, to avoid an inconvenience or slight impediment to sloops and schooners; owners of wharves or docks who may apprehend that their interests may be affected by a change of location of a bridge, are unanimous in their opinion that public improvement had better be arrested than that their interests should be affected. In this conflict of testimony and discordant opinion, we shall not stop to make any invidious comparisons as to the credibility of the witnesses, but assume such facts as we believe to be proven, without attempting to vindicate the propriety of our assertions.

1. The first of the three great questions so ably discusssed by the learned counsel in these cases, is briefly and lucidly stated in the following propositions, which complainants have endeavored to establish: First. That the Passaic river is a public highway of commerce, which under the constitution of the United States has been regulated by congress. Second. That the free navigation of the Passaic river as a common highway having been established by regulation of congress, and by compact between the states, it cannot lawfully be obstructed by force of any state authority or legislation. Third. The bridges proposed to be erected by the New Jersey Railroad Company and Plank Road Company will be each an obstruction to the free navigation of the Passaic river, and public nuisances. Consequently this court will enjoin their erection, on complaint of any injured party.

So far as these propositions involve the facts of the case, we find them to be as follows: The Passaic is a river having its springs and its outlet wholly within the state of New Jersey. Though a small and narrow river it is navigable for sloops, schooners, and the smaller classes of steamboats as far as the tide flows, some miles above Newark; at the upper end, and above this city there are several bridges, with small draws, and difficult to pass. These were all erected by authority of the state, and one of them more than fifty years ago. The city of Newark has been made a port of entry by act of congress [and the United States had surveyed the channel, built two light-houses, "fog-lights," spar-buoys, &c.];[3] has some little foreign commerce, and some with ports of other states. Being in fact but a manufacturing suburb of New York, much the larger portion of her commerce is with that city, and carried on the rail and plank roads connecting them. That the proposed bridges will in some measure cause an obstruction to

[2] [From 3 Wall. (70 U. S.) 782.]

[3] [From 3 Wall. (70 U. S.) 782.]

the navigation of the river, and some inconvenience to vessels passing the draws, is certainly true. Every bridge may be said to be an obstruction in the channel of a river, but it is not necessarily a nuisance. Bridges are highways as necessary to the commerce and intercourse of the public as rivers. That which the public convenience imperatively demands, cannot be called a public nuisance because it causes some inconvenience or affects the private interests of a few individuals. Now, if every bridge over a navigable river be not necessarily a nuisance, but may be erected for the public benefit, without being considered in law or in fact a nuisance, though certainly an inconvenience affecting the navigation of the river, the question recurs, who is to judge of this necessity? Who shall say what shall be the height of a pier, the width of a draw, and how it shall be erected, managed and controlled? Is this a matter of judicial discretion or legislative enactment? Can that be a nuisance which is authorized by law? Does a state lose the great police power of regulating her own highways and bridges over her own rivers, because the tide may flow therein, or as soon as they become a highway to a port of entry within her own borders? In the course of seventy years' practical construction of the constitution, no act of congress is to be found regulating such erections, or assuming to license a bridge, over such a river wholly within the jurisdiction of a state (if we except the doubtful precedent of the Cumberland road), and during all this time states have assumed and exercised this power. If we now deny it to the states, where do we find any authority in the constitution or acts of congress for assuming it ourselves? These are questions which must be resolved before this court can constitute itself "arbiter pontium," and assume the power of deciding where and when the public necessity demands a bridge, what is a sufficient draw, or how much inconvenience to navigation will constitute a nuisance.

The complainants in these several bills, in order to show jurisdiction in the court, have stated themselves to be citizens of the state of New York. Their right to a remedy in the courts of the United States is not asserted, on account of the subject matter of the controversy, nor do they allege any peculiar jurisdiction as given to us by any act of congress; but rest upon their personal right as citizens of another state to sue in this tribunal. It is very apparent, also, that the complainants, if not introduced as mere John Does or nominal parties (while those really contending are used as witnesses) are at least volunteers in the controversy, "post litem motam," who have bought the right to an expected injury for the luxury of the litigation. Without stopping to laud this exhibition of public spirit by citizens of a neighboring state, it is plain by their own showing, that they can demand no other remedy from this court than would be administered by the tribunals of the state of New Jersey in a suit between her own citizens. A citizen of New York who purchases wharves in Newark or owns a vessel navigating to that port has no greater right than the citizen of New Jersey. A court of chancery in New Jersey would not interfere with the course of public improvements authorized by the state, at the instance of a wharf owner on the suggestion that a change in the location of a bridge would cause a depreciation in the value of his property. This is not a result, for which (if the court can give any remedy at all,) it will interfere by injunction. The court has no power to arrest the course of public improvements, on account of their effects upon the value of property, appreciating it in one place and depreciating it in another. If special damage occurs to an individual, the law gives him a remedy. But he cannot recover either in a court of law or equity, special damage as for a common nuisance, if the erection complained of be not a nuisance. A bridge authorized by the state of New Jersey cannot be treated as a nuisance under the laws of New Jersey. That the police power of a state includes the regulation of highways and bridges within its boundaries, has never been questioned. If the legislature have declared that bridges erected with draws of certain dimensions will not so impede the commerce of the river, as to be injurious or become a public nuisance, where can the courts of New Jersey find any authority for overruling, reversing or nullifying legislative acts on a subject matter over which it has exclusive jurisdiction? Admitting, for the sake of argument, that congress, in the exercise of the commercial power, may regulate the height of bridges on a public river in a state below a port of entry, or may forbid their erection altogether, they have never yet assumed the exercise of such a power, nor have they by any legislative act conferred this power on the courts. The bridges will not be nuisances by the law of New Jersey. The United States has no common law offences, and has passed no statute declaring such an erection to be a nuisance. If so, a court cannot interfere by arbitrary decree either to restrain the erection of a bridge or to define its form and proportions. It is plain that these are subjects of legislative not judicial discretion. It is a power which has always heretofore been exercised by state legislatures over rivers wholly within their jurisdiction, and where the rights of citizens of other states to navigate the river are not injured, for the sake of some special benefit to the citizens of the state exercising the power.

But it has been contended, on the authority of a dictum of my own, in Devoe v. Penrose Ferry Bridge Co. [Case No. 3,845], "that the supreme court have decided in the case of Pennsylvania v. Wheeling Bridge, 13 How. [54 U. S.] 579, that although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a state,

yet that as courts of chancery they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a state." It is true that this doctrine was enunciated as a corollary from the Wheeling Bridge Case, on a motion for an interlocutory injunction against a bridge over a stream wholly within the territory and jurisdiction of Pennsylvania. On such motions I have always refused to hear and definitely decide the great points of a case. If there be a prima facie or even doubtful case shown, it is the interest of both parties that the interlocutory injunction should issue, and that the defendants should not expend large sums in erections which may possibly be treated hereafter by the court as nuisances. In the cases now before us, the same course was pursued; but after the full argument of this question on final hearing, and a most careful consideration of it, I feel bound to acknowledge that the dictum I have just quoted from the report of the Case of the Penrose Ferry Bridge Company is not supported by the decisions of the supreme court in the Wheeling Bridge Case. It is true that such an inference might be drawn from a hasty or superficial examination of the opinion of the court as delivered in that case. But the point now to be considered, was not in that case, and could not, therefore, have been decided. No judge in vindicating the judgment of the court, can deliver maxims of universal application, in every sentence, or oracles which may be read in two ways, one applicable to the case before him, and the other not. To sever the arguments of a judge from the facts of the case to which he refers, will often lead to very erroneous conclusions. The fact that Pittsburg has been made a port of entry may have been mentioned as an additional or cumulative reason why Virginia should not be allowed to license a nuisance on the Ohio, below that city. But the question whether the power to regulate bridges over navigable rivers wholly within the bounds of a state, could be exercised by it below a port of entry, and whether the establishment of such a port did ipso facto divest the state of such a power was not in that case, and therefore not decided. This assertion will be fully vindicated by a careful examination of the record in that case.

1. It must be noted as a circumstance of that case, that although the state of Pennsylvania in her corporate capacity was complainant, and "propter dignitatem" entitled to sue in the supreme court of the United States; yet, that when the bill was filed, the same complaint might have been sustained in the circuit court of the United States, or the bridge might have been prostrated as a nuisance by indictment in the proper state court of Virginia. The bill charged that the bridge proposed to be erected was in utter disregard of the license granted by its charter, which carefully forbid the least interference with the navigation of the Ohio. On the facts charged and proved, a court of chancery of Virginia, would have been bound to enjoin the erection of so palpable a nuisance to the navigation. The case therefore presented every fact necessary to give the court jurisdiction—a party having a right to sue in the court—a nuisance proposed to be erected without the sanction either of Virginia or the United States, and great special damage to the plaintiff.

2. During the pendency of this suit, the legislature of Virginia saw proper to come to the assistance of their corporation, in the unequal contest, and at its suggestion enacted that the bridge proposed to be built contrary to the license granted to the corporation, was according to it, and not therefore to be considered as a nuisance by the laws of Virginia—notwithstanding that the bridge was without a draw and for many days in the year would wholly obstruct the passage of steamboats.

3. This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions. Could Virginia license or authorize a nuisance on a public river, which rose in Pennsylvania, and passed along the border of Virginia, and which by compact between the states was declared to be "free and common to all the citizens of the United States?" If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the state of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there could be no measure to her power. She would have the same right to stop its navigation altogether, as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea therefore presented not only a great question of international law, but whether rights secured to the people of the United States, by compact made before the constitution, were held at the mercy or caprice of every or any of the states, to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defense, of course the complainant was entitled to a decree prostrating the bridge, which had been erected pendente lite. But to mitigate the apparent hardship of such a decree, if executed unconditionally, the court in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height or have a draw put in it which

would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn, that the courts of the United States claim authority to regulate bridges below ports of entry, and treat all state legislation in such cases as unconstitutional and void.

It is abundantly evident from this statement, that the supreme court, in denying the right of Virginia to exercise this absolute control, over the Ohio river, and in deciding that as a riparian proprietor she was not entitled, either by the compact or by constitutional law, to obstruct the commerce of a supra-riparian state, had before them questions not involved in these cases and which cannot affect their decision. The Passaic river, though navigable for a few miles within the state of New Jersey, and therefore a public river, belongs wholly to that state; it is no highway to other states, no commerce passes thereon from states below the bridge to states above. Being the property of the state, and no other state having any title to interfere with her absolute dominion, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a state. Canals, turnpikes, bridges and railroads are as necessary to the commerce between and through the several states, as rivers. Yet congress has never pretended to regulate them. When a city is made a port of entry, congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each state over her own public rivers. Congress may establish post offices and post roads; but this does not affect or control the absolute power of a state over its highways and bridges. If a state does not desire the accommodation of mails at certain places, and will not make roads and bridges on which to transport them, congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry, is an act for the convenience and benefit of such place, and its commerce; but for the sake of this benefit the constitution does not require the state to surrender her control over the harbor, or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own.

Whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the state of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other state. It would still be a port of entry, if congress chose to continue it so. Such action would not be in conflict with any power vested in congress. A state may, in the exercise of its reserved powers, incidentally affect subjects entrusted to congress without any necessary collision. All railroads, canals, harbors or bridges necessarily affect the commerce not only within a state, but between the states. Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a state exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads and canals, to land as well as water? Assuming the right (which I neither affirm or deny) of congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no act of congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being "a good judge" could hardly be given to one who would endeavor to "enlarge his jurisdiction" by the assumption, or rather usurpation, of such an undefined and discretionary power. The police power to make bridges over the public rivers is as absolutely and exclusively vested in a state as the commercial power is in congress; and no question can arise as to which is bound to give way, when exercised over the same subject matter, till a case of actual collision occurs. This is all that was decided in the case of Wilson v. Blackbird Creek, 2 Pet. [27 U. S.] 257. That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of any thing decided in Gibbons v. Ogden [9 Wheat. (22 U. S.) 1], or to deny the exclusive power of congress to regulate commerce. Nor does the Wheeling Bridge Case at all conflict with either. The case of Wilson v. Blackbird Creek [supra], governs this—while it has nothing in common with that of the Wheeling bridge.

The view taken by the court of this point dispenses with the necessity of an expression of opinion on the questions on which so much testimony has been accumulated, what is the proper width of draws on bridges over the Passaic? How far the public necessity requires them? What is the comparative value of the commerce passing over or under them? What the amount of inconvenience such draws may be to the navigation, and whether it is for the public interest that this should be encountered rather than the greater one consequent on the want of such bridges? and finally, the comparative merits of curved and straight lines in the construc-

tion of railroads. These questions have all been ruled by the legislature of New Jersey, having (as we believe) the sole jurisdiction in the matter. They have used their discretion in a matter properly submitted to them, and this court has neither the power to decide, nor the disposition to say, that it has been injudiciously exercised.

II. The second great question in this case is not affected by the conditions of the first. The court has undoubted jurisdiction to administer the relief here sought, if the complainants have shown themselves entitled to it. It is charged that the corporation called the "Proprietors of the Bridges over the Rivers Passaic and Hackensack" have a right to bridge these rivers "exclusive of all other persons whatsoever, in such manner as that no other bridge can be erected within said limits until the expiration of 99 years from the date of said original act (1790), without the consent of said proprietors." It is contended, also, that a majority of the stockholders cannot by law surrender or release this exclusive privilege or franchise, and that any law assuming to take away or authorizing any invasion of such franchise, impairs the obligation of the original and fundamental contract with and between the stockholders, and is therefore unconstitutional and void; and as a consequence, this court having jurisdiction of the parties, is bound to protect their franchise from invasion, on the complaint of any individual stockholder.

In order to a clear understanding of this point, it will be necessary to give a brief, but, nevertheless, a somewhat tedious history of the legislative and other transactions connected with it. Previous to the year 1790, the Passaic and Hackensack rivers had been crossed by means of ferries only. In that year the legislature of New Jersey passed an act "for building bridges over the Passaic, Hackensack," &c. As this act is somewhat anomalous in its provisions, and subject to misconstruction, it will be necessary to notice some of its provisions. The first section nominates certain commissioners, "who are authorized to put in execution the several services intended by this act." They are required to view the ground from Newark to Powles Hook, and fix upon the most suitable and convenient site for a bridge, and are authorized to erect, or cause to be erected, a bridge over each of these rivers. The bridges must have a draw of 24 feet, lamps, &c. After having agreed upon the sites of the bridges, they are required to lay out the roads to them. If the bridge be fixed at the ferry, the commissioners were to pay for the ferry rights; they were authorized also, at their discretion, to contract and agree with any person or persons who would undertake to build such bridges for the tolls allowed by the act; and for so many years, and upon such conditions as, in the discretion of the commissioners, should seem expedient. This agreement must be reduced to writing, signed and sealed by the parties thereto, and recorded, "and to be binding on the parties contracting as well as the state of New Jersey, and as effectual as if the same and every part, covenant and condition thereof had been particularly and expressly set forth and enacted in this law." The 15th section enacts "that it shall not be lawful for any person whatsoever, to erect or cause to be erected any other bridge or bridges over or across the said river Passaic, between its mouth and second river, &c." In February, 1793, these commissioners entered into a contract, by indenture, with some thirty other gentlemen, reciting their powers under the above act. By this deed they "demised, granted, and to farm let" the said bridges to be erected "as hereinafter declared, over said rivers, together with all tolls appertaining thereto." "To have and to hold the said bridges, with their respective tolls and profits, hereinbefore mentioned, &c., for a term of 97 years. In 1794 the stockholders in this company are constituted a body politic and corporate, by the name of the "Proprietors of the Bridges over the Rivers Passaic and Hackensack." In 1832, "the act to incorporate the New Jersey Railroad Company" was passed. As the proprietors of the bridges had claimed the sole right to build bridges over the Passaic and Hackensack on the proposed route of the railroad, the legislature, with a laudable regard for private rights, authorized the railroad company to purchase turnpike roads and bridges on the route, or any and all the shares of the capital stock of such roads and bridges. The stockholders were to be paid the par value of their stock, or have railroad stock to the same amount. As the stockholders in the bridge company were probably the persons most interested in obtaining the railroad charter, the act did not make it compulsory on the stockholders to accept the value of their stock in money, or railroad stock, but left it to the two corporations to arrange the matter among themselves. No difficulty appears to have been apprehended, as the railroad was authorized to purchase the stock, and thereby control the other corporations, and more especially as the wealthy and respectable men who owned the stock of the first were those most deeply interested in the last. The act, while it contemplated that the railroad corporation should have the control of both the turnpikes and bridges, did not permit the smaller corporations to be absorbed or annihilated by the greater, but ordained that the roads and bridges should be preserved and governed by the provisions of their respective charters. Accordingly, in November, 1832, the railroad corporation entered into an agreement with the "proprietors of the bridges," reciting the authority conferred on the railroad, and that the parties had agreed upon the terms of sale of the stock of the bridge company; and stipulating that the railroad pay to the stockholders of the bridge company $150 for every share of

their stock. It provided that the stockholders electing to receive payment for their stock according to this agreement, should show their assent before the first of January following, and might elect to receive money or railroad stock to same amount, reserving their "franchise privileges" as before held, and reserving also "all grants or privileges theretofore made by way of commutation." The reservations were made to meet the exigency of the proviso to the 10th section of the act of incorporation of the railroad company —"That nothing herein contained shall be so construed as to impair any reversionary interest or vested rights which the state or any incorporated company or individual may possess in virtue of an act for building bridges, &c., passed in 1790," &c. By this agreement the railroad is permitted either to use the old bridge or erect another along side, but so as not to obstruct, hinder, or interrupt the travel over the old bridge. In pursuance of their act of incorporation and of their agreement, the railroad bought some 930 of the 1,000 shares into which the stock of the "proprietors of the bridges," &c., was divided, at the price of $150 for each share of $100. They erected a railroad bridge at the end of Centre street, which has been used for upwards of twenty years. As a new bridge is now found necessary, and as the position of the old one requires sharp curves of the railroad through the streets of the city, which are not only inconvenient but dangerous, a supplement to the act incorporating the railroad was passed on the 3d of April, 1855, authorizing the construction of the bridge at Commercial Dock, and the removal of the old one at Centre street, and of the railroad track connected therewith. It requires the new bridge to have two draws, each at least 65 feet wide, on which a light must be kept at night, and a careful person to open the draws for free passage of vessels, with the same provision as to reversionary interests as is found in the 10th section of the original act. It requires also the consent of the "proprietors of bridges," &c., in writing, under the corporate seal, and that the giving of such consent shall not, except as to the said bridge so consented to, be construed, held, or deemed in any manner to strengthen or impair any rights or privileges which the said "proprietors may possess."

It is not worth while, for the purposes of this case, to inquire whether the "proprietors of the bridges," &c., can claim any franchise of greater extent than that contained and accurately defined in their written agreement with the commissioners. It clearly does not confer on them a right to build any other bridges than the two described and specified, or take tolls therefrom. They cannot be said therefore to have a monopoly for building of bridges within the boundaries specified in the act. The instrument called a lease or agreement defines the rights and the extent of the franchise granted to the company; and it may well be doubted whether the provisions of the 15th section, which are wholly omitted from their charter, can be invoked as any part of their franchise. Nevertheless, as the legislature of New Jersey seem to have treated this section as in the nature of a covenant by the state not to permit other bridges to be erected which might injure the value of the franchise conferred on the "proprietors" by the commissioners without the consent of the corporation, we shall treat it as such—at best it is no more. If the proprietors had the sole right to build bridges and take tolls, their whole franchise might have been condemned by the legislature under their right of eminent domain. A title to a franchise is of no higher quality than a title to land. Such indiscreet contracts by a legislature cannot paralyze the arm of government and stop the progress of improvement for a century. The legislature without attempting to define their rights or compelling them to renounce them for a proper consideration have merely suggested a very easy mode of getting over the difficulty. The railroad is authorized to purchase out the whole stock and franchise of the bridge company, by paying the full value thereof. Those stockholders who did not choose to accept such terms know well the purpose and object of this transaction was to give to the railroad corporation the control of this claim to a monopoly, whatever might be its validity or extent, without a destruction of the other corporate privileges and faculties. An acquiescence for more than twenty years in the exercise of this right by the railroad will hardly leave room to question it now, even if a majority of the stockholders should now be disposed to do so. But the parties now objecting, do not seem absolutely to deny the right of the railroad company to have a bridge over the Passaic somewhere, provided it be built so as to suit the private interest of certain wharf owners. Their franchise to receive tolls and pass free on their own bridge will not be impaired by the change. Nor is there any evidence that the value of the bridge stock will be in any manner affected thereby. When the legislature have decided that the public interests require the change of location of the track of a railroad, or a bridge connected with it, a court cannot be called on to enjoin such a change because it will cause a depreciation of property adjoining it, nor can members of the bridge corporation in this case call for the intervention of the court to protect them against the acts of the majority of the corporators, unless for some abuse of power, to the injury of the corporate privileges or property of the minority. It is no part of the corporate franchise of the proprietors, &c., that any of its stockholders who may chance to be wharf owners, shall wield their corporate privileges to enhance the value of their wharves. This change of the position of the railroad bridge is authorized by law. It has the consent of the "proprietors," given in the

manner pointed out by law, under the seal of the corporation. In giving this assent the corporation was acting within the scope of its powers, and in a case where the will of the majority must necessarily govern, when lawfully expressed. This is not a case where a majority of the stockholders are employing the common fund for the accomplishment of a purpose not within the scope of the institution. The majority must decide what is proper compensation for any real or supposed injury to their franchise of toll, which may result from the change of position of this railroad bridge. If it be part of their franchise to license other bridges, such a franchise can only be exercised by the corporation under their common seal and at the will of a majority. But it is plain that another bridge erected without legislative authority might have been treated as a nuisance, for whatever may have been considered the nature of the supposed monopoly, neither the law, nor their own lease, authorized them to build another bridge, or to give a valid license to others. The legislature admit that they are bound by contract not to authorize another bridge; but on the principle of "volenti non fit injuria" they have directed the railroad to obtain the consent of the corporation with whom this contract was made; whether this covenant was made with them originally as partners or corporators, can make no difference in the case. In neither case can a single individual by his negative vote control the majority of the body, or compel it to give or refuse its consent as may suit the interest of an individual or a minority. This supposed franchise of forbidding the legislature from licensing a bridge over these rivers seems to have been a puzzle for the learned lawyers of the state for half a century past; and, as it is claimed by a large number of highly respectable, influential and wealthy men, it has been treated with great reverence by the legislature, and the more so, as the lawyers could not agree in defining what it was. Some have fancied it an incorporeal hereditament in each stockholder, which cannot be affected by the act of another, having the quality of a polypus; and though divided into one thousand parts or pieces, each one became a unit, or distinct whole; others have treated it as a right of common, in which "quilibet totum habet et nihil habet," an indivisible unit of which, if a man has not the whole, he has nothing—and consequently a majority cannot dispose of it. But we do not think it necessary to search the lumber garret of obsolete law, in order to give a show of profound legal learning to an absurd conclusion. The provisos in the different acts of legislature, which have been invoked as conferring this power of obstruction on each one of one thousand partners or stockholders, make no new grant of power or franchise, and clearly refer to other valuable privileges, without being open to such misconstruction. Having, then, such evidence of the consent of the corporation as is required by law, we cannot say it is insufficient. The allegations in the bill, of irregularity or fraud in the election of the officers of the corporation, and obtaining the act giving such consent, even if sufficiently pleaded, have not been proved, and require no further notice. I am of opinion, therefore, on this point of the case, that the complainants have shown no legal right as stockholders of the corporation of "proprietors," &c., to interfere and overrule the act of the corporation. Nor have they alleged or shown such an improper use of the common property of the corporation, or such deviation from its original purpose, or abuse of the trusts confided to it, as will entitle them to the interference of a court of equity.

The third and last question for consideration, is, whether the railroad company has, by any valid contract, covenanted or agreed with the complainant, or those under whom they claim as assignees, that the railroad bridge over the Passaic shall be forever fixed at Centre street, so that the company cannot, even with consent of the legislature, and for their own and the public benefit, change the location of the bridge, shorten their road, and avoid difficult and dangerous curves. As we have already seen, the question of the expediency or necessity for this change of route on the road, is one not submitted to the judgment or discretion of the court. If the legislature has authorized it, the railroad have a right to proceed, unless bound by contract to maintain their bridge where it at present stands. The answer denies the existence of any such contract. Assuming that a contract which is to have the effect of forever restraining the improvement of this road at this point can be proved by parol, those who aver it, must be held to clear, consistent, and undoubted evidence, as to the parties, the consideration and the precise terms of such contract. Have we such proof?

Without wishing to make any remarks which may appear offensive to any of the highly respectable witnesses who have given such contradictory accounts of the transaction, it is too plain to be overlooked, that much of this conflict arises from the examination of persons as witnesses who are the real parties in interest. The transfer made post litem motam in order to constitute the complainant a party to the suit, is a veil too transparent to conceal the real parties to the litigation. But waiving this objection to the testimony of certain witnesses, as also any invidious comparison of the credibility of very respectable men, I must say that there is not such clear evidence of a contract, its consideration, its parties or its terms, as would justify a court in decreeing its specific execution. It appears that originally the railroad company had purchased the Commercial Dock property, with the view of erecting their bridge there. As the town of Newark was then built, the railroad would pass along its lower boundary. At this time railroads were

an untried experiment. It was a popular notion that it would be of great advantage to a town or city to have a railroad pass through its most frequented streets, that it would advance the value of property on the streets through which it passed, and increase their commerce; and that curves in a railroad were preferable to straight lines, being much more graceful and no less useful. From the prevalence of these notions, the popular feeling became much excited; and the more so, that certain individuals of wealth and influence, who owned wharves on the river, had shrewdly discovered that it would add considerably to the value of their property, if the railroad instead of crossing below it, could be bent round behind it, and crossing above, create an obstruction to the navigation of the river above their wharves. Public meetings were held, exhorting, entreating, and advising the railroad directors.—Suits were brought by lotholders in the name of the attorney general, threatening them with injunctions. Some wanted one thing, some another, and the result is perhaps best described in the graphic language of one of the witnesses: "I can only say, that according to my recollection now, there was much confusion and conflict of wishes among all the parties, and I don't know how many parties I could count up. I know there were sharp speeches and feelings exhibited, as much so as upon any thing I ever saw in this town, and to my view at the present moment, they were like two dogs that had been quarreling, until they got tired and left off, and there was a sort of a common consent to abandon the conflict, and not to keep the progress of the work from going on, by a general assent of making the bridge, where it is now. The location of the bridge was the result, but that there was any contract or agreement that was to be final and conclusive and not to be revoked, I know no such arrangement as that. There was a cessation of the conflict and the work went on." The directors, desirous of conciliating the people of Newark, and expediting the completion of their road, yielded to the pressure, and passed the following resolution, which had the effect of allaying the excitement. It is dated on the 24th of September, 1834, and is as follows: "Whereas, considerable diversity of opinion has prevailed among the citizens of Newark relative to the location of the railroad bridge across the Passaic river, and the location mentioned in the annexed resolution having been agreed upon as a mutual accommodation of conflicting interests, and with a view to the settlement of all matters of controversy; now, therefore, be it resolved, unanimously, that the railroad bridge be located across the Passaic river at the north end of the dock owned by Moses Dodd, with a draw of forty-five feet in width; provided that the right of way from the westerly termination of said bridge to the entrance of the avenue on Market street can be obtained on reasonable terms; and provided also, that the owners of property on the above mentioned part of the route of the railroad shall agree that the company may use any moving power thereon which they shall deem proper." And on the 26th of December, the following resolution was passed: "Whereas, it is desirable that the bridge across the Passaic river be definitely located, and whereas further delay, in order that all difficulties may be removed, is not deemed expedient, therefore, resolved, that the bridge across the Passaic river be, and the same is, hereby definitely located, immediately north of the dock lately owned by Moses Dodd." These resolutions of the board, for the purpose of proposing an accommodation of conflicting interests and putting an end to the controversy, seem to have brought the dispute to a close, and received general acquiescence. But these documents exhibit no contract, binding the corporation never to change the location of the road and bridge under any change of circumstances. They accordingly retained the Commercial Dock property, which was originally purchased for the purpose of a bridge. This proposition and resolution of the board was for the sake of peace. Those without had conflicting interests—they were bound to no conditions, they gave no consideration, except "ceasing to quarrel when they got tired." Even the parties who had brought suits to frighten the directors where not bound to withdraw them. The directors exercised their own discretion under the circumstances. But time, which changes all things, has produced a great change in the circumstances.—Newark has become a great city. Locomotives moving at a velocity of forty miles an hour, which were then considered but the dream of the projectors, are now established facts. Curves have given way to straight lines, and the notion that railroad cars darting through the most frequented streets of a city are neither a convenience nor a benefit, has become obsolete. The conflicting interests which inexperience and ignorance had originally produced, need no longer to be propitiated for the sake of peace. The people of Newark no longer object to having the bridge located where it was originally intended to place it, and the people of New Jersey, by their legislature, have determined that it would be beneficial to the public to have the old bridge, with its narrow and troublesome draws, taken away, a new one erected below with larger and better draws, and that the railroad should pass through the city by the shortest route—by a straight line, and not with short curves. The complainants have shown no contract made by themselves with the railroad company, nor have they shown any covenant running with the land on which they as assignees are entitled to a remedy at law, or relief in equity.

Having thus disposed of the three great points so ably discussed by the learned counsel, the minor issues of fact or law have become immaterial, and need no further notice.

Let a decree be entered in each of these cases dismissing the bill, with costs.

[These cases were taken on appeal to the supreme court, where, the court being equally divided, the judgment of the circuit court was in consequence affirmed. See 24 How. (65 U. S.) Append. 1.]

Case No. 9,621.

MILTENBERGER et al. v. PHILLIPS.

[2 Woods, 115.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

BANKRUPTCY — ASSIGNEES — SUIT TO RECOVER COUNSEL FEES PAID—LIMITATION.

A suit brought by the assignees in bankruptcy of a bank, to recover money paid as counsel fees by persons acting without authority, as commissioners for the liquidation of the bank under the state law, is barred unless brought within two years from the time the cause of action therefor accrued in favor of the assignees.

[Cited in Walker v. Towner, Case No. 17,089.]

[This was a suit by Miltenberger and Norton against Edward Phillips.]

Heard upon peremptory exception to the plaintiff's petition.

Thomas Hunton, for plaintiffs.

Edward Phillips, in pro. per.

WOODS, Circuit Judge. The petition was filed on the 2d of April, 1875, and alleges that on the 2d of June, 1871, the plaintiffs were appointed assignees in bankruptcy of the Bank of Louisiana, and were thereby entitled to possess and administer all the assets which were of the bank on the date of the filing of the petition in bankruptcy, which was on the 20th of May, 1869. The petition further alleges that on and before the 20th of April, 1870, the defendant received, as counsel fees, various sums of money, amounting in the aggregate to a large sum, which were assets of the bank, and were paid to him by certain persons pretending to act as commissioners of the bank, under authority of a court of the state of Louisiana, but in fact without any authority whatever. The purpose of the suit is to recover back the sums so paid to Phillips, as having been illegally paid. The defendant Phillips excepts peremptorily to the petition, among other grounds, because the action is barred by the two years limitation provided in section 5057, Revised Code, which declares that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to, or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." The money sued for was received by the defendant before the assignees were appointed, and more than two years transpired between this appointment and the bringing of this action. Therefore, if the section just quoted applies to cases like this, the action is barred. In my judgment it does apply, not only in terms but in spirit. In a recent case decided by the supreme court of the United States, Bailey v. Glover, 21 Wall. [88 U. S.] 342, it was held that the section under consideration was "a statute of limitation. It is precisely like other statutes of limitation, and applies to all judicial contests between the assignees and other persons touching the property or rights of property transferable to or vested in the assignee where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee." This authority, it seems to me, is decisive of this case. See, also, Norton v. De la Villebeauve [Case No. 10,350]. This action is barred, and cannot be maintained, and the exception setting up the bar is sustained. It is unnecessary to notice the other grounds of exception.

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

Case No. 9,622.

MILTON v. WILGUS.

[Cited in McCormick v. Humphrey, 27 Ind. 144. Nowhere reported; opinion not now accessible.]

Case No. 9,623.

In re MILWAIN.

[12 N. B. R. 358; 1 N. Y. Wkly. Dig. 76.] [1]

District Court, D. Oregon. 1875.

BANKRUPTCY — CREDITORS NOT ON SCHEDULE — ELECTION OF ASSIGNEE—POSTPONEMENT.

At the first meeting of creditors in the case of voluntary bankrupt, proofs of certain claims against the estate were presented, but the names of the alleged creditors did not appear on the bankrupt's schedule. *Held*, that the circumstance was sufficient to raise a doubt as to the validity of such claims within the meaning of section 5083 of the Revised Statutes, and ordered that the proofs be postponed until after the election of an assignee.

In bankruptcy.

M. W. Fecheimer, for the motion.

Joseph Simon, contra.

DEADY, District Judge. On June 19, 1875, Elijah Milwain was adjudged a bankrupt in this court, upon his own petition. At the first meeting of creditors, on July 6, the creditors Hotaling & Co., and Goldsmith and Loewenberg, moved to postpone the proofs of the claims of Greene, Carleton and Keith, whereupon the question, "Shall this motion be allowed?" was certified by the register to the judge for decision. As appears from the statement of the register, the grounds of the

[1] [Reprinted from 12 N. B. R. 358, by permission. 1 N. Y. Wkly. Dig. 76, contains only a partial report.]

motion are that the names of these alleged creditors do not appear on the bankrupt's schedule, and their alleged claims appear to be based upon running accounts, the items of which are not stated. Section 5085 of the Revised Statutes provides: that "when a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen."

The claim of Keith is for merchandise sold and delivered at different times specified, between May 6, 1871, and June 15, 1875, amounting to nine hundred and ninety-seven dollars and twenty-four cents, upon which the credits amount to nine hundred and twenty-eight dollars and fifty-two cents, leaving a balance in favor of Keith of sixty-eight dollars and seventy-two cents. Carleton's claim is for merchandise sold and delivered between April 27 and September 20, 1874, amounting to two hundred and twenty-eight dollars, with a credit of one hundred and sixty-four dollars and fifty-six cents, leaving a balance of sixty-three dollars and forty-two cents. Greene's claim is stated to be for merchandise and money loaned between November 1, 1872, and June 15, 1875, amounting to one thousand one hundred and ninety-eight dollars and fifty-eight cents, with a credit of two hundred and fifty-three dollars and seven cents, leaving a balance of nine hundred and forty-five dollars and fifty-one cents.

Under these circumstances I think there is good reason to doubt the validity of these claims. Section 5015 of the Revised Statutes requires the bankrupt to annex to his petition a schedule of his debts, containing the names of all his creditors and the nature of their demands, which schedule must be verified by his oath. The schedule in this case is silent as to these alleged creditors or their claims. In effect the bankrupt has thereby declared that he owes them nothing. It was his interest to speak the truth in the premises, for otherwise he might be denied his discharge, besides being liable criminally. True, he may have omitted these names from the schedule by mistake, and that may hereafter be shown. But there is no presumption that the schedule is incorrect in this particular, but the contrary.

In opposition to the oath of the bankrupt is the oath of each of these alleged creditors to their claims. They swear that their debts are valid and subsisting demands against the estate of the bankrupt. So far it is oath against oath, and that itself is sufficient to raise the doubt contemplated by the statute. But these creditors are interested witnesses. Their interest is to establish their claims. But the interest of the bankrupt in the matter, so far as he has any, is on the side of the truth. The affidavit of the bankrupt, and any one of these creditors, is of equal weight as evidence, except so far as the circumstances under which they testify tend to affect their credibility. As has been said, the affidavit of Milwain is that of a disinterested party, at least, while those in support of these claims are made by interested parties.

Again, it is a material circumstance to be considered in this connection, that these claims are based upon open accounts, running through some years, which are not stated in items. Keith's claim, it is true, is stated in particulars, so far as the date of each article is concerned, but the nature of the article itself is not mentioned or specified otherwise than as "merchandise." But that is no specification of the article sold. For all the information conveyed by that word, the article might as well have been styled "sundries." But in the other two claims, there is neither a specification of the nature of the articles sold nor the dates of their delivery.

Notwithstanding these objections, these claims may be valid and entitled to be proved. But the circumstances being sufficient to raise a reasonable doubt as to their validity, the proofs may be postponed until an assignee has had an opportunity to examine them.

Case No. 9,624.

MILWARD v. McSAUL

[8 Betts, D. C. MS. 71.]

District Court, S. D. New York. Nov. 24, 1846.

COURTS—FEDERAL JURISDICTION—UNITED STATES CONSUL AT FOREIGN PORT.

[A federal district court has no jurisdiction under Const. U. S. art. 2, § 2, or Act Sept. 24, 1789, § 9 (1 Stat. 76), or otherwise, merely because one party is a United States consul at a foreign port.]

[This was an action on the case by Joseph M. Milward against Enos McSaul, Jr., for false imprisonment. Heard on demurrer to the declaration.]

W. C. Barrett, for plaintiff.
F. R. Sherman, for defendant.

PER CURIAM. This action is prosecuted against the defendant for a false imprisonment and other injuries committed by him, at Laguina, he then being consul of the United States at that port. The special causes of demurrer assigned are that the declaration sets forth no cause showing that the defendant had jurisdiction as consul of the subject matter which is made the gravamen of the action and that accordingly case cannot be maintained, whatever wrong the plaintiff may have sustained by means of his arrest and imprisonment. The points discussed in the written argument have relation to the form of action brought, and the necessity of averring facts showing the subject matter within the jurisdiction of the defendant. But there is a paramount difficulty in the case, which is raised by the

general demurrer and must be disposed of by the court, although it has not been discussed by the counsel. This is a common law action brought in the district court upon the assumption that Const. U. S. art. 2, § 2, declaring that the judicial powers of the United States, shall extend to "all cases affecting ambassadors, other public ministers and consuls," and section 9 of the judiciary act of September 24, 1789, enacting that the United States district courts shall have jurisdiction, exclusively of the courts of the several states, of all suits against consuls, &c., &c., apply as well to persons holding the appointment of consuls under the authority of the United States as to consuls of foreign governments, resident within the United States. Most manifestly this is not so. A consul has no official character in his own country. He is no more than a private citizen in view of the laws of his own government, and is clothed with a privilege only in respect to the foreign nations where he represents his government and exercises his consular functions. This must be clearly so on the principles which originate and guaranty his privilege. 1 Kent, Comm. 41–45; 3 Story, Const. Law, 1652–1655. It results necessarily from the fact that he acquires no official character within the jurisdiction of our laws. That character is communicated to him on his recognition by the foreign government to which he is delegated and continues only with the exercise of his functions there.

Without considering the point raised as to the frame of the pleadings, or other special questions presented by the arguments, I am bound to declare that this court has no jurisdiction in a personal action at common law, sued against a consul of the United States. Judgment must be rendered, accordingly, for the defendant on the demurrer.

Case No. 9,625.

The MILWAUKEE.

[2 Biss. 509;[1] 4 Am. Law T. Rep. U. S. Cts. 147.]

District Court, E. D. Wisconsin. April, 1871.

COLLISION—SPEED—FOG WHISTLE.

1. Seven or eight miles an hour is not a proper rate of speed for a steamboat having barges in tow, at a dangerous point on the Mississippi river.

2. Steamboats on the Mississippi river are in fault for neglecting the rule for the government of pilots, which requires steamboats running in a fog to sound the steam whistle at intervals not exceeding two minutes.

This was a libel by the Security Insurance Company, insurer, against the steamboats Milwaukee and Imperial, to recover the value of 5,521 bushels of wheat, shipped at St. Paul, Minn., by John Robson on barges in tow of the steamer Imperial, and lost by collision with the steamer Milwaukee. The wheat was to be delivered in good order at the port of Dunleith, in the state of Illinois, "unavoidable dangers of the river and fire only excepted."

Emmons & Van Dyke, for libellants.
John W. & A. L. Cary, for respondents.

MILLER, District Judge. The Imperial, with her barges, was compelled to make a landing at Brownsville, about twelve miles below La Crosse, and remain there over night, on account of a fog. On the morning of the 13th of September they left that port and proceeded down the river for about two miles, to Coon slough, where the Minnesota shore makes a sharp projecting point, causing the river to cross to the Wisconsin shore. By reason of this bend the channel beyond the point cannot be seen until the point is passed. The pilot discovered a fog hanging over the point in the slough.

The steamboat Milwaukee was on a trip from Dubuque up to St. Paul. On the 13th of September, early in the morning, the weather being thick and foggy, the steamboat laid up near the elbow of Coon slough. About eight o'clock in the morning, the fog having cleared away somewhat, she proceeded on her voyage. For some distance there was some fog, then the river became comparatively clear of fog, and the pilot could see from half to three-quarters of a mile ahead, except when intercepted by an occasional bank of fog. And as the steamboat Milwaukee approached the bend in the river she discovered a bank of fog resting over the river, about 150 or 200 yards ahead; and at about the same time she discovered the steamboat Imperial with three barges in tow, emerging from the bank of fog, on her course down the river. The steamboat Milwaukee struck the starboard side of the starboard barge, the Robert C. Rodgers, causing the cargo of wheat to be lost in about eight feet of water.

The libel and answer both aver that their respective boats were running slowly and cautiously, on account of a fog hanging over the river. The fog was partially lifted where the sun reached it, but in the shade it still hung over the river. The evidence is, that both boats were running about seven or eight miles an hour, which I consider much too high a rate of speed in that state of the weather, and particularly at that difficult point of navigation.

Rule seven, for the regulation of pilots on rivers, requires the pilot of a steamer running in a fog, or thick weather, to sound his steam whistle at intervals not exceeding two minutes. It is apparent from the evidence that the Imperial had not sounded her whistle within several minutes before the collision. And it is certain that for some time

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

before seeing the fog bank, the Milwaukee did not sound her whistle. If the required signals had been given, it is highly probable that the boats would have avoided the collision. Stopping their respective engines while running into each other was too late. I consider that both steamboats are in fault, for running at too high a rate of speed while the river was not clear of fog, and for not blowing their steam whistles every two minutes, as required by the rules.

Reference is made to a commissioner to ascertain the amounts to be decreed.

Case No. 9,626.

The MILWAUKEE.

[Brown, Adm. 313.] [1]

District Court, E. D. Michigan. June, 1871.

COLLISION — STEAMERS MEETING END ON—RULE OF SUPERVISING INSPECTORS—SPEED.

1. It is not enough that steamers navigating a narrow channel are in charge of officers whose general competency is unquestioned; they should have a pilot on board acquainted with the particular channel, and the want of such pilot is prima facie a fault.

2. The absence of a lookout is not material, if the officer of the deck is in full possession of all the information a lookout could give him in time to avoid a collision.

[Cited in The Kallisto, Case No. 7,600. Approved in The George Murray, 22 Fed. 122.]

3. Rule 1 of the supervising inspectors (1865) cannot be construed to authorize one steamer to dictate to another a departure from the rule prescribed by article 13. The rule, however, may be sustained as an authority for an ascending vessel to propose to a descending vessel to depart from the requirements of the article, and for the descending vessel to accept such proposition, and to make such a departure, when thus mutually agreed upon, binding and valid.

[Cited in U. S. v. Miller, 26 Fed. 97.]

4. It is incumbent upon the vessel claiming the protection of the rule and a departure from the statutory requirement to show: (1) That a proposition to depart from the statute was made by her by means of the signals prescribed by rule 1, and in due season for the other vessel to receive the proposition and act upon it with safety. (2) That the other vessel heard and understood the proposition thus made. (3) That the other vessel accepted the proposition.

[Approved in The Mary Shaw, 6 Fed. 923. Cited in The Garden City, 19 Fed. 533; The Frostburg, 25 Fed. 452. Approved in The Clarion, 27 Fed. 130. Cited in The John King, 1 C. C. A. 319, 49 Fed. 472.]

5. There is no general obligation upon vessels navigating rivers to keep to the right of the centre of the channel, and no such custom proven to exist upon St. Clair flats.

6. The testimony of the officers and crew of each vessel, as to the number of whistles blown upon their own vessel, is to be believed in preference to that of an equal number of witnesses upon the other vessel.

[Cited in The Cherokee, 15 Fed. 121.]

7. Risk of collision begins the moment the two vessels have approached so near that a collision might be brought about by any departure from the rules of navigation, and continues up to the moment when they have so far progressed that no such result could ensue. Under such circumstances, vessels should adopt such a rate of speed as to be at all times under ready and complete control until the risk is passed.

[Cited in The Grand Republic, 16 Fed. 429.]

8. A steamer descending a channel 850 feet wide at 14½ miles an hour, and another ascending at 8½ miles, both condemned for too great speed under the circumstances.

9. Whether the relative duty of the steamships to slacken speed under article 16 (when they are approaching each other so as to involve risk of collision), attaches the same moment the duty to port attaches under article 13 (when they are meeting end on, or nearly end on, so as to involve risk of collision), considered and discussed.

[Cited in The Free State, Case No. 5,090; The Manitoba, Id. 9,029.]

The collision occurred at about 6 o'clock in the evening, on the 23d day of November, 1866, in the St. Clair river, just above the flats, and in what is known as the Southeast Reach of the South Pass of that river. The Lac la Belle was a steam propeller, and of large size, being about 1,200 tons burden, and was engaged in the Lake Superior trade; and at the time of the collision was bound down on a voyage from Lake Superior ports to Cleveland, in the state of Ohio. The Milwaukee was a side-wheel steamboat, of great strength and power, and was engaged in carrying freight and passengers across Lake Michigan, between the ports of Grand Haven, in the state of Michigan, and Milwaukee, in the state of Wisconsin. She had been to Detroit for repairs, and at the time of the collision was bound up on her return to Milwaukee. The Milwaukee hit the Lac la Belle on her port side, just abaft the fore-chains, at an angle of about 45 degrees from the stern, cutting her very nearly in two, and sinking her in about two minutes. The weather was fine, and it was a good night to see. This South Pass of the St. Clair river, above mentioned, is a crooked channel, although between the two bends constituting the "Reach" spoken of, and in which the collision occurred, the channel is nearly straight. The width of the channel, for some distance above and below the place of collision, varies from 450 feet above to 1,000 feet below, and within those limits there is always an ample depth of water for the largest vessels navigating the lakes. At the place of collision the navigable channel is about 850 feet wide, and the collision occurred within not to exceed 75 feet of the extreme northerly or American bank. The course of the river, from a considerable distance above the place of collision, is at first south southwest, and when it reaches a point a little over half a mile above the place of collision, it makes a sudden bend to the westward, which latter course it keeps until, at a point about half a mile below the place of collision, when it makes a sudden bend to about northwest. These two bends are from a mile to a mile and a quarter apart, and between them the chan-

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

nel is nearly straight, with a slight indentation or curve, however, in the north bank to the northward, at just about the point where the collision occurred. Approaching vessels in the day time, and their lights in a good night to see, are in plain sight of each other across the low and marshy lands and shoal water within these bends, and for a considerable distance both above and below the bends. The proofs showed that both vessels were keeping nearer the American channel bank (which was the port hand bank to the Milwaukee and the starboard hand bank to the Lac la Belle), than to the Canadian bank; that the Milwaukee turned the lower bend a little before the Lac la Belle turned the upper bend, but so nearly at the same time as to be practically simultaneous; that the lights of each vessel were first made from the other before either had turned the respective bends in the river, and, of course, the lights of the Lac la Belle then made from the Milwaukee were the green or starboard light and the white light, and the lights of the Milwaukee then made from the Lac la Belle were the red or port light and the white light; that when each so made the other's lights, they must have been about two miles apart, and when each turned the respective bends in the river, which, as we have seen, was nearly simultaneous, they were from a mile to a mile and a quarter apart, and were approaching each other at nearly or quite full speed—that of the Lac la Belle being about 14½ miles an hour, with the current (which at this point is 2½ miles an hour) added, and that of the Milwaukee being about 8½ miles an hour, with the current deducted, making the aggregate speed with which the two were approaching each other by the land about 23 miles an hour, or one mile in 2 minutes and 36 seconds; that these rates of speed were fully maintained by each until collision was inevitable, when the Milwaukee's engine was stopped and reversed, but not in time to produce any perceptible effect upon her speed before the collision occurred.

How the two vessels approached each other, what signals were given by each, and some other facts involved in the case, are stated in the opinion of the court.

The faults specifically charged in the libel against the Milwaukee were: 1. That she had no sufficient and competent officers and crew acquainted with the channel and navigation of the St. Clair river, and at their appropriate and proper places. 2. That they did not answer the signals of Lac la Belle and keep to the right hand side of the river, as both the law and good seamanship require; but, on the contrary, turned to the left, and attempted to pass to the left and to the westward of the said Lac la Belle, contrary to law and good seamanship. 3. Other faults, etc., unknown to libellants, but known to the officers and crew of the Milwaukee, which, when discovered, it was prayed might be inserted in the libel.

The faults specifically charged in the cross-libel against the Lac la Belle were, in the words of the libel: 1. "That said propeller was coming at full speed and showing her green and white lights, and as if to pass on the starboard hand side of the said steamboat. That while so running, and when the said propeller had approached quite close, suddenly she appeared to be swinging to starboard, as if under an order to port, and appeared to be attempting to pass across the bow, and on the port hand side of said steamboat, but on attempting to do so, she was made to run against and collide with the said steamboat Milwaukee." 2. "That although the master of the said steamboat had given his proper signals indicating which side he would pass, and had received an answer to said signal, and when the said propeller had commenced swinging to starboard, as aforesaid, and across the bows of the steamboat, the said master immediately stopped and backed his said steamboat, but so short was the distance between the said propeller and said steamboat, and so great was the speed of said propeller, that the said propeller came on and collided with the said steamboat as aforesaid."

The libellants against the Milwaukee laid their damages at the sum of $167,000, and the libellants against the Lac la Belle at the sum of $6,000.

John S. Newberry, George B. Hibbard, and Willey & Cary, for the Lac la Belle.

Alfred Russell and G. V. N. Lothrop, for the Milwaukee.

LONGYEAR, District Judge. The first charge of fault against the Milwaukee is, substantially, not that her officers and crew were generally incompetent, but that they were unacquainted with the channel and navigation of the particular waters in which the collision occurred, and that they were not at their proper places. As an independent or abstract proposition, I think it is clearly proven that the officers and crew of the Milwaukee had but very little experimental knowledge of that channel. And I think the proofs upon this point are such as to justify the court in holding that their knowledge in this respect was inadequate to the navigation of the difficult passes of the St. Clair river, especially in the night, and that such want of knowledge was sufficient, prima facie, to constitute a fault. Here was a large steamboat of great strength and power, to be navigated in the night time through a channel full of tortuous and narrow passages, difficult of navigation even in the day time, and requiring the highest degree of experimental as well as theoretical knowledge of those passages for safe navigation through them. When we add to this the fact that these difficult passages lie right in, and in fact constitute a part of the great highway of the entire commerce of the great

Northwestern Lakes, and are consequently literally filled with vessels passing and repassing, both night and day, Captain Trowel's attempt to take his vessel through, without an experienced pilot, however competent he may be to navigate the open waters, certainly seems like the very height of presumption, and was an act deserving a stern rebuke, if nothing more.

But the question, after all, is, was this want of knowledge on the part of the officers and crew of the Milwaukee the cause of, or did it contribute to the collision? The theory advanced on the part of the libellants against the Milwaukee is, that when the lights of the Lac la Belle were first made from the Milwaukee, Captain Trowel's want of knowledge of the bends in the river between the two vessels, the lights made being the green and white, led him to the conclusion that the Lac la Belle was crossing the Milwaukee's course, instead of meeting her, and that she would naturally pass to his starboard; and it was assumed that it was this misapprehension that resulted in the collision. The assumed fact upon which this theory is based is, that Captain Trowel did not know of the existence of the bends in the channel. If this fact were sustained by the proofs, or if it were left without direct proofs, to be inferred from Captain Trowel's general want of acquaintance with the channel, the theory might have some plausibility. But, unfortunately for the theory advanced, what proof there is as to that fact is decidedly the other way. In the first place, Captain Trowel swears substantially that he was aware of those bends, and in the next place he must of course have been made aware of the existence of them when the two vessels had turned them, which was in time, with correct management, to have avoided a collision; and finally, the signal given on board the Milwaukee, whether it was a single or a double blast of the whistle, was a signal given only when meeting, showing clearly that Captain Trowel understood at that time that they were meeting and not crossing. I think, therefore, that the theory advanced is rebutted by the facts proven. I shall have occasion, however, to allude to this subject again in connection with another branch of the case. The only charge made under the other division of the first charge of fault is that the Milwaukee had no lookout. It clearly appears, however, that the captain who was in charge of the navigation of the Milwaukee saw the Lac la Belle's lights and was in full possession of all the information that a lookout could have given him, in ample time to have avoided a collision. It is, therefore, immaterial to inquire into the fact whether there was a lookout or not. The second charge of fault against the Milwaukee is, substantially, that she did not keep to the right, but turned to the left, and that this was contrary to law and good seamanship.

The specific regulations, statutory and otherwise, involved in this charge of fault, are articles 13, 14 and 18 of the act of April 29, 1864 (13 Stat. 60, 61), which were then in force, and rule 1 of the rules adopted by the board of supervising inspectors, October 17th, 1865, also then in force, which articles and rule are as follows: "Art. 13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other. Art. 14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." "Art. 18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course," etc. "Rule 1. When steamers are approaching each other, the signal for passing shall be one sound of the steam whistle to keep to the right, and two sounds of the steam whistle to keep to the left. These signals to be made first by the ascending steamer. If the dangers of navigation, darkness of the night, narrowness of the channel, or any other cause, render it necessary for the descending boat to take the other side, she can do so by making the necessary signals, and the ascending boat must govern herself accordingly. These signals to be observed by all steamers, either day or night." The manoeuvring of the vessels which resulted in the collision commenced when each turned the respective bends in the river. This manoeuvring on the part of the Milwaukee, was a starboarding, and running in toward the American channel bank, and on the part of the Lac la Belle, a porting, and running in towards the same bank; so that, as has been before stated, the collision occurred within 75 feet of that bank, and that, too, in a channel which at that point was at least 850 feet wide, and at that time unobstructed. It seems incredible that vessels commanded by competent and intelligent officers should have thus collided in such a channel, and upon such a night. Surely, a grave responsibility rests somewhere, and I think we shall find it resulted in large part from a misapprehension, or at least a misapplication of the articles and rules above quoted.

It is contended on behalf of the Milwaukee that she gave the signals, viz.: two sounds of her steam whistle, prescribed by rule 1, for passing to the left, and that she was therefore right in passing to the left as she did. It is also contended that the Lac la Belle responded by two sounds of her steam whistle, and that, therefore, for a still stronger reason, the Milwaukee was entitled to do as she did.

On behalf of the Lac la Belle it is contended that rule 1 is in conflict with the articles of the statute above quoted, as applied to the facts of this case, and, therefore, affords no protection to the Milwaukee for starboarding and attempting to pass to the left as she did.

The fact that the Lac la Belle responded as alleged is also disputed and the contrary is contended. So far as the rule was in conflict with the act, it was undoubtedly of no effect; and it was so in conflict so far as it might be construed to authorize one vessel, whether ascending or descending, to dictate to the other a departure from any rule prescribed by the act. The rule may, however, be sustained (and I think this is the only effect that can be given to it), as an authority for an ascending vessel to propose to a descending vessel to depart from the requirements of the act, and for the descending vessel to accept such proposition, and to make such a departure when thus mutually agreed upon binding and valid. In such case, and no other, the rule was a protection to a steam vessel departing from a statutory requirement.

In this view of the subject the burden is upon the vessel claiming the protection of the rule and against any departure from the statutory requirement, to prove all the following facts: 1. That a proposition to depart from the statute was made by her by means of the signals prescribed by rule 1, and in due season for the other vessel to receive the proposition and act upon it with safety. 2. That the other vessel heard and understood the proposition thus made. 3. That the other vessel accepted the proposition.

And these facts must be made out by clear and satisfactory proofs. They must not be left to inference. The statute in question is one of vital importance for the protection of life and property upon the waters, and it will not do to hold a party blameless for a departure from its plain provisions, upon a plea of an agreement or license to do so, except where such agreement or license is admitted, or is made out beyond all reasonable doubt by clear and satisfactory proof. Where the agreement is denied, and the evidence is conflicting and contradictory, and does not clearly preponderate in favor of such agreement, the statute must govern, and the responsibility of parties must be determined accordingly. In this case it is all the same whether the vessels were approaching each other end on, or nearly end on, and so within article 13, or crossing, and so within article 14; for, in either case, the Milwaukee departed from the statutory requirements, to justify which she must prove an agreement authorizing her to do so. If they were meeting end on, or nearly end on, it was the statutory duty of both, under article 13, to port, which the Milwaukee did not do, but on the contrary, starboarded. If they were crossing, they were doing so on such courses that the Lac la Belle had the Milwaukee on her (the Lac la Belle's) starboard side, and under article 14 it was the statutory duty of the Lac la Belle to keep out of the way of the Milwaukee (which she had the right to do by taking either side of the latter), and under article 18 it was the statutory duty of the Milwaukee to keep her course, which she did not do, but starboarded.

I find, however, from the proofs that, as matter of fact, the two vessels were meeting end on, or nearly end on, within the meaning of article 13. That they were so meeting, and in such a manner as to involve risk of collision, is evident from the following considerations:

1. From the nearness of their respective courses to the American channel bank. Each vessel was keeping the American channel bank comparatively close aboard, and was running by it instead of by the compass. When the Milwaukee turned the lower bend, she was, by the estimates of those on watch on her at the time, about 200 feet from the shore, and circumstances seem to warrant that the estimate is very nearly correct. When the Lac la Belle turned the upper bend, she was, in the opinion of those on watch on board of her at the time, not beyond the center of the channel, but in fact between that and the American channel bank, and the circumstances seem to warrant that this estimate is also very nearly correct. As we have seen, the channel at this point was not to exceed 450 feet wide. At all events, it was not to exceed 500 feet so that, allowing the widest latitude, the Lac la Belle was not to exceed 250 feet from the American channel bank at this point. Between these two points (and as we have before seen, the two vessels were at these points at practically the same moment of time), the general courses of the two would be on straight lines, which lines, from the above data, could not be more than 50 feet apart, and might be, and probably were, less than that. The two vessels were then from a mile to a mile and a quarter distant from each other. By actual measurement it will be found that at this stage they could have varied but a very small fraction, not to exceed one-tenth of a point from dead ahead of each other. Even if we place the Lac la Belle within 100 feet of the extreme opposite bank, they would not vary more than one-third of a point from dead ahead. This is certainly as nearly end on as vessels usually approach each other. At all events, it is far within the definition which has been given by the courts of what is "end on or nearly end on," within the meaning of article 13. It can make no difference, in this connection, that the lights of the Lac la Belle, first seen from the Milwaukee, were the green and white lights only This would necessarily be the case until the Lac la Belle had turned the upper bend. In determining how vessels are approaching each other in narrow, tortuous channels like the one here in question, their general course in the channel must alone be considered, and not the course they may be on by the compass at any particular time while pursuing the windings and turnings of the channel. It is too late, however, to claim that Trowel was misled, by any such appearance of the lights of the Lac la Belle, into the supposition that she was crossing the course of the

Milwaukee, because the signal he gave and the manoeuvres he made are both inconsistent with such supposition. If the Lac la Belle had been crossing the course of the Milwaukee, and Capt. Trowel had so understood, then any signal to turn to the right or to the left would have been uncalled for and unnecessary, and, of course, would not have been given; he would have simply kept his course as required by article 18.

It is proper, perhaps, to remark here that I do not subscribe to the doctrine advanced on behalf of the libellants against the Milwaukee, that vessels navigating rivers must, in all cases, when meeting, keep to the right of the center of the navigable channel. I know of no such law in this country, and there is no such custom in the navigation of the channel in question. Vessels navigating rivers in this country, like vehicles in a highway, may use any part of the channel they may see fit, observing, however, in all cases when meeting or passing other vessels, the ordinary rules of navigation.

2. That the two vessels were so meeting—end on, or nearly end on—so as to involve risk of collision, is clear from the evident understanding on the part of each at the time, else why the signals and the manoeuvres by each? If there was no risk of collision, there was certainly no necessity and no excuse for any signal by either to go to the right or to the left, nor for the Milwaukee's starboarding as she did, or the Lac la Belle's porting as she did. The fact that each gave a signal intended to be given only in case of risk of collision, and that each changed her course with intent to avoid a collision, makes it clear that in the judgment of each there was such risk. Articles 13, 14, and 18, and rule 1, have no operation except in case of risk of collision. But independently of this, the idea that there was no risk of a collision is fully exploded by the fact that there was a collision.

I find, therefore, as matter of fact, that the two vessels were meeting end on, or nearly end on, so as to involve risk of collision, and hence that the case falls primarily under article 13, which requires each to put her helm to port so as to pass on the port side of the other. The proofs show that the Lac la Belle did so put her helm to port, while the Milwaukee put hers to starboard, and that the collision was brought about solely by these joint manoeuvres. I have also found, as matter of law, as before stated, that the Milwaukee having thus departed from the statutory rule, she is prima facie in fault, and that the burden is upon her to show that an agreement was entered into under rule 1 for such departure, and that to this end it was necessary for her to prove: 1. That she gave the proper signal, viz., two blasts of her steam whistle, proposing such departure, and in due season; 2. That such signal was heard and understood; and 3. That the proposition was accepted by the Lac la Belle.

As to the first proposition, there is a conflict between the testimony of the officers and crew of the Lac la Belle and those of the Milwaukee, as to what signal was heard by the former, and what was actually given by the latter. The testimony of those on board the Milwaukee is all agreed that the signal actually given by her was two blasts, and from their better means of knowledge as to what was done on board their own vessel, under a well-known and recognized rule for weighing conflicting testimony in cases of this sort, it must be held as proven that two blasts of the whistle were given by the Milwaukee, and that they were given so as to indicate the desire and proposition on her part to depart from the statutory requirement of article 13, and to pass to the left, as provided in rule 1, instead of to the right, as provided by said article.

In the view I shall take of the two remaining propositions, which I shall now proceed to consider, it is unnecessary to discuss the question whether the signal so made by the Milwaukee was made in due season. In point of fact, the signal was given at about the time the two vessels turned the respective bends in the river, and, consequently, when they were a mile to a mile and a quarter, or, in point of time, two minutes and a half apart. This would, no doubt, be in season under ordinary circumstances, but in consideration of the speed of the Milwaukee—11 miles through the water, and eight and a half by the land—which, under the circumstances that it was in the night time and in a narrow and crooked channel, of which the officers and crew in charge had comparatively no practical knowledge, was, to say the least, extraordinary, and also in consideration of the further fact that the approaching steamer's lights had been in sight for some time previous, and that it must have been evident to those in charge of the navigation of the Milwaukee that the other vessel was so approaching, also at a high rate of speed, it might be contended with much plausibility that the Milwaukee's signal ought to have been given sooner than it was. But without deciding that point, I pass to the consideration of the two remaining propositions, viz.: Whether the Milwaukee's signal was heard and understood by the Lac la Belle, and whether the proposition thus made was accepted by her. In this connection it must be borne in mind that the burden was upon the Milwaukee to maintain both these propositions. In departing from the statutory regulations, she assumed the entire risk of her signal being heard and understood by the approaching vessel, and of herself hearing and understanding the reply. The St. John [Case No. 12,224]; The Atlas [Id. 633]; The Washington [Id. 17,220].

Here again the testimony of the officers and crews of the respective vessels, as to what was actually done upon the one and heard and understood upon the other, is in direct con-

flict the one with the other. We might stop right here, and say that the witnesses standing in the main on an equal footing as to credibility, and disagreeing as to the main facts, the propositions are not proved; that under the rule heretofore laid down, the proof taken as a whole is not of that clear and satisfactory character necessary to make out a justification for the Milwaukee's departure from the statutory requirement. But this is unnecessary. Applying the same rule as was applied above to the testimony of the officers and crew of the Milwaukee as to what signal was actually given on board of her, to the testimony of the officers and crew of the Lac la Belle, as to what signal was heard on board the latter, and what signal was given by her, the evidence is overwhelmingly preponderating that the signal of the Milwaukee was actually heard and understood on the Lac la Belle as one blast of the steam whistle, instead of two, and that the signals given by the Lac la Belle were signals of one blast only, although repeated, thus clearly showing that the signal of the Milwaukee was not correctly heard and understood by the Lac la Belle, and that the proposition of the former to depart from the statutory rule was not accepted by the latter.

It was contended, on behalf of the Milwaukee, that, her whistle being a very loud one, if she gave two sounds, two must have been heard on the Lac la Belle. This is an inference merely; of course it is not conclusive as against positive, unimpeached testimony as to what was in fact heard, although it might, and no doubt would, be controlling in the absence of such testimony. The proof shows that the signal of the Lac la Belle was repeated, and it was contended on behalf of the Milwaukee that the two sounds of the steam whistle thus given were given so nearly together in point of time as, in fact, to constitute but one signal of two sounds within the meaning of rule 1; or, at least, that the one followed the other so closely as to justify the Milwaukee in assuming, as she did, that they constituted but one signal, and as such indicated an acceptance by the Lac la Belle of the Milwaukee's proposition to go to the left. By the proofs there can be no doubt that the two sounds given by the Lac la Belle were intended for separate signals, each as a signal to adhere to the statutory rule, to keep to the right. Yet, if they were given in such a manner as, in fact, to constitute but one signal of two sounds, the Lac la Belle must be held to respond accordingly, regardless of her intentions. It is not sufficient that they were so near together as to create a doubt merely as to which was meant, because in that case the Milwaukee had different duties to perform under other rules (2d and 10th rules of October 17th, 1865), which duties there is no pretense of her having performed. The two sounds meant by rule 1, as a signal, are well understood by all steam navigators, and in fact by all persons at all accustomed to hearing that signal given, to be two sounds in quick succession, constituting a sort of double sound or blast. The witnesses on the part of the Lac la Belle, the mate who gave the sounds, and a large number of the officers and crew who heard them, are fully agreed that the sounds were not of that double character. Estimates of time I place but little reliance upon. But we are not left to rely upon such estimates alone. Many of the witnesses tell us what they were doing, where they went, etc., between the two sounds, showing clearly that a considerable time must have elapsed, and amply sufficient to deprive the two sounds of the character claimed, and to show that the second sound was really such as was intended by the mate of the Lac la Belle then on watch, viz.: a repetition of the former signal of one sound to go to the right. This conclusion is strengthened by the testimony of Durling, the professional pilot of the St. Clair flats, who was listening to the sounds for a purpose connected with his professional employment, and who had no part or interest whatever in the affairs or navigation of either vessel.

I find therefore that the Milwaukee has failed to justify her departure from the statutory rule to port, and that therefore in this respect she was in fault.

I think the Milwaukee was also in fault in respect to her speed. Article 16 of the act of April 29, 1864 (13 Stat. 61), provides as follows: "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse," etc. This rule is but a re-enactment of what was the law before, and the law so re-enacted is but the embodiment of the dictates of common prudence. Under it a steam vessel is not permitted to approach another vessel, whether propelled by steam or otherwise, whether meeting or overtaking, so near that a collision is inevitable, or even dangerous, before taking the prescribed precaution. Risk of collision is sufficient to bring such steamer under the rule, and there is always risk of collision in case of vessels meeting or passing in a crooked and comparatively narrow channel like the one here under consideration. This the Milwaukee did not do, although she saw the Lac la Belle long before they came together. But, on the contrary, she was kept at quite or nearly her full speed up to but a moment before the collision, when her engine was stopped and reversed, but too late, and of course to no purpose. This excessive speed on the part of the Milwaukee was all the more reckless and inexcusable, and makes the fault all the graver and more reprehensible, for the reason that, as we have seen, her officers and crew were unacquainted with the channel, and for the further reason that such

speed was entirely unnecessary. She was going against the current, and nothing like her rate of speed was necessary for steerage way. It is, of course, impossible to lay down any precise rule as to just what rate of speed steam vessels shall adopt under such circumstances; but it is perfectly safe to say that they should adopt such a rate of speed as to be at all times under ready and complete control until the risk is fully passed, and this is certainly not the 11-knot speed of the Milwaukee, if we take it through the water, or her 8½-knot speed, if we take it by the land. But I shall notice this subject of speed further when considering the charge of excessive speed made against the Lac la Belle, which I shall now proceed to do.

The faults charged against the Lac la Belle, briefly stated, are substantially: 1. A sudden and unexpected change of course to starboard. This charge is fully disposed of in favor of the Lac la Belle in what has already been said. 2. Excessive speed. The speed of the Lac la Belle, as we have seen, was about twelve miles an hour through the water, and about fourteen and a half miles by the land. That of the Milwaukee was about eleven miles through the water and about eight and a half by the land. The Lac la Belle was moving with the current, and therefore not so readily controlled or so easily stopped as the Milwaukee, which was moving against the current. She was aware of the approach of the Milwaukee in ample time to have adopted the precautions dictated by article 16 above quoted, as well as by common prudence, by checking her speed so as to be under ready control. The same risk of collision, and the obligations thereby imposed, were upon her as were upon the Milwaukee. And yet we find her dashing down the current at nearly or quite her greatest rate of speed—a rate of speed, too, which is nearly, if not quite, equal to that of the fastest steamers navigating the Great Lakes, and keeping up that rate of speed with all the risk and danger fair before her, without check or diminution, up to the very moment of collision. If we may recognize degrees of fault in such cases, the fault of the Lac la Belle in this respect, notwithstanding the greater familiarity of her officers and crew with the channel, was even greater than that of the Milwaukee. It was claimed that the obligation to check did not attach to the Lac la Belle, because but for the mistake of the Milwaukee in starboarding when she ought to have ported, there was no danger of collision—that the Lac la Belle had a right to assume that the Milwaukee would obey the law, and if she had done so there would have been no collision, notwithstanding the excessive speed complained of. This doctrine, carried to its ultimate results, would avoid all rules having for their object the enforcement of precautionary measures for prevention of collisions, and would recognize the right of a vessel, herself technically obeying the rules, unnecessarily to run another down, which, accidentally or otherwise, might come in her way in consequence of some non-observance of those rules, neither of which results would for a moment be recognized as law by the learned advocates who advanced the doctrine stated.

Conceding, however, all that is claimed, the Lac la Belle was still in fault for not slackening her speed. The moment the Milwaukee starboarded and showed her green light to the Lac la Belle, there was danger of collision. This occurred, as we have seen, when they were a mile or a mile and a quarter apart. It then, if not before, certainly became the duty of the Lac la Belle to slacken speed. I think, however, it is open to discussion under article 16 whether the obligation of a steamship approaching another vessel to slacken speed does not attach the moment risk of collision is involved, and whether, under that article, it is allowable for such ship to wait to see if there is absolutely danger of collision before doing so. Danger of collision is, of course, included in risk of collision, but it is not all there is of it. There is never danger of collision other than by inevitable or inscrutable accident, where all fully and completely obey the law. Danger of collision begins only when one vessel or the other begins to depart from the rules established by law. Risk of collision begins the very moment when the two vessels have approached so near each other and upon such courses, that by a departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision might be brought about. It is true, that, prima facie, each has a right to assume that the other will obey the law. But this does not justify either in shutting his eyes to what the other may actually do, or in omitting to do what he can to avoid an accident, made imminent by the acts of the other. I say the right above spoken of is prima facie merely, because it is well known that departures from the law not only may, but do, take place, and often. Risk of collision may be said to begin the moment the two vessels have approached so near that a collision might be brought about by any such departure, and continues up to the moment when they have so far progressed that no such result could ensue. The Nichols, 7 Wall [74 U. S.] 663. The language of article 13, prescribing the condition in this regard, in which the helm of each shall be put to port, and that of article 16, prescribing the conditions under which they shall slacken speed, is precisely the same "so as to involve risk of collision." From this it would seem to follow that the obligation to slacken speed attaches the moment the obligation to port attaches, and that the former obligation continues while the latter continues—or, in other words, that the obligation to slacken speed under article 16 always co-exists with the obligation to port under article 13. The doc-

trine here asserted is forcibly illustrated by the case now under consideration. No one will contend for a moment that Capt. Trowel, of the Milwaukee, intended to disobey the law, but, on the contrary, I think, all must concede that he intended to obey it. He evidently misconceived his legal rights, and probably misapprehended the signals of the Lac la Belle, which misconception and misapprehension, and his consequent starboarding instead of porting, as we have seen, was the primary cause of the collision. The Milwaukee is held in fault in this respect, not because Capt. Trowel's departure from the law was willful or intentional, but simply because it was unauthorized. Such misconception of law and misapprehension of fact are occurring upon the waters daily and nightly, and it is to them that the great bulk of collisions is to be attributed, and the risk of collisions from these causes constitutes by far the larger portion of the risks of navigation growing out of collisions; and, I think it may be assumed that when risk of collision is spoken of in the law, it includes this risk as one of its principal elements. But as we have already seen, it is not necessary to go to that extent in this case.

It cannot be successfully claimed on either side that the failure to slacken speed did not contribute to the collision. The aggregate of the speed of the two was about twenty-two miles an hour, or one mile in a little over two minutes and a half. If the speed of each had been slackened to even one-half what it was (and I think it ought to have been slackened more than that), each would have been afforded an opportunity to fully comprehend the mistake which had been made, and to provide against it. It is fair to presume that if this had been done we should not now be considering one of the most, if not the most calamitous and deplorable collisions ever recorded as happening upon the Great Lakes and their connecting waters.

I find, therefore, that the collision was caused primarily by the unauthorized departure of the Milwaukee from the statutory rule prescribed by article 13 of the act of 1864, requiring each vessel, in the situation in which the two then were, to put her helm to port so as to pass on the port side of the other, and that a contributing cause of the collision, and without which it is fair to presume it would not have occurred, notwithstanding such primary cause, was the gross and inexcusable failure on the part of each vessel, and more especially the Lac la Belle, to slacken speed as required by article 16. It results, therefore, both vessels being in fault, that there must be a division of damages.

The importance of this case not only to the parties immediately interested in respect to the amount involved in dollars and cents, but also to the interests of commerce and navigation in respect to the principles involved, has led me into a close and careful scrutiny and consideration of the facts in the case, and of the able and exhaustive arguments and briefs of the learned advocates on both sides, from which I have derived much aid in my investigations—such a scrutiny and consideration as those interests, both private and public, seemed to demand. I have been led also into a somewhat extended elucidation of my conclusions, thereby the more thoroughly to test their correctness, and also in order that if either party, or both, feeling aggrieved by my conclusions, shall desire a review, the appellate court may have before it my reasons in full, and be thus enabled the more readily to judge of their soundness or unsoundness. Decree for a division of damages.

For a full discussion of the question of speed, see The Free State [Case No. 5,090].

MILWAUKEE (HUNNEMAN v.). See Case No. 6,878.

MILWAUKEE & ST. P. R. CO. (BARNES v.). See Case No. 1,016.

MILWAUKEE & ST. P. R. CO. (BRIGHT v.). See Case No. 1,877.

MILWAUKEE & ST. P. R. CO. (DREW v.). See Case No. 4,079.

MILWAUKEE & ST. P. R. CO. (HOWARD v.). See Case No. 6,761.

MILWAUKEE & ST. P. R. CO. (KELLOGG v.). See Case No. 7,664.

MILWAUKEE & ST. P. R. CO. (MINNETT v.). See Case No. 9,636.

MILWAUKEE & ST. P. R. CO. (UNITED STATES v.). See Cases Nos. 15,778 and 15,779.

MILWAUKEE & S. R. CO. (SMITH v.). See Case No. 13,082.

Case No. 9,627.

The MILWAUKEE BELLE.

[2 Biss. 197;[1] 9 Am. Law Reg. (N. S.) 311; 3 Am. Law T. Rep. U. S. Cts. 65; 2 Chi. Leg. News, 50; 17 Pittsb. Leg. J. 148.]

District Court, D. Wisconsin. Nov. Term, 1869.

SHIPPING — JETTISON — GENERAL AVERAGE — ON DECK.

1. Goods laden on deck with consent of the shipper under a bill of lading excepting "dangers of navigation," and necessarily jettisoned, do not make a case for general average.

[Approved in Wood v. The Sallie C. Morton, Case No. 17,958. Criticised in The William Gillum, Id. 17,693; The Watchful, Id. 17,250. Disapproved in Wood v. Phoenix Ins. Co., 1 Fed. 240.]

2. The fact that the shipment on deck was sought by the master for the purpose of trimming his vessel, *held* not to be material.

Libel for contribution for loss by jettison of a quantity of pig lead, shipped on board this schooner at the port of Racine, in the state of Wisconsin, to be transported to the port of Buffalo, in the state of New York. By the bill of lading, the pigs of lead were

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

shipped on deck, in good condition, to be delivered in like good order, the dangers of navigation excepted. The schooner was laden with wheat in bulk.

Cary & Rea, for libellants.
Emmons & Van Dyke, for respondents.

MILLER, District Judge. [Libellants shipped on board this schooner at the port of Racine, in the state of Wisconsin, divers pigs of lead to be transported to the port of Buffalo, in the state of New York. By the bill of lading the pigs of lead were shipped on deck, in good condition, to be delivered in like good order, the dangers of navigation excepted. The schooner was laden with wheat in bulk. It is alleged in the libel, that at the time the lead was received on board, the vessel was so badly stevedored, that she was not in a proper condition to safely take it on deck, or to safely transport it according to the tenor or effect of the bill of lading, or to safely and securely hold and carry the under-deck cargo. And that the vessel being in an unseaworthy condition, set sail on her intended voyage with the lead on board. And, by reason of the vessel not being well trimmed, and not in condition to resist the ordinary perils of the sea by reason of said improper trimming, and not by any embarrassment or danger caused by the lead being on deck, the officers and crew of the vessel jettisoned the lead from off the deck into the waters of Lake Michigan, whereby the lead became wholly lost, and was not delivered according to the tenor and effect of the bill of lading. Libellants demand strict proof whether the jettison was made necessary by a peril of the sea, or from improper stowage of the under-deck cargo. And if jettison were made necessary by a peril of the sea, then by the custom and course of the admiralty and maritime laws, they claim that the loss is a case of general average loss. Claimants in their answer confess the shipment of the lead, and they urge that the vessel being tight, staunch and strong, and well manned, equipped, and having a cargo of 14,700 bushels of wheat in her hold, sufficiently and properly stowed and secured, and forty tons of pig lead shipped on deck, pursuant to the bill of lading, left the port of Racine, bound for the port of Buffalo, and while on the voyage on Lake Michigan, she encountered a severe gale, labored hard, shipping much water on deck, filling herself, and rendering it necessary to knock away the bulwarks to free her, and the gale increasing, it became necessary for the preservation of the vessel, and of the lives and officers of the crew, and for the safety of the whole, the officers, on consultation, determined to jettison a portion of the lead, and thereupon they jettisoned about 838 pigs, and on arriving at Buffalo, the whole cargo was delivered, except the pigs of lead jettisoned. It is also averred that the cargo under deck was not a full cargo, and was so known to the agent of the shippers, and the lead was shipped on deck at the request of said agent. The answer further alleges that the loss so occurred by a peril of the sea, is not a general average loss, nor is the same to be contributed for in general average.] [2]

It is agreed between the advocates of the parties that the storm was of force and violence sufficient to render the jettison necessary. The proof sustains the allegation that the master solicited the lead for the purpose of trimming his vessel. The proof does not establish a custom to ship lead on deck. That has been done in several instances for the purpose of trimming grain bearing vessels, but to establish a custom derogating from the general law, it is not enough to prove that the act has been frequently done. It must be proven to be so generally known and recognized, that a fair presumption arises that the parties in entering into their engagement, do it with reference to the custom, and tacitly agree that their rights and responsibilities shall be determined by it. This case does not rest on custom, there being an express agreement between the freighter and the master of the vessel, that the lead should be stowed on deck.

The question presented for the consideration of the court is, is the loss of the lead by the jettison a general average loss? The general cargo having been delivered at the port of destination, upon payment of the freight, the demand is against the vessel alone for her proportional contribution. Under the view taken of the point presented, I will not consider whether this libel can be maintained against this vessel, after delivery of the cargo.

It appears that the master having ascertained that his vessel was not trimmed, applied to the agent of the owner of the lead, to ship it on deck, for the purpose of trimming the vessel for the voyage, and thereby rendering her sea-worthy. From this fact negligence is not chargeable to the master, in respect to putting the vessel in trim. The jettison was rendered necessary by a peril of the sea, for the safety of the vessel and cargo, and was a loss by the peril of the sea.

It is a general and an ancient rule of the law of shipping that goods shall not be carried on deck. Reasons for this rule are, that goods placed on deck are more liable to be lost by being swept overboard, and to damage by water, and endanger both ship and cargo, as the weight is put far from the hold, and thereby makes the vessel less stable and less manageable, and more apt to labor in a heavy sea. And it encumbers the deck and embarrasses the crew in working a sail vessel, and perhaps the common safety sometimes may not require jettison if lading were not on deck to bring the dangers on the vessel, or contribute to enhance them.

The rule is also a general rule, that goods

[2] [From 9 Am. Law Reg. (N. S.) 311.]

laden on deck and jettisoned are not contributed for, and such is particularly the rule when goods are laden on deck by consent of the shipper. I have had this matter under consideration in former cases, and must dispense with reference to the very numerous cases affirming this rule. Maritime orders and rules, both ancient and modern, recognize the distinction between cargoes placed on deck with consent of the freighter, and cargoes under deck. They do not give a recourse against the master, the vessel, or the owner. The admiralty courts of England and America have almost uniformly treated the owner of goods on deck with his consent, as not having a claim on the master, in case of jettison, although bound to contribute.

This being a proceeding against a sail vessel, I shall not enter upon the consideration of some modern judgments against vessels propelled by steam. The case of Lawrence v. Minturn, 17 How. [58 U. S.] 100, is referred to as a leading case of binding authority. The ship Hornet was libelled for non-delivery of two steam boilers and chimneys shipped at New York, on deck by special agreement, and consigned to libellants in San Francisco. It being discovered on the voyage, that the ship could not be navigated with safety in a storm, the deck load was thrown overboard. The facts in the case show that the jettison was justifiable, and the loss occasioned by the peril of the sea. The court says "This bill of lading declares that the property is to go on deck. It excepts perils of the seas. The exception must be construed with reference to the particular adventure, which the contract of the affreightment shows was contemplated by the parties. Under this bill of lading, the question is, not what in other circumstances could be deemed a peril of the sea, but what is to be deemed such when operating on this vessel, with this deck load. If a very burdensome cargo like iron is taken on board, and heavy weather met with, and jettison made, it would not be a ground of claim against the owner that the weather encountered would not have been sufficient to justify a jettison, if the cargo had been cotton. And when this freighter consented to place on the deck of this ship his boilers and chimneys, weighing upwards of thirty tons, not distributed about the deck, but lying in a small space, must he not be taken to have known that their necessary effect might be to embarrass the sailing of a ship in a gale of wind, and cause her to labor in a heavy sea?" The libel was dismissed. In this case libellants having shipped on deck eleven hundred and sixty pigs of lead weighing about forty tons, they consented that the vessel might thereby be rendered less manageable, and more liable to labor in a storm, and they, and not the vessel, must bear the loss of a portion of the deck load by the necessary jettison.

It is contended that in equity the vessel should contribute for the loss, as the deck load was used in putting her in trim for sea. That is begging the question. I cannot enter into consideration of the inducement to the contract of the parties.

The libel will be dismissed.

NOTE. See The Wellington [Case No. 17,384], and cases there referred to.

The general rule that there is no contribution for goods laden on deck is held in The Paragon [Id. 10,708]; Lennox v. United Ins. Co., 3 Johns. Cas. 178; Johnston v. Crane, 1 Kerr, 356; Wolcott v. Eagle Ins. Co., 4 Pick. 429; Cram v. Aiken, 13 Me. 229; Taunton Copper Co. v. Merchants' Ins. Co., 22 Pick. 108.

In Barber v. Brace, 3 Conn. 13, it is held that a parol agreement that goods may be stowed on deck, made after the delivery of the bill of lading, is a good defense to a loss occasioned by such stowage. But when it is customary to carry a certain class of goods on deck the rule has been relaxed. Gould v. Oliver, 4 Bing. N. C. 676; Brown v. Cornwell, 1 Root, 60; Rogers v. Mechanics' Ins. Co. [Case No. 12,016]; Toledo, etc., Ins. Co. v. Speares, 16 Ind. 52. And in Milward v. Hibbert, 2 Gale & D. 142, the owners of pig lead loaded on deck, having been allowed contribution in general average on showing a usage so to carry, the ship-owner recovered against the underwriters; and Denman, C. J., reviewing the English authorities, says that they fall far short of the rule that owner of deck cargo can in no case recover in general average.

A distinction has also been made between sail vessels and steamers, the distinction going to the reason of the rule. Hurley v. Milward, 1 Jones & C. 224; Gillett v. Ellis, 11 Ill. 579; Harris v. Moody, 4 Bosw. 210, approved by the court of appeals in 30 N. Y. 266; Merchants' & Manufacturers' Ins. Co. v. Shillito, 15 Ohio St. 559.

The supreme court have entirely settled the rule that a clean bill of lading imports a contract that the goods shall be stowed under deck, and that parol evidence that they were to be stowed on deck, is inadmissible. The Delaware, 14 Wall. [81 U. S.] 579. This was a case of jettison of pig iron, and the court expressly limit their decision to the case where no usage or custom of a particular trade is shown sanctioning a stowage on deck, no proof of such usage having been introduced in that case.

MILWAUKEE R. CO. (SECOMBE v.). See Case No. 12,601.

Case No. 9,627a.

The MIMI.

ROBERTS et al v. The MIMI.

[6 Adm. Rec. 281.]

District Court, S. D. Florida. March 5, 1859.

SALVAGE — CONSORTS — ACCEPTANCE OF SERVICE — RECONSIDERATION.

[After wrecking vessels have consorted together to save the cargo and materials of a stranded ship filled with water, which are amply sufficient for that purpose, a vessel subsequently arriving is not entitled to come into the consortship, nor are the wreckers or master obliged to accept the services of her steam pump where clearly it could not save the ship. The master may also reconsider his determination to employ the pump.]

[This was a libel in rem by John W. Roberts and others against the cargo and materials of the bark Mimi for salvage.]

Winer Bethel, for libelant.
S. J. Douglas, for respondent.

MARVIN, District Judge. Nine wrecking vessels had arrived at the wreck, and had consorted together to save cargo and materials, when the Eliza Catherine, carrying a steam pump, being the tenth vessel, also arrived, and tendered her assistance. The vessel was at the time full of water, and, according to the master's statement, had filled in about twenty minutes after striking the reef. About fourteen feet of the extreme afterpart of her keel was started off, and turned partially out, and also four or five feet of the garboard streak was torn off. The master of the ship at first consented to take the assistance of the pump, and his determination of this point, according to the views of the wreckers, entitled the Eliza Catherine herself to come into the consortship; and it was accordingly so understood. The master, however, a few moments afterwards, upon examining the bottom of the ship, with a water glass, changed his mind, and determined, that he would not take the assistance of the pump. The wreckers then determined that the Catherine should not come into the consortship; they having vessels and men enough without her to save the cargo and materials.

It is the duty of the wreckers to employ all reasonable means, with the master's consent, to save the ship as well as the cargo; and if there was a reasonable doubt whether the pump, in the present case, would have freed the vessel, if tried, it was their duty to advise the master to try it, and to have assisted at once in getting the pump on board. The employment of the pump would not necessarily let the vessel that carried it into the general consortship; but the pump and vessel would be compensated for the services which the pump actually rendered. In the present case, I do not think that there is room to entertain a reasonable doubt that the ship was so far broken and bilged as that the pump could not have freed the vessel. Consequently there was no obligation on the part of the wreckers either to employ the pump or advise its employment.

Second. The determination of the master to employ the pump being the consideration of the supposed agreement of consortship, a change of his determination caused a failure of the consideration, and avoided the contract.

Third. That, under the circumstances, the Eliza Catherine was rightfully excluded as a salvor from the general consortship.

The following decree was entered:

This bark, laden with cotton from Galveston to Amsterdam, was lost on Pickles reef. Nine wrecking vessels, carrying in all one hundred men, saved a portion of the cargo and materials, valued $41,281. Referring to the libel and answer for the facts of the case: It is ordered, adjudged, and decreed, that the libellants have and recover in full compensation for their services the sum of thirteen thousand four hundred and twenty dollars, in full compensation for their services in saving the said cargo and materials, and that upon the payment thereof, and the costs and expenses of this suit, the wharfage, storage, labor bills, and other charges, the marshal restore said cargo to the master of the said bark, for and on account of whom it may concern; that the said salvage be divided among the salvors by allotting to the first consortship the sum of ten thousand eight hundred and twenty nine dollars, and to the second consortship the sum of two thousand five hundred and ninety one dollars.

MINA, The (TOWNSHEND v.). See Case No. 14,121.

Case No. 9,628.

MINCHIN v. DOCKER.

[1 Cranch, C. C. 370.] [1]

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

WITNESS—NEGRO—COMPETENCY—PRESUMPTION.

1. A free black man, born of a white woman, is a competent witness against a white man.

2. Evidence that a black man has, for many years, publicly acted as a free man, and been generally reputed to be free, rebuts the presumption of slavery arising from color, and is evidence that he was born of a white woman.

Slander. Charles Cavender, a black man, was admitted to testify for the plaintiff, after witnesses had been examined by the court on oath, and testified that Charles had acted publicly for eleven years as a free man, and was generally reputed as such.

DUCKETT, Circuit Judge, said that persons born free, that is, descended from a white woman, were not, in Maryland, held to be negroes; and were permitted to testify against white persons. And although color is prima facie evidence of slavery, yet the fact that the witness had, for a long time, publicly acted as free, turned the presumption the other way, and was prima facie evidence that he was born of a white woman.

CRANCH, Chief Judge, concurred.

FITZHUGH, Circuit Judge, absent.

See Acts Assem. Md. 1717, c. 13, § 2, and Acts 1796, c. 67, § 5.

Case No. 9,629.

MINER v. HARBECK.

[1 Abb. Adm. 546.]

District Court, S. D. New York. June, 1849.

SEAMEN —WAGES — DISCHARGE BY CONSUL — ENTRIES HOW MADE.

Where a United States consul in a foreign port discharges a seaman without payment of

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

three months' wages, (under 5 Stat. 395, § 1), the discharge will not avail the owner as a defence to a suit for the two months' wages, which by the provisions of the act accrue to the seaman, unless the consul makes an official entry of his act both upon the list of the crew and upon the shipping articles. These entries must be made by the consul personally.

This was a libel in personam by Lewis Miner against William H. Harbeck to recover wages as seaman.

BETTS, District Judge. The libellant shipped at this port on July 8, 1848, on board the brig Susan, on a voyage to the south of Europe, thence to one or more ports in South America, and thence to such other ports or places as the master might direct, for a term not exceeding twelve calendar months. The ship went to Lisbon, and thence to Rio Janeiro, when the captain chartered her to the coast of Africa, and back to Rio Janeiro.

On December 21, 1848, the libellant (with others of the crew) was there discharged at his own request and by consent of the master, and his wages were paid him in full to that day; and the same day he shipped on board the bark Elvira Harbeck, owned by the same persons, for the United States.

There is no ground of claim in the case other than for three months' wages because of the discharge at Rio Janeiro. The libellant left the brig from choice, and the respondent had no agency in his discharge other than the assent of the master to it. It was not procured or suggested by him. The libellant can maintain no claim for wages to the time of his return to the United States, because his term of service had not then expired, and he would have been bound to offer to remain with the brig to the end of twelve months. The equity of his claim, therefore, clearly rests on the effect of his discharge according to the provisions of the statute.

By section 3 of the act of February 28, 1803 (2 Stat. 203), the discharge of a seaman abroad by his own consent, subjects the master to the payment of three months' wages, two of which enure to the benefit of the seaman himself. The act of July 20, 1840 (5 Stat. 395, § 6), so far varied this regulation as to authorize a discharge, on mutual consent of the master and mariner, by a consul abroad, without payment of the three months' wages. if the consul thinks it expedient not to require such payment.

But the discharge is of no efficacy unless the consul makes an official entry thereof upon the list of the crew and the shipping articles. 5 Stat. 395, § 7. This formality was not observed in the present case. The master testifies that the discharge was authorized and made by the consul, but only one certificate, that to the crew list, was given, and that was executed by a deputy, and not by the consul personally.[1]

This is not a compliance with the conditions of the statute, and, therefore, cannot avail the owner as a legal defence to the action. The defect is merely technical, for the proof is uncontradicted that the consul acted personally in the matter, that the libellant desired his discharge and accepted his pay, and that the consul fully approved the arrangement.

Still, under the circumstances, the libellant is in law entitled to recover the two months' wages demanded, the allotment of them to seamen on such discharges not being specially for their benefit, but in furtherance of the national policy of deterring masters of vessels from leaving seamen abroad. He is, however, equitably bound to account for his earnings on board the Elvira Harbeck, and if they equal the $36 payable at Rio Janeiro, they will extinguish his demand, and must be applied to its satisfaction. He may accordingly, at his option, have a reference to ascertain the amount of wages paid him by the latter vessel, and if it was less than $36, take a decree against the respondent for the balance.

Decree accordingly.

[1] On the effect of a formal and valid consular discharge as a protection to the master and owners, see Lamb v. Briard [Case No. 8,010]; Tingle v. Tucker [Id. 14,057]. For other defects in the form of a consular certificate, see The Atlantic [Id. 620].

Case No. 9,630.

MINER v. McLEAN.

[4 McLean, 138;[1] 3 West. Law J. 4.]

Circuit Court, D. Ohio. July Term, 1846.

TAXATION — TAX TITLE — REQUISITES COMPLIED WITH—EVIDENCE—RETURN—PAROL—VARIANCE.

1. To constitute a legal and valid title to land sold for taxes, the claimant must show that all the substantial requisitions of the law have been complied with.

2. The county treasurer and collector must return under oath the delinquent lands to the county auditor, or there can be no forfeiture of such lands for non-payment of taxes.

[Cited in Raymond v. Longworth, Case No. 11,595.]

3. The county auditor is required to make a record of such return, which record can not be altered by parol evidence.

[Cited in Martin v. Barbour, 34 Fed. 706.]

[Cited in Evans v. Newell (R. I.) 25 Atl. 348.]

4. Nor is a transcript from the auditor, essentially differing from the record, admissible as evidence.

At law.

Mr. Stanbery, for plaintiff.

Mr. Swayne, for defendant.

OPINION OF THE COURT. This ejectment is brought to recover lot 240 in Columbus, which is claimed by the plaintiff under a tax title. Several transcripts from the county auditor, and auditor of state, were given in evidence, showing the tax charged on the above lot for the years 1841 and 1842;

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

the returns of the same as delinquent, and afterward as forfeited to the state, with the penalty and interest charged, and also the sale of the lot by the state, and the deed given to the purchaser. A deed from the purchaser to the lessor of the plaintiff was also in evidence. The defendant, as assignee of Nehemiah Gregory, the late owner of the lot, a bankrupt, raised several objections to the title, some of which will be now considered. And first, it is objected that the delinquent list of 1841 was not signed and sworn to by the county treasurer, as required by the statute. By the act of 23d March, 1840, the county auditor is required, between the first Monday in June and the 15th day of August, in each year, to make out a duplicate of the taxes assessed in his county, in the manner therein prescribed. This duplicate he is required to deliver to the county treasurer, who is collector of the tax. The 27th section of the same act requires the auditor to "take from the duplicate, after the period for collection has elapsed, previously put into the hands of the treasurer for collection, a list of all such taxes as such treasurer shall have been unable to collect, therein describing the property on which such delinquent taxes are charged, as the same are described in such duplicate, and shall note thereon, in a marginal column, the several reasons assigned by such treasurer why such taxes could not be collected; and such list shall be signed by the treasurer, who shall testify to the correctness thereof, under oath or affirmation, to be administered by the auditor." The original record, kept by the county auditor, being produced in evidence, shows neither the signing, it is alleged, nor the oath which is required. In the record there is a "return of taxes delinquent for the county of Franklin, for the year 1841," including taxes on both real and personal property. Then follows a statement of a settlement between the county auditor and treasurer, required by the above section, to which is affixed the following: "I, William Long, treasurer and collector of taxes for Franklin county, do solemnly swear that the foregoing list of delinquencies, to the best of my knowledge and belief, are truly stated, and that the reasons for returning such taxes delinquent, as stated therein, do, as I verily believe, truly exist." Signed, "William Long, Treasurer and Collector for Franklin County." This is, clearly, neither an oath nor an affirmation, as required by the statue. It is merely the certificate of the treasurer and collector, no oath having, in fact, been administered, as appears from the record. The formal words, "I do solemnly swear," introduced into the certificate, are without effect. The signature, I think, may be considered as a signing within the statute. The objection that the settlement intervenes between the signature and the "list of delinquencies," seems to have but little force. A transcript from the county auditor of the above duplicate, contains the oath of the treasurer of the county, as required by the statute. But, in this respect, the transcript can not be received as evidence, as it differs from the record. The county auditor is required to make a record of the return of the delinquent lands, by the treasurer and collector of the county; and this record, or a certified copy of it, only, is evidence. Parol evidence is not admissible, to supply a defect in the record. This well-established rule can admit of no relaxation.

Was the oath of the county treasurer and collector, to the return of delinquent lands, essential to the validity of the tax title? In Harmon v. Stockwell, 9 Ohio, 93, the court say: "The statute (2 Chase, 1106, § 30) requires in terms, that the list of delinquent lands returned to the county auditor during the years 1821, 1822, and 1823, shall be attested by such collector on oath." The oath in that case, not having been administered by proper authority, the court held "that the return of the collector was not under the securities and sanctions which the law required, and that the omission was fatal to a title held under such strict principles as a tax sale;" and in Thompson v. Gotham, 9 Ohio, 175, the court said: "In order to sustain a title under a sale for taxes, it is not sufficient to produce the collector's deed; there must be evidence to show that the tax has been levied, that the steps required by law to authorize a sale, have been taken, and that the person making the deed had power to make it."

In the case of Winder v. Sterling, 7 Ohio, 192, the collector returned the delinquent list in the same manner as the collector in the case under consideration; and that return was sustained by the court, on the ground that the legislature had prescribed the form which had been literally followed up by the collector. That form was prescribed by the act of 1825, which was repealed long before the return now in question was made. I should be inclined to think, however, if the act of 1825 were still in force, that an oath was necessary. The form of the oath was given in that act; and because the name of the officer who was to administer the oath was not stated in the form, the court ruled that no oath was necessary—in other words, that the form, and not the substance, was all that the legislature required. The act requiring the oath or affirmation of the treasurer and collector, now in force, is substantially the same as the act under which the decision above cited, of Harmon v. Stockwell, was made. Of course, that decision must rule the present case.

Whether a greater degree of strictness of procedure is required before the forfeiture of lands than afterward, need not be decided in this case. Until the land forfeited by the state shall be sold, the owner has a right to redeem it; the right, therefore, vested in the state, is not absolute.

Several other grounds were assumed in the defense; but, as the above point is decisive as to this suit, it is not necessary now to decide the other objections to the title.

As to the objection that the duplicates, made out at the auditor of state's office for the county auditor, do not appear to have been certified, I doubt whether it is sustainable. Whenever an officer is specially required to certify, his certificate is essential to the validity of the document. But, in cases where he is not so required, his certificate may not be necessary. Where the signature of the auditor of state is necessary, I doubt whether it can be affixed by a deputy. In the absence of the auditor, the chief clerk is expressly authorized to act, by the statute; but this provision is limited to the person who holds the office of chief clerk.

Judgment of not guilty.

MINER (UNITED STATES v.). See Case No. 15,780.

Case No. 9,631.

MINGE v. GILMOUR.

[Brunner, Col. Cas. 383;[1] 1 Car. Law Repos. 34.]

Circuit Court, D. North Carolina. June Term, 1798.

REAL PROPERTY — BARGAIN AND SALE DEED — WHAT PASSES BY—ESTATE TAIL—HOW BARRED —EX POST FACTO LAWS—CONSTITUTIONAL AND STATUTORY CONSTRUCTION—POWERS OF COURTS.

1. A deed of bargain and sale only passes such estate as the grantor has and can rightfully convey.

2. The issue in tail, with assets, are barred by their ancestor's deed of bargain and sale with warranty; and where other land descends liable to a charge, it is assets pro tanto.

3. An ex post facto law is one which punishes as a crime an act done before its passage, which, when committed, was not so punishable. The term does not apply to acts of a civil nature.

4. The judiciary, as a co-ordinate branch of the government, may declare a statute to be void if repugnant to the constitution; but where laws within the general scope of the authority of the legislature are passed, the courts cannot declare the same void because, in their opinion, they are contrary to principles of natural justice.

The jury found a special verdict, the substance of which is that John Minge, the grandfather of the lessor of the plaintiff, was seized in fee of the premises described in the declaration; that being so seized, he duly made his last will and testament on the 26th of November, in the year 1760; that the said John Minge departed this life in the year 1772, and his son David, the devisee, became seized of an estate tail on the said lands; that David, the son of John, being so seized and in possession of the said lands, executed a deed of bargain and sale on the 15th of February, 1779, to Charles Gilmour and William Hendric, containing the following clause of warranty: "And the said David Minge, for himself, his heirs and administrators, the aforesaid piece or parcel of land, with the appurtenances thereunto belonging, doth by these presents secure, and forever defend from the lawful claim or demand of any person or persons whatsoever, unto the said Gilmour and Hendric, their heirs and assigns; in testimony whereof, the said David Minge hath hereunto set his hand and seal the day and year above written"; that he afterwards, on the 15th of May, 1779, duly made his last will and testament, with a codicil annexed of the date of the 28th February, 1781, by which he devised land to John Minge which, at the time of his decease, was of greater value than the land conveyed to Gilmour and Hendric. They also find that the consideration money expressed in the deed had been paid. They pray the advice of the court, etc. The plaintiff claimed as heir in tail to David Minge.

Taylor & Badger, for plaintiff.
Davie & Baker, for defendant.

Before IREDELL, Circuit Justice, and SITGREAVES, District Judge.

IREDELL, Circuit Justice. I cannot refrain from expressing my high satisfaction in having heard this cause so ably and perspicuously argued on both sides; and which alone, in a case of so much novelty in some respects, and intricacy in others, could have enabled me to form an opinion so early. The title of the lessor of the plaintiff (independent of that of the defendant) is prima facie clear under a tenancy in tail; the father, who was tenant in tail in possession, having died, and he as his eldest son, as such entitled to enter. The defense is grounded on two points:— 1. A denial of the right of entry of the lessor of the plaintiff, which if well founded effectually destroys this remedy by ejectment; since, if the lessor of the plaintiff had no right to enter, he had no right to make the lease confessed by the common rule; and without such lease, either actual or confessed, the action cannot be maintained. 2. A denial of his title altogether, independent of the remedy now used for asserting it; which, if well founded, shows that the lessor of the plaintiff has no title upon which he could recover in any form of action.

To prove the first point, the defendant's counsel produce a deed of David Minge, the father of the lessor of the plaintiff, and who was the tenant in tail in possession, dated the 15th February, 1779, conveying the premises in fee with warranty to Charles Gilmour and William Hendric, under whom the defendant claims. This, it is alleged, bars the entry of the son, for these reasons: 1. Be-

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

cause such a deed, under the act of assembly of North Carolina passed in the year 1715, (chapter 38, § 6), is to be deemed equal to a feoffment in fee with livery, which it is admitted would create a discontinuance, and drive the issue to his formedon. [The section relied on in the act of assembly is as follows: "All deeds or conveyances of lands, tenements or hereditaments, goods or chattels, which are already passed and registered, or which shall be registered within one year after the ratification of this act, for which a good and valuable consideration has been actually and bona fide paid, shall be good and available in law and equity to the purchasers and their heirs and all others claiming by, for or under them, in as full and ample a manner to all intents and purposes as if such title had been made either by fine, common recovery, livery of seizin, attornment, or any other ways used and practiced within the kingdom of Great Britain."][2] 2. Because, if this deed is not to be deemed a feoffment, it is at least a bargain and sale; and a bargain and sale, in fee with warranty, by the tenant in tail in possession, does, in itself, with or without assets, create a discontinuance, and consequently take away the entry of the issue. 3. Because an act of assembly passed in 1734 (which will be more particularly considered presently), if it does not bar the title, takes away all remedy by action or entry; and therefore whatever right may subsist in the lessor of the plaintiff, the courts are not permitted to give effect to it.

With respect to the first reason (that under the act of assembly of 1715 the deed ought to be deemed to have the same effect as a feoffment with livery and seizin). I do not think the act of assembly ought to have any such operation. If it had been necessary to convey the land at all, that a feoffment should have been made use of, the livery would have been dispensed with, together with any words of form that had been omitted, and public proof and registration be considered as a substitution of one kind, and a better kind of notoriety for another and a worse, because a feoffment at the present day, differently from the solemnities in former times, may be executed with livery in secret; though at the same time it is to be observed that even in that case, as our act requires all conveyances of land to be registered, such a feoffment must be registered; otherwise even an actual feoffment and livery itself would not be sufficient. In this respect, I conceive the law of this state differs from that of England. But when a conveyance has sufficient form to convey a rightful estate, it appears to me utterly unjustifiable to apply words in an act of the legislature which are calculated to give effect to a rightful conveyance imperfectly executed, in such a manner as to convert, by necessary construction, a rightful estate into a wrongful one; as in this instance, when the deed can operate as a bargain and sale (which is held to convey only what may lawfully pass), to say it shall operate as a feoffment, in order that it may work a discontinuance; for whatever legal effect a discontinuance may have, still it implies some wrong in the person who creates it. Thus, in strictness of law, and laying aside for the present all consideration of the indulgences granted to attempts to unfetter estates tail, it was the duty of the ancestor to preserve the right of possession for the heir, and not to deprive him of it by alienating that right to another, to his prejudice. We ought not, therefore, at any rate to say, in the present instance, when the ancestor's deed was sufficient to pass a rightful estate, that it shall be held to pass a wrongful one, unless upon the face of the deed there was clear evidence to show that the latter was his intention. But there is no such evidence in this case, for surely there is nothing on the face of this deed to warrant us in saying that the deed was designed as a deed of feoffment, and therefore that it shall operate (under this act) as a deed of feoffment would do, accompanied with actual livery.

The second reason (that this deed, operating as a bargain and sale in fee with warranty by tenant in tail in possession, does in itself, with or without assets, create a discontinuance), I am clear is well founded. The following authorities on the subject appear to me to be decisive (Litt. Ten. §§ 598–601; Co. Litt. 328; Gill. Ten. 112), placing a bargain and sale and a release on the same footing. And the reason, I conceive, why the warranty creates a discontinuance in the case of bargain and sale with warranty annexed, is this: It is a principle that when an estate to which a warranty is annexed is defeated, the warranty is good. Litt. Ten. 741. By the bargain and sale in this case, the bargainee had an estate called a base fee, determinable on the entry of the issue in tail. If there had been no warranty, the entry of the issue (speaking generally, and independent of the particular circumstances of this case) would have destroyed the estate altogether. If, therefore, notwithstanding the warranty, the entry of the issue was lawful, by his entry the estate to which the warranty was annexed would be defeated, and consequently the warranty itself destroyed. But in order to prevent this consequence, and to make the bargainee bar the issue if he can, by showing assets descended from the ancestor, the issue is not allowed to enter, and by that means ipso facto determine the estate, but he is driven to his formedon; in which case, the estate still subsisting until judgment is given against him, the warranty may be pleaded; and then the judgment will be given either for the demandant or tenant, as assets shall be made to appear or otherwise.

Being of opinion that for this reason the lessor of the plaintiff had no title to enter, it is unnecessary to say anything as to the

[2] [From 1 Car. Law Repos. 34.]

remaining reason alleged; and this, indeed, would be alone sufficient to entitle the defendants to our judgment. But as in every case, and especially one so important as the present, it is more desirable to decide on the intrinsic merits of a title than merely on the form of bringing it before the court, I shall proceed to investigate the real merits of the defendant's title independent of any form.

The title of the defendant is grounded upon the deed of the tenant in tail, David Minge, which I mentioned before, dated and executed the 15th of February, 1779, and conveying the premises in fee to Charles Gilmour and William Hendric, under which the defendant claims. This deed, as the defendant alleges, hath defeated the title of the lessor of the plaintiff, in one of two ways. Either—1. By the operation of the deed as a bargain and sale, with warranty and assets descending on the issue in tail, the present lessor of the plaintiff. Or, 2. By the act of the assembly of this state of April, 1784, c. 22.

With regard to the first, it is clear and is admitted that if assets to sufficient value have descended on the lessor of the plaintiff, he is barred; the reason of which is to prevent circuity of action, because the warranty binds him to fulfil the warranty of his ancestor, if he hath assets to that purpose; and if he recovered in this action he would be immediately possessed of assets, and of course liable to an action in respect of them. But it is objected that in this instance the heir is not liable in respect of assets,—1. Because the land descended liable to a charge. 2. Because the heir did not take in quality of heir, but as devisee. As to the first reason, the law seems to be that notwithstanding a charge, if it doth not exhaust the whole assets, the heir shall be liable in respect to the overplus, which he undoubtedly takes as heir. Though the law appears formerly to have been held otherwise, yet probably that was owing to the uncertainty in many cases of ascertaining whether a charge would exhaust the whole assets or not, and a particular decision unwarily crept into a general principle. Later decisions seem to have placed this on a proper footing by declaring that where the charge is plainly less than the value of the whole land, the overplus shall be assets. The assets in the present instance are expressly found to be sufficient beyond the charges to which the estate is liable; and therefore this objection is of no avail. But I have serious doubts whether, at the time of the death of the ancestor (which is the true time for considering the liability of the heir), he did not take as devisee, and not as heir; in which case he seems not to be liable; though, possibly, if they have in Virginia a statute like that in England concerning fraudulent devisees, he might, even under those circumstances, be deemed liable. I know not how the fact as to the Virginia law is; and therefore, as well as because the inference is altogether a new suggestion, which would demand much consideration before it ought to be established, I consider this point of the case, it being uncertain whether he takes as heir or devisee, too doubtful to ground an opinion upon it.

I therefore proceed to the next inquiry—whether he is barred by the act of assembly? I admit, as strongly as any man can assert, that if this act of assembly is plainly unwarranted by the constitution, it is totally void as being passed without authority, the authority of the legislature being, in certain cases, restricted by a superior power which must of course be obeyed. The constitution is a law of the land, as well as an act of assembly, with this difference: that the former is a supreme law, paramount to all acts of assembly, and unrepealable by any. As in case there is a dispute whether one act of assembly is in force or another, the judges must decide this, and when the latter law is inconsistent with a former, say the latter is in force, because it has repealed the former, having authority to repeal it. So when the constitution says one thing and an act of assembly another, the judges must say the former law is in force and not the latter, because the former is a supreme law unrepealable and uncontrolable by the authority which enacted the latter.

The act in question has been contended to be unconstitutional, because it has been suggested that it is in violation of the following parts of the constitution of this state: The twelfth, fourteenth, and twenty-fourth sections of the bill of rights, which is declared to be a part of the constitution.

The twelfth section is as follows: "That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land." This I believe is taken from Magna Charta, and simply means, as I understand it, that there shall be no violation of the laws of the land. This provision, in the barbarous and ignorant times in which Magna Charta was enacted, might be proper to restrain the excesses of arbitrary and unprincipled kings and nobles, who were every day trampling on the law; more especially as, even in more settled times, a dispensing power was alleged by many to be a part of the prerogative of the crown. In the present era of improved knowledge of law and liberty, it seems scarcely to have been necessary, though no principle is of higher importance; because no one would have the effrontery to contend that he had a right to violate the law. It is a part of the constitution, however, that must be sacredly observed; and I trust it is a principle that would have been equally respected if it had formed no part of it. If the law of the land does not in this case authorize judgment to be given for the defendant, in the opinion of this court, it will undoubtedly not be given.

The fourteenth section is in the following words: "That in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The expression here is rather indefinite, but at the utmost it can only mean that in all cases where trial by jury formerly took place such should be the mode of trial in future. To apply that to this case: In ejectments formerly, on the issue of not guilty, the trial was by jury; so it has been in this instance. The constitution, therefore, in this particular has been exactly observed.

The following are the words of the twenty-fourth section: "That retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty. Wherefore no ex post facto law ought to be made." This, from the construction of the whole clause, evidently relates to punishment by subsequent acts for things innocently done at the time, or then punishable in a different manner. The clause considers the words "ex post facto," as I conceive, to have that meaning; otherwise the conclusion is too large for the premises. In a great case now depending in the supreme court of the United States, argued last February, on the meaning of ex post facto laws, in the sense of the constitution of the United States, numerous and strong authorities were adduced to show that the expression "ex post facto" technically had that meaning. A majority of the judges appeared to be convinced of it, but upon the doubt of one the case was not decided. There are strong reasons why the expression should be confined to criminal and not to civil cases. No principle can ever justify the punishment of an innocent man; and a man is certainly innocent who violates no law in being. Neither can it ever be justified to punish a man not entirely innocent, in a different manner from the punishment prescribed and pointed out to him at the time his offense is committed. These are first principles of natural justice, a deviation from which will generally be found as impolitic as it is unjust. But in times of violent faction or confusion of any kind, men are often prompted, if they can, to destroy their adversaries under the color of the law. The numerous acts of attainder in England, and other arbitrary parliamentary punishments, show how necessary it was for a wise people, forming a constitution for themselves, to guard against tyrannies like these; but there not only is little reason to apprehend a legislative interference for the sake of unjustly transferring property from one man to another, but a constitutional provision to that effect would be found extremely difficult without interfering with some of the most necessary principles of legislation. A few instances will be sufficient to show this: 1. As to the roads. It is absolutely necessary in every country that there should be a power of laying out public roads. This of course must be done under the direction of the legislature. Suppose, in the opinion of the legislature, a particular road ought to be laid out; but one or two individuals who own land through which it must pass will not consent to part with any of it for that purpose. Are the public to suffer for want of such a road, or may not the legislature order the land they have occasion to make use of to be valued, and appropriate it accordingly, after paying or tendering the value? 2. In the case of fortifications. The erection of such in particular places might be indispensable for the safety of the country in defending it against a foreign enemy. Ought the possibility of such defense to be liable to be defeated by the caprice or disaffection of a single individual, or the legislature to cause the fortifications to be erected, taking the proper care to compensate the individual to the full value of the property and for any consequential injury arising from the loss of it? 3. So also in the case of light-houses. It is certainly the duty of every country, not only for the safety of its own citizens, but from motives of general humanity to all others, to erect light-houses on such parts of the coast where dangers to navigation may be imminent without such assistance. How defective would be that policy which should deprive a legislature of so useful a power, to the loss, possibly, of many innocent lives! 4. So also when it is deemed necessary to impose taxes. Is anything more common than to direct a distress upon the property of an individual, if his taxes are not paid, and if unpaid within a limited time, that the property either real or personal, as the case may be, shall be sold in order to raise the money? These are obvious instances, to which others might easily be added to show that a legislature would be deprived of some of its most essential and important powers, if its authority was so restricted that it could not take away property from individuals, in any instance, without the owners' personal consent, directly given for that purpose, even for objects of the utmost public concern, and after the greatest care to prevent any injury to the individual. It would therefore have been very unwise if the constitution had restricted the legislature in any such instance; and this consideration, combined with the little probability of such a power being abused, is a strong additional reason why the words "ex post facto" should be confined to criminal cases only, especially when there not only are no words that require a contrary construction, but the words themselves plainly point out the construction I have given.

It is, however, further urged by the counsel for the plaintiff that this act is contrary to natural justice, and therefore void. Some respectable authorities do, indeed, countenance such a doctrine—that an act against

natural justice is void. Others maintain a different one, with at least an equal claim to respect. Under these circumstances, I can only consult my own reason; and I confess I think no court is authorized to say that an act is absolutely void merely because, in the opinion of the court, it is contrary to natural justice.

Two principles appear to me to be clear: If an act be unconstitutional, it is void. If it be constitutional, it is valid. In the latter case it must be admitted that the legislature have exercised a trust confided to them by the people. In doing so they necessarily are left to their own discretion, and it is to be presumed they will have a due regard to justice in all their conduct. It is, however, I conceive, left to them so far without control; and if they abuse their trust in the execution of an acknowledged power, they are indeed responsible, in the only way in which a legislature can be responsible, for not exercising their authority properly; but still, having exercised an authority confided to them, their act is legal in the same manner as a judgment given by this court would be, in a case confessedly within its jurisdiction, however erroneous the principles may be on which the court decided. The words "against natural justice" are very loose terms, upon which very wise and upright members of the legislature and judges might differ in opinion. If they did, whose opinion is properly to be regarded—those to whom the authority of passing such an act is given, or a court to whom no authority, in this respect, necessarily results? This case is surely different from an unconstitutional act which the courts must certainly declare to be void, because passed without any authority whatever. The constitution, by saying that the legislature shall have authority in certain cases, but shall not have in others, as plainly declares everything valid done in pursuance of the first provision, as everything void that is done in contradiction of the last; and it may surely be inferred that if, in addition to other restrictions on the legislative power, such a restriction as that in question was intended, so as to leave it to the courts, in all instances, to say whether an act was agreeable to natural justice or not, this restriction would have been inserted, together with others. All courts, indeed, as being bound to give the most reasonable construction to acts of the legislature, will, in construing an act, do it as consistently with their notions of natural justice (if there appears any incompatibility) as the words and context will admit; it being most probable that, by such construction, the true design of the legislature will be pursued; but, if the words are too plain to admit of more than one construction, and the provisions be not inconsistent with any articles of the constitution, I am of opinion, for the reason I have given, that no court has authority to say the act is void because in their opinion it is not agreeable to the principles of natural justice.

Admitting, however, that this is a ground upon which a court has authority to decide, I am of opinion that this act is not contrary to the principles of natural justice. We are to recollect that, for many centuries in England the establishment of perpetuities in landed estates has been deemed a great grievance. An estate tail, in particular, created by the statute de donis (which is undoubtedly a perpetuity, because by possibility it may last forever), has been considered a dangerous support of a high aristocratic interest attended with numerous evils both public and private, so much so that though the statute has never been directly repealed, yet successful evasions of it have been practiced, and some of them with the direct sanction of the legislature itself. If this act, therefore, has been in such discredit even in England, where there exists a government consisting of king, lords, and commons, of course a great aristocratical interest, nothwithstanding which it has been deemed too aristocratical even for them, well might it excite the jealousy and precaution of the representatives of the people of this state, assembled to establish a republican form of government, founded on the basis of political equality among all the citizens, and to which any aristocratical devices must be particularly detrimental. This subject, therefore, did not escape the attention of the convention who framed the constitution of this state; but they made the following provisions concerning it: 1. In the bill of rights (section 23): "That perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed." In the constitution (section 43): "That the future legislature of this state shall regulate entails in such a manner as to prevent perpetuities." It may well be conceived that in the very critical period in which this convention sat, and considering the other important business they had to do, they had not sufficient leisure to attend to this subject, so as to make a provision for it in all its proper details. They therefore directed a future legislature to do it; but, by the anxiety they showed on the subject (declaring perpetuities and monopolies contrary to the genius of a free state, and directing the legislature in the manner above expressed), they showed their opinion of the existence of the evil, their earnest desire to remedy it, and that it was of a kind which in their opinion required the sanction of the constitution itself, and might not safely be confided altogether to legislative discretion to provide a remedy or not. It may therefore justly be considered that the legislature had the authority of the convention as to this object devolved on them, and consequently, that when the law passed which they were directed to enact, it should have the same effect as if the provisions in it had formed part of the constitution itself. The provision in the constitution would otherwise be nugatory and idle, since, had that said nothing on the subject, the legislature

might undoubtedly have regulated entails as they pleased.

It is a known principle of law, in any ordinary case, that when any estate is created by virtue of a power, the party to whom it is conveyed shall be deemed to hold the estate under the power, and not simply under the conveyance itself. We know it is an invariable principle of equity (whose object it professedly is to decide on the principles of natural justice, when no express law interferes), that what ought to have been done shall be regarded as done. As estates of this nature are declared by the bill of rights to be contrary to the genius of a free people, and that they ought not to be allowed, and the legislature are directed by the constitution to regulate entails in such a manner as to prevent perpetuities, if either the difficulty of the case, the interference of other business, or the wilful neglect of the legislature occasioned a postponement of the remedy which it was the duty of the legislature to provide, it cannot be unreasonable to say, that when the provision was made, it should guard against any intermediate evils (if any had occurred), which had accrued contrary to the true intent and meaning of the constitution, in which the whole people had an interest, and the benefits of which they were entitled to, without the legislature being at liberty to withhold them. Upon a great scale the legislature may be considered as trustees, the people as the persons for whose benefit the trust was created. Ought they, therefore, to suffer any injury by any delay in the execution of the trust? They certainly ought not, if it were in the power of the trustees to prevent it. In this case, I conceive, the legislature, at the time they executed this authority, were to consider whether the evils which had happened in the mean time (if any had happened) required a retrospective remedy in order to defeat any mischief which a delay contrary to the intent of the constitution had occasioned or not. If it appeared to them that such a remedy was proper, to give the constitution its full effect, I conceive they not only had authority, but it was their duty to provide it; the whole regulation on this subject being by the constitution itself left to their discretion. If no such remedy appeared necessary they might make an ordinary act, to take place in every particular in future; but they viewed it in the former light, and their decision, of course, must be submitted to. The persons to be affected by this act who resided in the state, and were citizens of it, might derive more benefit from their share of the public property occasioned by the remedy against so great an evil, than loss by being deprived of a particular estate derived from so obnoxious a source. They, at any rate, partake equally of the benefits of the constitution with others who were parties to it, and consequently liable to all its advantages and disadvantages. Persons who are not resident in the state, but as citizens of other states are permitted to hold lands in it, though in some respects differently circumstanced, cannot expect to hold their titles upon a different footing from citizens themselves, and may possibly, in some particular instances, be compensated for the loss of one estate by the superior value of others, if they hold such, derived from the general influence of wise precautions for the public benefit. In a state of society properly regulated it must frequently happen that private and publis interests in some degree interfere with each other. In such cases is it not unavoidable, and agreeable to the very principle on which all governments are formed, that the former should yield to the latter? Yet, clear as this principle is, and necessary as in many cases it is that it should be enforced, many, from injudicious notions of liberty, speak of the rights of each individual as if he subsisted in a state of nature unconnected with any other mortal in the universe, and deriving no benefits from a well-constituted society, which are more than an ample compensation for any accidental sacrifice which the pubilc interest may occasionally require of a subordinate private advantage to a superior public good. These are considerations upon the supposition that the rights of the lessor of the plaintiff subsisted in full force under the statute de donis until the act of assembly in question was made. That, however, may well be doubted because there seem at least plausible reasons for suggesting that it was altogether taken away by the constitution, or at least by the act of assembly of April, 1778, c. 5. It will be immaterial to consider the effect of the former, because if the latter was not operative enough for the purpose, the former undoubtedly was not; and if the latter was, it was sufficiently early to establish the title of the defendant on this ground.

The provisions of the act in question, so far as they concern this subject, are as follows: "Whereas doubts may arise upon the revolution in government, whether any and what laws continue in force here: For prevention of which, be it enacted," etc., "that all such statutes and such parts of the common law as were heretofore in force and use within this territory, and all the acts of the late general assemblies thereof, or so much of the said statutes, common law, and acts of assembly as are not destructive of, repugnant to, or inconsistent with the freedom and independence of this state, and of the government therein established, and which have not been otherwise provided for in the whole or in part, not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full force within this state." Though these words are altogether in the affirmative, they imply a negative because the act was expressly made to remove doubts "whether any and what laws" were in force, and of course to exclude from the construction of being in force all not specified. If, therefore, the statute de donis be not one of those intended by

the legislature to be in force, it remained no longer in force after this act was made, even had it been so till then. Whatever doubt might have existed otherwise, yet the words of the bill of rights and the constitution themselves show that, in the opinion of those who framed them, this act was deemed inconsistent with the freedom and independence of this state. This act, therefore, was not one of those declared to be in force, and consequently, if no exception is to be made of this case in particular, it is to be deemed abrogated, at least from that time. There being special provision in the constitution concerning entails, any act on this subject might be deemed impliedly excepted from these general words if such estates then in being were to be entirely destroyed by it; but if they were not, the only effect such a construction could have would be to reduce them to their common law condition, that is, to make them fees conditional, by taking off the restraint of alienation which the statute de donis imposed, and which restraint constituted the whole danger from them which the constitution contemplated. If this view of the subject be proper, then, as this act was passed in April, 1778, when David Minge was alive, instead of holding an estate tail, as before, he held an estate called a fee conditional one, the property of which undoubtedly was, as he had then issue born capable of inheriting the estate, to alien the estate as he thought proper. His alienation, accordingly, to Gilmour and Hendric, under the deed of the 15th February, 1779, is (upon this ground) a complete bar to the lessor of the plaintiff, independent of all other circumstances in the case. I do not, however, confidently rely upon this principle; but whatever doubt may be entertained on that part of the case, I am clear in the former reasons I have urged, showing that the title of the lessor of the plaintiff (if he ever had any) was constitutionally taken away by the conjoint operation of the constitution and the act of assembly passed in pursuance of its express authority; and therefore that he must fail in this case as well for want of title as from pursuing an improper remedy.

I am althorized to say my Brother SITGREAVES [District Judge] concurs in this opinion; the consequence is that there must be judgment for the defendant.

MINGO (UNITED STATES v.). See Case No. 15,781.

MINGOS (VICTOR SEWING-MACH. CO. v.). See Case No. 16,936.

Case No. 9,632.

MINI v. ADAMS.

[The case reported under above title in 3 Wall. Jr. 20, and 12 Leg. Int. 4, is the same as Case No. 2,673.]

Case No. 9,633.

MINIFIE v. DUCKWORTH.

[2 Cranch, C. C. 39.] [1]

Circuit Court, District of Columbia. Dec. Term, 1811.

JUSTICE OF PEACE—APPEAL—CASE TRIED DE NOVO.

Upon an appeal from the judgment of a justice of the peace, the cause is to be tried de novo.

THE COURT said that the appeal suspended the judgment below, and the cause must be tried de novo, as if no judgment had been rendered.

MINIFIE (NEALE v.). See Case No. 10,070.

MINIFIE (UNITED STATES v.). See Case No. 15,782.

Case No. 9,634.

The MINNA.

[Blatchf. Pr. Cas. 333.] [2]

District Court, S. D. New York. March 26, 1863.

PRIZE—VIOLATING BLOCKADE—JUDICIAL NOTICE.

1. Vessel and cargo condemned for an attempt to violate the blockade.

2. The court will take judicial notice of the fact that the shipper at Nassau, a neutral port, of a cargo captured as prize, for an alleged attempt to violate the blockade, is a person who is shown by the records of the court to have been actively engaged in trading to and from the blockaded ports of the enemy.

In admiralty.

BETTS, District Judge. A libel was filed in this suit March 2, 1863. The warrant of attachment and the monition issued thereon were returned by the marshal as duly served, on the 24th of the same month. A default was ordered therein by the court, and the ship's papers, with the proofs in preparatorio, and the proceedings in the suit, were, on the same day, submitted to the court for adjudication. The libel alleges the capture of the vessel and cargo by the United States steamer Victoria, on the 18th of February last, at sea, near Beacon Inlet, off the coast of North Carolina, and that the vessel and cargo are subject to condemnation and forfeiture as prize of war, and sent to this port for adjudication for that cause. There was found on board of the vessel, when seized, a certificate of British registry of the vessel, at the port of Quebec, to Thomas Norris, of that place, as owner, bearing date October 10, 1853. There are frequent changes of the command of the vessel indorsed on the registry, down to the date of

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

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

November 20, 1860. The vessel had on board a clearance from the port of Nassau, for New York, dated February 10, 1863; bills of lading and invoices of the cargo, principally salt, shipped by Adderly & Co., of the same date, shipment and destination; also a letter of advice of like date, from the shippers to Messrs. Thomas & Holmes, of New York. No other papers relating to the voyage were produced from the vessel. The master, the mate, the cook and one seaman were examined as witnesses in preparatorio, on the 2d and 3d days of March instant. The master says that he was put in command of the vessel and cargo at Nassau, by Adderly & Co., residing there; that she was captured about twenty miles southeast of Wilmington, N. C.; that the master and crew (nine in number) were hired at Nassau about the middle of February last; that the lading was salt, copperas and drugs; that the voyage was to commence at Nassau, and end at New York; that he knew of no other destination; that he knew that Wilmington had been blockaded; that when he left Nassau, he supposed it was in possession of the United States; that it was under blockade at the time the vessel was captured; and that when the vessel was arrested she was steering westerly, towards the land, the wind being northeasterly. The mate says the vessel was captured about five miles from land, which was in sight; that he told the master the vessel was near land, but she was kept standing in; that he knew of the war and the blockade of Wilmington, but does not know what information the captain had; that the course of the vessel was altered when the steamer was first discovered; that she then went about again, and stood inshore, and then the master and crew abandoned her; that the captain ordered the vessel to be headed to the shore before he took to the boat; that he (the witness) does not believe the captain was bound on an honest voyage to New York, but believes he intended to run the vessel ashore and go on shore himself; that the captain ordered the wheelman to steer her for the shore; and that he (the witness) believes that the captain intended to run the blockade on this voyage. The cook states that the capture was made between seven and eight o'clock a. m., about five miles off shore, between Wilmington and Cape Fear, and that he knew that the coast was under blockade at the time.

This testimony presents the case of an English vessel procured for the alleged voyage by a house at Nassau, N. P., which house has been notoriously engaged with great activity, since the blockade has been imposed on the coasts of the Carolinas, in trading to and from the enemy ports in that vicinity, in violation of the blockade. That fact has been established by floods of evidence, so that the court cannot avoid judicially noticing its existence, any more than it can the proximity of that house and of its managers to the blockaded ports. The Apollon, 9 Wheat. [22 U. S.] 374; Peyroux v. Howard, 7 Pet. [32 U. S.] 342. They took the direction of this vessel, which had been previously registered in the province of Canada, and officered, manned, laded, and despatched her, without any documentary title to her or her service, and put her upon a voyage from Nassau to New York with a cargo brought from Canada to Nassau, passing by New York and specially adapted to the markets and wants of the rebels, and containing nothing which appears to be of any particular demand or attraction in the New York market. They furnished no evidence of the circumstances and necessity of the voyage performed. They ran the vessel and cargo directly from Nassau across to Wilmington and she was arrested heading in shore, between Cape Fear and Wilmington. No log-book or memorandum is found noting the course of the navigation or the cause of it. When pursued by the capturing vessel the master and crew of the prize abandoned her in a boat, and attempted to make the shore themselves and to have the vessel also run into the territory of the enemy. The mate testifies his belief that the vessel came on the coast with the intention of running the blockade. This is clearly the language and import of the whole transaction; and I am satisfied that the vessel was, when captured, navigated with the intention of violating the blockade, and is lawful prize of war. Decree accordingly.

Case No. 9,635.

MINNESOTA LINSEED OIL CO. v. COLLIER WHITE LEAD CO.

[4 Dill. 431; Syllabi, 74; 15 Alb. Law J. 39; 24 Pittsb. Leg. J. 96.] [1]

Circuit Court, D. Minnesota. 1876.

CONTRACTS—BY TELEGRAPH—ACCEPTANCE—WHEN COMPLETE.

1. In "contracts by telegraph" the same rule as to acceptance prevails as in contracts by mail; the contract is completed when an acceptance of the proposition is deposited for transmission in the telegraph office.

[Cited in Garrettson v. North Atchison Bank, 47 Fed. 870.]

[Approved in Haas v. Myers, 111 Ill. 424, 426.]

2. In case of a proposition by telegraph for the sale of certain goods, the market for which was subject to sudden and great fluctuations, an immediate answer should be returned, and an acceptance of such proposition telegraphed after a delay of twenty-four hours from the time of its receipt was not an acceptance within a reasonable time, and did not operate to complete the contract.

[Cited in Ortman v. Weaver, 11 Fed. 362;

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 15 Alb. Law J. 39, and 24 Pittsb. Leg. J. 96, contain only partial reports.]

De Witt v. Chicago, B. & Q. Ry. Co., 41 Fed. 485; Marr v. Shaw, 51 Fed. 864.]
[Cited in Trounstine v. Sellers, 35 Kan. 447, 11 Pac. 444.]

This action was removed from the state court and a trial by jury waived. The plaintiff seeks to recover the sum of $2,151.50, with interest from September 20, 1875—a balance claimed to be due for oil sold to the defendant. The defendant, in its answer, alleges that on August 3d, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the said month of August, twelve thousand four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff has neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or counter-claim to plaintiff's cause of action. The reply of the plaintiff denies that any contract was entered into between it and defendant.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant: "Minneapolis, July 29, 1875. To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri: Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped. Minnesota Linseed Oil Company."

The following answer was received: "St. Louis, Mo., July 30, 1875. To the Minnesota Linseed Oil Company: Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer. Collier Company."

The following reply was returned: "Minneapolis, July 31, 1875. Will accept fifty-eight cents (58c), on terms named in your telegram. Minnesota Linseed Oil Company."

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 p. m., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8:53 a. m., the following dispatch was deposited for transmission in the telegraph office: "St. Louis, Mo., August 3, 1875. To Minnesota Linseed Oil Company, Minneapolis: Offer accepted—ship three hundred barrels as soon as possible. Collier Company."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis: "Minneapolis, August 3, 1875. To Collier Company, St. Louis: We must withdraw our offer wired July 31st. Minnesota Linseed Oil Company."

Answered: "St. Louis, August 3, 1875. Minnesota Linseed Oil Company: Sale effected before your request to withdraw was received. When will you ship? Collier Company."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon. It is urged by the defendant that the dispatch of Tuesday, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil. The plaintiff, on the contrary, claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

Young & Newel, for plaintiff.
Geo. L. & Chas. E. Otis, for defendant.

NELSON, District Judge. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. See 14 Am. Law Reg. 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also, Trevor v. Wood, 36 N. Y. 307.

The reason for this rule is well stated in Adams v. Lindsell, 1 Barn. & Ald. 681. The negotiation in that case was by post. The court said: "That if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on ad infinitum." See, also, 5. Pa. St. 339; 11 N. Y. 441; Mactier v. Frith, 6 Wend. 103; 48 N. H. 14; 8 C. B. 225. In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Pars. Cont. 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by

letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (volume 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. * * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied. Judgment accordingly.

Case No. 9,636.

MINNETT v. MILWAUKEE & ST. P. RY. CO.

[3 Dill. 460; 3 Cent. Law J. 281; 13 Alb. Law J. 254; 8 Chi. Leg. News, 169; 22 Int. Rev. Rec. 67.] [1]

Circuit Court, D. Minnesota. 1875.

REMOVAL OF CAUSES—LOCAL INFLUENCE AND PREJUDICE — WHO MAY MAKE AFFIDAVIT — FINAL TRIAL—TIME OF APPLICATION FOR REMOVAL.

1. The act of March 2, 1867 [14 Stat. 558], as to the removal of suits from the state to the federal court, although technically repealed by the Revised Statutes, is therein substantially reenacted, and a party on complying with its provisions is entitled to a removal of the cause.

[Cited in Crane v. Reeder, Case No. 3,356.]

2. The president, and perhaps, the general manager of a railway company, is prima facie entitled to make the required affidavit in such a case.

[Cited in Mix v. Andes Ins. Co., 74 N. Y. 56.]

3. Such application may be made after a new trial on the merits has been granted and before the new trial has been commenced.

[Cited in McCallon v. Waterman, Case No. 8,675.]

The plaintiff [John Minnett] brought his action in the state district court; and after a trial upon its merits and a verdict in his favor, the court, upon the defendant's motion, granted a new trial, for reasons, as stated, that "said verdict is not justified by the evidence and is contrary to law." The defendant on February 13th, 1875, presented a petition for the removal of the case to the United States circuit court, embodying the substance of the language of the third subdivision of section 639, page 113, Rev. St. U. S., except that it states that there has been "no final hearing or trial of the cause." The proper security was offered, and the affidavits of the president of the company defendant, and its general manager, were made and filed at the time of filing the petition. The defendant's attorney, after these steps had been taken, served a notice upon the attorneys for the plaintiff of a motion before the state district court for the removal of the suit. In this notice he states that the defendant has filed the affidavit provided for by an act of congress approved March 2d, 1867. The motion came before the court, and after counsel for the plaintiff and defendant had been heard, the removal was ordered February 23d, 1875. The plaintiff now moves before this court for an order remanding the suit, for the reasons: 1. Because said cause was sought to be removed under Act 1867, c. 196, which act was not in force at the date of the presentation of the petition for said removal, and of the order granted thereon. 2. Because the petition, affidavit and bond presented to the state court were not drawn, executed or approved under or by virtue of any law of the United States in such case provided, in force and ef-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 3 Cent. Law J. 281, contains only a partial report.]

fect at said date. 3. Because no removal can or could be had of said cause after a trial thereof upon the merits. Other reasons were urged, but they are substantially embodied in those above given.

E. C. Palmer, for the motion.
Gordon E. Cole, contra.

NELSON, District Judge. 1. If the defendant complied with the law in force at the time it presented the petition, affidavits and security, it was entitled to have the suit removed, and the judge of the state court had no discretion in the premises. The petition makes no allusion to any particular act of congress, but states that the petitioner is a citizen of the state of Wisconsin, and the plaintiff a citizen of the state of Minnesota; alleges the amount sought to be recovered sufficiently large to give the federal court jurisdiction, and in terms embraces all that is set forth and necessary to be done under the third subdivision of section 639, Rev. St.

These statutes embrace all the laws in force December 1, 1873, as revised and consolidated; and section 639 contains all the provisions of the several previous acts relating to the removal of suits from the state to the federal court. The only change made is in the act of 1867, by transposition of the words in the phrase, "at any time before the final hearing or trial," so as to read, "at any time before the trial or final hearing."

The notice of the motion which was served upon the plaintiff's attorney states that the removal is demanded under the act of 1867, which was technically repealed at the time the defendant presented its petition. The right of removal, however, does not depend upon the contents of the notice of the motion for removal; and the state court, as before stated, could not withhold the removal if the existing law in regard to the petition, affidavits, and security was complied with. This court is also bound to retain jurisdiction of the suit under such circumstances.

2. In my opinion, the allegation in the petition, that there has been no final hearing or trial of the cause, is a compliance, substantially, with the third subdivision of section 639, which gives the right of removal at any time before "the trial or final hearing;" and corporations being within its purview, any proper officer—particularly the president, who is the head of the organization—could make the requisite affidavit.

3. The other question necessary to be determined is whether, there having been a trial upon the merits, the defendant is entitled to a removal of the action, a new trial having been granted. The statute requires the petition to be filed before "the trial or final hearing of the cause;" and it is urged that a trial on the merits prevents the removal of the case. "The trial" mentioned in the act, in my opinion, means, not "one trial," or "a trial," but a determination of the rights of the parties forever. When a new trial was granted, the suit was in the same position that it would have been had no trial taken place; the first trial had been erroneous—it had not been in accordance with the law, and there had been no such examination of the rights involved as was contemplated by congress in using the word "trial." Again "the trial" mentioned in the act means a final investigation of the rights involved in the court of original jurisdiction.

The terms "the trial," and "final hearing" are used by congress as having a relative connection—a reciprocal meaning—the former applicable to actions at law, and the latter to equity cases. The word "suit" embraces actions at law as well as equity cases, and the conjunction "or" connecting the words "the trial" and "final hearing" is used, as it often is, where it is sought to give an explanation or definition of the same thing in different words. Such must be the true construction of the law, for it is hardly probable that a distinction would be made between actions at law and equity causes, which would present a strange anomaly as suggested by Mr. Justice Swayne in Insurance Co. v. Dunn, 19 Wall. [86 U. S.] 225, that "in equity cases a final hearing only could take away the right of removal, while any trial, however interlocutory in its character, should have the same effect in an action at law." To avoid this the supreme judicial court of Massachusetts, in Galpin v. Critchlow [112 Mass. 339], construing the law of 1867, which used the language "before the final hearing or trial," said the "'trial' appropriately designates a trial by jury of an issue which will determine the facts in an action at law, and 'final hearing,' in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity."

The supreme judicial court of New Hampshire, in Whittier v. Hartford Ins. Co. [55 N. H. 141], agree to the judgment in the Massachusetts case, and consider the reasoning in that applicable to the law as it appears in section 639, par. 3. With great respect for these courts, I cannot agree to their interpretation of the statute. In equity practice the term "hearing" has a well defined meaning, viz: "that stage or proceedings in an equity cause which corresponds to a trial of a cause at law; the hearing of counsel upon the pleadings and proofs." The qualifying adjective "final" makes this "hearing" one that absolutely ends the matter in dispute, and is explanatory of the words "the trial." This case is certainly within the spirit of the law, and in my opinion within its letter. The motion to remand is denied. Motion denied.

NOTE. Subsequently another ground was taken before the circuit judge, on which to remand the cause, viz: that the Milwaukee & St. Paul Railway Company was a domestic corporation of Minnesota, but on examing the pleadings and the legislation of the state applicable to the question the court overruled the objection, referring to the case of Williams v. Mis-

souri, Kansas & Texas Railway Co. [Case No. 17,728], and the cases there cited.

See Farmers' Loan & Trust Co. v. Maquillan [Id. 4,668].

Case No. 9,637.

The MINNIE.

[Cited in Baker v. The Slobodna, 35 Fed. 542. Nowhere reported; opinion not now accessible.]

MINNIE, The (MARSH v.). See Case No. 9,117.

Case No. 9,638.

The MINNIE MILLER.

[6 Ben. 117.] [1]

District Court, E. D. New York. May, 1872.

SALVAGE—DETENTION OF PROPERTY BY SALVORS—COSTS.

The ship P. fell in with the brig M. about 175 miles from New York. The brig had lost her masts, but had rigged jury masts, and was making progress towards New York, her destination. The P. took her in tow and towed her till near Sandy Hook, when a tug took her to New York, where she arrived five days after she was taken in tow. Part of her chain having been left on board of the P., was demanded of her, but the master of the P. refused to give it up, saying they should hold it till the salvage was settled. The value of the brig, freight and cargo, was $18,500. *Held*, that the service was not towage merely, but salvage; that $2,250 was a proper amount to be awarded, and that the libellants should not recover costs because of the refusal to deliver up the chain, such costs to be paid by the owners, unless the refusal was shown to have been without the knowledge of the owners, and, in that case, by the master.

[Cited in The Col. Adams, 19 Fed. 796; The Marie Anne, 48 Fed. 748.]

This was a libel by the owners and the master and crew of the ship Pacific to recover salvage for services rendered to the Minnie Miller. The Pacific fell in with the Minnie Miller about 175 miles from New York, dismasted and in distress. Both vessels were bound to New York. The ship took hold of the brig and towed her nearly to Sandy Hook, the service occupying five days. The brig's answer to the libel denied that the service was a salvage service, stating that, though she had lost her masts, yet jury masts had been rigged, by means of which the brig was prosecuting, and could have prosecuted, her voyage, and was not in distress. It was claimed, on behalf of the brig, that the brig was only bound to pay for towage, which she was willing to pay. The value of the brig, freight and cargo was $18 500. It appeared in evidence that a part of the brig's chain, which had been used in towing her, was left on board the Pacific and was brought by her to New York. A demand was made for the chain, but it was not given up, the master of the Pacific saying that they would keep it till the salvage was determined.

James K. Hill, for libellants.

W. A. Darling, for claimants.

BENEDICT, District Judge. The facts proved in this action disclose a case of salvage service rendered by the ship Pacific to the brig Minnie Miller; and a proper reward to be paid therefor by the brig, her freight and cargo, I judge to be the sum of $2,250, the same to be borne by the brig, her freight, and the cargo, in proportion to their respective values. I give the libellants no costs because of the circumstances attending the detention of the brig's chain by the ship after a demand made therefor

Courts of admiralty are always careful to see that in any case of salvage a proper reward is paid therefor, and they are not only willing but competent to protect salvors in their rights. There is, therefore, seldom, if ever, any excuse for the use of pressure of any kind to secure or even hasten a proper adjustment of the salvor's claim.

In the present instance there was no necessity for retaining possession of the chain, and it should have been promptly returned to the brig, instead of which it was detained, with the notice that it would be held till the salvage was settled, and it is still so held.

To mark my disapproval of such action, I refuse costs, and direct that, in apportioning the salvage, the libellants' costs be charged to the owner of the ship, unless it be made to appear that the captain detained the chain without the knowledge of the owner, in which case the master must bear the costs.

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

Case No. 9,639.

The MINNIE R. CHILDS.

The R. P. NOBLE.

[9 Ben. 200.] [1]

District Court, E. D. New York. July, 1877.

COLLISION—STEAMBOAT AND VESSEL—SPEED.

1. Where a tug coming into the channel of the Kill von Kull, above Staten Island, with a schooner in tow, met a steamboat coming from Newark Bay, and exchanged signals with her, but a collision ensued between the steamboat and the tow: *Held*, that the steamboat was in fault, for not getting to the east side of the channel, after exchanging signals with the tug showing that the latter was to go on the west side.

2. The tug was not in fault for keeping up her speed under the circumstances, nor the schooner in fault for not failing to cast off the hawser.

3. A steamboat that cannot be steered should be stopped.

[Cited in The City of Macon, 47 Fed. 925.]

In admiralty.

L. A. Lockwood, for the libellants.

Beebe, Wilcox & Hobbs, for the tug.

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

H. B. Whitbeck, for the steamboat.

BENEDICT, District Judge. This action is brought to recover for damages done to the schooner Gillan, by being run into by the steamboat Minnie R. Childs, on August 1st, 1874, in the Kills. The schooner was being towed by the tug-boat R. P. Noble, upon a hawser some eighty feet in length, and was bound towards New York. The Minnie R. Childs was bound in the opposite direction, on a trip from Newark to Coney Island. The time of the collision was about 10 o'clock in the morning. The weather was clear, the tide flood, and there were no other vessels to interfere with the navigation. The place of the collision was between the stake-light and the lower end of the middle ground in the channel that runs from opposite Elizabethport, and between the middle ground and the Staten Island shore, where there was abundant room for vessels like these to pass in safety. The libellant charges fault upon both the steamboats. Each steamboat charges the other with being the sole cause of the collision, and the Minnie R. Childs charges fault upon the schooner.

Upon an examination of the voluminous testimony taken in the case, I deem it entirely clear that no fault can be imputed to the schooner. The fault suggested (which, by the way, is not made to appear in any pleading), is that she omitted to cast off the tow hawser when it was seen that the Minnie R. Childs was likely to strike her. But that manoeuvre would have been of doubtful propriety, to be thought of only at the last moment, and the failure to adopt it in the extremity is not a fault. It seems also to be apparent that there was no fault in the management of the tug. She turned the point of the middle ground as close as she could do with safety, and from that time until the collision, was bearing as strongly as she could for the west side of the channel, which extends about a half a mile from the point of the middle ground to the stake-light. She blew two whistles to indicate her intention to take the west side, as soon as the Minnie R. Childs appeared at the stake-light, which whistle was replied to by two whistles of the Childs, and the evidence is that those whistles were in accordance with the universal custom of boats passing up that channel on flood tide. I see nothing improper in the movements of the tug. The weight of evidence is that it is usual for boats going up in such trips to take the west side. The testimony is that any other course would have been dangerous, and it is conceded that her choice of the west side was acquiesced in by the Childs at once, for she answered by two whistles the two whistles of the tug. It is true the tug kept up her speed until the moment of the collision, but that was the only effort she could make to avoid the collision, and it was calculated to accomplish the end. From the time of exchanging signals until the accident, the Noble kept to starboard as much as possible, and she was close to the west side of the channel when the vessels struck.

The pilot of the Childs says he was close on the bar himself, not more than twenty-five yards from it, at the collision. It seems clear then that the collision must be attributed to the fault of the Childs, in that she did not keep further to east and so as to pass the tow to west in accordance with the signals that had been exchanged. The pilot of the Childs testifies that he saw the tug when she began to turn the lower part of the middle ground and at once gave one whistle; that the tug answered immediately with two whistles to which he replied with two whistles. This testimony shows conclusively that the Childs acquiesced in the course chosen, that she expected to take the east side and that the tow would take the west side. But for some reason the Childs failed to get over to the east side as is shown by the positions of the vessels at the collision. Under the circumstances it was the duty of the Childs to get over to the east side, so as to pass in safety, or if she could not do that to stop and allow the tow to pass her to port, as it would have done if the Childs had stopped before coming up to the tow. The pilot of the Childs says that he did not ring to stop until the Noble was just lapping the bow of the Childs.

It was suggested in the argument that the Childs in such shallow muddy water would not steer well, and that this is the reason for the failure to get over to east. If such be the fact it does not avail to relieve the Childs from responsibility for damage caused thereby. If she could not be steered she should have been stopped. There must be a decree in favor of the libellant against the Childs, and the libel as against the Noble must be dismissed with costs. Let a reference be had to ascertain the amount of the damage.

Case No. 9,640.

The MINNIE R. CHILDS.

[10 Ben. 553.] [1]

District Court, S. D. New York. Oct., 1879.

MARITIME LIEN—DOMESTIC VESSEL—MATERIALS—PRIORITIES.

1. Materials were furnished in the state of New York to a vessel owned in the state, by three parties, F., D. & M. Specifications of lien were filed, as required by the statute of New York, first by F., second by M., and third by D. A few days after D. had filed his specification of lien, he filed a libel against the vessel to enforce his lien and the vessel was seized under the process. F. next filed a libel against her, and lastly M. filed a libel also. The vessel being sold and the proceeds not being sufficient to pay all the claims, the question of priority was brought before the court. *Held*, that the order of the filing of the specifications did not determine the order of the attaching of the liens.

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

2. The rule that claims should be paid in the order of the filing of the libels was too well settled to be disturbed in this district, notwithstanding the authorities elsewhere in favor of a payment pro rata.

In admiralty.

N. A. Halbert, for Delamater.
D. McMahon, for Fairbanks.
R. D. Benedict, for McCurdy.

CHOATE, District Judge. The libellants in these three several suits have furnished supplies and materials to the steamboat Minnie R. Childs, a domestic vessel, and their libels were severally filed to enforce liens therefor under the statute of the state of New York. The first libel filed was that of Delamater, June 26, 1879, the second that of Fairbanks, June 28, 1879, and the third that of McCurdy, July 1, 1879. The processes were issued and attachments of the vessel thereupon were made in the same order of time. The vessel has been sold and the proceeds are not sufficient to pay in full the amounts found due to the several libellants by their decrees, and the question is how the proceeds shall be distributed.

The statute of New York (Act April 24, 1862 [Laws 1862, p. 956]) provides that "whenever a debt amounting to fifty dollars or upwards as to a sea-going or ocean-bound vessel, or amounting to fifteen dollars or upwards, as to any other vessel, shall be contracted by the master, owner, &c., of any ship or vessel or the agent of either of them within this state for either of the following purposes, (enumerating them) such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon, except mariners' wages." Section 2d provides that, "such debt shall cease to be a lien at the expiration of six months after the said debt was contracted, unless at the time when said six months shall expire, such ship or vessel shall be absent from the port at which such debt was contracted, in which case the said lien shall continue until the expiration of ten days after such ship or vessel shall next return to said port; and in all cases such debt shall cease to be a lien upon such ship or vessel, whenever such ship or vessel shall leave the port at which such debt was contracted, unless the person having such lien shall within twelve days after such departure cause to be drawn up and filed specifications of such lien," &c. The act directs that these specifications are to be filed in the clerk's office of the county in which the debt was contracted. It also provided machinery for the enforcement of the lien by the issue of a warrant to the sheriff of the county and subsequent proceedings in the state courts resulting in the sale of the vessel. By section 19 it was provided that "upon the distribution of such proceeds the various claims exhibited, which are found to be subsisting liens upon such vessel or the proceeds thereof, according to the provisions of this act, shall, with their respective costs, expenses and allowances, be ordered to be paid out of such proceeds, in the order of the delivery of the respective warrants to the sheriff."

It is insisted on behalf of the libellants Fairbanks and McCurdy that the claims should be paid in the order in which the specifications were filed; that the special provisions of the act relating to the order of distribution are not binding on this court; that they cannot be applied because there are no warrants issued to the sheriff; and that the liens are created by the filing of the specifications and the claims thereby become, in the order in which they are filed, liens against the vessel, each subsequent lienor taking an interest subject to such prior liens as have already attached by virtue of the act. It is further insisted by the libellant McCurdy, that if this is not the proper rule in this case, yet that the rule that has been followed in this district of distributing proceeds among libellants of the same class in the order in which their libels were filed is erroneous and that the true rule is that the proceeds should be distributed pro rata without regard to the time of filing the libels.

In this case the specifications were filed by Fairbanks, June 14, 1879, by McCurdy, June 16, 1879, and by Delamater, June 17, 1879. I see no ground whatever for the claim that the filing of the specification creates the lien, or that it first attaches to the vessel upon such filing. On the contrary, the statute is explicit that the lien exists before the filing of the specification, and upon the contracting of the debt. The filing is made necessary simply to prevent the lien already existing from being discharged. It has been held that the lien given by such a statute is held subject to the limitations contained in the statute as to its duration. The Edith, 94 U. S. 518, 522.

In respect to those parts of the statute which provide a remedy in rem in the state court and direct the distribution of the proceeds with reference to the order in which the warrants issue to the sheriff, it seems to me that they are not to be regarded as limitations upon the duration of the lien or conditions of its enjoyment. They cannot be literally applied, since there are and can be no such warrants issued. It seems to me that they fail altogether, and can have no application since the entire remedial machinery provided has been held to be unconstitutional and void. The Lottawanna, 21 Wall. [88 U. S.] 580. Nevertheless, the liens declared by the statute, with what may properly be regarded as the limitations and conditions attached thereto, remain and are enforceable in this court. It is argued on behalf of the libellant Delamater that the issue of the process of this court is so far analogous to the warrant to the sheriff provided for by the act, that this part of the act is still controlling and applies to the process

of this court under which the vessel is arrested. That provision may have been adopted to conform the remedies of lienors to those of lienors whose claims were enforceable in the admiralty court. Very probably this is so. And yet it seems to me that this is not one of the conditions attached to the lien itself as an essential part of it, but that it has to do with the remedy only. The same section defines the costs to be paid in the same order of priority to be the costs allowed in suits at law by the laws of the state. This is certainly not of the essence of the lien, nor controlling in this court.

It is still insisted on behalf of the libellant McCurdy that the ordinary rule of the admiralty court, which distributes the proceeds in the order in which the libels were filed, ought not to be applied here because the reason on which it rests does not apply. It is argued that the rule is based on the principle that the first libellant has the preference because he takes the first measure to enforce his claim, and that here the filing of the specification is the first act towards enforcing the claim. There seems to be no force in this suggestion, since the filing of a specification is not a measure taken for the enforcing of the lien or claim, but simply to keep it from expiring by lapse of time.

The lien given by the state statute is in effect only a right to have the vessel applied to satisfy the debt, a right similar in its nature to a maritime lien, and must be enforced as such. The rule giving priority to the lienors in the order in which their libels are filed is too well established in this district to be now questioned in this court, notwithstanding the very considerable weight of authority in favor of a different distribution. The Globe [Case No. 5,483]; The Triumph [Id. 14,182]. See The America [Id. 288]; The Fanny [Id. 4,638]. The proceeds should be distributed among the libellants in the order in which their libels were filed.

MINNIE R. CHILDS, The (HUDSON COAL CO. v.). See Case No. 6,836.

Case No. 9,641.

MINON v. VAN NOSTRAND et al.

[Holmes, 251.] [1]

Circuit Court, D. Massachusetts. Aug., 1873.[2]

BANKRUPTCY—ARREST UNDER STATE PROCESS—POOR DEBTORS—INJUNCTION.

1. Where a debtor has been arrested on execution of a state court, and has claimed the benefit of the provisions of the state law for the relief of poor debtors, before proceedings in bankruptcy, the circuit court will not enjoin the creditor from proceeding under his execution.

2. An arrest on execution before the arrested debtor's petition in bankruptcy, is not avoided by adjudication of his bankruptcy.

3. The filing by an execution creditor, after adjudication of the bankruptcy of the debtor, of charges of fraud in opposition to the discharge of the debtor, under the Massachusetts law for the relief of poor debtors, cannot be considered a suit at law or in equity to be stayed under the twenty-first section of the bankrupt act [of 1867 (14 Stat. 526)].

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

[This was a bill in equity by Michael G. Minon against William T. Van Nostrand and others. From a decree of the district court dismissing the bill (Case No. 9,642) an appeal was taken to this court.]

C. R. Train and J. O. Teele, for appellant.

Burbank & Lund, for appellee.

SHEPLEY, Circuit Judge. The appellant was arrested on the third day of November, 1869, on an execution which issued on a judgment recovered against him in favor of the defendants, in the superior court for Suffolk county, on the fifteenth day of October, 1869. The debtor was taken before a commissioner of insolvency, and entered into a recognizance in due form of law, with sureties, conditioned as follows: "That said judgment debtor, Michael G. Minon, within thirty days from the day of his arrest, as above (in said recognizance) mentioned, will deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by law, and appear at the time and place fixed for his examination, and from time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon."

The appellant, subsequently desiring to take the oath for the relief of poor debtors, as provided by the laws of Massachusetts, made application to David H. Coolidge, a commissioner of insolvency; and a time and place was fixed for his examination, and the debtor and creditors appeared before the commissioner. The examination of the debtor was commenced, and the proceedings were continued from time to time to the twenty-fifth day of March, 1870. On the fourteenth day of February, 1870, the debtor filed his petition in bankruptcy, and on the sixteenth day of February he was duly adjudged a bankrupt. On the 25th of March he appeared before the commissioner of insolvency. Charges of fraud were filed by the creditors. The bankrupt proved the fact of his bankruptcy, and the proceedings thereon, and prayed that further proceedings under the execution be stayed, and he be released from his arrest, and allowed to go thereof without day. This prayer was denied by the commissioner. The bankrupt subsequently filed in the district court his petition for a writ of injunction against further proceedings by the creditors before the commissioner under the

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 9,642.]

execution and the recognizance, and for his release from that arrest. The district court dismissed the petition, and the case is brought before this court by appeal.

The recognizance having been taken before the commencement of proceedings in bankruptcy, the sureties could only be discharged by a performance of the conditions of the recognizance. While the arrest continues, all other means to obtain payment of the judgment are suspended. When an arrest has been made upon an execution, and the debtor has claimed the provisions of the state law for relief, prior to his application in bankruptcy, the circuit court will not enjoin the creditor from proceeding with his execution. Craggin v. Bailey, 23 Me. 104. The arrest is not avoided by the bankruptcy. The proceedings under the recognizance were instituted at the debtor's instance. The filing of the charges of fraud was only a proceeding incidental to the previous proceedings instituted by him, in the nature of an answer or plea in bar to the debtor's application. Parker v. Page, 4 Gray, 533. Such filing of charges of fraud cannot be treated as a suit at law or in equity to be stayed under the twenty-first section of the bankrupt act.

Decree affirmed.

Case No. 9,642.

MINON v. VAN NOSTRAND et al.

[1 Lowell, 458; [1] 4 N. B. R. 108 (Quarto, 28).]

District Court, D. Massachusetts. July, 1870.[2]

BANKRUPTCY — ARREST UNDER STATE PROCESS — POOR DEBTORS — CHARGES OF FRAUD.

1. A debtor arrested on execution before filing his petition in bankruptcy cannot be relieved from the arrest by this court.

[Approved in Brandon Nat. Bank v. Hatch, 57 N. H. 461. Cited in Hussey v. Danforth, 77 Me. 20; Stockwell v. Silloway, 105 Mass. 519.

2. Charges of fraud filed against a defendant who is seeking the benefit of the poor debtor law of Massachusetts, though filed after the bankruptcy of the debtor, do not make a new suit or proceeding so as to enable this court to interfere and discharge the debtor.

[Cited in Everett v. Henderson, 150 Mass. 421, 23 N. E. 318.]

Bill in equity. The facts of this case as alleged in the bill and admitted in the answer, were these: In October, 1869, the respondents [William T. Van Nostrand and others] recovered judgment and execution against the plaintiff [Michael G. Minon] in the superior court of the county of Suffolk. The plaintiff was arrested on the execution in November, and gave a recognizance before Mr. Coolidge, a magistrate duly authorized to act in the premises, to appear within thirty days thereafter for his examination under the laws of the commonwealth for the relief of poor debtors. He did so appear, and the examination was begun, and was afterwards continued from time to time, and was not concluded at the time of the hearing in this case. On the fourteenth day of February, 1870, the plaintiff was duly adjudged a bankrupt, and an assignee of his estate has been chosen and qualified. On the twenty-fifth day of March, the plaintiff again appeared before Mr. Coolidge, according to the tenor of his recognizance, and after proving to the satisfaction of the magistrate the fact of his bankruptcy, and the proceedings therein, prayed that all further action under the execution be stayed until the question of his discharge should be terminated in this court; and this being denied, prayed to be discharged from his arrest, which was likewise denied. The present respondents afterwards on the same day filed with said Coolidge charges of fraud against the plaintiff under the statute of the commonwealth, when the above-mentioned prayers were renewed and again denied; and the case has been continued to the present time. [It is further alleged that the charges of fraud are only cognizable in this court sitting in bankruptcy, and] [3] the bill prayed for an injunction restraining the respondents from proceeding further under the execution and recognizance, and that the plaintiff be suffered to go thereof without day and without further molestation, and for general relief. [The case has been conducted with great courtesy on both sides, and with a view of obtaining either here or on appeal a binding adjudication of the law upon the important points involved.] [3]

C. R. Train, for plaintiff.

R. Lund, for defendants.

LOWELL, District Judge. I have already more than once decided that a debtor who is under arrest at the time his petition in bankruptcy is filed, cannot be relieved on habeas corpus. I came to this conclusion with reluctance; but it seemed to be the necessary construction of section 26, and the rule 27 of the supreme court, founded upon it, that the benefit of the writ was only for bankrupts arrested after they became such, —and I have not changed that opinion. [It may be that congress hesitated to interfere with a consummated arrest under the apprehension that the debt might thereby be discharged and not be revived if the bankrupt should fail to obtain his discharge in bankruptcy, or it may be that the case was overlooked.] [3] However I may regret the fact, a bankrupt seems to be left under such circumstances, to the operation of the laws of the state. Now the law of Massachusetts is very peculiar. It professes to abolish imprisonment for debt, but really does so only in case the defendant shows his poverty, and besides, comes within its definition of a

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

[2] [Affirmed in Case No. 9,641.]

[3] [From 4 N. B. R. 108 (Quarto, 28).]

fair and honest debtor. In respect to poverty and even to property concealed or conveyed on a secret trust for the debtor's benefit, it would seem that all such inquiries have, after bankruptcy, devolved upon the assignee, who is bound to prosecute them for the general benefit of creditors, including the judgment creditor, and that all examination which is for the advantage of the latter only ought to be dispensed with. This was always my view of the operation of the insolvent law of Massachusetts, but I have no power to require the state magistrate to adopt it, and to admit the debtor to the benefit of the oath. This want of power is admitted, but the plaintiff's contention is, that the specific charges of fraud which the statute of the state authorizes the judgment creditor to make, and which if duly alleged and proved, not only prevent the release of the debtor, but may subject him to punishment, are a new suit or proceeding against him which should be stayed to await the result of the proceedings in bankruptcy. By the law of the state charges of fraud, some of which may concern only the relations of the two parties to the suit, may be made by the creditor, in writing, pending the examination before the magistrate, and thereupon the defendant is to plead to them, and the case proceeds before the magistrate like a suit at law, with a right of appeal and of an ultimate jury trial. If final judgment is against the defendant he may be sentenced to the house of correction for one year, or to jail for six months, and shall lose all benefit of the law for the relief of poor debtors. This anomalous law has been decided to be constitutional and to be of a mixed character, mainly civil, but partly criminal. Gen. St. c. 124, §§ 10, 31–34; Chamberlain v. Hoogs, 1 Gray, 172; Parker v. Page, 4 Gray, 533; Stockwell v. Silloway, 100 Mass. 298. No public prosecution is provided for, and it seems to result from the whole tenor of the act that the defendant may end the case at any time before sentence by paying the debt and costs. Indeed his recognizance in case of appeal is to surrender himself within thirty days after final judgment, or pay the debt. The whole proceeding therefore appears to be framed with the view of giving the creditor an extraordinary hold upon a debtor whom he supposes to be fraudulent, but with whose conduct public justice has no particular concern.

I do not mean to be understood as throwing any doubt on the propriety of the decision which upholds the constitutionality of the law. The only question for me is whether the filing of such charges by a judgment creditor is a new suit which ought to be stayed under section 21 of the bankrupt act [of 1867 (14 Stat. 526)], which prohibits a creditor whose debt is provable under the act from prosecuting to final judgment any suit at law or in equity therefor, against the bankrupt, and requires "any such suit or proceeding" to be stayed to await the determination of the court in bankruptcy on the question of the discharge. It is argued with much force that "any such suit or proceeding" includes something more than any suit at law or in equity, and will cover any legal mode of enforcing payment of a provable debt. And I am very much inclined to think that this is so, and that a creditor who should undertake to prosecute a proceeding in admiralty or to seize on execution after-acquired property of the bankrupt, would be within the scope, as he clearly would be within the mischief of this section. If this be so, no creditor holding a provable debt can prosecute any proceeding for its recovery pending the bankruptcy. But the difficulty here is that all the original action is on the part of the debtor. He was under arrest before the proceedings, and the law has seen fit to provide that he shall not be released from such an arrest by habeas corpus. It seems to me to follow that equity cannot relieve him, because equity, in such a case, follows the law, and never undertakes to relieve against lawful arrests. Then the debtor applies for the benefit of the state law, and that unfortunately gives relief only in certain cases. If the debtor can show a compliance with that law he is discharged, otherwise not. And the charges of fraud, though declared to be a sort of suit at law and ordered to be conducted accordingly, are incidental, not to the recovery of the debt, but to the attempt of the debtor to take the benefit of the statute. They are, say the supreme court of Massachusetts, "intended to be used as an answer or plea in bar to the debtor's application for the benefit of the act. . . . No such charges can be made as an independent distinct substantive process against the debtor. They are only incidental to the previous proceedings commenced by him to obtain his release from confinement." Parker v. Page, 4 Gray, 533. If this be the true nature of these charges, it is not a suit or proceeding to recover a debt, but a counter plea to prevent the release of the person of the debtor lawfully in arrest, and I cannot hold that it ought to be stayed, because I should thereby give the debtor the benefits of the Massachusetts act, without its disadvantages, and be in effect saying that the creditor might oppose his taking the oath, if he would do it in a way which should be entirely agreeable to the debtor. The bankrupt having before his bankruptcy given a recognizance to take the poor debtor's oath, or surrender; and the arrest not being avoided by the bankruptcy, I have no right to avoid it indirectly by requiring the proceedings under it, and which are instituted at the debtor's instance, to be conducted in any particular manner, or to be stayed in part, for his further advantage. The filing of the charges does not appear to be a suit or proceeding for the recovery of the debt, more than would be the renewal of the execution, or the char-

ging in execution, or any other matter incident to the lawful arrest. This is the whole gist of the case.

I do not say that the magistrate ought not to admit him to take the oath notwithstanding the charges. I have no right to meddle with this. There appears to be some reason to suppose that the justices of the circuit court may entertain a different opinion upon this question, and I need not say that I shall cheerfully acquiesce in any rule they may lay down. Until they have decided the point I must act upon my own carefully considered opinion. The answer of the defendants brings up the whole merits of the case, and my decision is intended to be final in this court, so as to allow of an appeal. Bill dismissed.

[The decree in this case was affirmed by the circuit court upon appeal. Case No. 9,641.]

Case No. 9,643.

Ex parte MINOR.

[2 Cranch, C. C. 404.] [1]

Circuit Court, District of Columbia. April Term, 1823.

JUSTICE OF PEACE—CAPIAS—WARRANT OF ARREST—BEFORE JUDGMENT.

A justice of the peace in Alexandria county has no power to issue a capias ad respondendum, or warrant of arrest, for a small debt, before judgment.

Upon the return of the habeas corpus directed to Leonard Adams, a constable of the county of Alexandria, it appeared that Mr. Minor was in his custody under a warrant of arrest, or capias ad respondendum, issued by Adam Lynn, Esq., a justice of the peace of that county, directed to the said Leonard Adams, commanding him to take into his custody the body of the said Thomas Jefferson Minor, and him safely keep, so that he should have him before him or some other justice of the peace for that county, on the 5th day of June, 1823, to answer to Broders, Evans & Co. in a plea of trespass on the case for one dollar due by account. This precept was dated the 5th of June, 1823. By the act of congress of the 27th of February, 1801 [2 Stat. 103], the laws of Virginia were continued in force in the county of Alexandria, as they then existed; and it was enacted that the justices of the peace, to be appointed under that act, should, in all matters civil and criminal, have all the powers vested in, and should perform all the duties required of, justices of the peace as individual magistrates, by the laws thus continued in force therein; and should have cognizance of personal demands to the value of twenty dollars, exclusive of costs. By the act of the assembly of Virginia of the 16th of January, 1801, the justices of the peace, as individual magistrates, were forbidden to issue even an execution against the body of the debtor, and a fortiori, a capias ad respondendum. This law was one of the adopted laws under the act of congress of the 27th of February, 1801 [2 Stat. 103], and continued in force in the county of Alexandria until the act of congress of the 1st of March, 1823 [3 Stat. 743], extending the jurisdiction of the justices of the peace in the recovery of debts to the amount of fifty dollars, which they are "to try, hear, and determine," and "to give judgment" "in the same manner and under the same rules and regulations, to all intents and purposes," as they were then "authorized and empowered to do when the debt and damages did not exceed the sum of twenty dollars, exclusive of costs." This act of March 1, 1823, does not designate the process by which the defendant is to be brought before the magistrate, but leaves it as it was before.

THE COURT, upon this view of the case, ordered Mr. Minor to be discharged from the custody of the constable.

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

MINOR (GONZALES v.). See Case No. 5,530.

MINOR (MECHANICS' BANK OF ALEXANDRIA v.). See Case No. 9,385.

MINOR (REED v.). See Case No. 11,647.

MINOR (SLADE v.). See Case No. 12,937.

Case No. 9,644.

MINORS et al. v. The MARY.

[Bee, 119.] [1]

District Court, D. South Carolina. Oct., 1798.

SEAMEN—WAGES—NOT EARNING FREIGHT—MASTER'S CERTIFICATE.

Wages decreed upon the captain's certificate that they were due, though the vessel was in port, not earning freight. Such certificate the best evidence, no articles being produced.

This is a suit for seamen's wages, and a certificate of the captain is produced, in which he acknowledges the amount due. It is objected, that these seamen [Marcus Minors and others] had assisted the captain to carry the vessel out of her course. That these wages accrued in port, when the vessel was earning no freight, and was in the custody of the marshal. That all wages due up to the time of the vessel's arrival had been paid.

BY THE COURT. The only question is whether the owners of the vessel are answerable for the act of the captain in this instance. I think they are. Captain Dillingham was master of the vessel at her arrival here, on the 27th February last. On the 10th April the marshal took charge of the vessel, by order from this court. On the 1st of

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

June following she was discharged from his custody. The actors in this cause continued on board the whole time, considering themselves bound to do so. They demand wages from 1st March to 1st June; and the captain certifies their right to them. They can produce no higher evidence, for they cannot compel the production of the articles; nor have the other parties brought them forward. Let the marshal sell this ship, or so much as may be necessary, and let these wages be paid, with costs of suit.

Case No. 9,645.

MINOT v. PHILADELPHIA, W. & B. R. CO.

[2 Abb. (N. S.) 323; 7 Phila. 555; 3 Am. Law T. Rep. U. S. Cts. 193; 27 Leg. Int. 396; 5 Am. Law Rev. 370; 2 Leg. Gaz. 385.] [1]

Circuit Court, D. Delaware. 1870.[2]

CORPORATIONS—TAXATION—CONSTITUTIONAL LAW—COMMERCE BETWEEN STATES.

1. A circuit court has jurisdiction of a suit by a citizen of another state against a corporation created by the state in which the court is held; notwithstanding the corporation also holds charters from other states.

[Cited in Howard v. American Dairy, etc., Co., Case No. 6,753.]

2. A state, acting through its legislature, may denude itself, by a contract, of power to impose taxes upon a corporation. But such exemption must be conferred expressly, or must appear by clear and necessary implication from the legislative act; it cannot be favored by presumption or intendment.

3. The payment by a corporation, to the government of the state, of a bonus for granting a charter of incorporation, does not protect the grantee of the franchise from all taxation, except such as the state has reserved a right to impose in the charter itself.

4. A tax upon the ordinary and lawful means of transportation is really a tax upon the thing carried; hence, a state law imposing a tax upon locomotives, passenger and freight cars, &c., being not merely a police regulation, but an expedient for raising revenue, involves a tax upon the passengers and freight transported, and is unconstitutional as interfering with commerce between the states.

[Cited in Morrill v. State, 38 Wis. 431.]

In equity.

STRONG, Circuit Justice. The complainant is a citizen of the state of Massachusetts, and a stockholder of the Philadelphia, Wilmington, and Baltimore Railroad Company, a body corporate of the state of Delaware, under the laws of that state. The defendants are the said company, and two other citizens of Delaware, one, the treasurer of the state, and the other, collector of state taxes. The facts of the case, out of which title to equitable relief is claimed to arise, are these:

By an act of assembly of the state of Delaware, passed 1832 [Laws Del. p. 107], and a supplement thereto, a corporation named the Wilmington and Susquehanna Railroad Company was created, with power to build and maintain a railroad from the boundary line of Pennsylvania and Delaware to the city of Wilmington, and thence to the line of the state of Delaware towards the Susquehanna, in the direction of Baltimore. The act provided that the company should pay annually into the treasury of the state a tax of eight per cent. on all dividends which might exceed six per centum on the capital stock actually paid in. This provision was subsequently repealed; and it was enacted that the company should pay annually into the treasury of the state a tax of one-quarter of one per cent. on the capital stock of four hundred thousand dollars. Under an act of assembly of the state of Maryland, enacted in 1831 [Laws 1831–32, c. 296, § 19], and under its supplements, another railroad company was created, called "The Delaware and Maryland Railroad Company," with power to construct and maintain a railroad from some point on the Delaware and Maryland line, to some point on the Susquehanna river: and it was provided in the act, that the shares of the capital stock of the company "should be exempt from the imposition of any tax or burden by the states assenting to said act, except upon that portion of the permanent and fixed works of said company which might be within the state of Maryland." About the same time (namely, in the year 1831), under an enactment of the legislature of Maryland, another company was chartered, called "The Baltimore and Port Deposit Railroad Company," with power to construct and maintain a railroad from Baltimore to Port Deposit, which is on the Susquehanna river. And in the same year (1831), the legislature of Pennsylvania authorized the incorporation of a company called "The Philadelphia and Delaware County Railroad Company," with power to construct a railroad from Philadelphia along or near to the route of the Baltimore post road, to the Delaware state line. The name of this company was subsequently changed to that of "The Philadelphia, Wilmington, and Baltimore Railroad Company." All the companies were organized, and their roads formed a complete line between the cities of Philadelphia and Baltimore, needing only a bridge across the Susquehanna, which was subsequently built by the consolidated company, at a cost of about one million and a half dollars.

It was doubtless the intention of the several legislatures to provide for a continuous line between the two cities. Subsequently, under the authority of legislative acts of the states of Maryland and Delaware, passed in 1835, the Wilmington and Susquehanna Railroad Company and the Delaware and Maryland Railroad Company were consolidated under the corporate name of the former, and became one body politic or corporate, the capital stock of the two companies being united. The act

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 3 Am. Law T. Rep. U. S. Cts. 193, and 5 Am. Law Rev. 370, contain only partial reports.]

[2] [Affirmed in 18 Wall. (85 U. S.) 206.]

of assembly of the state of Delaware authorizing the consolidation, enacted that the holders of the stock of the united companies should hold, possess, and enjoy, all the property, rights, and privileges, and exercise all the powers granted and vested in the said railroad companies, or either of them, by it or any other law or laws of Delaware or Maryland. A similar act was passed by the legislature of Maryland. Thus the four companies became reduced in number to three. A further consolidation then took place. In the year 1838, the three companies, under legislative provisions of the three states named, were united and merged into each other, thus becoming one body corporate, with a common stock, and having as the corporate name, "The Philadelphia, Wilmington, and Baltimore Railroad Company." The act of the legislature of Delaware, under which this consolidation was effected, declared that "the respective companies shall constitute one company, and be entitled to all the rights, privileges, and immunities which each and all of them possess, have, and enjoy, under and by virtue of their respective charters." The words of the Maryland act were, "that the said body corporate so formed shall be entitled within this state, to all the powers, privileges, and advantages, now belonging to the two first above named corporations;" those whose road lay within Delaware and Maryland.

Such was the origin, and such are the rights of the corporation defendants, so far as they need now be stated. The company have completed, and now maintain a continuous railroad route from Philadelphia to Baltimore, through parts of the three states named. Its capital stock consists of one hundred and eighty-six thousand and eighty-eight shares, fully paid, each of the par value of fifty dollars, although at its formation it had only forty-five thousand shares. Of these less than two thousand were held by citizens or residents of Delaware, on June 30, 1869. The entire length of the railroad is ninety-nine and seventy-six-hundredths miles, of which only twenty-three and three-hundredths miles are in the state of Delaware, and the value of the property locally situated in that state, is much less than twenty-three-ninety-ninths of the whole. Much the larger portion of the locomotives, passenger and freight cars, and trucks, belonging to the company, were used during the year 1869 for the purpose of transporting persons and freight in and by a continuous course of transportation, through, from, and into the state of Delaware, and very few were used exclusively within the state.

By an act of assembly of the state of Delaware, passed April 8, 1869 [Rev. Code Del. 1874, p. 41], the legislature imposed upon every railroad and every canal company, incorporated by or under any law of the state, and doing business therein, in addition to other taxes then imposed by law, a tax of one-fourth of one per cent. of the actual cash value of every share of the capital stock of such company, directing the tax to be paid to the state treasurer on the first day of the next following July, and on the first day of July in each and every year thereafter. The president and treasurer of every such company was required to furnish to the state treasurer, every year, a statement of the number of shares of the company, with an appraisement thereof, verified by his oath or affirmation, on the first of each July, and forthwith to pay the amount of the tax. It was provided, however, in the act, that where the line of railroad or canal belonging to any company liable to the tax, lay partly in the state of Delaware and partly in an adjoining state or states, such company should be required to pay the tax on such number of the shares of its capital stock as should be in that proportion to the whole number of shares of such stock, which the length of such railroad or canal within the limits of the state should bear to the entire length of such railroad or canal. By section 5 of the act, it was enacted, that if the president or treasurer of any company liable to the tax, should neglect or refuse to furnish the statement above described for a period of ten days after it was required to be furnished, the state treasurer should notify an assessor to assess the tax, and issue a warrant to a collector of state taxes to collect the same.

Section 1 of the same act imposed another tax upon the same class of companies, with similar provisions for its ascertainment and collection. It was a tax of three per centum upon the net earnings or income received by such a railroad or canal company, from all sources during the preceding year, with a proviso like that contained in section 4 already mentioned. This tax was required to be returned and paid on the first day of January in each year, or within thirty days thereafter.

Section 3 of the same act imposed yet another tax, with similar provisions for its return and collection. It enacted that every railroad company incorporated by the state, and doing business therein, should, on the first day of January in each year thereafter, within thirty days from such time, pay to the state treasurer a tax of one hundred dollars, for the use, in the said state of Delaware, of each locomotive belonging in whole or in part to such company, and at any time during the preceding year used by said company within the state of Delaware, and twenty-five dollars for the use in the state of each passenger car, belonging in whole or in part to such company, and at any time during the preceding year used by said company within the state, and ten dollars for the use in the state of each freight car of every description, and each truck belonging to such company, and at any time within the preceding year used by said company within the state. Section 6 of the act enacted that in case of default in paying any of the said taxes, a pen-

alty of ten per cent. thereon should be added by the collector, and collected with the tax.

The complainant charges that all the taxes are illegal; that they are imposed in violation of the rights conferred upon the Philadelphia, Wilmington, and Baltimore Railroad Company by its charter, and that they are forbidden by the constitution of the United States. On November 25, 1869, he inquired of the company whether they intended to protect his interests as a stockholder by resisting the collection of the tax; and stated that, as it was illegal, protection against it should be provided for. In response to his inquiries, the board of directors resolved, that while they protested against the illegality of the tax, they declined to take the responsibility of interfering to prevent its collection, leaving the stockholders at liberty to assert their rights as they might think proper. The complainant then filed this bill, praying that it may be decreed the corporation is not bound to pay the said taxes, or any of them, and that the act of the Delaware legislature, so far as it imposes them, and provides for their assessment and collection, is unconstitutional and void. The bill also prays an injunction upon the company against furnishing the statements required by the act, or paying the taxes, and upon the other defendants against taking steps for their collection.

At the argument it was queried whether the case was within the jurisdiction of the court, and whether, if it was, the case presented was a proper one for equitable cognizance. Upon these points I have no doubt. The complainant is a citizen of Massachusetts, and the corporation defendants are a corporation that owe their life to the state of Delaware, citizens, therefore, of the state, within the meaning of the judiciary act. True, they are also a corporation of Pennsylvania and of Maryland, but they are not the less on that account a corporation of Delaware. They have been sued in the circuit court of the United States at least twice before, and the fact that they are a corporation of three states has not been considered an objection to federal jurisdiction. The other two defendants are citizens of Delaware. And that the court has equitable jurisdiction of such a case as the present is not open to denial. That it has, repeated decisions show, and such has been the determination of the supreme court. Dodge v. Woolsey, 18 How. [59 U. S.] 331. It was also submitted at the argument, with some hesitation, that the act of the Delaware legislature, passed April 8, 1869, was not intended to apply to this railroad company. As I have no doubt that it was, I pass this by, and come directly to the great question of the case: Is the act unconstitutional, so far as it imposes the taxes mentioned in it upon the corporation defendants?

The argument on behalf of the complainant is, that in the charter of the company there is an express exemption from liability to the imposition of any such taxes, and that the charter being a contract with the state, the act of assembly of 1869 is in conflict with the provisions of the constitution that inhibit the states from passing any law impairing the obligation of contracts. If it be the fact that the charter contains such an exemption, it must be admitted that the consequence mentioned follows, for it is too late to deny that the charter is a contract between the state and the company, and (however well it might be doubted, if it were an open question), it must be conceded that a state, acting through its legislature, may, by contract, in whole or in part, denude itself of power to impose taxes upon a corporation created by it. True, this is a step towards self-destruction, and one would think no state constitution gives such power to its legislatures. Yet it has more than once been decided; and many contracts made by states with corporations, that their property shall be exempt from taxation, in whole or in part, for limited periods or permanently, have been enforced. See cases collected in Home of the Friendless v. Rouse, 8 Wall. [75 U. S.] 430.

But I do not think the charter of this company contains any express exemption from liability to such taxation as the state of Delaware is now attempting to enforce. What is relied upon by the complainant in support of his assumption that the company is thus exempted, is section 19 of the Maryland act, incorporating the Delaware and Maryland Railroad Company. By that section, that company was declared to be exempt from the imposition of any tax or burden, by the states assenting to the law, except upon that portion of the permanent and fixed works of said company which may lie within the state of Maryland; and it was further declared, that any tax which should thereafter be levied upon said section, should not exceed the rate of any general tax which might at the same time be imposed upon similar real or personal property of the state, for state purposes. And when, by its act of July 24, 1835, the Delaware legislature consented to the consolidation of that corporation with its own company, "The Wilmington and Susquehanna Railroad Company," under the corporate name of the latter, it was enacted in the first section that the holders of the stock of the said railroad companies so united, as provided for, "shall hold, possess, and enjoy, all the property, rights, and privileges, and exercise all the powers granted to and vested in the said railroad companies, or either of them" by that act, or by any other law or laws of Delaware or Maryland. So a prior act passed in 1833, whereby the Wilmington and Susquehanna Railroad Company was authorized to form a union with such companies as then were or might thereafter be incorporated in the states of Pennsylvania and Maryland, for the purpose of constructing railroads in said states, so that the capital stock of said companies should constitute a common stock, enacted

that the respective companies should "constitute one company, and be entitled to all the rights, privileges, and immunities which each and all of them possess, have, and enjoy, under and by virtue of their respective charters." Hence it was argued, that because the Delaware and Maryland company was expressly exempted from any taxation, except upon its fixed and permanent property lying within the state of Maryland, the consolidated company, namely, this defendant corporation, is entitled to the same exemption in the state of Delaware.

To this I cannot assent. The argument, I think, misapprehends the statutes upon which it is built. True, the present company possesses all the rights and immunities which each of its constituents enjoyed before their consolidation. But what were those rights and immunities? Unquestionably they were only such as could be conferred by the states that created the corporation. The legislature of Maryland could not confer upon the corporations created by it any rights in Delaware; nor could it confer upon them any immunity from taxation upon their property within the state of Delaware—I mean any immunity from Delaware taxation; and it made no attempt to do so. Section 19 of the act of 1835 refers to exemption from Maryland taxation, and to no greater. That was the right, the privilege, the immunity, possessed by the Delaware and Maryland Railroad Company, and that right or immunity belongs now to the consolidated company. The language of the act authorizing a union of the companies is not that they shall, when united, have all the rights and immunities in this state, which each of them has in the state by which it was chartered. The purpose was not to extend any of the powers or privileges possessed by the several companies, but to give them, as they were, collectively to the united company. In other words, it was intended that the consolidated company might exercise, within Maryland, the rights of the Maryland corporations, and enjoy their privileges, and, within Pennsylvania, possess the rights and privileges of the former Pennsylvania company. Such I understand to have been the construction adopted by the supreme court in Philadelphia & W. R. Co. v. Maryland, 10 How. [51 U. S.] 376. The act of Maryland which authorized the two companies of that state to unite with the companies of the other states, enacted that the new corporation—that is, the consolidated one—should be entitled, within that state, to all the powers and privileges and advantages, then belonging to the two Maryland corporations. In commenting upon this, Chief Justice Taney remarks as follows: "Now as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed, should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place and possess the powers, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them." I hold, therefore, that there is in the charter of the present defendant corporation, no express exemption from liability to taxation by the state of Delaware.

And I can find nothing in any of the legislative acts relative to this company (viz: acts that gave it its existence), which, in my opinion, would justify me in holding it impliedly exempt from such taxation. Any implication, to have such an effect, must be a necessary one; every presumption is against it. The right to tax all property of natural and artificial persons within a state is an attribute of state sovereignty. Conceding now, as I must, in view of past decisions, that it may be partially surrendered, it must still be ruled that as the right is essential to the existence of the body politic, nothing less than that which is equivalent to an express surrender of it, by a binding contract, will avail to enable any person or corporation successfully to assert an exemption from liability to its exercise. Without attempting to cite even a tithe of the cases in which this principle has been asserted, I mention two: Providence Bank v. Billings, 4 Pet. [29 U. S.] 503; Railroad Co. v. Maryland, 10 How. [51 U. S.] 376.

What is relied upon by the complainants as raising an implication of exemption are the following provisions of the acts already mentioned. By the Delaware act of June 18, 1832, which incorporated the Wilmington and Susquehanna Railroad Company, the capital stock was defined to be four hundred thousand dollars, and the company was required to pay annually into the treasury of the state a tax of eight per cent. on all dividends which might exceed six per cent. on the capital stock actually paid in. By the supplement to this act, passed July 24, 1836, this provision respecting a tax on dividends was repealed, and it was enacted that the company should pay annually into the treasury of the state a tax of one-quarter of one per cent. on the capital stock thereof, of four hundred thousand dollars, the tax to be paid semi-annually. By a further supplement, passed June 27, 1836, the company was authorized to increase its capital stock to an extent not exceeding three hundred thousand dollars, with a proviso that the right of taxing the said sum when it should become a part of the capital stock should be reserved to the legislature. As all the privileges and immunities of this company have devolved upon the now existing company, it is argued that the stipulation that the Wilmington and Susquehanna Company should pay a tax of one-quarter of one per cent. on its capital of four hundred thousand dollars amounts to a contract that it shall not be liable to further taxation; and that, consequently, the present defendant corporation is protected to that extent.

To this I cannot accede. The act of 1835 does not declare that no other taxation shall be imposed, or that the power of the state is exhausted; nor is such the necessary implication from what was said. Certainly it is not to be inferred from the imposition of a tax that no additional tax shall be laid; and I cannot perceive that it makes any difference whether the tax is imposed by general law, or reserved in a contract obtained from the state. All persons dealing with the state are presumed to know the character of the party with whom they are dealing; and, if they are obtaining a grant of a franchise, that the grant is always construed strictly against the grantee. In Com. v. Easton Bank, 10 Pa. St. 442, it was decided, that a bank which had been chartered under a general law that prescribed the payment of a specified tax on its dividends, was subject to a later general law increasing the rate of taxation, and that the later law, as applied to the bank was constitutional.

I agree that the reservation in the act of 1836, of a right to tax the additional stock authorized, tends to awaken suspicion that the legislature had some doubts whether, without the reservation, any tax could be imposed additional to that spoken of in the act of 1835. But this is not enough to overcome the presumption that there was no intention in either act to destroy the right of the state to prescribe such taxation as its necessities might require.

It has been argued that when a charter has been granted to a company, and a bonus has been exacted for it, the franchises and property of the company cannot be taxed any further than is provided in the charter, because, if I understand the argument correctly, the company is a purchaser of its rights in such a case. If this were so, the argument does not apply to the case in hand, for no bonus was exacted from this company. It cannot be said that the tax laid of one-quarter of one per cent. was in any proper sense a stipulation for a bonus. But I do not agree that a company which has paid a bonus for its charter, is thereby freed from liability to taxation. There is no reason that will bear examination for any such doctrine. If there is a bonus paid, it is only a part of the price paid for the franchise granted. It is measurably the consideration for the state's contract. But every charter to an improvement company is based upon a consideration given, or to be given, by the grantee. If it were not so it would not be a contract. It may not be a pecuniary consideration paid into the state treasury. It may be money expended for a public use, the construction of a highway, or something in which the public has an interest. What matters it then, that the payment of a bonus makes the grantee of a franchise a purchaser, when all grantees of corporate franchises are purchasers? There is a consideration given in all cases. The quantum of the consideration is quite immaterial. The grantee of land from a state is commonly a purchaser for a consideration paid. He holds his title by contract. No one ever doubted that he takes the land subject to taxation. Why should it be otherwise with the grantee of a franchise? Land is no more property than a franchise. This has often been decided. Both are subject to the right of eminent domain. Bridge Co. v. Dix, 6 How. [47 U. S.] 507; 17 Conn. 454; 3 Paige, 45. Both in grants of land and in grants of franchises, the subjects of the grant are understood to be held under the government, not against it, and, of course, they are subordinate to the powers of the government, except so far as those powers have been unmistakably relinquished.

And I do not find that the authorities sustain the doctrine that the payment of a bonus for a charter protects the grantee of a franchise from all taxation, except such as the state has reserved in the charter itself a right to impose. Ohio Bank Cases, 16 How. [57 U. S.] 369, and 18 How. [59 U. S.] 331, certainly decide no such thing. In those cases it appeared there had been an express exemption, and what would have been the effect of a bonus paid was not considered. What was decided in Jefferson Branch Bank v. Skelly, 1 Black [66 U. S.] 436, was, that the charter of a bank is a franchise not taxable as such, if a price has been paid for it, which the legislature has accepted, with the declaration that it is to be in lieu of all other taxation. On the other hand, in Bank of Pennsylvania v. Com., 19 Pa. St. 144, where it appeared that by the charter of a bank it had been required to pay a very large bonus, it was, nevertheless, subject to an increased tax subsequently imposed. It was ruled that the bank acquired no privilege, exemption, or immunity, under its charter, except what was given expressly and unequivocally; that corporate privileges are never implied; that the legislature can only disarm the state of any portion of the sovereign power which belongs to her, by words showing that to be her intention so plainly that they cannot be misunderstood; that the taxing power is an incident of the state's sovereignty, and that the state does not lose it by granting a charter which says nothing on the subject. This was said of a charter that exacted a bonus of hundreds of thousands of dollars.

The case of Gordon v. Appeal Tax Court, 3 How. [44 U. S.] 133, has been called to my attention. It must be admitted that Mr. Justice Wayne, who delivered the opinion of the court, seems to have thought the acceptance of a proffered bank charter, which requires the payment of a bonus, constitutes a contract that binds the state not to impose any further tax upon the franchise granted, though not interfering with the right to tax the capital stock of the company. In answer to the question, "Why, when bought,

the franchise, as it becomes property, may not be taxed as land is, which has been bought from the state?" he said, "The reason is that every one buys land subject in his own apprehension to the great law of necessity that we must contribute from it and all of our property, something to maintain the state; but as to a franchise for banking, when bought, the price is paid for the use of the privilege while it lasts, and any tax upon it would be substantially an addition to the price." I confess that I do not feel the force of this attempted distinction. I do not see why, if a tax is an addition to the price in one case, it is not in the other. The truth is, it is in neither; for the purchaser in neither case has bought anything more than a right to enjoy the subject of the grant subordinately to the constitutional claims of the government. That is all that is meant by property held in civil society. But the remarks of Mr. Justice Wayne upon the subject were obiter dicta. The thing decided in the cause was that the state of Maryland could not impose a tax, not upon the bank either for its franchise or its capital, but upon its stockholders for the shares held by them individually, the charter of the bank having been granted in consideration of a bonus paid, and containing an express stipulation that the faith of the state was pledged not to impose upon the bank any further tax or burden during the continuance of its charter under the act.

My attention has been directed to no case which maintains the doctrine for which the complainants contend. It is sustained neither by reason nor authority. If, therefore, it be true (which I do not concede) that the clause in the Delaware act of assembly, passed July 24, 1835, which imposed on the Wilmington and Susquehanna Railroad Company a tax of one-quarter of one per cent. on its capital stock, was the exaction of a bonus, it does not, in my opinion, deprive the state of the power to levy upon the corporation defendant in this case additional taxes.

I come, then, to the conclusion that there is nothing in the act of assembly of April 8, 1869, so far as it imposes upon the company an additional tax of one-fourth of one per cent. on the cash value of its capital stock, and a tax of three per cent. on its net earnings, that is in conflict with the constitutional inhibition that no state shall pass a law impairing the obligation of contracts. With the fairness of such taxation I have nothing to do. The question before me is exclusively one of legislative power, and I think the legislature has not thus far transcended its legitimate authority.

The remaining question is attended with more difficulty. I refer to the legality of the tax imposed by section 3 of the act. That section exacts from the company the payment every year of a tax of one hundred dollars for the use in the state of each locomotive, owned in whole or in part by the company, and at any time during the preceding year used by the company, within the state. A similar tax, though less in amount, is imposed for the use in the state of each passenger, freight, and truck car; for the use of the rolling stock generally. This is not a tax upon the property of the company, nor upon its franchise generally. It is not a tax upon the locomotives or the cars. It is called a tax upon their use in the state; but it seems to be rather a license fee exacted for the privilege of using rolling stock. Can such a burden be imposed? I have said the franchise can be taxed as property, and that the property acquired or held under it is taxable; but it may be doubted whether such an exaction as this can be regarded as a tax either on the franchise or on the property of the company. Can the state, after having granted to the complainants the right to run locomotives in and through its territory freely, and also the right to use all the ordinary means of conveying freight and passengers, compel the payment of license fees for the use of those ordinary means of transportation, and that not for police purposes? Can it say to the grantees of this franchise, "True, you have purchased the right to use locomotives and cars; but if you use them you shall pay an additional price"? And is not a license fee thus exacted an additional price? I do not propose, however, to answer these questions or to decide that such an exaction is or is not an impairing of the obligation of the contract between the company and the state, for, in my opinion, the law of the state that attempts to impose this tax or duty is invalid for other reasons.

In the statement of facts to which the parties have agreed, I find the following. It is agreed "that much the larger portion of the locomotive engines, passenger cars, freight cars, and trucks, belonging to the Philadelphia, Wilmington, and Baltimore Railroad Company, were used during the year 1869 (the year for which this tax is attempted to be collected), on the aforesaid main line of railroad of the said company, extending from the city of Philadelphia, in the state of Pennsylvania, through the state of Delaware to the city of Baltimore, in the state of Maryland, and for the purpose of transporting persons and property in and by a continuous course of transportation through, from, and into the said state of Delaware; that a number of engines, passenger and freight cars, and trucks, were used during the said year, on the main line from Philadelphia to a point about a mile beyond Wilmington, and thence on the line of railroad known as the 'Peninsular Line,' extending through Delaware and a part of the eastern shore of Maryland to Christfield, and the several branches therefrom, and that very few of either the engines, cars, or trucks, of the said company, were used exclusively within the state of Delaware during the year 1869."

It is, therefore, admitted, that the tax or license fee is laid upon the use of the locomotives, cars, &c., mainly employed in transporting persons or property through the state from other states, or into it, or out of it. Such an imposition is, in my opinion, a regulation of commerce between states. It is a prescription that passengers and merchandise shall not be carried through the state except upon certain conditions. If the tax can be imposed at all, it may be to any extent. It has often been said that when a right to tax exists it is unlimited by anything but the discretion of the legislature that imposes it. This, of course, is to be understood as applying only to cases where the state has not by contract restricted its power. Said Chief Justice Marshall, in McCullough v. Maryland, 4 Wheat. [17 U. S.] 316: "An unlimited power to tax involves necessarily a power to destroy, because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. If the states may tax, they have no limit but their discretion, and the bank must, therefore, depend on the discretion of the state for its existence." If this is so, the power to tax the use of all means or instruments of conveyance of persons or property through the state is the same as a power to prevent such use entirely. There is only a difference in the extent of its exercise.

Now, I think it can hardly be maintained that a law, declaring that merchandise and passengers shall not be carried on a public highway by locomotives or cars, from Philadelphia through the state of Delaware into Maryland, would not be a manifest regulation of inter-state commerce, quite as truly such as was the embargo of 1807 a regulation of foreign commerce. And if the enactment of such a law would be beyond the constitutional power of a state, the act of the Delaware legislature, of which the plaintiffs complain, must be equally so, for it differs only in degree. And it is not the less a commercial regulation, because it does not discriminate between transportation exclusively domestic and that which extends into other states. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state, the nature of the exaction cannot be changed by adding to it similar conditions for allowing transportation wholly within the state. I need hardly say, that a tax upon the ordinary and lawful means of transportation is practically a tax upon the thing transported.

Holding, then, as I do, that the Delaware statute of April 8, 1869, was an attempted regulation of commerce among the states, I come next to the question whether it was beyond the power of the state to make. I shall not enter at large upon a discussion of the much debated question, how far the power given to congress by the constitution to regulate commerce among the states is exclusive. Certain it is, that in the earlier decisions of the supreme court it was said to be unlimited, and so exclusively vested in congress that no part of it can be exercised by a state, except the power to regulate commerce completely internal; that is, entirely within a single state. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; and the Passenger Cases, 7 How. [48 U. S.] 283.

I am aware that it has often been argued, and sometimes intimated in decisions, that so far as congress has not legislated on the subject, the states may regulate commerce, at least internal commerce. Of this I remark in passing, that if they can, it is difficult to see why they may not add regulations to foreign commerce beyond those made by congress, for the power over both is vested in the federal legislature by the same words. But I apprehend it will be found on examination that the cases that have sustained state laws alleged to have been regulations of inter-state commerce have been those that related to bridges or dams across streams wholly within a state, or other kindred subjects—things only in a restricted sense commercial subjects. Wilson v. Blackbird Creek Co., 2 Pet. [27 U. S.] 250; Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713. They are exceptional. The subjects are such as in the last mentioned case it is said "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." But, without pursuing this subject further, it may safely be said that none of them are like the present. They admit, and some of them assert, that wherever subjects of the power to regulate commerce are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by congress. Surely passage and transportation through a state are of this nature. If not, it is unfortunate. It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, by taxing the use of means of transportation, every other may; thus commercial intercourse between states remote from each other may be destroyed. The produce of Western states may be effectually excluded from Eastern markets; for though it might bear the imposition of a tax by one state, it would be crushed under the weight of many.

I have already protracted this opinion to such a length that I do not feel justified in referring to many of the decided cases. In Almy v. California, 24 How. [65 U. S.] 169, it was ruled by the supreme court that a

law of the state imposing a stamp duty upon bills of lading for gold or silver transported from that state to any port or place out of the state, was substantially a tax upon the transportation itself, and was unconstitutional. It is true the decision was rested on the ground that it was a tax upon exports; and, subsequently, in Woodruff v. Parham, 8 Wall. [75 U. S.] 123, the court denied the correctness of the reasons given for the decision; but they said at the same time the case was well decided for another reason, viz: that such a tax was a regulation of commerce—a tax imposed upon the transportation of goods from one state to another, over the high seas, in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in Crandall v. Nevada, 6 Wall. [73 U. S.] 35, and with the authority of congress to regulate commerce among the states. In the very recent case of Crandall v. Nevada, 6 Wall. [73 U. S.] 35, it was held that a special tax imposed by the state on railroad and stage companies for every passenger carried out of the state by them, was a tax on the passenger for the privilege of passing through the state by ordinary modes of travel, and not simply a tax on the business of the companies. Hence it was ruled that the power of a state to impose such a tax is inconsistent with rights conferred by the constitution on the federal government and on the people, and consequently that no state can lay such a tax. The majority of the court, indeed, declined to put their decision upon the ground that the tax was a regulation of inter-state commerce, and as such, beyond the reach of the state, but all the judges agreed that the state law was unconstitutional and void. The chief justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the state legislature was inconsistent with the power conferred upon congress to regulate commerce among the several states, and I do not understand that the other members of the court held decisively that it was not thus inconsistent. The case, in any view of it, decides that a state cannot directly or indirectly tax persons for passing through or out of it. That is enough for the case I have before me. The Delaware statute of April, 1869, does indirectly levy a tax upon both persons and property for transit through the state, into it, and out of it. It is, therefore, in my opinion, so far in conflict with the constitution of the United States.

I shall, therefore, enjoin against any steps for the assessment, collection, or payment of the tax prescribed by section 21 of the act of April 8, 1869, namely, the tax for the use of locomotives, passenger cars, freight cars, and trucks, and I shall refuse the injunction prayed for to prevent the collection and payment of the tax prescribed by section 15, upon the actual cash value of every share of the capital stock of the company defendant, and I shall also refuse an injunction against the collection and payment of the tax prescribed by section 20 upon the net earnings or increase of the company.

Decree accordingly.

[The decree in this case was affirmed in the supreme court upon appeal. 18 Wall. (85 U. S.) 206.]

MINOT (WAGENER v.). See Case No. 17,033.

MINOT (WESTON v.). See Case No. 17,453.

MINTURN (BROWN v.). See Case No. 2,021.

Case No. 9,646.

MINTURN v. LARUE et al.

[1 McAll. 370.] [1]

Circuit Court, N. D. California. July Term, 1858.[2]

FERRY—STATUTORY RIGHT—POWERS BY IMPLICATION—MONOPOLY.

1. Equity will protect by injunction a statutory right, where the title of complainant is free from doubt.

2. Where the legislature has granted the franchise of constructing and keeping a ferry, no powers will be construed to have been given by implication, unless of a direct character. None not so derived will be conceded, except by the express language of the law.

3. A monopoly will never be awarded except by implication of a most direct and immediate character, and as necessarily annexed to powers expressly granted.

[Cited in State v. Black River Phosphate Co., 32 Fla. 82, 13 South. 648.]

The bill in this case was filed praying for an injunction to restrain the defendants [Larue and others] from infringing upon an alleged exclusive franchise of the complainant in a ferry between the town of Oakland and the city of San Francisco.

Hoge & Wilson and E. W. F. Sloan, for complainant.

Gregory Yale and Crockett, Baldwin & Crittenden, for defendants.

McALLISTER, Circuit Judge. The bill in this case is exhibited in behalf of Edward Minturn, a citizen of the state of New York, who alleges himself to be the proprietor of a ferry established across the Bay of San Francisco, with its termini at the town of Oakland and the city of San Francisco. The bill prays for an injunction against the defendants, who, it is alleged, are infringing the exclusive privileges which complainant claims to hold in the said ferry. A motion is made upon the bill and affidavits filed by both parties, for the issue of the writ prayed for. In the affidavits of both parties are introduced matters collateral to the merits, and

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

[2] [Affirmed in 23 How. (64 U. S.) 435.]

which cannot be subjects of legitimate consideration in the discussion of this case. Instead of being distinct affirmations or denials of facts material to the issue, they are argumentative, denunciatory, and partake more of the character of written discussions, than of sworn statements of facts constituting the true merits of the cause. Perhaps the appropriate course would have been for the court to have suppressed them as tending to introduce confusion, and constitute a dangerous precedent in the practice of a court of chancery. But as neither party moved for their suppression, content with calling the attention of the court to the character of these documents, it was agreed by both parties that the affidavits should be read; the propriety of the admission of them, or portions of them, discussed on the final argument of the motion, and the disposition of them left to the court. Now, there is a large proportion of these documents the court feels bound to discard from its consideration. Whether the charter of the town of Oakland was obtained by fraudulent practices from the legislature of this state? Whether the ordinance of the trustees of the town of Oakland, passed for the establishment of the ferry, was the result of conspiracy? Whether the contract between the town of Oakland and Carpentier, the assignor of complainant, was the offspring of fraudulent connivance? Whether the ferry has been so grossly mismanaged as to constitute an imposition on the public? Whether the proprietorship of the ferry has been a source of profit or not? Whether all good citizens demand that the monopoly of complainant should be arrested? Whether public opinion among the citizens of Oakland emphatically requires it to be done? These matters, and all akin to them, which have been embodied in the affidavits, or directly intimated in them, must be disregarded, and this case decided by an application of well-settled legal principles to the issue made. The complainant asks for the extraordinary interposition of this court for the protection of what he considers a legal statutory right; and if given, it must be by the application of principles, independent of all other considerations. He claims as assignee of one Charles Minturn, himself the assignee of one Edward R. Carpentier, who is the alleged grantee of the ferry from the town of Oakland.

The defendants, independently of the defects alleged by them to exist in the title of the complainant, set up by way of defense, a claim under a direct transfer to them of the premises in dispute, from the town of Oakland, subsequent in date to the assignment to complainant by Charles Minturn. They also set up as a defense, the fact, that the steamer they are running has been duly licensed and enrolled for the coasting trade, under the laws of the United States, and as such is entitled to navigate the waters of the Bay of San Francisco. In the view the court entertains of this case, it will be unnecessary to investigate the character of this latter defense. The complainant Minturn, contends that the documentary title exhibited, vested in him an exclusive privilege to the ferry for the term of twenty years from the date of the contract between the town of Oakland and the said Carpentier. That such contract, under which he claims, vested in him such an interest as excludes any one from the right to run a boat on the route between the city of San Francisco and the town of Oakland, and concludes the town of Oakland from conferring on any one the right to do so during the period of time said contract shall exist. He further contends, that he has exhibited a prima-facie case, and that it entitles him to an injunction; that the court will not look to the extent and validity of the complainant's title, but postpone the consideration of them to a future stage of the case. There is a class of cases where the court will, although not satisfied with, but entertaining doubt as to the complainant's title, grant an injunction forthwith, before answer. But this is done to prevent irreparable mischief. Where the injury sought to be enjoined, is the transfer of negotiable paper by an irresponsible party; a destructive trespass to the inheritance; the repetition of a nuisance, or the commission of some act not reparable in damages, the court ex necessitate will order an injunction to keep the parties in statu quo until its doubts have been removed by the facts elicited in the future investigation of the cause. This is not such a case. The title of the complainant is set forth in his documentary proof; and all the materials for its investigation by ascertaining their legal effect, are before the court. It involves no inquiry into complicated facts. It depends alone upon the construction of the charter which gave it birth. Why should the court decline to pass upon it, but postpone the investigation into the construction of it, intermediately enjoining the adverse party from running their boat?

The complainant asks for an injunction to enjoin from the alleged infringement of what he claims to be his statutory right. Now, the power of this court to interpose, depends upon the fact that his right is clear and without doubt, his possession actual, and when his legal title is not put in doubt. 1 Johns. Ch. 611. In Livingston v. Van Ingen, 9 Johns. 585, Chancellor Kent says, "Injunctions are always granted to secure the enjoyment of statute privileges of which the party is in the actual possession, unless the right be doubtful." The same doctrine, that before the court will interfere by injunction the right of the complainant should be free from doubt, is enunciated by Savage, C. J., in North River Steamboat Co. v. Livingston, 3 Cow. 755. It may be therefore assumed that the right of the complainant must be legal, clear, and beyond reasonable doubt. The question, then, into its validity and ex-

tent becomes not only a necessary but preliminary inquiry to the issue of an injunction.

Now, the source of complainant's title is to be found in the charter of the town of Oakland. He claims under assignment from Edward B. Carpentier, grantee of that town. No interest could pass from the latter to its grantee save what was vested in it by its charter, and none other could pass from it to the grantee under whom complainant claims, whatever may be the terms of the instrument executed by them. As to the character of this interest it must be that of a vested interest, or property; or it is a franchise; or lastly, it may be termed, as characterized by one of the solicitors for the complainant, "a legislative power." The decisions of the New York courts upon the interest conveyed to the city of New York in the ferries which cluster around it, are based upon the transfers made of them to it by the old charter of the British crown, and the legislature, from time to time, of the state of New York. These transfers are alienations containing all the operative words of conveyance known to deeds transferring the fee in real estate; and their legal effect is fixed by well settled principles. Those New York decisions can, therefore, afford no proper guide in the construction of the Oakland charter. In fact it was not contended in the argument that any property in the ferry was vested in the town of Oakland by its charter, as was the case in New York. One of the solicitors for complainant contended that although no property was conveyed, a franchise was transferred; and the other affirmed that something more than a franchise passed, and termed it a "legislative power." The court considers it a mere naked, incorporeal right. It is created by law; exists only in contemplation of law. It is invisible, intangible, and incapable of a physical possession, and depends on the law for its protection. 2 Gray, 27. But whatever be the interest that passed, its nature and extent must be ascertained in order to see if the title of complainant be so free from doubt as to authorize the court to interfere by injunction. The charter of Oakland is a public grant for the establishment and regulation of ferries across navigable streams, is a subject within the control of government, and is not matter of private right. In the construction of such a grant, designed by the sovereign power making it to be a general benefit and accommodation to the public, the rule is, that if the meaning of the words be doubtful they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication beyond the natural and obvious meaning of the words, and if these do not support the right claimed, it must fall. Mills v. St. Clair Co., 8 How. [49 U. S.] 569. In such a grant nothing passes but what is granted in clear and explicit terms. And neither the right of taxation, nor any other power of sovereignty which the community have an interest in preserving undiminished, will be held by the court to be surrendered unless the intention to surrender is manifested by words too plain to be mistaken. Ohio Life Ins. Co. v. Debolt, 16 How. [57 U. S.] 435. In Beaty v. Lessee of Knowler, 4 Pet. [29 U. S.] 168, the court say, "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied."

In the Charles River Bridge Case, 11 Pet. [36 U. S.] 548, it is said "when" a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist in the language of this court above quoted "that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." In that case the principle was applied to the charter given, to the proprietors of a bridge, by the state of Massachusetts. The court say in relation to the charter, "It is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation for the purpose of building the bridge, and establishes certain rates of toll which the company are authorized to take. . . . There is no exclusive privilege to them. . . . No engagement from the state that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent, and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them it must be implied simply from the nature of the grant, and cannot be inferred from the words by which the grant is made. . . . All the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would have gone over it and renders their franchise of no value. This is the gist of the complaint. . . . In order, then, to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain, and that they impaired, in other words violated, that contract by the erection of the Warren bridge." The court then proceed to decide that no contract of the kind arose out of the words of the charter, and consequently by the erection of the Warren bridge no violation of any contract made with the pro-

prietors of the existing bridge had taken place. [Charles River Bridge v. Warren Bridge] 11 Pet. [36 U. S.] 549.

The case of Fanning v. Gregoire, 16 How. [57 U. S.] 524, is an instructive one on this point. The complainant stated that he had been authorized by an act of the state legislature, framed in 1838, to establish and keep a ferry for the term of twenty years, and that by the terms of the act it was provided that no court or board of commissioners should authorize any other person to keep a ferry within the limits; and the bill prayed for an injunction against the defendants. These latter defended on the ground, that under a contract made with the city of Dubuque, within the limits of which the ferries were situated, they (the contract bearing date in 1832) were running their boat, which did not interfere with the right of the plaintiff other than such interference as is the necessary result of a fair competition. It was contended by complainant that the privilege conferred on him was exclusive; that the right had been given to him and his heirs for twenty years; that an ordinary license is not granted to a man and his heirs; that it was provided in the act "that no court or board of county commissioners shall authorize any other person (unless as is hereinafter provided by this act) to keep a ferry within the limits of the town of Dubuque." In reply to all this the court decided that the grant to complainant was not exclusive. As to the last suggestion of complainant the court say, "The prohibition on a court and the board of county commissioners to grant a license for another ferry, it is urged would show an intent to make the grant exclusive. And that the reason for this might be found in the alleged fact that when the ferry was first established a considerable expenditure was required and little or no profit was realized for some years." But all the judges present, except one, held that the grant was not intended to be exclusive. In that case the court below had refused the injunction and dismissed the petition, and the judgment was affirmed by the supreme court. [Fanning v. Gregoire] 16 How. [57 U. S.] 533.

The case of Thacher v. Dartmouth Bridge, 18 Pick. 501, is a strong illustration of this doctrine. The act of incorporation under which defendants were authorized to erect their bridge did not provide any mode of ascertaining or paying the damage which any individual owner of land might sustain by the appropriation of his property. It was urged by defendants that without the exercise of such power the bridge could not be erected. But the court considered the consent of owners might be obtained by gift or purchase; at all events it would not give the power by implication. It deemed that where the legislature, in the exercise of high sovereign power, intended to confer such a power upon a corporation, they do it in express terms, or by necessary implication. It is not to be presumed that such a power is intended to be granted unless the intent to do so can be clearly discovered in the act itself. In the present case there is no such power in terms, and we think there is none by implication. Id.; [Fanning v. Gregoire] 16 How. [57 U. S.] 534.

The foregoing authorities establish the canons of construction that must be applied to the charter of Oakland.

As to its language. The clause in it on which complainant relies gives to the trustees of Oakland power to do many things, and among them power "to lay out, make, open, widen, regulate and keep in repair all streets, roads, bridges, ferries, public grounds and places, wharves, docks, piers, sewers, wells and alleys, and to authorize the construction of the same; and with a view to facilitate the construction of wharves and other improvements, the lands lying within the limits aforesaid between high tide and the channel, are hereby granted and released to said town." The first observation to be made on this charter may be embodied, mutatis mutandis, in the language of the supreme court of the United States, in the case already cited [Charles River Bridge v. Warren Bridge] 11 Pet. [36 U. S.] 545. It (the charter) confers on them the ordinary facilities for the purpose of constructing a ferry. There is no exclusive privilege which they are entitled to bestow. There is no engagement from the state, that another ferry should not be erected. Nor is there an undertaking not to sanction competition, nor to make improvements that may diminish the amount of the income of any ferry that might be constructed. Upon all these subjects, the charter is silent. If the plaintiff is entitled to them, it must be implied from the nature of the grant, and cannot be implied from the words by which the grant is made. All the franchises, and rights of property in the charter mentioned, is the right of constructing ferries, and still remain. But its income is destroyed, or diminished, by the additional facilities afforded by defendants, for transportation and travel. This is the gist of the complaint. In order to entitle plaintiff to relief, it is necessary to show that the legislature in this charter contracted not to do the act he complained of, or that the town of Oakland was authorized to make the contract; or, in other words, that the contract has been violated. The foregoing language of the supreme court, U. S. (with slight alterations), settles the principle that the complainant can only obtain relief on a contract; that none such arose out of the words of the act of the legislature, and it could not be raised by implication from the nature of a public grant. But again, the manner in which the legislature uses terms of conveyance, shows that they had an understanding of their legal effect. When they propose to convey certain lands described, they indicate their intention by using the operating words of "grant and release;" when

they propose to confer certain municipal franchises, they state simply that the power to exercise them is conferred upon the town.

It is urged, that the delegation of a power to make, regulate, and construct ferries, gives an implied power to create exclusive privileges; and it is pressed as a reason for this implication, that at the first construction of the ferry, it demanded a large expenditure, and was for a long time a source of little profit. We have seen that in a public grant, no inference can be made from the supposed nature of the grant, and that if the right of plaintiff is not sustained by clear and obvious words, in the language of Chancellor Kent, "without doubt," the right must fall. A similar argument as to original cost was raised in the case of Fanning v. Gregoire, 16 How. [57 U. S.] 524, and was not deemed entitled to consideration. When the ordinary power of constructing ferries across the navigable waters of the bay, in any direction from Oakland, was conferred on its authorities, it would be a violation of the rules of construction of public grants, to decide that the legislature intended to confer their whole power upon the corporation, and thus preclude themselves from all future opportunities of public improvement. It cannot be considered that the power to grant exclusive privileges to an individual, for nearly a quarter of a century, is to be regarded as belonging to the town by implication. This would be a most extraordinary construction, when we regard the uniform policy of this state, from the earliest law regulating ferries, as manifested upon the statute-book. Anterior to 1855, the regulation of ferries was confided to the courts of sessions. The supreme court of this state having decided that the law conferring the power upon those tribunals was unconstitutional, the legislature committed the power to supervisors.

It is contended that the laws prior to 1855 being unconstitutional, the grant to the town of Oakland cannot be considered as made in subordination to those general laws, and is free from their restrictions. This may be true; still, when we look to the character of these laws, they stand on the statute-book, and serve to show the restrictive and cautious policy of the legislature in relation to ferries. They were only authorized to be established for a short period of time, under various restrictions; and, in no instance did the legislature exclude themselves from establishing additional ones, when public convenience should require it. This uniform policy of our legislature is to be kept in view, when the question arises whether, in the absence of express words and obvious natural language, it is to be presumed to have departed from such policy, and to have bestowed on the town of Oakland the right to grant exclusive privileges, and thus preclude all future intervention on the part of the legislature, even over waters navigable to the ocean. The legislature could not have supposed they had done so when, in less than twelve months afterwards, they passed an act in relation to ferries, in which they repealed the second section of the act creating public ferries, passed 18th March, 1850, as applied to certain bays (among them that of San Francisco), within the limits of the state or their shores, and repealing so much of said section as could be so construed; and enacting that the navigation of said bays, and the transportation of freight or passengers across, through, and over the same, should be free and exempt from the restriction of any ferry-laws now in force in this state. That the legislature had the right to keep the navigation of the bay within the limits of the state, and the transportation across them free and exempt from the restriction of any ferry-laws in force, we think cannot be doubted. For this court to interpose by an injunction to restrain parties from navigating across the Bay of San Francisco, on the ground that they were infringing upon the exclusive privileges of a ferry, in the face of a statute of the state which declares that such bay shall be exempt from all ferry restriction, would be an improper exercise of power.

It is urged that, admitting it was in the power of the legislature to alter, modify, or take back the administrative-legislative power conferred by the charter, still, when private rights have issued out of the exercise of such power by the town of Oakland, they cannot be affected by the repealing action of the legislature. This view assumes that the contract between the town of Oakland and Carpentier, did invest him with a property in the ferry, and legally transferred to him an exclusive right for twenty years. The authorities cited, and the reasoning predicated upon them, tend to show that nothing but a legislative or administrative power was transferred, and that limited to the ordinary construction of a ferry, not authorizing the authorities of Oakland to give a monopoly of it to any one. Such contract, therefore, could not pass such exclusive privileges to a private individual as would paralyze any future action of the legislature. That private rights might arise from the legitimate exercise, by the town of Oakland, of its corporate privileges, there is no doubt; and the repeal of those privileges by the legislature might not affect those rights. To illustrate, the charter gives to the town of Oakland the power of selling or otherwise disposing of its common property. In the exercise of that corporate right, private rights might arise, and a subsequent repeal by the legislature of the corporate privileges of the town, would not defeat the previously vested private rights of the individual. So far from such right having vested in Carpentier, under the contract between him and the town of Oakland, even if the latter had made a grant of the ferry with covenants for the exclusive enjoyment of the franchise granted, this would not have restricted them from exercising the power con-

ferred on them by the charter to construct additional ferries. Such authority was vested in them as trustees for the public, and cannot be restrained by the covenant of the city. In constructing ferries, the authorities of Oakland were acting under a statute in the exercise of which the public had an interest. The city of Oakland was not the owner of the ferry, nor of an exclusive franchise; and although it may have granted it with a covenant for quiet enjoyment, and might be responsible on such covenant to the grantee, still, such covenant could not restrain the authorities of Oakland from exercising their judgment in creating additional ferries, as in their opinion the public interest should require. In re Fay, 15 Pick. 252. But the contract between the town of Oakland and Carpentier, must be deemed a fraud upon the law, and a complete evasion of its policy and object. A public trust was confided to the authorities of Oakland, to be executed by them as agents of the public. It was not in their power to denude themselves of the trust. It was not their "common property," and, by the charter, could not be sold or disposed of. It was a public trust, to be exercised by them as agents of the community, which they could not discard so as to prevent their successors from establishing additional ferries required by the public convenience. By the contract they granted, sold, released, and conveyed to an individual, his successors and assigns, exclusively, for the space of twenty years, the right to keep and run a public ferry or ferries, so as to demand and receive compensation therefor, between the town of Oakland and the city of San Francisco, and between the said town and any other place, together with all and singular the ferry-rights, privileges, and franchises, which now are or may hereafter be held and owned by said town. By such contract the then authorities of Oakland attempted to convert a public trust to private and individual use, and to place for twenty years under the exclusive control of an individual and his assigns, all, even future, means of ferry communication across the navigable waters from Oakland to any other place. Such never was the intention of the legislature. Such an act, it was not in the power of the authorities of Oakland to do, and such a transaction a court of equity cannot sustain. This tribunal could not interpose by the extraordinary process of an injunction to support rights derived from such a source; and maintain a title, which so far from being free from doubt, was executed under a contract in fraud of the law under which it professes to be executed; and to sustain restrictions over the navigable waters of this state, which the legislature has declared shall be exempt from all such restrictions.

HOFFMAN, District Judge. The bill in this case is filed for an injunction to restrain the defendants from interfering with the privilege or franchise of the complainant in a ferry from the town of Oakland to this city, of which he claims to be the exclusive owner for a term of years. This franchise is alleged to have been conferred on the complainant by an ordinance, and contract pursuant thereto, made by the trustees of Oakland, in the year 185–. The authority of the trustees to make the ordinance and contract is derived from the act of the legislature, passed May 4, 1852. Under the supposed authority of this act, a contract was made by the trustees, granting to the assignor of the complainant the privilege, claimed to be exclusive, of keeping and running all ferries between the town of Oakland and the city of San Francisco and elsewhere. It is not denied that the defendants are running a ferry-boat between this city and the town of San Antonio, touching at Oakland; nor that the profits and business of the complainants are seriously affected thereby. It is urged that the court should not at this stage of the cause, determine its whole merits, but that the injunction should be granted if the complainant has made out a prima-facie case. But it is well settled that injunctions will not be granted to secure the enjoyment of a statutory privilege, unless the right be clear. 3 Cow. 755; 1 Johns. Ch. 611.

In cases where an injunction is prayed to restrain an act which, if committed, will work irreparable mischief, it will be granted ex necessitate, even in doubtful cases, as the only means of keeping the parties in statu quo, and preventing the final decree from being abortive. Such are, the cases of the threatened destruction of heir-looms or works of art, or objects having a pretium affectionis —like family portraits, &c., or the publication of private letters, or the erecting of nuisances calculated to work irreparable mischief, &c. In all such cases, it is clear that if the court, by refusing the injunction, permits the act to be done, its subsequent decree granting the injunction would be but a brutum fulmen. But when an exclusive privilege under a statute is claimed, and the court is asked to forbid the commission of an act, otherwise lawful, because it interferes with the exclusive privilege claimed, the legal right of the complainant must be clear. It is said that in this case the court should interfere because the trespasses on the complainant are continuous and cannot be estimated in damages. But the damage to the defendants, if they are prevented from running their boat until their cause is heard, are equally unsusceptible of calculation, and may be far greater than the complainant can sustain by the competition. The court should therefore be fully satisfied that the right exists before, by its injunction, it will cause to the defendants an injury quite as irreparable, and perhaps more extensive, than that apprehended by the complainant.

The supposed authority of the trustees to make the ordinance and contract relied on by complainant, is contained in the third section

of the act to incorporate the town of Oakland, passed May 4th, 1854. This section provides "that the board of trustees shall have power to make such by-laws and ordinances as they may deem fit, proper, and necessary; to regulate, improve, sell, or otherwise dispose of the common property; to prevent and extinguish fires; to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries, public places and grounds, wharves, docks, piers, slips, sewers, wells, and alleys, and to authorize the construction of the same; and with a view to facilitate the construction of wharves, and other improvements, the lands lying within the limits aforesaid, between high tide and ship-channel, are hereby granted and released to said town." It is not claimed that the foregoing provisions constituted a grant to the town of Oakland, of all ferries from that town, as property. It is urged, however, that they amount to a delegation to the trustees of all the legislative and sovereign power possessed by the state over the subject of ferries from that town. That in the exercise of that power, the trustees could make any contract, and confer any rights with regard to ferries, they might deem proper, and that having done so, the rights thereby conferred, vested, and remain indefeasible, either by the trustees or the state, except in the exercise of the right of eminent domain.

The first question to be considered is, what were the nature and extent of the authority conferred upon the trustees by the act above cited? The only words in the clause which can be construed to confer the powers supposed, are the words "make" and "authorize the construction of." It is evident that most of the empowering words in the phrase do not apply to all the objects in reference to which the powers are to be exercised. For instance: the word "open" cannot refer to "ferries," nor the word "widen" to "wells." The words "lay out," evidently refer to "streets," "roads," "public places," and "grounds;" and the words "authorize the construction," have obviously a more specific reference to the docks, wharves, bridges, and sewers mentioned, than to the public places and grounds, or to the ferries. It is clear, therefore, that the various empowering words in the phrase must be construed distributively, reddendo singula singulis; and they must be distributed among the objects mentioned, in such a way as to give, with respect to each, only those powers which would naturally be conferred upon a municipal corporation, with reference to such objects. To apply the word "make" to "ferries," and to construe it as conferring the absolute right of leasing indefinitely, or granting the franchise for all ferries from the town to any individual, would seem a forced interpretation, suggested rather by the desire to find in the act the authority sought for, than by the natural construction of the phrase itself. If "make" were the only word which could apply to ferries, or if "ferries" were the only word which would satisfy and give effect to the word "make," the construction contended for would be more plausible. But the word "regulate" not only can be applied to ferries, but it is sufficient to confer all the authority with respect to them, which would naturally and appropriately be given to a municipal corporation, from whom a grant of the franchise in property is withheld; while the word "make" has a similar operation if applied to the bridges, wharves, piers, docks, sewers, wells, &c. To make "ferries" is certainly an unusual and awkward expression. The more appropriate phrase would obviously be "to establish ferries;" and had the extensive powers with regard to them which are now claimed, been intended to be conferred, it is hardly possible that the legislature would have omitted in specific terms to grant and enumerate them. The construction contended for assumes that while the legislature withheld the grant of the franchise from the corporation as property, it nevertheless intended to give them full power to grant the exclusive franchise as property to any individual; to be assigned or sold by him at pleasure, and capable of being owned by a foreigner or a citizen of another state; and all this by the force of the word "make," which is wrested from its natural application to other objects, and made to refer to ferries by an ingenious and forced construction. The words "authorize the construction of" cannot be appealed to as conferring the powers attempted to be exercised in this case. Whatever propriety there might be in the phrase "construct a ferry," the power to do so can hardly be deemed a power to grant or lease an exclusive franchise and privilege of establishing it, especially when such franchise is not conferred upon the donee of the power to construct; and in this case the power is not given to "construct," but to "authorize the construction of ferries," if, indeed, it refers to ferries at all. It is, therefore, merely a power to permit, or to allow them to be constructed. It would surely be an unwarrantable latitude of construction, to hold that a power to permit the construction of a ferry, unaccompanied by a grant of the franchise, authorized the absolute grant of an exclusive franchise to any one the party empowered to permit might see fit to give it. But, for the reasons before assigned, I think the words "authorize the construction of" apply to wharves, docks, piers, bridges, &c., and not to ferries; with reference to which they are obviously inappropriate.

But assuming that the words "make" and "authorize the construction of" apply to ferries, the question recurs, whether the trustees were authorized by the power thus given, to confer the right now claimed. The ordinance under which the contract with Edward R. Carpentier was made, provides that "the trustees, &c., do hereby make, open, widen,

lay out, grant, create, ordain, establish, and regulate a public ferry between the said town of Oakland and the city of San Francisco, to be called the 'Oakland Ferry'; and they do hereby bargain and contract with Edward R. Carpentier, his heirs, agents, and assigns, to run said ferry for the period of twenty years, according to the terms of this ordinance, either as a separate ferry, or in connection with, or continuance of, the one already established and used between said town and said city, hereby granting, selling, and releasing and conveying to the said Carpentier, and to his successors in interest and assigns, exclusively, for the said period of twenty years, the right to keep and run a public ferry, or public ferries, so as to demand and receive compensation therefor, between the said town of Oakland and the city of San Francisco, or between the said town of Oakland and any other place; together with all and singular the ferry-rights, privileges, and franchises, which now are or may hereafter be owned by said town." The contract made in pursuance of this ordinance is in substantially the same language. Admitting that so much of this ordinance as purports to establish, create, and make a public ferry between Oakland and San Francisco is a valid exercise of the power conferred on the trustees, we are next to inquire whether the grant and the subsequent contract was also within the power of the trustees. It will be seen that the trustees in express terms convey and grant for twenty years, to Carpentier and his successors exclusively, the right of running and keeping a ferry or ferries between Oakland and San Francisco, and between Oakland and any other place, and they undertake to convey to him "all the ferry-rights, privileges, and franchises which now are or may hereafter be owned by said town." It is not contended that the town of Oakland was the owner of any exclusive ferry-franchise whatever. The grant, therefore, of the ferry-franchises owned by the town would, of course, pass for nothing. As to the grant of all ferry-franchises which might thereafter be owned by it, no observations are necessary; but it is said that the trustees, in the exercise of their power to establish ferries, had incidentally and as the appropriate means of establishing them, the right to release them to individuals. It is not necessary to inquire into the authority of the corporation to establish a particular ferry, and to lease it to an individual. The right they have attempted to convey to Carpentier was not a lease of a particular ferry between a certain point in the town of Oakland and the city of San Francisco, but the exclusive right to keep and run a ferry or ferries between Oakland or any other place. They thus abdicated and renounced the exercise of all the powers with respect to ferries with which they were entrusted, except that of "regulating." For the power to establish other ferries could be of no avail, so long as Carpentier retained the exclusive right to run and keep them. It would perhaps be difficult to find, in the history of municipal corporations another instance of so extraordinary a grant. It was not only not an exercise of any power they may have possessed to establish ferries, but it was, in effect, the surrender of the whole power to establish them, and it amounted to an agreement that no ferry should be established from Oakland to any place whatever, unless by the permission of the person to whom they had given the exclusive right to run them. It seems to me that the legality of this grant cannot for a moment be supposed. The authority vested in the board was conferred upon them as trustees for the public, to be exercised for the public good. They had not only the right, but it was their duty, and that of their successors, to exercise the power of establishing ferries, as agents and trustees of the public, whenever the public good might require.

The power to establish ferries, if it existed at all, was a continuing power and duty, which existed in every board of trustees for the time being; and no covenant by one board not to exercise it, or for the exclusive enjoyment of the franchise by an individual, could prohibit or restrain their successors from exercising the powers vested in them by the statute to establish and license other ferries required by public convenience and necessity. In re Fay, 15 Pick. 243. But to ascertain more certainly the intention of the law, and the nature and extent of the powers conferred upon the trustees, the legislation of the state with regard to ferries must be considered. By the act of March, 1850 [Laws Cal. 1850-51, p. 758], all persons were forbidden to keep ferries without a license, except for their own use, or that of their families. The courts of sessions were empowered to establish ferries across bays, creeks, or sloughs, bounding or within their respective counties, as they might deem necessary, and were authorized to issue a license to keep a public ferry to any suitable person applying therefor, for a term not to exceed one year, on the fulfillment by the applicant of certain pre-requisites. They could also license and establish additional ferries within less than two miles from a regularly established ferry, when necessary for public convenience, and on notice to the proprietor of such previously established ferry. The act further provides for the establishment of ferries on private property, for the occupation of ground at either end of the ferry, and for the publication of a notice of the application for a ferry. It also prescribes the duties and privileges of ferrymen, and provides for the rates of ferriage, revoking licenses, and for the penalties to be imposed for a refusal to transport persons or property. All these provisions were of a general character, and applied to all the counties of the state. They were evidently designed to provide by general law for the establishment of ferries, for confer-

ring the franchise in suitable cases, with proper checks and securities, and with the express reservation of the right to confer a similar franchise upon persons other than the proprietor of the first-established ferry, whenever it might be deemed necessary or advantageous to the public. The same provisions, in substance, remain as part of the general law of this state to the present day, except that it having been determined that under the constitution of this state the courts of sessions could not exercise the functions assigned to them by the act, the same powers, in substance, were, by the act of 1855, vested in the boards of supervisors.

On the 14th of April, 1853 [Laws 1850–53, p. 763], an act was passed, declaring that the 2d section of the act creating and regulating public ferries, should not be construed to apply to the bays of San Pablo, Suisun, San Francisco, or Monterey; and the navigation of said bays, and the transportation of freight or passengers over, across or through the same, was declared to be free and exempt from the restriction of any ferry-laws then in force in the state. These provisions have been repeated, in substance, in all the succeeding ferry-laws passed on the subject. It will not be disputed that these laws indicate and establish the settled policy of this state, with regard to public ferries: that it was intended to confer the franchise, for a limited time, on persons found to be suitable, and with certain privileges, checks, securities, and penalties, carefully provided by law; that such privileges were not to be exclusive, but other ferries could be established, contiguous to any established ferry, whenever deemed necessary; and that the state was to derive a revenue from the issuing of the licenses. The law of 1853, and subsequent enactments to the same effect, show that the great arms of the sea therein mentioned, were not regarded as fit for the establishment of any ferries whatever, but that their navigation and the transportation of freight and passengers, across, through, and over them, were to be left free and exempt from the restrictions of any ferry-laws in force in this state. Such being the settled policy and law of this state, with regard to public ferries, and with reference to the bays mentioned, it is not to be presumed, without the clearest evidence of a contrary intention, that the legislature intended to confer upon the trustees of a small town in the Bay of San Francisco, the power to grant an exclusive privilege to establish ferries across the most important of those bodies of water the navigation of which was, the next year, declared free and exempt from all ferry-laws.

If the general ferry-law, under which no exclusive rights could be acquired, nor licenses granted for more than a year, was deemed unfit to be applied to the Bay of San Francisco, the inference is irresistible, that it could not have been the intention only one year previously, to confer upon the trustees of a town an unlimited power to grant exclusive privileges, for any period, with reference to the same waters, to any individual they might choose. It is admitted that the law by which the power claimed was conferred, might at any time have been repealed. Had the legislature, when, in 1853, it declared the bays mentioned to be exempt from the operation of all ferry-laws, and the navigation over and across them to be free, supposed that the trustees of Oakland were empowered to grant an exclusive right to an individual to establish ferries to the most important city of the state, they would surely not have omitted to revoke the powers, and repeal the law by which they were conferred.

The question we have been considering, is purely one of construction; and even if the language of the act were more doubtful, yet when read by the light of the previous and immediately subsequent legislation of the state, its true interpretation would seem to be unmistakable. But, it is said that the power to establish a ferry imports ex vi termini, a power to confer exclusive rights in the ferry so established; that without such rights it would not be a ferry in the legal sense of the term. But on this point, the case of Fanning v. Gregoire, 16 How. [57 U. S.] 524, is decisive. In that case, Fanning claimed under a direct grant from the legislature, authorizing him to keep a ferry at the town of Dubuque, across the Mississippi river, for the term of twenty years. This he accordingly established. Subsequently, the state conferred upon the city-council of Dubuque, power to license and establish public ferries across the Mississippi; and under the power a license was granted. On a suit by Fanning against the licensee, it was held that his franchise was not exclusive, but that the legislature had a right to license other ferries. It is clear that if a direct grant to an individual, of authority to establish and keep a ferry at a particular place does not vest in him an exclusive franchise, the grant to a municipal corporation of power to establish ferries does not authorize them to bestow exclusive privileges. If the term "ferry" in the grant to Fanning did not impart any exclusive franchise, it cannot have that meaning in the act incorporating Oakland. It can surely make no difference whether the state is supposed to have duly surrendered to an individual its power of improvement and accommodation in a great and important line of public travel, or whether it is supposed to have authorized a municipal corporation to surrender it; in either case "its abandonment ought not to be presumed, where the deliberate purpose of the state to abandon it does not appear." [Charles River Bridge v. Warren Bridge] 11 Pet. [26 U. S.] 549.

It is urged that, even if the town of Oakland or the state had power to license other ferries, yet the right of complainant to the exclusive enjoyment of the ferry on the par-

ticular ferry-ways established by him ought to be protected. But in the case above referred to, no such distinction appears to have been taken. The right claimed was, like this,—an exclusive right to run a ferry from a certain town across the Mississippi for twenty years. The infringement complained of was the licensing and establishment of another from the same town across the same river. The court decided that the franchise claimed was not exclusive, and that the establishment of the second ferry was legal. It is nowhere suggested that the second licensee could not run his boat from any part of the town of Dubuque, and even from the same wharf as that used by the first licensee. 2dly. The privilege attempted to be granted in this case, was not the privilege of keeping and running a ferry from any specified dock or wharf in the town of Oakland to any other point across the bay. It was the right to keep and run a ferry or ferries from the town of Oakland generally to any place whatever. Whether, if the trustees had established a ferry from a certain wharf, and leased the same to an individual, his rights in such ferry would have been exclusive, it is not necessary to inquire; for the right granted was the exclusive right to run "a ferry or ferries" from the town of Oakland to any place, with all the ferry-rights, privileges. and franchises then owned or thereafter to be owned by the town.

But admitting, for the sake of argument, not only that the trustees were empowered to establish ferries, but that the legislature intended to confer upon them powers to grant to an individual the exclusive franchise for any period, of running and keeping the ferries so established, such a construction affords an argument almost irresistible, that those powers could only have been conferred with regard to ferries wholly within the corporate limits. Within those limits is the creek San Antonio, which can only be crossed by bridges or boats. If, then, the power to grant the franchise in property was intended to be conferred, it is surely more reasonable, and more in accordance with every rule relating to the construction of grants of this description, to construe it as referring to ferries across waters wholly within the corporate limits, than to suppose it to extend to ferries across a bay the navigation of which was, in less than a year afterwards, declared free and open to all. With reference to the streets, docks, wharves, and sewers, this limitation is necessarily understood. Why not with regard to ferries, if the power to grant the franchise was intended to be given? The ferry from Oakland to this city affords the principal, if not the only means of convenient access to the commercial centre and chief seaport of the state, not only to the citizens of Oakland, but to the inhabitants of a considerable district; and the possession of an exclusive franchise of running and keeping all ferries between Oakland and this city, gives to the possessor the practical control of the means of communication. Can it be supposed that the legislature intended to give the power to grant such a right to the corporate authorities of a town situated at one terminus of the ferry, and to take away or render nugatory the rights of the county at the other terminus to license ferries across the water forming their common boundary? That this right existed in both counties under the law of 1851, is clear. But the privileges conferred by the license under the ferry-laws, are limited, and not exclusive in the person obtaining the license. To suppose then that the power contended for was conferred upon the trustees of Oakland, we must suppose that the powers given to every county on the Bay of San Francisco, between which and Oakland a ferry might be established, were revoked and the general ferry-laws on that subject repealed by implication. And this by force of the word "make," which we are asked first to apply to ferries, and then to construe as has been explained. It may be said that the question is not now as to the right of other counties to license ferries under the general ferry-laws. This is true. But the question is as to the exclusive right of the complainant to a ferry between Oakland and this city—as against the defendants; and in construing the law under which his alleged rights are claimed, it is of importance to show that the power to confer such rights was incompatible with the then existing laws conferring powers over ferries to other counties, and could only have been given by repealing pro tanto those laws; as also that it was incompatible with subsequent laws, by which all power to establish ferries over the waters in question was taken away. It has not seemed to me necessary to refer on this point to the general rules relating to the construction of grants of this kind. It is not denied that grants of privileges, franchises, etc., are to be strictly construed, and that nothing is to be taken by intendment. It is claimed, however, that this is a delegation of legislative authority, and not a grant of a franchise, and that therefore a different rule must be applied. I confess myself unable to see the propriety of this distinction in the present case. The state is the sovereign from whom the power is derived, whether it is supposed to have granted directly to a corporation the exclusive franchise as property, as was done in the case of the city of New York, or to have granted to the corporation power to make an exclusive grant of the franchise to an individual; in either case, the rules of construction must be the same. It can surely make no difference whether the corporation is the direct grantee of the franchise, or the donee of a power to make a grant of it and receive the consideration.

Many other questions were raised and argued at the hearing, which it is unnecessary to discuss. On the whole, I think, 1st. That

it is at least doubtful whether the act incorporating the town of Oakland, gave to the trustees any other power with regard to ferries than that of regulating them. 2d. That if the power to establish ferries was conferred, such power was held by them as a public trust, to be exercised by them and their successors when the public good might require. They had, therefore, no authority to confer upon any individual the exclusive right to keep and run a ferry or ferries, between Oakland and San Francisco, still less such a right with regard to ferries "between Oakland and any other place." 3d. That if such powers were intended to be given the trustees, they could only have referred to ferries across waters wholly within the corporate limits of the town. 4th. That under any possible view of the case, the right of the complainant is doubtful; and that, therefore, the injunction ought not now to be granted.

[The decree in this case was affirmed in the supreme court upon appeal. 23 How. (64 U. S.) 435.]

Case No. 9,647.

MINTURN v. SMITH.

[3 Sawy. 142;[1] 1 Am. Law T. Rep. 507.]

Circuit Court, D. California. Sept. 14, 1874.

TAXATION—TAX TITLE—VOID—CLOUD ON TITLE—INJUNCTION.

1. The general statute authorizes a tax collector for state and county taxes to execute a deed upon a tax sale, and further provides that such deed shall be prima facie evidence of certain facts recited therein, and conclusive evidence of the regularity of the proceedings in all other respects. A subsequent statute provides that a town tax in a certain town shall be assessed and collected at the same time, and in the same manner as provided by said general act, and confers upon the town treasurer all the powers exercised by the tax collector of the state and county taxes under the general act, but makes no provision as to the effect of the tax deed executed by the town treasurer. *Held*, that such deed will not be prima facie evidence of the regularity of the prior proceedings.

2. A void tax deed which the statute does not make prima facie evidence of the regularity of the assessment and sale, does not cast a cloud upon the title.

3. An injunction will not be granted to restrain the collection of a tax, where the deed issued upon a sale for taxes would not cloud the title.

[This was a motion for an injunction by Edward Minturn against Thomas A. Smith to restrain the collection of certain taxes.]

W. W. Crane, for complainant.

George W. Tyler, for defendant.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

SAWYER, Circuit Judge. The question in this case is, whether a deed issued by the treasurer of the town of Alameda upon a sale for town taxes under the act of 1872 [Laws 1871–72, p. 276] to incorporate the town of Alameda, would be prima facie evidence of title, and would, therefore, cast a cloud upon the title. Section 7 of the act is as follows:

"The annual tax authorized by this act to be levied by the board of trustees, shall be levied, assessed and collected at the same time, and in the same manner, as is or may be by law provided for the levying and collecting state and county taxes within the county of Alameda, the treasurer being hereby vested with the same powers to make collections for taxes as is, or shall be, conferred upon tax collectors for the collection of state and county taxes within said county."

This is the only provision of the act affecting the question. The general provisions of the Political Code relating to the collection of state and county taxes, have no application except so far as they are made applicable by said section seven. The general statute is made applicable, so far as the mode, manner, and time of assessing and collecting the tax is concerned, and the treasurer, with respect to the town tax, is vested with all the powers that are conferred upon tax collectors of state and county taxes by the Political Code, but it goes no further. The town treasurer may sell for town taxes legally levied, and execute a deed in pursuance of such sale, because the tax collector of state and county taxes may do so. The power of the treasurer is spent when he has executed the deed.

Section 7 does not say what the effect of that deed shall be. It does not provide that it shall have any other effect than ordinary deeds executed by public officers upon tax sales. The general act does not stop with authorizing the tax collector to execute the deed prescribed, but goes on in sections 3786 and 3787, to provide, that the deed so executed by the tax collector shall be prima facie evidence of title in the grantee as to certain enumerated particulars, and conclusive evidence as to all others. This is something outside and beyond the powers of the tax collector. It is intended to change a rule of evidence—to shift the burden of proof as to the regularity of the proceedings resulting in the tax deed from the claimant under, to the party claiming against, the tax deed.

The act under which the tax in question is levied, stops short of the effect of the deed as an instrument of evidence. It says nothing about its effect, but ends with the powers of the treasurer. Without such provision the deed can only have the effect of ordinary tax deeds. The act must be strictly construed, as it assumes to divest title to land in invitum. That such is the rule, is clear from the principal authority cited by complainant, Sibley v. Smith, 2 Mich. 487. In that case the statute, besides the provision that the officers should proceed in the same

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

manner and exercise the same powers as the officers under the general act, adds, "and in all respects, with the like effect." It was upon this clause alone that the title was sustained. See, also, 1 Blackf. 336; Blackw. Tax Titles, 449 et seq., and cases cited. We do not think the deed which the treasurer is authorized to issue, would have the same effect as evidence as a deed executed by the tax collector under the general law. It would not be prima facie evidence of title, and consequently would not cast a cloud upon the title. This is settled by numerous decisions in this state. Huntington v. Central Pacific R. Co. [Case No. 6,911], and cases cited. There is, therefore, no ground for an injunction.

Motion for injunction denied.

MINTURN (UNITED STATES v.). See Case No. 15,783.

MIRANDA, The (FOSTER v.). See Case No. 4,977.

Case No. 9,647a.

MIRICK v. HEMPHILL.

[Hempst. 179.] [1]

Superior Court, Territory of Arkansas. July, 1832.

NEW TRIAL—IMMATERIAL ERROR—DETINUE—RECOVERY—VALUE—HOW INSTRUCTIONS UNDERSTOOD BY JURY.

1. Although the court may err in instructions to the jury, yet if it is apparent that justice has been done, a new trial should not be granted.

2. In detinue, the value of the article sued for is a secondary object, and even if excessive, as assessed by the jury, it is doubtful if a party can complain of it, as he may discharge the judgment by the restoration of the property.

3. Affidavits of jurors cannot be received, to show how the instructions of the court were understood.

Appeal from Hempstead circuit court.

[This was an action of detinue by Ephraim Mirick against Andrew Hemphill.]

Before ESKRIDGE and CROSS, JJ.

OPINION OF THE COURT. This case comes up, by appeal, from the Hempstead circuit court. The plaintiff brought an action of detinue to recover an obligation on Soher, Goodman & Co., for the proceeds of fourteen bales of cotton, to be received of John Bradley, and obtained a judgment for the same, if to be had, if not, the value thereof, estimated by the jury at four hundred and eighteen dollars and six cents, together with the costs of suit. The defendant afterwards moved the court for a new trial, which motion was overruled, and he excepted, setting out the evidence on the part of the plaintiff, and the instructions given to the jury.

Three grounds are relied upon for the reversal of the judgment. 1st, that the court instructed the jury contrary to law; 2d, that the defendant held the obligation as bailee, and no demand was proven to have been made previous to the institution of the suit; and 3d, that the court refused to hear, on the motion for a new trial, the affidavits of several of the jurors, setting forth their understanding of the instructions which influenced their verdict.

The instructions, to which the first objection relates, were in substance, that if the jury found for the plaintiff, they ought to find for him the obligation, if to be had; if not the value thereof, and the criterion in ascertaining it, would be the value of fourteen bales of cotton in New Orleans, at the time specified in the sale bill of Soher, Goodman & Co., set out in the bill of exceptions, and that in estimating the fourteen bales of cotton, all the evidence ought to be taken into consideration. The sale bill referred to, is an account of the sale of fourteen bales of cotton, for A. Hemphill, received of John Bradley, by Soher, Goodman & Co., in New Orleans, in May, 1830, amounting to the sum of four hundred and eighteen dollars and six cents, after deducting all charges for freight, storage, and expenses. If these instructions are objectionable, it is only in that portion which relates to the criterion by which the jury was directed to be governed, in finding the value of the obligation. It was, doubtless, going too far, on the part of the court, to instruct that the criterion in estimating the value of the obligation, would be the value of the fourteen bales, sold in New Orleans, by Soher, Goodman & Co., there being no evidence showing that the cotton mentioned in the obligation was required to be sold there, or that it was actually sold at that place. It is very apparent that no injustice was done the defendant in consequence of it, as the testimony set out in the bill of exceptions, shows conclusively that the jury was fully warranted in assuming the criterion to which they were referred by the court. The defendant, therefore, having sustained no injury on account of the instructions objected to, the court rightfully overruled the motion for a new trial, so far as predicated upon misdirection to the jury. There is another view of the first ground relied upon by the defendant for the reversal of the judgment, that we think, deserves consideration. The action is detinue, and although it was the duty of the jury to assess the value of the obligation, that value is a secondary object, and not recoverable, but upon the contingency of the obligation not being restored. Whatever, then, may have been the value of the obligation, assessed by the jury, the defendant can discharge it by its restoration. See the case of Thompson v. Porter, 4 Bibb, 72. He is not by the finding of an improper or excessive value, inevitably subjected to injury. He might restore the obligation. The second ground, namely, that a special request was necessary before the institution of the suit, if tenable

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

at all, is fully met by the testimony, as a demand is proven to have been made.

The third, and last, which relates to the refusal of the court to hear the affidavits of several of the jurors as to their understanding of the instructions, is not tenable. 2 Tidd, Prac. 817; 5 Burrows, 2667. We are of opinion, therefore, that the circuit court properly refused a new trial. Judgment affirmed.

Case No. 9,648.

The MISPAH.

[5 Reporter, 519.] [1]

Circuit Court, D. Delaware. April 1, 1878.

SHIPPING—AFFREIGHTMENT—OBLIGATION TO SIGN BILLS OF LADING—DEMURRAGE—CHARTER PARTY—MEASURE OF DAMAGES.

1. A charter party stipulating that demurrage shall be paid day by day, and that the master shall sign bills of lading, requires the master to sign bills, although demurrage may be at the time due and unpaid.

2. In an action on the contract to compel the signing of bills the libellant can recover only the actual expense incurred and rendered necessary by the master's refusal.

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

The bark Mispah was chartered by Wright & Co., to be loaded with a cargo of grain at Philadelphia for Belfast. The charter party provided inter alia for thirty-two running lay-days at the first-named port, and demurrage at the rate of 16 pounds per day thereafter, payable day by day, the master to sign bills of lading as requested without prejudice to the charter, the charterer's responsibility to and on the shipment of the cargo, the vessel to have a lien for freight and demurrage. The charterers consumed the lay-days in loading, and in three days in addition; for two of these days they paid demurrage, but refused, though without denying liability, to pay for the third. At that time there were in board 40,000 bushels of grain for which no bill of lading had been signed, and the master refused to sign unless the charterers would pay the demurrage or indorse the amount due on the bills. This not being done, and after notice, the master sailed with the cargo and without signing the bills. The vessel being beyond the jurisdiction of the court at Philadelphia, an attachment was obtained from the district court for Delaware, and under it the vessel was arrested in Delaware Bay. The master then, under an interlocutory order, signed the bills and gave security. The libellants were awarded by the court for the breach of charter $225 for the actual expense of the attachment and arrest (tug hire, &c.), and in addition exemplary damages, making the whole award $500. The respondent appealed.

J. Warren Coulston, for appellant.

The master was justified in sailing as he did. He would have lost the demurrage if he had signed the bills, as requested, and they had passed to an innocent purchaser. Kay, Shipm. 325, and cases cited. The manifest sufficiently showed the cargo he was to deliver. Ben. Adm. 286. In no case can the decree for exemplary damages be sustained.

H. G. Ward and Henry Flanders, contra.

The master was guilty of trespass in carrying away the goods without giving a bill of lading, and the exemplary damages were properly given. Bennett v. Lockwood, 20 Wend. 222; Miller v. Garling, 12 How. Prac. 203. He was bound to sign the bills, and had no lien at the port of lading. Francesco v. Massey, L. R. 8 Exch. 101; Kish v. Cory, L. R. 10 Q. B. 553; Christoffersen v. Hansen, L. R. 7 Q. B. 509; Pedersen v. Lotinga, 5 Wkly. Rep. 290; French v. Gerber, 1 C. P. Div. 739.

McKENNAN, Circuit Judge. I think the court below was right in holding that charterers were in culpable default in refusing to pay the demurrage confessedly due the master, or to make such an indorsement on the bills of lading as would evince his right to enforce his lien upon the cargo for it at the port of discharge. I am also of opinion that the master mistook his remedy for this wrong; that when he sailed from the port of Philadelphia without first signing proper bills of lading, he violated the charter party, and that the vessel is liable for the damages directly resulting from this unwarranted departure. But the method adopted in the assessment of damages was clearly erroneous. The master was in no sense a trespasser. He was lawfully in possession of the cargo in pursuance of the charter party, and his liability occurred solely from his breach of one of its stipulations, which required him to sign bills of lading before sailing. It was therefore simply a cause of contract, and is properly exclusively so treated in the libel. Even then, if the master's conduct had been attended by circumstances of aggravation, which would in an action of trespass justify the imposition of exemplary damages under the form of libel, the libellants are entitled to compensatory damages merely, and these are to be measured by the expenses incurred in pursuing the vessel and asserting their right to the fulfilment of the charter party. The expenses thus incurred are shown to amount to $225, and for this sum there must be a decree —— with the costs of the suit in the district court ——, the costs of this court to be paid by libellants.

[1] [Reprinted by permission.]

Case No. 9,649.

The MISSISQUOI.

[8 Ben. 6.] [1]

District Court, E. D. New York. Jan., 1875.

COLLISION—STEAMBOAT AND SMALL BOAT—RIGHT OF WAY—PLEADING.

1. A man in a small boat saw a steamboat approaching him, two or three hundred feet away. He alleged that the steamboat came on without slacking speed and struck his boat before he had time to get out of the way; and he filed a libel to recover for the damage to the boat. *Held*, that, on this libel, which conceded the obligation of the small boat to get out of the way of the steamboat, if she had time, the question was whether she did have time.

2. As the libel stated that the steamboat was two or three hundred feet away when she was seen, the small boat did have time to get out of the way, and the libel must be dismissed.

[Cited in The Bay Queen, 42 Fed. 272.]

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Charles E. Crowell, for claimant.

BENEDICT, District Judge. This action is brought to recover for the destruction of a small boat which was crushed between a canal-boat, lying alongside the Columbia dock, and the propeller Missisquoi. The statement of the libel is, that the propeller was seen approaching when 200 or 300 feet distant, and then was hailed, but that she came on without slacking her speed and struck the small boat before the man in the boat had time to get the boat out of the way.

Upon this libel, which concedes the obligation of the small boat to get out of the way of the approaching tug, if given time to do so, the question is whether the libellant did have time to pull his boat out of the way of the propeller, after the propeller was seen by him to be approaching. The weight of the evidence is that he had such time. Indeed, this may be said to appear on the face of the libel, as it is quite manifest that a small boat with a man in it could be pulled the few feet necessary to take her out of the danger of being crushed between the boats, sooner than the propeller would move the 200 or 300 feet she is stated in the libel to have been distant, when seen and hailed by the libellant. The libel is dismissed with costs.

Case No. 9,650.

The MISSISSIPPI.

District Court, S. D. Florida. 1871.

SALVAGE.

[Libel in rem by Grayham I. Lester and others against the cargo and materials of the American steamship Mississippi.]

L. W. Bethel, for libelants.

S. R. Mallory, for respondent.

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

McKINNEY, District Judge. The allegation and proofs in this case having been fully heard and understood, and deliberation had, and the value of that portion of the cargo saved by the first set of salvors having been fixed at the sum of $175,000 by agreement of the parties, including the portion sold by the marshal for the sum of $27,662.28, for the purpose of determining the salvage thereon; and that a portion of said cargo saved by the second set of salvors has been sold by the marshal for the sum of $1,521.35, and the remainder thereof appraised under an order of court at the sum of $2,820.30, making in the aggregate the sum of $4,341.85,—

It is therefore ordered, adjudged, and decreed, that the libelants have and recover in full compensation for their salvage services, rendered to the cargo of the steamship Mississippi twenty per cent. of the net value of that portion saved by them, as set forth in their libel, to be ascertained, by deducting from the sum of one hundred and seventy five thousand dollars, the agreed value thereof, the proper proportion of the costs and expenses, of this suit, and other expenses properly chargeable thereon, to be taxed and allowed by the court; and that the petitioners John Lowe and others have and recover for their services fifty per cent of the net value of that portion of the cargo saved by them, as set forth in their petition, to be ascertained in the same manner: the shares of the master and crew of the schooner Isabel to be forfeited for the use and benefit of the owners and insurers of the property.

[See Case No. 9,651.]

Case No. 9,651.

The MISSISSIPPI.

[10 Adm. Rec. 610.]

District Court, S. D. Florida. June 8, 1874.

SALVAGE—CONSOLIDATION OF LIBELS—COMPENSATION.

[1. Where several libels are filed against the cargo of the same vessel for services of the same nature and character, they will be joined and considered as one suit for the purposes of awarding salvage.]

[2. Where a cargo was saved partly in a damaged and partly in an undamaged condition, *held*, that there should be allowed, of the net value, thirty per cent. on the undamaged goods, forty per cent. on certain cotton ties saved from the orlop deck, fifty per cent. on merchandise badly damaged, and all of certain cotton ties, hoop iron, steel bars, and other property saved from the lower hold by diving.]

[Cited in Baker v. The Slobodna, 35 Fed. 544.]

[Libels in rem by Sylvanus Pinder and others, George Bocker and others, O. L. Baker and others, and S. A. Pyfrom and others against the cargo saved from the stranded British steamer Mississippi, for salvage.]

L. W. Bethel, W. C. Maloney, Jr., and G. Browne Patterson, for libellant.

Miner Bethel, for respondent.

LOCKE, District Judge. The allegations and proofs in these several causes by libel or petition having been fully heard and understood, and mature deliberation had thereupon, and it appearing that the services for which salvage is claimed, in each libel or petition, have been rendered to the cargo of the same vessel, and are of the same nature and character, it is ordered that the several cases be joined and for the purpose of awarding and decreeing salvage considered as one; and the property saved having been partly sold and partly appraised, the part sold for twenty-six hundred and eighty-one 46/100 dollars ($2,681.46), and the portion appraised at twenty-three thousand seven hundred and sixty-four 89/100 dollars ($23,764.89), and no objection having been made to said sale or appraisement, that said sale be confirmed and appraisement adopted for the purpose of determining salvage. And that the libellants and petitioners are entitled to recover, in full compensation for their services, thirty per cent. of the net value of the property saved in an undamaged condition, including 21 crates of crockery, 7 cases clay pipes, 687 boxes of tin, and 38 bales of cotton domestics; forty per cent. of the net value of the cotton ties saved from the orlop deck, namely, the 1,724 bundles, saved by the Harriet Maria, and 1,260 bundles saved by the Competitor; and fifty per cent. of the net value of the cases of merchandise so badly damaged as to be sold, and all the cotton ties, hoop iron, bars of steel, and other property saved from the lower hold, most of which was saved by diving; the net value of the property sold to be ascertained by deducting from the amount of proceeds of that sold the duties and a proper proportion of all costs and expenses of the suit, wharfage, storage, labor bills, landing and storing commissions, and all other charges incurred; of the property appraised, by deducting from the appraised value, the proper proportion of all costs and expenses, wharfage, storage, labor bills, landing, storing, and reshipping commissions, and all other charges incurred, excepting the respondents' proctor fee for defending. And whereas there may be some charges incurred to be borne by the vessel and cargo jointly, which would be taxed in proportion to the value of the property saved were both values known, that one-half of such charges should be taxed as against the property saved in proportion to the several values.

The court further ordered that whereas it had been reported and brought to the notice of the court that sundry boxes and cases were brought into port by the schooner Explorer in a damaged condition, and certain portions of their contents had been taken therefrom, that the master of said schooner Explorer, and all others interested in salvage earned by said schooner, appear at a day named, to show cause why the salvage earned by said vessel and crew be not forfeited.

[See Case No. 9,650.]

MISSISSIPPI & M. R. CO. (MUSCATINE v.). See Case No. 9,971.

MISSISSIPPI & M. R. CO. (WARD v.). See Case No. 17,156.

MISSISSIPPI & RUM RIVER BOOM CO. (PATTERSON v.). See Case No. 10,829.

MISSISSIPPI, ETC., BOOM CO. (UNITED STATES v.). See Case No. 15,784.

MISSISSIPPI CENT. R. CO. (ILLINOIS CENT. R. CO. v.). See Case No. 7,008.

MISSISSIPPI VAL. & W. R. CO. (WALKER v.). See Case No. 17,079.

Case No. 9,652.

The MISSOURI.

[3 Ben. 508; 10 Int. Rev. Rec. 179; 11 Int. Rev. Rec. 5; 2 Chi. Leg. News, 97.] [1]

District Court, E. D. New York. Nov., 1869.

LIEN FOR PENALTY—FALSE MANIFEST—JURISDICTION.

1. Under the 24th section of the act of March 2, 1799 (1 Stat. 646), which enacts that if goods imported in a vessel of the United States are not entered on the ship's manifest, the master shall forfeit and pay a sum equal to their value, and the 8th section of the act of July 18, 1866 (14 Stat. 180), which provides that where a vessel or her owner or master are subject to a penalty for a violation of the revenue laws, "such vessel shall be holden for the payment of such penalty, and may be proceeded against summarily, by libel, to recover such penalty, in any district court of the United States having jurisdiction of the offence," it is not necessary, in a libel filed against a vessel to recover such a penalty, to aver any prior seizure of the ship.

[Followed in The Missouri, Case No. 9,653. Cited in U. S. v. The Missouri, Id. 15,785; The Joshua Leviness, Id. 7,549; The Saratoga, 9 Fed. 324; The Paolina S., 11 Fed. 173. Followed in The Snow Drop, 30 Fed. 80. Cited in The C. G. White, 64 Fed. 581.]

2. It is not a necessary preliminary to such a suit, that the ship should have been seized, or that proceedings to recover the penalty should have been instituted against the master or the owner personally.

[Followed in The Missouri, Case No. 9,653. Approved in U. S. v. The Queen, Id. 16,107. Cited in The Saratoga, 9 Fed. 328. Followed in The Snow Drop, 30 Fed. 80. Distinguished in The Sidonian, 38 Fed. 441.]

3. Such a suit against a vessel is a civil case of admiralty and maritime jurisdiction, and is within the jurisdiction of the court. It is so, because the subject-matter is maritime in its nature.

[Followed in The Missouri, Case No. 9,653. Cited in The Helvetia, Id. 6,345. Followed in U. S. v. The Queen, Id. 16,108. Cited in Pollock v. The Sea Bird, 3 Fed. 575.]

4. Liens upon a ship are necessities of her existence and usefulness. They are to her what credit is to a merchant.

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[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 10 Int. Rev. Rec. 179, contains only a partial report.]

5. A proceeding against a ship, in rem, is, in some sense, her bankruptcy proceeding.

In admiralty.

B. F. Tracy, U. S. Dist. Atty.
Goodrich & Wheeler, for claimants.

BENEDICT, District Judge. This is a proceeding in rem instituted in behalf of the United States against the steamer "Missouri," to recover the sum of $2,998.00, for which sum it is claimed that this steamer is holden to the United States under the laws thereof.

The averments of the libel are, that, at a certain specified time, certain goods, wares and merchandise, which are particularly described, were imported and brought into the United States from a foreign port in this vessel, which were not included in her manifest, contrary to the act of congress passed March 2, 1799, and which belonged to or were consigned to the master, mate, officers and crew of said vessel; that the value of said merchandise was $2,998, and, by reason of the premises, and by force of the statute in such case made and provided, the said vessel, her tackle, apparel and furniture, became liable to the United States for the payment of the sum of $2,998, as a penalty. Wherefore it was prayed that process in rem issue against said vessel, her tackle, apparel and furniture, to enforce the payment of said penalty, and that the vessel might be arrested, and the said penalty pronounced for by the court, and the vessel condemned and sold to pay the same. Under this libel the usual process in rem, according to the course of the admiralty, was issued against the vessel, by virtue of which she was duly seized in waters within the jurisdiction of this court, whereupon the claimants duly appeared and filed their claim, and at the same time excepted to the libel—which exceptions are now to be disposed of.

The question raised as to the jurisdiction is first to be considered. A statement of the provisions of law under which this libel is filed, is necessary to show the precise questions which the case presents.

The act of March 2, 1799, § 24 (1 Stat. 646), which is referred to in the libel, provides as follows: "If any goods, wares and merchandise shall be imported or brought into the United States in any ship or vessel whatever belonging in the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from any foreign port or place, without having a manifest or manifests on board, agreeably to the directions in the foregoing section, or which shall not be included or described therein or shall not agree therewith: in every such case the master or other person having the charge or command of such ship or vessel shall forfeit and pay a sum of money equal to the value of such goods not included in such manifest or manifests."

Subsequently it was by statute enacted (see Act July 18, 1866, § 8, 14 Stat. 180): "That in any case where a vessel, or owner, or master, or manager of a vessel shall be subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily, by libel, to recover such penalty, in any district court of the United States having jurisdiction of the offence."

Under these two provisions of law it is here contended, on the part of the government, that, by reason of the facts set forth in the libel, a lien has been created upon this steamer for the sum of $2,998, which lien may be enforced by ordinary proceedings in rem upon the instance side of the court, and that such proceedings may be taken in any district where the vessel may be found, without previous seizure thereof—all which propositions the claimants deny.

The act of July 18, 1866, under which this libel is filed, is an instance of incorporating into the revenue laws that marked feature of the maritime law which treats a ship as a person, and makes her personally responsible for the acts of those who own or control her. Such legislation is but the offspring of that necessity, out of which sprang the rule of the maritime law. It was long ago found necessary, in order to regulate the business and conduct of ships, which wander everywhere and are the efficient agents both for good and evil of persons often entirely unknown or impossible to be found, as between man and man, to charge the ship—which is always known and can always be found—not only with the contracts but the torts of her master and her owners.

This same necessity has been felt in respect to the dealings of the ship master and ship owner with the government, and accordingly the act of 1866, in order to secure obedience to the revenue laws, causes the unlawful acts of the ship master and ship owner to charge the ship herself with the penalties prescribed for the violation of those laws.

The legal effect of this statute, therefore, taken in connection with the act of March 2, 1799, is to cause the unlawful transportation of cargo by the master, contrary to the act of March 2, 1799, to charge the ship with the penalty there prescribed, in the same manner as, according to the maritime law, a violation of the sailing rules by the master, which causes a collision, charges the ship with the damages ensuing.

In construing such a statute, milder, as it is, than many statutes, it should be borne in mind, that it is a revenue law, and, like all revenue laws, to be so construed as effectually to accomplish the intention of the legislature, and not, necessarily, with great strictness in favor of the defendant. Taylor v. U. S., 3 How. [44 U. S.] 210.

Let it be noticed, then, that the act does

not declare a forfeiture, but simply creates a charge upon the ship, and that the case made by the libel is not one of seizure, but of lien.

Property forfeited to the government may be seized, but I am not aware that a seizure is ever permitted, except when the title to the property has changed, by operation of law. A seizure is an assertion of title in the government, and the subsequent proceedings in court are proceedings to try the title so asserted. When the object of such a seizure is a ship, the subsequent proceeding is, in substance, a petitory suit, and within the admiralty and maritime jurisdiction of the United States. The act, therefore, would not support a seizure, for it does not order a forfeiture.

But, it is said, this cannot be so, because the act expressly provides for a seizure, when it declares that the ship "may be seized, and proceeded against summarily, by libel." The word "seized," as here used, cannot, however, be considered as referring to a revenue seizure, but to that seizure by the marshal, under the process of the court, which forms part of every proceeding in rem, in the admiralty. So construed, the provision for a seizure and summary hearing, upon a libel, is simply a statutory averment of the jurisdiction of the district courts, to enforce the lien, which the act creates, according to the course of the admiralty. This construction of the act is, certainly, reasonable, while to hold that the word "seizure," as used, was intended to authorize an assertion of title to property not forfeited, but simply subject to a lien, perhaps insignificant in amount, would be to give to the statute a strange and harsh effect. My opinion, therefore, is, the objection to the libel, that it does not aver a seizure within the district, must fail. No such averment is necessary, because no prior seizure could be legally made, in a case like this.

The case being, then, simply a proceeding to enforce a lien, the next question is, whether it is a civil case of admiralty and maritime jurisdiction. It might be deemed a sufficient answer to this question, to say, that the act, when it declares that the proceeding against the ship shall be by libel, clearly intended to declare the cases under it to be cases of admiralty jurisdiction. But if this be not so, or if a doubt be entertained as to the competency of the legislature to require a proceeding according to the course of the admiralty, in a case not within the constitutional provision, I hold the present case to be within the admiralty and maritime jurisdiction conferred by the constitution, and for two reasons.

One reason—to my own mind entirely satisfactory—is, that it is a proceeding to enforce a lien upon a ship. A ship is never free from liens. From her cradle on the stocks, to her grave in the sand, she is always, to a greater or less degree, encumbered by those charges which attach to her, under the rules of the maritime law. These liens are necessities of her existence and usefulness as a ship. They are to the ship what credit is to the merchant. Without them, she must lie by the wall; by means of them, she plows the sea. A proceeding to enforce any lien upon a ship, by her sale—which is the only method of enforcing a lien—must, if injustice is to be avoided, call in question all the liens upon her, and must, accordingly, involve an adjudication upon liens created by the maritime law, and exclusively maritime in their nature. It would seem, therefore, that it might well be held, for this reason, if for no other, that all such proceedings should be taken in that court to which the determination of maritime questions more especially belongs.

And all such proceedings should be held to be within the jurisdiction of the admiralty, for the further reason that the proceeding in rem of the admiralty is the only proceeding, known to the law, which is competent to determine the rights which are liable to be involved by any attempt to enforce a lien upon a ship.

An illustration, such as might be presented any day, will serve to show the correctness of this proposition. Suppose, then, the case of a lien upon a ship, to the extent of her value, under this act of 1866, and that the ship proves to have been heavily bottomried abroad, and, on the voyage home, to have sustained a collision, by which a ship, equal to her in value, has been sunk. Of course, upon arrival, she owes a considerable sum to her crew, and her cargo turns out damaged by the disaster. If, in such a case, the lien of the government is to be enforced by a suit at law, who is to be the defendant? Do you say, the owners? They have no interest to defend, until they have successfully disputed both the bottomry and the collision demands. If you say, the bond-holder, his interest depends upon the validity of his bond, and the invalidity of the collision demand; and that, in turn, can only be recognized after it appears that the cause of the collision was faulty navigation of the vessel proceeded against; and what, in such a suit, is to become of the sailors, and of the demands of the numerous freighters?

To such a state of facts—and I have supposed no unreasonable case—a suit at law is inadequate. In all such cases, the proceeding in rem of the admiralty, to which all the world are parties—a proceeding which is, in some sense, the ship's bankrupt proceeding, whereby she is discharged of all her debts, and her value distributed among her creditors—a proceeding, of which the supreme court, in the case of The Moses Taylor, 4 Wall. [71 U. S.] 427, say: "The distinguishing and characteristic feature of a proceeding in admiralty is, that the vessel or thing proceeded against is itself seized, and impleaded defendant, and judged, and sentenced accordingly," —such a proceeding, I say, is a necessity, if injustice is to be avoided. By means of that most sensible and useful of legal proceedings,

the conflicting demands of the government, of the bondholder, of the owner, of the crew and of the freighters in the case supposed, are all easily adjudicated and disposed of at once—perhaps even the ship meanwhile earning a sum equal to them all, to the advantage of her owners, and the benefit of mankind.

My own opinion, therefore, is, that a sufficient reason for sustaining the jurisdiction of the admiralty in a case like this is to be found in the nature of the thing to be proceeded against—namely, a ship.

But a second reason can be given, and that is, that the subject-matter, which is the foundation of the charge upon the ship, is clearly maritime in its character, and therefore within the admiralty and maritime jurisdiction of the United States. The lien which is sought to be enforced arises, under the statute, out of an alleged unlawful importation of cargo by this ship. This is as clearly a "water transaction"—to use the words of Chief Justice Marshall—as the exportation of cargo, and in the case of The Vengeance, 3 Dall. [3 U. S.] 297, the jurisdiction was sustained upon the sole ground that the exportation of cargo in a ship was a water transaction. Such matters have indeed long been conceded to be within the lawful jurisdiction of the admiralty. Godol. 43.

If, then, the subject-matter out of which the lien arises be maritime, the lien, although created by statute, may be enforced in the admiralty. The St. Lawrence, 1 Black [66 U. S.] 522.

Because of the subject-matter, therefore, I hold the present proceeding to be a case within the admiralty and maritime jurisdiction of the United States.

Nor do I see any difficulties, in the way of enforcing the act of July, 1866, in accordance with these views, such as seem to have occurred to the minds of some, in considering the effect of similar provisions in the passenger laws. The provision of the act which requires the proceeding to be by libel in the admiralty, would doubtless be held to import that the lien is to be treated according to the principles and rules of the admiralty, which are ample to prevent injustice and also to protect commerce.

Again, it is objected to this libel that it fails to show jurisdiction in this court, inasmuch as the libel does not show that jurisdiction of a criminal prosecution for the illegal importation of the cargo in question is in the district court of this district, while the act of 1866 declares that the proceedings against the vessel shall be "in the district court having jurisdiction of the offence."

If it were necessary, controlling reasons could be assigned against holding the word offence, as here used, to refer to the criminal act of the master or owner, but I understand it to be conceded that this cargo was brought from a foreign port to the city of New York by way of Sandy Hook, and an amendment of the libel to correspond with the facts will therefore obviate the necessity of determining this point in this case. The offence, created by the 24th section of the act of March 2d, 1799, is complete when the goods are brought within the limits of a port of entry,—U. S. v. Ten Thousand Cigars [Case No. 16,450]; and all cargoes brought from sea by Sandy Hook to the port of entry of New York, first arrive at such port within the limits of the Eastern district of New York. Under any construction, this court would accordingly have jurisdiction. Furthermore, I apprehend that the provision of the act of February 25th, 1865, which confers upon this court concurrent jurisdiction with the Southern district of New York over all seizures and matters made or done in the waters of the harbor of New York, would cover the case.

There remains to consider one other objection to this libel, which is, that it contains no averment of a prior judgment against the master for the penalty now sought to be recovered against the vessel. Upon this question my opinion is, that, under the act of 1866, proceedings like the present may be taken against the vessel in the absence of any proceedings against the master or owner.

The obvious intention of the act was to enable the government to enforce the revenue laws by a prompt seizure and prosecution of the vessel, in case of a violation of them. It therefore declares that, when the master or owner incurs a penalty, the vessel may be seized and proceeded against summarily. If a forfeiture had been declared, any previous proceedings against the master would not have been suggested; and a forfeiture, to be followed by instant seizure without prior proceedings against any one, is frequently declared for the act of the master. Thus the act of March 2, 1799, forfeits the vessel, for the unloading of cargo before arrival at place of discharge, and also for the unloading without permit, or otherwise than in open day. The act of June 27, 1864, forfeits the vessel, for unloading except in presence of an inspector, and for a refusal of the person in charge to deliver the key. The act of July 18th, 1866, forfeits the vessel, for failure of the master to report at the first port all goods bought for use of the vessel in British provinces. The act of 28th March, 1826, forfeits the vessel, for neglect of the master to deliver his manifest.

In place of instant forfeiture of the whole vessel, the act of 1866 creates a lien, which is by far the milder form of punishment, and, if so construed as to render it as effective as possible, it will still be much less vigorous than many laws. It is easy, therefore, to say that the words, "holden for the payment of such penalty," used in this act, are intended to create an original liability on the part of the ship for a penalty equal to that imposed upon the master or owner, and that the words, "seized and proceeded against summarily," preclude the idea of

delay, and import that the proceeding may follow the unlawful act, and rest upon that alone—thus adopting the rule of the maritime law, that a ship may be treated as a person, and "judged and sentenced accordingly." The Moses Taylor, 4 Wall. [71 U. S.] 427; The Palmyra, 12 Wheat. [25 U. S.] 14.

And it will be found that great difficulties attend any other construction of the act for if it be held that the ship becomes chargeable by the unlawful act when committed, but can only be proceeded against at the termination of proceedings against the master or owner, which may be commenced at any time within five years, a most dangerous class of secret liens upon ships will be created, to the great detriment of commerce, with but little, if any, advantage to the government; while if it be held that, under the act, the vessel first became chargeable upon the rendition of a judgment against the master or owner, the ship would become first chargeable long after the transaction, when she might meanwhile have been sold to innocent parties, or encumbered by liens to her full value, or removed to foreign parts.

A further objection to the latter construction seems to me also entitled to great weight, namely, that, under it, the owners and other parties interested in the ship would be debarred from the right to contest the question of liability for the penalty. A judgment against the ship master, in an action where he would be the only defendant, and of which no others would have notice, would be conclusive of the liability of the ship. I cannot believe that such was the intention of the legislature.

On the other hand, it may be said, that, under the construction here sought to be given to the act, the proceeding against the ship would often be a proceeding to collect an uncertain sum, inasmuch as many of the penalties imposed for violations of the revenue laws are, within certain limits, left to the discretion of the court which tries the offender.

To which the sufficient answer is, that the same discretion can as well be exercised in the proceeding in rem against the ship, as in the proceeding in personam against the master. Proceedings in rem, for sums uncertain and dependent on the judicial discretion, are common proceedings in the admiralty, as, for instance, actions for salvage, personal injuries, and the like.

The considerations, which I have thus endeavored to present, seem to me to lead forcibly to the conclusion to which I have arrived, that, under the act of 1866, taken in connection with the 24th section of the act of March 2, 1799, the facts alleged to exist in the present case are sufficient to create a lien upon this steamer for the amount of the penalty claimed, which may be enforced by a proceeding in admiralty in this court, without proof of a prior seizure of the vessel or of a prior judgment against the master for such penalty.

Let an order be entered over-ruling the exceptions, and requiring the claimants to answer within one week, unless further time be granted.

[At a subsequent hearing, a decree was entered against the vessel for a penalty of $2,342, and costs. Case No. 9,653. This was affirmed upon appeal to the circuit court. Id. 15,785.]

Case No. 9,653.

The MISSOURI.

[4 Ben. 410; [1] 12 Int. Rev. Rec. 209.]

District Court, E. D. New York. Dec., 1870. [2]

PENALTY—GOODS NOT ON THE MANIFEST—IMPORTATION—EVIDENCE—MANIFEST—SEIZURE REPORTS.

1. On the arrival of a steamer from Havana at the port of New York, several lots of cigars, no one of which lots consisted of as many as three thousand, or had any shipping marks on them, were found in different parts of the vessel. No permits were obtained by any one for the landing of any of these lots, and they were not on the manifest, and were not returned by the officers as landed with the cargo: *Held*, that, as no entry of cigars of less than three thousand in a single package can be made (14 Stat. 328), and as all goods on the manifest must be designated by a shipping mark (1 Stat. 644), none of these goods could have been intended to be on the manifest, and all must have been intended to be landed, and the steamer was, therefore, liable for the penalty of the value of the goods, under the 8th section of the act of July 18, 1866 (14 Stat. 180).

[Cited in The Sidonian, 38 Fed. 442.]

2. Goods are imported and brought into the United States, when brought within the limits of a port of entry with the intention of unlading them there.

3. A paper, purporting on its face to be the manifest of the steamer, was proved to have been produced from the usual place of deposit in the custom house for ships' manifests, and it was proved that no other manifest for the voyage was on file, but no other proof of the genuineness of the paper was offered: *Held*, that the paper was admissible in evidence.

4. It was proved that certain other lots of cigars were brought to the store-room of the seizure department of the custom house, as seized goods, and the reports of the seizure, required by the regulation, and produced from the files of the department, stated that these lots had been found on the steamer. No such lots of cigars appeared on the manifest: *Held*, that this evidence was not sufficient evidence of the importation of the goods in the vessel to shift the burden of proof to the claimants.

In admiralty.

B. F. Tracy, U. S. Dist. Atty.

Goodrich & Wheeler, for claimant.

BENEDICT, District Judge. This is a proceeding in rem, wherein, under the provisions of the act of July 18, 1866, § 8 (14 Stat. 180), it is sought to charge the steamship Missouri with the amount of certain

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

[2] [Affirmed in Case No. 15,785.]

penalties, to which it is claimed the master of that vessel has become subject, by reason of the importing or bringing into the United States from a foreign port, in that vessel, certain quantities of cigars, which were not included in or described in the manifest, as required by the act of March 2, 1799, § 24 (1 Stat. 646). The main questions of law, upon which the right to maintain this action depends, have been determined, so far as this court is concerned, in disposing of the exceptions which were taken to the libel [Case No. 9,652], and will not be again referred to. The only question now presented is, as to the sufficiency of the evidence introduced by the government to show that the cigars described in the libel were imported into the United States from a foreign port, in this steamer, without being included in the ship's manifest.

The proofs show, that the Missouri arrived in the port of New York, on the 1st of October, 1868, from Havana, and proceeded, by way of the Narrows, to pier 4, North river, where she lay until October 8th. She came directly from Havana to this port, and such goods as were brought in her, were imported and brought into the United States when brought within the limits of a port of entry, with the intention of unlading them there, U. S. v. 10,000 Cigars [Case No. 16,450], and cases cited.

After the arrival of the steamer at the pier, as the evidence shows, eleven different lots of cigars were found stowed away in different parts of the vessel, some in the coal bunker, some in a closet, some in the forecastle, some concealed among the cargo amidships, and some in the lower hold, no one of which lots contained as many as 3,000, or had any shipping marks upon them. No permits were obtained by any one for the landing of any one of these lots, and none of them were returned by the officer as landed with the cargo. According to the act of July 28, 1866, § 1 (14 Stat. 328), no entry of cigars of less than 3,000 in a single package can be made, and according to the act of March 2, 1799, § 23 (1 Stat. 644), all goods upon the manifest must be designated by a shipping mark. None of these goods could, therefore, have been intended to be upon the manifest, and all must have been intended to be landed.

The facts above stated are proved by the witnesses who seized the cigars, and by the production of the officer's return, in which none of these lots appear, and, in addition, the manifest of the vessel is produced from the files of the custom house, in which none of these cigars were described or alluded to. Objection is made to the introduction of the manifest, upon the ground that its genuineness is not proved. But the document produced is proved to have been produced from the usual place of deposit, in the custom house, for ship-manifests. It purports, on its face, to be this steamer's manifest for the voyage in question, and it is proved that no other manifest for the voyage is on file. The law required the vessel to have a manifest, and that the master should deliver it to the collector of customs, and, being produced from the custody of the collector, under such circumstances, the place of its deposit is sufficient to warrant its introduction in evidence. U. S. v. Johns, 4 Dall. [4 U. S.] 415; Catlett v. Pacific Ins. Co. [Case No. 2,517]; Buckley v. U. S., 4 How. [45 U. S.] 251.

There are three other lots of cigars mentioned in the information, and known in this proceeding as lots 12, 13 and 14, in regard to which the only evidence tending to show that they were imported in this vessel, is the fact that, at the time this steamer was here, they were brought to the store-room of the seizure department of the custom house, as seized goods, and the regular reports of their seizure, required by the regulation, produced from the files, state that the cigars named were found on this steamer, in places described, immediately after her arrival on this voyage.

This evidence, coupled with the absence of any such packages from the manifest, and the officers' return of the cargo, it has been insisted, is sufficient to shift the burden of proof to the claimants. But this cannot be so. The facts proved furnish no evidence which will warrant the inference that the three lots of goods were brought into this port in this steamer. The value of the various lots, as to which I have found the evidence to be sufficient, is $2,342, and the statute fixes the penalty at the value of the property. For that amount the steamer must be, therefore, held liable, and a decree against her for that amount, with costs, will be entered.

[This cause was taken into the circuit court on an appeal, where the discussion on the act of July 18, 1866 (14 Stat. 180), and the act of March 2, 1799 (1 Stat. 646), resulted in the concurrence of the presiding judge with the opinion delivered in the district court. Case No. 15,785.]

Case No. 9,654.

The MISSOURI.

[1 Spr. 260; 18 Law Rep. 38.] [1]

District Court, D. Massachusetts. Dec., 1854.

SALVAGE — FRAUDULENT CONSPIRACY — WHO AFFECTED BY THE FRAUD — CONCEALED PROPERTY.

A vessel had been saved from going to pieces on the rocks, with the aid of the master and crew of another vessel, and was subsequently stranded. While the property on board was in the process of transportation to the other vessel, with their aid, and was still in danger, the masters of the two vessels engaged in a fraudulent conspiracy to appropriate to their own use a portion of the property saved. Part was afterwards

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission. 18 Law Rep. 38, contains only a partial report.]

remitted to the owners. The master of the salving vessel brought a part to a home port, and concealed it. It was subsequently discovered by other persons, and seized on a libel, in behalf of the owners and crew of the salving vessel, for salvage: *Held*, that the fraudulent conduct of the master did not defeat their claim; that they were entitled to salvage, both on the property concealed, and on that remitted, and had a lien on the former for the salvage due on both.

[Cited in U. S. v. Stone, 8 Fed. 250.]

This was a libel [against A. T. Leach and others] in behalf of the owners and crew of the ship Sterling, of Salem, Henry C. Pitman, master, for salvage on a large amount of specie, and some other property, taken, and alleged to have been saved, from the barque Missouri, of New York, Samuel N. Dixey, master, when wrecked on the coast of Sumatra. The master and first and second mates of the Sterling were not parties to the libel. In October, 1850, the Missouri and Sterling were lying together in Rigas Bay, waiting to take in cargoes of pepper; each with a large amount, (the Missouri about $24,000,) of specie on board. In the afternoon of October 31st, the Missouri got under way to leave the bay, but was taken aback, at the entrance of the harbor, by a head wind, and let go her anchor. The next morning she was riding with one anchor, very near a high rocky bluff, and as the libellants' witnesses testified, with a heavy sea running, and a gale blowing on shore. Captain Pitman came on board about 10 a. m., and remained a half hour, or an hour, and then left, after making an arrangement that Dixey should hoist a signal, in case he wished to get under way. In the afternoon, about 4 o'clock, the Missouri still riding with one anchor, a signal was hoisted, and Pitman, with four men, came to the Missouri. Just before he reached her, the cable parted; another anchor was let go, but the cable of that also parted. Pitman and his men assisted in making sail on the vessel. She weathered the point, and came into a bight between two rocky bluffs, with a sandy beach about half a mile long, the wind and sea setting in upon the beach. They attempted to tack, but, owing to the chains under foot, she missed stays. The kedge was thrown out, but came home, and she went stern on, upon the beach. A large amount of specie was removed to the Sterling that night; and, either the night of the wreck, as the claimants contended, or the next morning, as the libellants admitted, while the alleged salvors, or some of them, were still engaged in saving articles from the wreck, Pitman and Dixey agreed to appropriate about two-thirds of the specie to their own use, and to restore about one-third to the owners, reporting to them that the Malays had stolen the remainder; part of which the libellants contended the Malays did actually take. No attempt was made to get the Missouri off, at any time. The Sterling proceeded to Analaboo, where Dixey procured another vessel, which he manned with his crew, and sailed for Penang, taking with him part of the specie, and part he left on board the Sterling, in charge of Captain Pitman. After their separation, Dixey remitted to his owners, in New York, by bills of exchange, the sum of $7,355.18. Pitman completed his cargo, and arrived at Holmes' Hole in the winter of 1851. When there, he went on shore and secretly buried in the sand a large amount of specie. Subsequently, Pitman and Dixey were indicted for stealing and plundering from the Missouri, on the coast of Sumatra. Dixey pleaded guilty, and Pitman was tried and convicted, at the March term of this court, A. D. 1852. Before this, information having been obtained in regard to the burial of the money, a reward was offered, and about $7,500 was discovered near Holmes' Hole, brought to Boston, and placed in the custody of the court. Against this specie, the present libel was filed. On the trial of the present case, a great deal of evidence was introduced, bearing upon the conduct of Pitman and Dixey, in regard to the management of the vessel and the disposition of the specie, the danger incurred from the Malays, the probability that any of the specie fell into their hands, the burial of the money at Holmes' Hole, the expense and trouble incurred in recovering it, and other matters. This evidence it is not necessary to give in detail. The conclusions of fact, reached by the court, appear in the opinion.

R. H. Dana, Jr., for libellants. This argument is not reported, as the points and authorities will be found sufficiently referred to in the opinion of the court.

Rufus Choate and Geo. S. Hale, for claimants, suggested that there were circumstances in the case, which gave rise to the suspicion that the Missouri might have been purposely wrecked, and as to this, referred to the authorities cited to the other points. No salvage is recoverable, because the loss was occasioned by the negligence of Pitman, agent of the owners of the Sterling. The Duke of Manchester, 4 Notes of Cas. 575; Shersby v. Hibbert, 5 Notes of Cas. 470; The Neptune, 1 W. Rob. Adm. 297. The negligence which will defeat a claim for salvage, is not necessarily gross negligence, but ordinary negligence, for a person of the experience and occupation of the alleged salvors. The Cape Packet, 3 W. Rob. Adm. 125; The Dygden, 1 Notes of Cas. 115. No claim for salvage can be entertained, because the specie was taken from the Missouri animo furandi. No title to property, or right to compensation, can be acquired for any one by a violation of the law. "Ex dolo malo non oritur actio. Jus ex injuria non oritur. Non debeo melioris conditionis esse quam auctor meus, a quo jus in me transit." Broom, Leg. Max. 571. An attachment, effected by illegally breaking the defendant's door is invalid. Ilsley v. Nichols, 12 Pick. 270. A common carrier has no lien on goods unlawfully put

into his hands and transported. Robinson v. Baker, 5 Cush. 144.

By the general principles of salvage, the act on which the claim is founded must be lawful. Talbot v. Seeman, 1 Cranch [5 U. S.] 3, 28; The Alerta, 9 Cranch [13 U. S.] 359, 367; The Bee [Case No. 1,219]; The Florence, 20 Eng. Law & Eq. 607, 616; The Barefoot, 1 Eng. Law & Eq. 661; Clarke v. The Dodge Healy [Case No. 2,849]; Rowe v. The Brig [Id. 12,093]; The Adventure, 8 Cranch [12 U. S.] 221, 227; The Fleece, 3 W. Rob. Adm. 279; The Blenden-Hall, 1 Dod. 414. And see Laws Oleron, art. 25, in 1 Pet. Adm. Append. 39. The right to salvage is founded on enlarged principles of public policy, as a reward to noble conduct. It is designed to encourage honesty, and discourage fraud. The Boston [Case No. 1,673]; Talbot v. Seeman, supra; The Emulous [Id. 4,480]; The Henry Ewbank [Id. 6,376]. But where the act, without which there is no salvage, is in itself a gross crime, these principles forbid a reward.

It is everywhere admitted, that embezzlement, or gross misconduct, forfeits a vested claim for salvage, as against the guilty party. What, then, is the ground of the owners' claim to salvage, independent of the guilty master? Admitting that an embezzlement by him, subsequent to the vesting of a salvage claim by meritorious acts, might not affect their right, still, when the act of crime is inseparable from the salvage service, and the disposition made of the property saved is designed to carry out a felonious purpose, the nature of the act defeats any claim for salvage; or, to speak more correctly, no claim for salvage can arise. Here the libel alleges, that this salvage service was the removal to the Sterling, and previous acts of the salvors. But this removal was larceny; it was a felonious trespass. What, then, is the foundation of the owners' claim? The early English authorities do not seem inclined to favor it. It has been said, "The master and crew are, in strict language, the only salvors;" that "in former times, before the introduction of steam vessels," the claim of owners was only "incidentally" entertained. Cases where the ship herself rendered considerable service, were considered as a sort of exception. Dr. Lushington says, the owners of a steam vessel "may come in and make a claim, as owners of the vessel, incidental to the claim of the master and crew." The Beulah, 2 Notes of Cas. 61; The San Bernardo, 1 C. Rob. Adm. 178; The Vine, 2 Hagg. Adm. 1; The Salacia, Id. 264; The Charlotte, 3 W. Rob. Adm. 72, 6 Notes of Cas. 281; The Two Friends, 2 W. Rob. Adm. 349. Thus, we contend, their claim is recognized, as derivative and incidental, arising from, and depending on, the master's act. The crew may stand on a different footing from the owners. They labor with their hands; they incur personal hazard, and their claim may be considered as original and independent, and, therefore, be not affected by a fraud, like that here committed, while that of the owners is defeated by it.

Here it has been held by Story, J., that the master has an implied authority from the owners to save property. The Nathaniel Hooper [Case No. 10,032]. And the same judge says: "A salvage crew cannot, by any shuffling, or management, deprive the owners of their right to share in the salvage. They must take or lose in common with the latter." The Henry Ewbank, supra, 419. See The Robert, 3 C. Rob. Adm. 202. And in The Britain, 1 W. Rob. Adm. 40, it is held, that the master may bind his owners, by an agreement to do salvage service, for a specified sum. Salvage service, then, is in the course of his employment, and the owner is responsible for acts done in the course of such employment, though wilful and malicious, criminal and not authorized. Dias v. The Revenge [Case No. 3,877]; Ralston v. The State Rights [Id. 11,540]; Die Fire Damer, 5 C. Rob. Adm. 358. The act, whatever it is, is the foundation of their claim. "Qui sentit commodum sentire debet et onus." Adopting the act, they adopt its consequences, and such ratification is equivalent to a previous authority. Broom Leg. Max. 553, 557, 679. Would the owners have a claim for salvage if Pitman and Dixey had wilfully cast the Missouri away, with the design, which it is admitted they formed and attempted to carry out afterwards, of appropriating a part not designated to themselves? The specie would be in as much danger, and the owners as innocent, as now. But it would be an outrage on every principle of justice and sound policy, to permit a felon to recommend himself to his employers, and afford a motive to them to protect him against his crime; by securing a large reward for them, by that crime, and to enforce, by the aid of a court of justice, compensation for an act which is part of a scheme in defiance of all justice. Gross negligence of salvors, pending the salvage, forfeits the owners' claim for previous meritorious services. The Duke of Manchester, supra. Why not larceny of the property saved? In the cases of The Florence, and The Barefoot, the owners' claim was held to be forfeited, or prevented, by the alleged acts of the master and crew, if proved.

The Rising Sun [Case No. 11,858], cited by libellants, was purely a case of subsequent embezzlement, i. e., subsequent to meritorious acts, by which, it may perhaps be said, the claim for salvage had vested. It does not appear, as a matter of fact, in The Boston [Id. 1,673], or Mason v. The Blaireau, cited by the libellants, that the embezzlement was committed before the property saved reached a place of safety. In The Blaireau, 2 Cranch [6 U. S.] 240, it was held immaterial, whether it was committed before or after reaching the port of Baltimore, as to the question then before the court; but Judge Marshall said: "The fact must have occurred before he parted with the possession acquired by the act, on the merit of which his claim for salvage

is founded." There can be no claim for salvage on the money remitted. The felonious taking applied to the whole sum, and infected the whole transaction. The remitting was part of the fraud, designed to assist in concealing it; furthermore, the remedy for salvage on that is only by a libel in personam against the owners, to whom it has been delivered. Lewis v. The Elizabeth & Jane [Case No. 8,321]; Brevoor v. The Fair American [Id. 1,847]; The Nicolai Heinrich, 22 Eng. Law & Eq. 617. And for the salvage, if any, due on this, there is no lien on the rest. When this specie was taken out by the claimants, they entered into a stipulation to pay the sum decreed by the court, as salvage. On what? Only on the specie for which they stipulated. If salvage on $15,000 can be decreed here, when $7,500 have been seized on the libel, the stipulators might be held to pay more than the value of the property libelled, which can never be intended. And see The Ooster Eems, cited in The Two Friends, 1 C. Rob. Adm. 271, 284, note; The Progress, 1 Edw. Adm. 210; The North Carolina, 15 Pet. [40 U. S.] 40; Cutler v. Rae, 7 How. [48 U. S.] 729. There is no right to salvage on the specie found at Holmes' Hole. It is well settled, that salvage is only due on property actually saved, however meritorious the services of the salvors. The Dodge Healey, supra; The Ranger, 3 Notes of Cas. 590. And when the salvors, having performed salvage services, abandon the property, they forfeit their claim. The India, 1 W. Rob. Adm. 406. This specie was abandoned,—not restored to the owners, but abstracted from them, and concealed. The true salvors are those who dug it up on the island. It was recovered solely by their exertions, and those of the claimants, without any assistance from any one of the libellants, and if the whole matter had been left to them, it would never have been recovered. If any salvage is given here, it must be small. There was no deviation, no risk, no loss of time, little labor; and a large deduction must be made for the expenses incurred by the claimants in recovering the specie, and for the articles not restored.

SPRAGUE, District Judge, delivered his opinion, in substance, as follows:

There is no doubt that the Missouri and cargo were in peril, at the time referred to, and in a condition to be the subjects of salvage service; and that the libellants rendered a salvage service, in taking from the vessel a large quantity of specie, a great part of which has come to the possession of the claimants. The safety of this specie is owing to voluntary exertions of the seamen of the Sterling, and to the use of the Sterling herself. But the claimants insist, that there are facts here which defeat this claim; that there was a fraudulent conspiracy by the masters of the two vessels to embezzle part, at least, of the money. It is not denied that there was a conspiracy and actual embezzlement; but it is contended by the libellants, that those only who participated in the fraud should suffer for it, and that the innocent should not bear the penalty. The research and learning of the counsel have produced no case, where the courts have gone further than to inflict that punishment on the guilty; none where they have gone so far as to decide that others, not personally implicated in the offence, shall forfeit their right. Two cases are relied upon: The Florence, and The Barefoot. In the former, there was no misconduct, and no forfeiture. In the latter, the vessel having been sunk on the coast, several small vessels from the shore interfered, and obstructed the owners of the cargo, in their endeavors to save it. The owners of these vessels did not assert their innocence, and it was not even suggested that the wrongful interference was without their assent.

But it is insisted that the circumstances of this case go beyond any which have as yet been reported, on the ground that the act here performed, on which the libellants' claim was founded, was fraudulent in its inception.

It is urged that it is not a case of subsequent embezzlement, but of a fraudulent conspiracy in the beginning, that the property should be originally taken for a fraudulent purpose; that, as Captain Pitman had the control of the Sterling and her crew, and intended by his acts to commit a fraud, the owners and crew, as well as himself, can claim only through a fraud, which the law does not allow. And this, certainly, deserves consideration. I think it clear, and, indeed, it is not distinctly contended otherwise, that there was no fraud, or misconduct, previous to the stranding. The proof is, that the skill and labor of Pitman and his men assisted materially in saving the vessel from total destruction. There is no ground to presume that any fraud was conceived, until after the vessel was wrecked upon the beach. But the salvage service had been previously commenced, by saving the vessel and cargo from total loss upon the rocks. With respect to the time of the conspiracy, the evidence shows that after the stranding of the Missouri, and before the removal of the specie, while it was in preparation for removal, the appropriation of it to their own use was suggested by Dixey to Pitman; and the latter testifies that the only objection he made, was the danger of discovery. I am satisfied, that, although at that time there was no settled plan, as to the division of the money, yet that the proposition was so far entertained that Captain Pitman acceded to measures designed to conceal the real quantity of specie, and to a misrepresentation of the quantity, which would be a means of deceiving others. I cannot but consider their whole conduct as intended, at the time, to place themselves in a position to take advantage of any opportunity to appropriate the specie; and that Pitman was willing to

wait and see if it could be done, and, if so, to join in the crime. I think his intention was to keep the course of proceeding in his own power; and that must affect his conduct, so as to give it the character of a fraudulent transaction on his part, from the time of the first suggestion by Dixey.

Therefore, so far as the facts are concerned, I find that before the specie was fully transferred, and while it was in process of transportation, there was a fraudulent conspiracy designed to be carried into effect, if means could be found for concealment, and that the parties did subsequently carry it into effect.

I shall now consider the two different funds to which this claim relates.

First, as to the sum of $9,000, which it is said the parties intended to restore to the owners. That was taken from the Sterling by Dixey, and the greater part of it transmitted to them. That was originally saved, avowedly, for the owners, and came to their use; but it is insisted, that no salvage is due on that because it was contaminated by the general fraudulent intent. But shall that defeat the claim of the crew and owner? Why should the crew be deprived of their reward? It is said, because the master entered into a fraudulent conspiracy. But it is not pretended, that they participated in it. What is their condition? The vessel was stranded. They went on board, rescued the specie, transported it to the Sterling, and delivered it to the agent of the owners. This was the service of the crew, aided by the vessel.

A claim for salvage rests on two grounds,—individual justice and public policy. Why should the crew be deprived of it, on either ground? Their services were faithfully rendered, and on the ground of private justice, their claim is the same as in any other case. As to public policy, that policy generally favors the preservation of property. It is for the interest of mankind that the fruits of human labor should be preserved. It is the policy, too, of every country, that its own property should be preserved. Its preservation is beneficial, into whatever hands it falls; but the original owner must not be divested of more than that policy requires. The books state, in detail, various elements to be taken into consideration, in determining the amount to be paid to those who have rendered a salvage service, but I have nowhere seen a satisfactory general principle laid down. I think the true principle of the salvage reward is, to give a sufficient inducement to render the service promptly, perseveringly, and honestly. And in some cases, as on a dangerous coast, to offer sufficient inducements to competent persons to keep themselves in a state of preparation to afford relief, and to be watchful in the discovery of objects requiring it. This accords both with public policy and the true interest of the owners.

It must be remembered, that salvage is a contingent compensation. And the law should afford an inducement to exertion, where it is as yet unknown whether any reward will be secured. Without this, there will be nothing but motives of humanity operating upon the mind.

Sometimes great exertions are made, and great hazard and loss incurred, without success, and public policy requires that such a promise of reward should be held out, in case of success, that all those in a situation and competent to render relief, shall be eager to do so, from the mere hope of gain; for example, that the sailor, who alone sees from the mast-head a vessel in distress, or the master, who descries her at a distance, with a telescope, shall not be tempted to pass her by, but shall have a prospect of pecuniary advantage, which may prompt his efforts.

Why, then, deprive the seamen of their reward, because another man has acted with an improper purpose? If, indeed, his fraud is so carried out, that the property is not restored, they lose that reward; but that is because their efforts are not ultimately successful.

There is, however, a technical argument, that they claim through the master, and under him. But salvage service is voluntary. The master has no authority to compel seamen to engage in it. I do not mean to say that they may not be bound to act under his orders, if they engage in the service; but the service itself is voluntary.

Further, the salvage service did not begin with the removal of specie. It began when they went on board, and assisted in making sail on the Missouri, to weather the point. There was a salvage service in thus relieving the vessel and cargo from the imminent peril of going on the rocks,—continued by saving the cargo and part of the appurtenances of the vessel.

This was, undoubtedly, in aid of the Missouri's crew, but that is unimportant. Dixey continued to be master, so long as they remained on board of the Missouri. The only thing that can be said to vary this from other cases, is, that possession continued in Dixey, until they got on board the Sterling. Then the possession was in Pitman and his crew; because Pitman was in command, and Dixey was under his control. If Dixey was assigned, as it is argued, a particular part of the cabin, and the specie placed in his charge, still I do not think that changes the legal or equitable aspect of the case.

The salvage service was honestly performed by the crew, and then the property was intrusted by them, as perhaps they were obliged to intrust it, since they could not control it on board of the Sterling, to the custody of Pitman.

As to the right of the owners of the Sterling, it is argued by the claimants that, in the cases where salvage was allowed to the owner, but forfeited by the guilty party, the embezzlement took place after the property had reached a place of safety. I do not find

that question raised in the cases, and do not see why the cases cited by the libellants' counsel do not cover this point. See Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; The Boston [Case No. 1,673]; The Rising Sun [Id. 11,858]. In all these cases, the embezzlement was while the property was in the care and custody of the salvors. There is no difference in principle between embezzlement before and after the property has been brought to a place of safety, and while still in the possession and control of the salvors. But it is contended that the master is the agent of the owners, and that they claim through his fraud, which the law will not permit. But is it so? What had the owners to do with the fraud? Nothing. It was not authorized by them. The truth is, the acts of Pitman were as well a fraud on the owners of the Sterling, as on those of the Missouri, and intended to deprive them of their share of the salvage. Why should the owners of one vessel say to those of the other, your agent conspired with my agent to commit a fraud, and you shall lose by it for my benefit. But I do not rest the decision on this alone. There is no real distinction between this and the other cases.

It is said that the whole claim is through Pitman. How so? He had the power to use their property, but it does not set up, or sanction, his fraud, for them to claim a salvage reward for such use. There was an original service by the owners, as much as by the mariners. Their ship was used; the time of the crew, paid for by them, and their provisions, were used. The whole service was co-ordinate. The men could not act without the ship, nor the ship without the men. The right to salvage accrues from the use of the vessel.

In the early English decisions, the courts seem reluctant to acknowledge the rights of owners, and in some cases have magnified the claims of the master, at their expense, attributing to him the whole merit of the use of the vessel, without considering whether it was by the authority or assent of the owners, or not; but the true view is, to regard him as being permitted by the owners to use their property. If he does so, and loses their vessel, it is their loss, and he is not called upon to make it good. The owners consent to, and authorize the salvage of the property, but not that he should secrete or embezzle it. That is not his agency, and when he does that, it is without their sanction. It is a matter of public policy, to hold out to them an inducement to permit the master to use their vessel. If they should instruct him not to save property, he would be bound by their orders. And they will so instruct him, if the law does not give them, not only a full indemnity, but an additional pecuniary reward.

Now the probability of the reward is an element to be weighed, as well as the amount; but by the doctrine now contended for,' in addition to the ordinary contingencies of salvage service, they must run the risk of the master's honesty.

As to the $9,000, my opinion is, that the owners are entitled to salvage on that amount, or on so much of it as was restored.

With respect to the portion recovered, at Holmes' Hole, I have had more difficulty. That did not come to the owners' use, by the mere act of the salvors. It was concealed on board of the Sterling; was separated from the rest, with the knowledge of Pitman only; brought to Holmes' Hole, and there buried; and has come to the owners' hands by other means. And the question is, whether the right to salvage is lost. I have reflected on this, and have come to the conclusion that it is not. To sustain a claim for salvage, the property must be saved, the salvors must contribute to its safety, and the property must come to the owners' use, or within their reach. Here, the property was saved from impending peril, and has come to the use of the owners. To be sure, the salvors have not personally delivered it. The captain has embezzled it, or at least attempted to do so, and endeavored to deprive them of it. He did not succeed; and it is now in the hands of the claimants. The merit of the owners and seamen is the same, as if no fraud had been attempted by the master. Had Pitman succeeded in his fraudulent attempt, no salvage would have been due; because the property would never have reached its owners. As an illustration, suppose a ship, with treasure on board, is sunk on the other side of the globe, and a vessel is fitted out, proceeds to the spot, and with risk and labor succeeds in obtaining it, and then puts it on board of a third vessel, to be brought home, and on the passage, the master and crew of the latter vessel attempt to embezzle it, but unsuccessfully, and it finally comes to the hands of the owners; shall the original salvors be deprived of their reward? I see no principle of justice, or policy, which requires it.

I think the libellants are entitled to salvage on the $7,500. On the question, whether there is a lien on each part for the whole salvage, I have no doubt. Where the whole property belongs to the same person, there is no reason for saying to the salvors, if you permit any portion of it to go beyond the reach of process, you shall lose your lien upon the residue, for the salvage on such portion. Such a rule would be inconvenient to both parties.

It is for the interest of the owners, that no more of the property should be withheld from them than is necessary for the security of the salvor.

The circumstance that a portion of the specie was separated from the rest, and remitted to the owners by Dixey, their master, can make no difference. The lien for salvage in no degree depends on possession. It is true, that Judge Peters, in Brevoor v. The

Fair American [Case No. 1,847]; and after him, Judge Woodbury, Packard v. The Louisa [Id. 10,652],—held the contrary; but they were under a mistake. An admiralty lien is a privilege, a jus in re, perfect where there never has been possession, or where it has been lost or relinquished. To this familiar and well-established doctrine, the lien for freight is an exception, but that for salvage is not.

In determining the amount of salvage to be awarded, it is to be borne in mind, that there was no deviation, or detention, of the Sterling, which could affect her insurance, or delay her voyage; as she was at her anchorage, waiting for the pepper crop, and the services of the crew were of short duration, and attended with no particular hazard.

The amount on which salvage is to be given is $15,103.91. It appears that all but six of the crew have been settled with. I award to the owners of the Sterling $600; to each of her seamen, who was on board the Missouri when she went ashore, $88; to each of her other seamen $53. It appears that $18 was paid to each of them by Captain Dixey, at Analaboo, and receipts taken, expressed to be in full for labor and services. It is contended, that this is a bar to their recovery. Upon all the testimony, I do not think it can be so treated. But the $18 must be deducted from the salvage decreed to each man.

Decree accordingly.

MISSOURI, The (UNITED STATES v.). See Case No. 15,785.

MISSOURI, K. & T. R. CO. (UNITED STATES v.). See Case No. 15,786.

MISSOURI, K. & T. R. CO. (WILLIAMS v.). See Case No. 17,728.

MISSOURI RIVER, FT. S. & G. R. CO. (ARMSWORTHY v.). See Case No. 550.

MISSOURI RIVER, FT. S. & G. R. CO. (STROUD v.). See Case No. 13,547.

MISSOURI VAL. LIFE INS. CO. (CLIPPINGER v.). See Case No. 2,901.

MISSOURI VAL. LIFE INS. CO. (SMITH v.). See Case No. 13,083.

Case No. 9,655.

MISTON v. LORD.

[1 Blatchf. 354.] [1]

Circuit Court, S. D. New York. Oct. Term, 1848.

AFFREIGHTMENT—RETURN TO SHIPPING PORT—SALE OF CARGO—AUTHORITY OF MASTER.

1. A., by his agents, chartered a vessel for a voyage from New-York to Havre, the freight to be payable on the arrival and discharge of the cargo at Havre. The vessel sailed, but encountered a storm and sprang aleak, and put back to New-York. The cargo was discharged, and, on a survey, was found to be so much damaged by salt water, that it would not bear transportation, nor would its shipment have been safe for the vessel or crew. A.'s agents refused to interfere with it, and the master sold it at auction. In an action by A. for the nett proceeds: *Held*, that the owner of the vessel was not entitled to retain anything for freight.

2. Whether the underwriters would be liable for the freight, quere.

3. In cases of necessity happening during a voyage, the master is, by law, created the agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of a sound discretion, are binding upon all parties in interest.

[Cited in The Ann D. Richardson, Case No. 410. Distinguished in Moore v. Hill, 38 Fed. 334.]

4. The voluntary acceptance of the cargo by the shipper at an intermediate port would have the effect to charge him with a ratable portion of the freight.

5. But, where the port of distress and of acceptance of the cargo is the port of shipment, and no part of the voyage has been performed, the shipper ought not to pay freight.

6. Where the voyage is broken up, no more for the benefit of the cargo than for the benefit of the ship owner, and the shipper has derived no benefit under his contract, he ought not to pay any freight.

[Cited in The Ann D. Richardson, Case No. 410.]

7. The master having failed to deliver the cargo according to the bill of lading, and there having been no waiver of performance by the shipper at the port of distress, the owner of the vessel is not entitled to freight, notwithstanding the damaged state of the cargo justified its sale by the master at the port of distress.

[Distinguished in Leckie v. Sears, 109 Mass. 428.]

8. The agency of the master on behalf of the shipper at the port of distress, arising out of the necessities occasioned by the disaster, is limited to the sale of the cargo.

This was an action to recover a sum of money in the defendant's hands, under the following circumstances. The plaintiff shipped a cargo of flour, wheat and corn in bulk, hides, &c., from New-York to Havre, under a charter party, entered into on the 19th of December, 1846, by his agents, and the defendant as agent of the owners of the barque Dana, the freight to be payable on the arrival and discharge of the cargo at the port of delivery. The bills of lading bore date the 16th and 23rd of January, 1847. The plaintiff resided in France and the cargo was purchased and shipped by the house of Marret & Robert of New-York, his agents for that purpose. The vessel sailed on the 27th of January, and, after being out a few days, was overtaken by a violent storm, which crippled her and caused her to spring aleak, so that, notwithstanding a portion of the cargo was thrown overboard, the damage to her was so serious that the captain was obliged to put back to New-York, where he arrived on the 10th of February. It became necessary to discharge the remaining cargo for the purpose of repairing the vessel, and, on a survey, the cargo was found to be so much damaged by the salt water, that it would not

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

bear transportation, nor, in its condition, would the shipment have been safe for the vessel or crew. The shippers, Marret & Robert, refused to interfere, having no authority from the plaintiff except to purchase and ship the goods; and the master, under the circumstances, deemed it best, for the interest of all parties concerned, to sell the cargo at public auction. It was sold accordingly, the nett proceeds amounting to $15,789.12. The purchasers, at considerable labor and expense, dried portions of the wheat, so that it was afterwards sold for full price. The greater part, however, was sold as damaged and at inferior prices. The freight upon the cargo, according to the charter party, amounted to $6,344.50. The ship was repaired, and sailed with a new cargo on the 16th of March, on a voyage to Belfast, Ireland; the freight far exceeding that which would have been earned under the charter to Havre. The defendant, as agent of the ship owners, received the nett proceeds of the sales of the damaged cargo, to recover which this action was brought. The defendant claimed a deduction of the whole amount of the freight under the charter party. A verdict was taken for the plaintiff, for the full amount of the nett proceeds, subject to the opinion of the court.

Francis B. Cutting, for plaintiff.
Daniel Lord, for defendant.

NELSON, Circuit Justice. I have looked into all the cases in the books upon this question, both English and American, and am satisfied that the weight of authority is decidedly against the allowance of any freight, under the circumstances of this case, as between the owner and the shipper. Whether the underwriters would be liable for the freight under their policy, it is not necessary to determine. The same conclusion must also be arrived at on principle. By the contract of the parties, the freight was not to be payable until the arrival and discharge of the cargo at the port of delivery. No part of the contract has been performed. There has been no default on the part of the shipper, nor has he done any act dispensing with performance. There is no doubt, that where the cargo is so much damaged that to proceed with the voyage will endanger the safety of the ship or render the cargo worthless, it is the duty of the master to land and sell it at the port of necessity, in the absence of instructions from the shipper, even though it may have been in a condition to be carried in specie to the port of destination and there landed. In cases of necessity happening during the voyage, the master is, by law, created the agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of a sound discretion, are binding upon all parties in interest. But the question still arises, whether, in such cases, the shipper is to be subjected to the payment of freight. The voluntary acceptance of the cargo by the shipper at an intermediate port, will, it is admitted, have the effect to charge him with a ratable portion of the freight. But there is no authority for subjecting him to freight, where the port of distress and of acceptance of the cargo is the port of shipment, and where no part of the voyage has been performed. In several such cases, freight has been denied. What seems decisive of this case, and of the class of cases to which it belongs, is, that admitting the master to be the agent, at the port of distress, of all parties interested, and that he has acted bona fide and for the benefit of all concerned, in the sale of the damaged cargo, yet, inasmuch as the goods were in a condition that would endanger the safety of the ship and the lives of the crew, if they were carried forward, it cannot be said that the voyage was broken up for the benefit of the cargo any more than for the benefit of the ship-owners. Independently of any duty that the master owed to the cargo under the existing calamity, the interest of his owners dictated the breaking up of the voyage; and, it being broken up under those circumstances and for that cause, and the shipper having derived no benefit under his contract, it is difficult to find any principle, legal or equitable, that would subject him to any part of the freight. Judgment for plaintiff.

[See The Ann D. Richardson, Case No. 411.]

MITCHEL (CASTOR v.). See Case No. 2,507.

MITCHEL (VAN METER v.). See Cases Nos. 16,864 and 16,865.

MITCHEL (VEIL v.). See Case No. 16,908.

Case No. 9,656.

In re MITCHELL et al.

[3 N. B. R. 441 (Quarto, 111).] [1]

District Court, D. Massachusetts. 1869.

BANKRUPTCY—PARTNERSHIP—PART OF FIRM PETITIONING.

1. A firm, originally composed of three members, was dissolved by the withdrawal of one. The two remaining members, constituting a new firm, subsequently filed their petition in bankruptcy. Upon objection being made by the member of the firm who had withdrawn, it was *held*, that the court has jurisdiction of the petition of the two parties, though the firm may have been composed of three.

[Explained in Re Wallace, Case No. 17,095.]

[2. Cited in Re Redmond, Case No. 11,632, to the point that a conveyance by one partner of his individual property, although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy as against the firm, even though such conveyance was made with intent to hinder, delay, or defraud firm creditors, or with a view to give a preference to a firm creditor. In such case this proceeding must be against such partner alone.]

[In the matter of T. P. Mitchell and others, bankrupts.]

[1] [Reprinted by permission.]

LOWELL, District Judge. The bankrupts were partners in trade under the firm name of Mitchell & Moulton, before November, 1868, and contracted debts which are yet unpaid. In that month they made a new firm by joining with them one George W. Duncan, under the style of Mitchell, Moulton & Co. The firm lasted about two months, when Duncan retired and assigned all his interest in the joint business and effects to Mitchell & Moulton, and they undertook to pay all the joint debts and save Duncan harmless therefrom; and they gave him a mortgage for one thousand dollars on the machinery and fixtures of the late firm, as security for the performance of this undertaking. Mitchell & Moulton continued to be associated together until they lately filed their joint petition in bankruptcy in the usual form as copartners. Their schedules show debts of the first firm of Mitchell & Moulton, and debts of the second firm of Mitchell, Moulton & Co., and none of the last firm. The only joint assets are the machinery and fixtures, valued at three thousand dollars, and mortgaged to Duncan, as before noticed, for one thousand dollars. George W. Duncan appeared before the register and objected to his proceeding with the cause; and the register has certified the facts to me, and a brief has been submitted in support of the objections. The point taken is that the court has no jurisdiction of a petition by two partners of a firm of three. I suppose the register had grave doubts of the jurisdiction, or he would not have certified the case to me. It was not a question arising in the course of the proceedings, but a suggestion by an amicus curiae going to defeat the suit entirely; and as such, proper enough to be certified on the responsibility of the register. It is the first time I ever heard that a member of a firm cannot commit a separate act of bankruptcy and become bankrupt without joining his copartners, which appears to be the substance of the objection intended to be taken. But that point does not really arise here, because the bankrupts were partners under the firm of Mitchell & Moulton, and as such have the right to file a joint petition. If they were likewise partners with Duncan in another firm, and he shall apply to have that firm adjudged bankrupt, I suppose the court would have power to consolidate the suits, if expedient, or in some other appropriate way to arrange that the greatest convenience to creditors should be arrived at with the least expense. He has not done this, and does not even allege that he is bankrupt. As regards the injustice that it is said the creditors of Mitchell, Moulton & Co. will suffer if these proceedings are carried on, I am entirely unable to discover it. The rights of all classes of creditors are the same under all forms of proceedings; and, in fact, these creditors appear to have a substantial advantage, because they are secured to the extent of one thousand dollars, which amounts to about fifty per cent. of their debts. The cause is to proceed forthwith before the register.

Case No. 9,657.

In re MITCHELL.

[8 N. B. R. 47; [1] 5 Chi. Leg. News, 271.]

District Court, D. Maine. 1872.

BANKRUPTCY—LIEN ON STOCK—WAIVER.

A party who has a lien for pasturing stock by the statute of the state, waives and abandons such lien by voluntarily surrendering up the possession of the property and allowing it to be sold without claiming any lien thereon at the time. The estate of the bankrupt, however, is liable for the keeping of the stock from the commencement of bankruptcy proceedings up to the date of its surrender.

[Cited in Re Harlow, Case No. 6,070.]

According to the laws of Maine (Act 1872), an agistor of cattle has a lien for pasturing stock which may be enforced by the court, on petition of the agistor, after commencement of proceedings in bankruptcy by or against the owner of the cattle, but it may be lost or abandoned by a voluntary surrender of the stock to the assignee. An agistor kept cattle of the bankrupt [J. C. Mitchell] for pasturing during the summer and fall months, and for some time after the proceedings in bankruptcy, and delivered them to the assignee, without claiming a lien for the pasturage, who sold them at public auction. Held, that he had lost or waived his lien as agistor by voluntarily surrendering to the assignee the cattle, and by allowing them to be sold by him as unencumbered property belonging to the bankrupt's estate, and that the keeping the property after institution of bankruptcy proceedings is an equitable lien for which the estate is liable. This is a petition of Wiley, who claimed that he had a lien on certain cattle of the bankrupt, under the laws of Maine, (Act 187), as an agistor for pasturage of the stock during the summer and fall months, and for a period of time after the commencement of the proceedings in bankruptcy, viz.: October 17th, 1872. The assignee took the cattle and sold them as unencumbered, December 31st, following, Wiley voluntarily surrendering his possession and making no claim of his lien at the time. Wiley now prays the court to adjudge his claim to be a lien or privity under the laws of Maine.

Peters & Wilson, for Wiley.

H. C. Goodenow, assignee pro se.

FOX, District Judge. Upon the application of Moses C. Wiley, of Bangor, in the county of Penobscot and state of Maine, asking to be paid his lien as an agistor, etc., it is adjudged, under act of 1872, the petitioner

[1] [Reprinted from 8 N. B. R. 47, by permission.]

had a lien for pasturing the stock, but "it is founded on the possession of the property and is lost or waived when possession is voluntarily abandoned," says Howard, J., in Miller v. Marston, 35 Me. 154, and as the petitioner voluntarily surrendered this property to the assignee, and allowed it to be sold by him as belonging to the estate and unencumbered, I do not think his lien continued, but he must be deemed to have waived and abandoned it. The estate is liable for the keeping of the property from the date of the institution of proceedings in bankruptcy.

Case No. 9,658.

In re MITCHELL.

Ex parte SHERWIN.

[16 N. B. R. 535; [1] 17 Alb. Law J. 26.]

District Court, D. Massachusetts. Jan. 5, 1878.

TAXATION — BANKRUPTCY — FUNDS IN HANDS OF ASSIGNEE.

The funds in the hands of the assignee may be taxed by the state.

The city of Boston assessed a tax of one thousand five hundred and fifty three dollars and twenty one cents upon the assignees of Mitchell, Green & Stevens, for the personal estate of the bankrupts in their possession, or under their control, on the 1st of May, 1876, the beginning of the fiscal year. The assignees denied the right of the city to assess them, and the case was submitted to the court upon agreed facts, under a petition by the collector of the city to order the assignees to draw their warrant for the amount of the tax. The assignees had made return of the property to the assessors under protest, so that there was no dispute about the quality or amount. It consisted in part of money, and, in a larger part, of a stock of goods. The stock was sold by the assignees on the 3d of May, in pursuance of an arrangement made before the first day of the month, and the proceeds were divided among the creditors at once, long before the assessment was actually made, or notice given that it would be made; but there was enough money of the estate remaining to pay the tax, if it is properly and legally assessed upon them.

E. P. Nettleton, for petitioner.

J. Wilder May, for assignees.

LOWELL, District Judge. The first ground taken by the assignees is, that they are officers of the court; that the funds in their hands are in the custody of the law, and, therefore, not to be disturbed or interfered with by any action on behalf of the state. An able opinion to this purport has been given by one of the registers. In re Booth [Case No. 1,645]. I cannot subscribe to that opinion. I can see no interference or obstruction of the court, or of the law in taxing, to the owner thereof, any fund that may happen to be in whole or partly in the registry of the court, or under its direction, as was the case with the money here, provided there is no attempt to affix upon it a lien, or in some way to disturb the actual custody of the fund. Such an assessment is merely an official declaration that the owner of the fund should pay his share of the public burdens. I do not know why a ship in the hands of the marshal should escape taxation to the owner, though, undoubtedly, it will be free from levy or seizure as long as it remains in his official possession. If the state undertook to tax an assignee in bankruptcy as such, that is, to tax his office and franchise, his right to exercise a function under the laws of the United States, or in any mode to discriminate against an assignee, or against the estate of a bankrupt, very different considerations might arise.

It is said the assignee is an officer of the court; and so he is, in a certain sense, and so is every attorney who practices in the court; and this will protect them from taxation as such officers, but not necessarily in respect to funds which they are to administer for private persons, though their administration should be under the control of the court. The law of Massachusetts for levying taxes does not undertake to act upon personal property in rem, but merely upon the owner. An assignee is an officer of court, and much more, as I shall have occasion to show.

2. I have examined with great care the law of taxation. Gen. St. c. 2, passim. I should be glad to find there an exemption of assignees who had so promptly and faithfully executed their trust that, while they were appointed in April, they had realized and distributed a great part of the assets long before any assessment was actually made upon them; but I have searched in vain. Section 2 provides that all property, real and personal, of the inhabitants of the state, shall be taxed unless expressly exempted. Section 5 provides what property shall be exempted, and does not mention bankrupts or insolvents, or their estates or assignees.

Section 10 provides that all personal estate shall be assessed to the owner in the city or town of which he shall be an inhabitant on the first day of May, with numerous exceptions as to the place, and some as to the person—such as that, under some circumstances, the legal owners shall be assessed, and, under others, the equitable owner—but none which makes any exemptions not included in section 5, and none which affect this case in any direct way, though the section clearly shows that all trustees are intended to be included in the word "owner," unless otherwise provided for.

The remaining question is, whether the assignees were the owners of this property. This closely resembles the question already answered, and the remarks I am about to

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make are to be taken as applicable to both points. If assignees are mere agents of the court, and the fund is one in court, there might be reason to say that it was without a definite owner who could be ascertained and assessed, but there is no doubt that assignees are trustees, with great powers and large discretion. They have the legal title and control of the property as fully as the bankrupt had, and it has been repeatedly decided that statutes, or rules having the binding power of statutes, which regulate the administration of their trust, such, for example, as require them not to sell by private contract, or not to bring action or suit without an order of court or a consent of creditors, are merely directory, so that a neglect of them will form no valid objection to a title and no defense to an action or suit. I am of opinion, therefore, that the assignees were the owners of this property on the 1st of May, and that the assessment was properly made before then, and that they should pay the tax. Order accordingly.

Case No. 9,659.

MITCHELL v. BARCLAY.

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

PATENTS—LICENSE—ESTOPPEL—CERTAINTY—ADVERSE PATENT—EXCLUSIVE POSSESSION AND ENJOYMENT—BARE HOLDING OF PATENT.

1. The mere taking a license does not estop the licensee denying the validity of a patent.

2. In order to establish a right by estoppel, the instrument in support of the estoppel must be precise and certain, and must cover a range as wide as the effect sought to be given to it.

3. Upon a motion for a preliminary injunction, the defendant justified his acts under an outstanding adverse patent, which however was alleged to have been irregularly issued. *Held*, that the court would not ignore the rights of parties under such instrument, because there may have been some irregularity in its issue, and assume it to be a nullity.

4. Where there has been no adjudication as to the validity of a patent under which a party claims, such party must show that he has had exclusive possession and enjoyment for some time before a preliminary injunction will be granted in his favor.

5. The possession and enjoyment of a patent, which will justify a court in granting a preliminary injunction, previous to a trial at law establishing the validity of the patent, must be something more than the mere holding of the parchment, or muniment of title, or experimenting with the patented article. If it is a machine or tool it must be brought into use; if a process, it must be put in execution; if a composition of matter or patented article, it must be put on sale. This is the true doctrine both in England and in this country.

6. The bare holding of a patent and an infringement alone constitute no complete ground of relief, at least by preliminary injunction.

[Cited in Law, Pat. Dig. 281, 387, 395, and 464, to the points as stated above. Nowhere more fully reported; opinion not now accessible.]

[Decided by SHIPMAN, District Judge.]

Case No. 9,660.

MITCHELL v. BUTLER.

[The case reported under above title in 8 Rep. 232, 25 Int. Rev. Rec. 185, and 4 Cin. Law Bul., is the same as Case No. 9,670.]

MITCHELL (DANIEL v.). See Cases Nos. 3,562 and 3,563.

Case No. 9,661.

MITCHELL v. DEGRAND.

[1 Mason, 176.] [1]

Circuit Court, D. Massachusetts. May Term, 1817.

BILL OF EXCHANGE—PROTEST FOR NON-ACCEPTANCE—WHEN ACCEPTED BILL PAYABLE—MEANING OF PAYABLE AT SIGHT.

1. When, upon a bill payable at so many days after sight, the holder presents the bill for acceptance, and elects to consider what passes on such presentment, as a non-acceptance, (although in strictness he might have otherwise acted,) and protests the bill for non-acceptance, he is bound by such election as to all the other parties in the bill, and must give due notice to them of the dishonor accordingly, otherwise they will be discharged. And a subsequent acceptance by the drawee on the next day will not be sufficient to charge the drawer, in case no such notice is given, and the drawee fails before the day of payment.

[Cited in brief in First Nat. Bank of Burlington v. Hatch, 78 Mo. 15.]

2. A bill drawn payable at five days after sight, and accepted on the first day of a month, is payable on the ninth of the same month, the day of the acceptance being excluded, and the three days of grace allowed; a demand on the eighth and protest for non-payment on that day, is too early, and therefore void.

[Cited in Edgar v. Greer, 8 Iowa, 395. Distinguished in Lawson v. Farmers' Bank of Salem, 1 Ohio St. 214.]

3. A bill, payable at five days after sight, is presented for acceptance on the 30th of September, but not in fact accepted until the 1st of October, the acceptance takes effect only from that day, and does not relate back to the time of presentment on the preceding day. A bill, payable at so many days after sight, means so many days after legal sight, that is, so many days after the acceptance, for that is the sight, to which the bill refers.

This was an action on a bill of exchange drawn by P. P. F. Degrand, the defendant, in Boston, on George P. Stevenson, of Baltimore, in favor of Alexander Mitchell, the plaintiff, of the same place. The tenor of the bill was as follows.

"$1000. Boston, 26th Sept., 1816. At five days sight please pay to the order of Alexander Mitchell, Esq. one thousand dollars in bills of the Bank of the City of Baltimore, which please to charge with or without further advice to your friend and obedient servant, P. P. F. Degrand.

"George P. Stevenson, Esq., Baltimore."

On the 30th of September, it was presented for acceptance at the counting-house of the drawee, by John C. Conner, the clerk of the plaintiff; the drawee was then absent

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

on military duty, but his clerk requested it might be left, saying Mr. Stevenson would accept it, when he returned. The bill was left, and immediately protested by the plaintiff for non-acceptance. On the following day John C. Conner called again at the counting-room of the drawee, and met him coming out. Mr. Stevenson told him that he was much engaged at the moment, but would accept, and send the bill to Mr. Mitchell in the course of the day. No notice was given to the drawee of the protest for non-acceptance before the 8th of October, on which day the bill was protested for non-payment, the drawee having failed before that time. On the 12th of the same month a Mr. Stanton, who was the plaintiff's agent for this purpose, called upon the defendant for payment, which he refused on the ground of not having received due notice of the protest for non-acceptance. The bill and protest were afterwards remitted to Mr. Stanton in a letter dated the 12th of October.

Shaw & Williams, for defendant, contended: First. That there was no acceptance of the bill by the drawee on the 30th of September. That there was no evidence, that Dugan, the clerk of Stevenson, had any authority to accept it; that his saying that it would be accepted, could only be considered as his opinion of what Stevenson would do. That there was nothing therefore in the present case, which could amount to an acceptance, either by the clerk or Mr. Stevenson, and that the holder himself was of the same opinion fully appeared from his having caused the bill to be protested on the same day. Sayer v. Kitchen, 1 Esp. 209; Orr v. Maginnis, 7 East, 359; Sproat v. Matthews, 1 Durn. & E. [1 Term R.] 182. Secondly. That if the circumstances, which took place on the 30th of September, did not amount to an acceptance, but on the contrary were considered in the light of a non-acceptance, and a protest made accordingly by the plaintiff, then no subsequent arrangement between the holder and drawee could so alter the case, as to affect the rights of the drawee, and change the non-acceptance into an acceptance, or in any degree release the holder from the obligation of duly notifying the defendant of the previous non-acceptance. Bentinck v. Dorrein, 6 East, 199. Thirdly. That even should the subsequent acceptance by the drawee be considered as annulling the previous non-acceptance, and rendering notice of it to the drawer unnecessary, still the defendant would not be liable, inasmuch as it appeared from the facts, that the drawee was called upon for payment a day before the bill became due; for if the acceptance was on the 1st of October, the only day, on which there could be any pretence of one, the bill would be due on the ninth, whereas it was presented for payment, and protested on the 8th of October. Wiffen v. Roberts, 1 Esp. 261. Fourthly. That there was not in fact any legal acceptance of the bill by the drawee at any time. He merely told the clerk of the holder that he would accept it, whereas the acceptance ought to have been in writing.

Prescott & Gallison, for plaintiff, argued, that notice of the protest for non-acceptance was not in this case necessary, because before there was an opportunity of notifying the defendant, the bill was accepted by the drawee, and the previous non-acceptance rendered void. That the holder had a right to consider the circumstances attending the presentment of the bill on the 30th of September as a non-acceptance, or not, as he pleased, and that although he had the precaution to have the bill protested, he was not concluded by it from taking advantage of a subsequent acceptance if made within a reasonable time. Sproat v. Matthews, 1 Term R. 182; Bentinck v. Dorrein, 6 East, 200. Secondly. That as to the presentment for payment being made too early, it was not the case, because the acceptance must be considered as referring back to the day of the first presentment of the bill, which was on the 30th of September. Beawes (1st Ed.) p. 447, § 252. Thirdly. That the verbal acceptance of Mr. Stevenson, by saying he would accept the bill, was sufficient to satisfy the law, without any acceptance in writing. Clarke v. Cock, 4 East, 57; 5 East, 510; Wynne v. Raikes, 5 East, 515; Lumley v. Palmer, 2 Strange, 1000; Pierson v. Dunlop, Cowp. 571; Bayley. Bills, 44.

In the course of the cause the counsel for the defendant called upon Mr. Stanton for a letter, which he received from the plaintiff, in order to prove, that the plaintiff himself never thought, that there was any acceptance in this case; and that he only now advanced it for the purpose of charging the drawer. Mr. Stanton stated, that the letter was destroyed by his clerk; and the clerk upon being questioned said, that he received it from Mr. Stanton with some other letters, which he was directed to destroy, and, as he supposed, for the purpose of keeping them out of the way.

STORY, Circuit Justice. This is an action on a bill of exchange, brought by the payee against the drawer. The bill was payable five days after sight; and was presented at the counting-room of the drawee for acceptance on the 30th of September. No acceptance was then made, the drawee being absent on military duty, and his clerk expressing only an opinion, that it would be accepted by the drawee. I do not say, that under these circumstances the holder was bound to treat what passed between him and the clerk, as a non-acceptance of the bill. On the contrary he might properly have waited until the next day, as a reasonable time to ascertain the intentions of the drawee, and such delay could not have been deemed laches on his part. But he elected to consider the bill as dishonored on the

30th of September, and protested it accordingly for non-acceptance. And the question now is, whether, as to all the other parties to the bill, he is not bound by that act; and I am very clear that he is. When a bill is once dishonored, the holder is bound to give notice, by the next practicable mail, to the parties, whom he means to charge for the default. Lenox v. Roberts, 2 Wheat. [15 U. S.] 377. By the legal construction of the contract they have a right to such notice, and the omission to give it, with due and seasonable diligence, discharges them from every legal liability upon the bill. No such notice was given in this case, and therefore the drawee was absolved from all liability. But it is said that on the 1st of October, and before the mail for Boston was closed on that day, the drawee accepted the bill, and thereby notice became unnecessary. Assuming that the evidence in this case clearly shows an acceptance, still in my judgment it does not change the previous legal predicament of the parties. When once a bill is dishonored, the right of the other parties to notice immediately and absolutely attaches, and no subsequent acts between the holder and drawee can vary that right. Whatever is afterwards done by the holder is at his own peril, and cannot change the responsibility of others. A holder cannot elect to treat a bill as dishonored, and afterwards as duly honored. The consequences of such a doctrine would be the most mischievous to the commercial world; and I have no difficulty in holding it not to be law.

But supposing this point were doubtful, there is another, which is decisive against the plaintiff. The acceptance, if any, was certainly not made before the 1st day of October; and upon that supposition the bill being payable five days after sight, was payable on the ninth and not on the eighth day of October; payment was therefore demanded a day before the bill became due. To avoid this conclusion, it is argued, that the acceptance may be considered as relating back to the 30th of September, when the bill was first presented. But neither of these grounds can be maintained. The doctrine of relation cannot apply to cases of this nature. The acceptance or non-acceptance of a bill is a single act, taking effect from the time when done, and having no retroactive operation. How can it be possible to say, that this bill was accepted on the 30th of September, when the party has expressly protested it for non-acceptance on that day? There is as little foundation for the other suggestion. A bill, payable in so many days after sight, means after so many days legal sight. Now, it is not merely the fact of having seen the bill, or known of its existence, that constitutes a presentment to the drawee in legal contemplation. It must be presented to him for acceptance, and the time of the bill begins to run, not from the mere presentment, but from the presentment and acceptance. If the acceptance be general, it is in legal construction an agreement to pay in so many days after the acceptance, for that is the sight, which the drawee admits and refers to. A different doctrine is supposed by Mr. Justice Bayley (Bayley, Bills, 67. But see Id. 53) to be asserted by Beawes (1 Beawes, Bills Exch., Ed. 8vo. 1795, p. 455, § 252); and if it be so (which is not admitted), I should not incline to uphold his authority against that of Marius (Marius, Bills, 19), who holds the doctrine I have asserted, and which I think stands sustained upon principle, as well as authority.

Plaintiff non-suited.

NOTE. Upon examination it will be found that Beawes does not assert the position contended for. His language is, "If bills are made payable at some days after sight, their acceptance is dated on the day they are presented, and from thence the days of their running are counted." Beawes, Bills Exch. (Ed. 1795) p. 455, § 252. This language is not free from all ambiguity; but its true meaning seems to be, that the acceptance is the time, from which the running of the days of a bill, payable at so many days after sight, is to be computed, which is in effect the same as the doctrine of Marius. The doctrine of Marius is recognised in Chit. Bills, pp. 195, 277; Com. Dig. "Merchant," F, 7. Campbell v. French, 6 Term R. 200, 212; Poth. de Change, pt. 1, c. 1, § 2, art. 13; Code de Comm. lib. 1, tit. 8, art. 131. See, also, Bayley, Bills, 53.

MITCHELL (DENNETT v.). See Case No. 3,789.

Case No. 9,662.

MITCHELL v. GREAT WORKS MILLING & MANUF'G CO.

[2 Story, 648.] [1]

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

CREDITOR'S BILL—ACCOUNT—CONCURRENT JURISDICTION — BANKRUPTCY — ENTIRE SETTLEMENT AND DISTRIBUTION—CONSTITUTIONAL LAW—AUTHORITY TO ENACT BANKRUPT LAW.

1. Certain persons associated themselves together, under the name of the "Wilson Mill Privilege," and appointed A. and B. as their agents and attorneys, who took charge of their property, and erected buildings, and made improvements, and advanced money; afterwards, they obtained a charter and incorporation as "The Great Works Milling and Manufacturing Company," and voted to settle all the accounts of the agents, and ratified their proceedings, and continued A. as their agent; but no settlement of the agents' accounts was ever made; and the present bill being brought by their assignee, it was *held*, that it was a proper case for the interposition of a court of equity.

2. In matters of account courts of equity possess a concurrent jurisdiction with courts of law, in most, if not in all cases, and where the case is one wherein a court of law could not afford an adequate redress, it is proper for the interposition of a court of equity.

[Cited in Duryee v. Elkins, Case No. 4,197; Re Strauss, Id. 13,532; Perry v. Corning, Id. 11,003; Gaines v. City of New Orleans, 17 Fed. 19; Pacific R. R. v. Atlantic & P. R.

[1] [Reported by William W. Story, Esq.]

Co., 20 Fed. 279; Herrick v. Throop, 24 Fed. 535.]

[Cited in Tillar v. Cook, 77 Va. 480.]

3. Under the bankrupt act of 1841, c. 9 [5 Stat. 440], the circuit and district courts have full jurisdiction in equity, in respect to all cases arising in bankruptcy, to do all which is necessary and proper to accomplish the entire settlement and distribution of the bankrupt's estate, whether the proceedings be formal or summary.

[Cited in Re Wallace, Case No. 17,094. Approved in Pritchard v. Chandler, Id. 11,436; Goodall v. Tuttle, Id. 5,533. Doubted in Smith v. Crawford, Id. 13,030, and Bachman v. Packard, Id. 709, as to the jurisdiction of the circuit court.]

4. Congress have a complete constitutional authority to enact a bankrupt act, giving to the district and circuit courts full jurisdiction in law and equity.

5. Congress has no right to require, that the state courts shall entertain suits for the objects and purposes to be carried into effect by the bankrupt act.

[Cited in Goodall v. Tuttle, Case No. 5,533; Sherman v. Bingham, Id. 12,762.]

[6. Cited in Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643, and cited in brief in Norton v. Barker, Id. 10,349, to the point that a lien holder is an adverse claimant.]

[7. Cited in Payson v. Dietz, Case No. 10,861, to the point that state courts are not deprived of jurisdiction in ordinary common-law and equity suits, simply because brought by the assignee in bankruptcy.]

[8. Cited in Walker v. Towner, Case No. 17,089, to the point that the two-years limitation in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property.]

[9. Cited in Ward v. Jenkins, 10 Metc. (Mass.) 590, and cited in brief in Pike v. Crehore, 40 Me. 509, to the point that the bankrupt law vests all the property in the assignee, and confers upon him as full power to sue as the bankrupt has; and that this property right includes all debts due the bankrupt.]

Bill in equity. The bill was brought by Nathaniel Mitchell, of Portland, assignee in bankruptcy of Seth Paine, Jr., and John L. Meserve, both of said Portland, formerly partners under the name and firm of Paine & Meserve, against the Great Works Milling and Manufacturing Company. It sets forth, that Enoch Paine, Josiah S. Little, Seth Paine, Junior, and John L. Meserve, all of Portland, and state of Maine, and Joseph B. Hervey, of Newburyport, Massachusetts, having, before the time hereinafter mentioned, formed themselves into a voluntary association, and being then and there the owners of certain real estate in the county of Penobscot, known as the "Wilson Mill Privileges," did, on the twenty-second day of June, 1835, by an agreement in writing between themselves, duly signed and sealed, appoint Seth Paine, Junior, and John L. Meserve aforesaid, to be their agents and attorneys, to act on the matters aforesaid, on behalf of all of said parties, a copy of which said agreement is annexed, and made part of the bill. That on the twenty-seventh of July, 1835, Joseph W. Hale, Francis B. Todd, and Nathaniel F. Deering, all of Portland, became the purchasers of one undivided twelfth part each of the aforesaid property, and that Edmund L. D. Breton, at Bangor, on the seventh of August, 1835, also became the purchaser of one undivided twelfth part of the said property, and that the said Hale, Todd, Deering, and Breton, by a writing to that effect, under their hands on the back of said agreement, consented and agreed to be bound by the said agreement in the same manner as if they had been originally parties thereunto; and the said Paine and Meserve having been duly appointed, as above set forth, the agents and attorneys for the Wilson Mill Privilege Association, took upon themselves that trust, and continued in that capacity until the dissolution of said association, and that they went on to the property, and caused extensive improvements to be made, and buildings to be erected thereon, in pursuance of the instructions, and in carrying out the intentions of the members of said association; during the progress of which improvements, the said Paine and Meserve were at great personal expense, and laid out and advanced large sums of money, for the benefit of said association; in consequence whereof the said association became greatly indebted to the said Paine and Meserve. And that the said association ratified and confirmed the said actings and doings of said Paine and Meserve. That they petitioned the legislature of the state of Maine for an act of incorporation, which was granted in 1831, incorporating Enoch Paine, Nathaniel F. Deering, E. M. Wildredge, John L. Meserve, Joseph W. Hale, Joseph B. Hervey, Josiah S. Little, Francis B. Todd, and their associates, being the associates aforesaid, owners of said Wilson Mill Privileges, by the name of the Great Works Milling and Manufacturing Company, and that the said Paine and others, the associates aforesaid, accepted the charter of incorporation, and transferred and conveyed all their interest in the property of the association to the Great Works Milling and Manufacturing Company, which last mentioned company accepted the transfer, and in consideration thereof, they undertook and promised to pay, meet, or adjust, all the debts and liabilities of said voluntary association; and that afterwards, at an adjourned meeting of the stockholders of the Great Works Milling and Manufacturing Company, held on the twenty-third day of May then next, it was voted, that the directors be authorized to settle all the accounts of the agents and attorney of the proprietors, and that the doings and contracts of the attorney of the proprietors be hereby ratified and confirmed, the said proprietors being said associates, and the proprietors of the Wilson Mill Privileges, and designated in said vote as proprietors, in contradistinction to the stockholders, as such, in the said corporation; that, at a directors' meeting of the directors of the said corporation, held the twenty-fourth day of May, 1836, it was "voted, that Mr. Seth Paine, Jr., be requested to proceed to the establishment of the company, and, in behalf

of the directors, to assume the agency and direction of the business of the company, and report his doings to the directors." And that, in pursuance of this vote and authority, the said Paine continued to act in the capacity of agent for said company, and, in the discharge of the duties of said office, laid out, and advanced, and expended large sums of money for the benefit of the said corporation; in consequence whereof the said corporation became greatly indebted to the said Paine. That in the month of September, 1837, there was an attempt made to settle the account between Seth Paine, Jr. and the Great Works Milling and Manufacturing Company, and, at the same time, Paine and Meserve presented their account against the Great Works Milling and Manufacturing Company, which account was not disputed; but a certain amount due from the said Paine and Meserve was allowed towards payment of it. And that, afterwards, another attempt was made at settlement; but the parties did not make any adjustment at that time, nor have the said Paine and Meserve, nor the said Paine, been able to obtain a settlement to this time; although the said Paine and Meserve have been ready, and frequently solicited an adjustment; but that the corporation have delayed and refused, from time to time, to make any such settlement, and still refuses so to do. And, although the said Seth Paine, Jr. was constituted the agent of the said corporation, yet the said Paine being, in fact, in company with the said Meserve, and acting, as well for said Meserve as for himself, the said Paine, in all his acts, making advances, and superintending, and directing the business of said company, agreeably to said vote of May 24th, 1836, acted as a member of and for the joint interest of said firm. And that all sums of money, due, on account of such agency, and such disbursements and expenditures of said Paine, are in fact, in equity, and good conscience, due to said Paine and Meserve. And that there is, in fact, due to said Paine and Meserve, on a fair and equitable adjustment of accounts, from said corporation, a large sum of money, to wit, 2,310 dollars, with interest thereon. All which actings and doings of the said Great Works Milling and Manufacturing Company, in their own behalf and on behalf of the Wilson Mill Privileges Association, are contrary to equity and good conscience, and tend to the manifest wrong and injury of the plaintiffs in the premises. In consideration whereof, and forasmuch as the plaintiff is remediless in the premises in and by the strict rules of the common law, and cannot have adequate relief save in a court of equity, where matters of this and the like nature are properly cognizable and relievable, the plaintiff prays for a writ of subpoena in due form of law, directed to the Great Works Milling and Manufacturing Company and to the proper officers of said corporation, or in such other manner as this honorable court shall direct, thereby commanding the said corporation, by its proper officers, or in such manner as this court shall direct, to appear before your honors at a certain day, then and there to answer the premises, and to stand and abide such order and decree therein as shall be agreeable to equity, and good conscience.

To this bill a demurrer was filed, and the cause was argued upon the demurrer by W. Pitt Fessenden, for the company.

Wm. P. Preble, for plaintiff.

STORY, Circuit Justice. Two objections have been taken, on the part of the defendants: (1) That the matter of the bill, although for an account, is completely remediable at law, and, therefore, not the fit subject matter of a bill in equity. (2) That the circuit court has not jurisdiction in this case in bankruptcy under the bankrupt act of 1841 (chapter 9). In the judgment of this court, neither objection is maintainable; and I will shortly proceed to state the reasons of this determination. As to the first objection, it is certainly true, that, in matters of account, courts of equity possess a concurrent jurisdiction, in most if not in all cases, with courts of law. In the present case, taking the statements of the bill to be true, which we must upon the demurrer, it seems to us not only clear, that it is a case fit for the interposition of a court of equity, but that it is emphatically so, as one where a court of law could not render any justice in the matter; or, if any, it must be a very crippled and imperfect redress. It is, indeed, impossible to read the bill and not to feel, that some of the claims there set up, considering the complications and changes of interests of the parties, cannot be adequately examined or properly disposed of except in a court of equity. But the more material consideration is that, which respects the jurisdiction of this court to maintain the bill under the bankrupt act of 1841 (chapter 9), as it is a case, which would not otherwise fall within its general jurisdiction. At the threshold of the argument, we are met with the suggestion, that when the act was before congress, the opposite doctrine was then maintained in the house of representatives, and it was confidently stated, that no such jurisdiction was conferred by the act, as is now insisted on. What passes in congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed, that the opinions of a few members, expressed either way, are to be considered as the judgment of the whole house, or even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute. The questions can be, and rarely are, there debated upon strictly legal grounds, with a full mastery of the subject and of the just rules of interpretation. The arguments are generally of a mixed character, addressed by way of objection, or of support, rather

with a view to carry or defeat a bill, than with the strictness of a judicial decision. But if the house entertained one construction of the language of the bill, non constat, that the same opinion was entertained either by the senate or by the president; and their opinions are certainly, in a matter of the sanction of laws, entitled to as great weight as the other branch. But in truth, courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true, that the legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect. Any other course would deliver over the court to interminable doubts and difficulties; and we should be compelled to guess what was the law, from the loose commentaries of different debates, instead of the precise enactments of the statute. Nor have there been wanting illustrious instances of great minds, which, after they had, as legislators, or commentators, reposed upon a short and hasty opinion, have deliberately withdrawn from their first impressions, when they came upon the judgment seat to re-examine the statute or law in its full bearings.

Passing from these considerations, which have been drawn from us by the suggestions at the bar, let us look at the actual provisions of the bankrupt act of 1841 (chapter 9). And here, in order to ascertain the jurisdiction of the circuit court, we must first examine what is the jurisdiction given to the district court. The 6th section of the act declares: "That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy, arising under this act, and any other act, which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity." And then, not by way of restriction, but of explanation, if not of enlargement of the objects of this jurisdiction, it proceeds to declare: "And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy, arising between the bankrupt and any creditor or creditors, who shall claim any debt or demand under the bankruptcy; to all such creditor and creditors, and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." Now, it seems to us, impossible to doubt, that the object of these clauses, which are sufficiently broad and comprehensive for the purpose of giving the district court complete jurisdiction to accomplish, of itself, all the purposes of the act, and to enable it, independently of any other jurisdiction, to begin, continue, and end, all such proceedings as might be necessary and proper, in an equitable view, to accomplish the entire settlement and final distribution of the bankrupt's estate. To us it seems perfectly clear, that congress possess a complete constitutional authority to enact such a law for such an object; for the judicial power, by the constitution, extends "to all cases in law and equity, arising under this constitution and the laws and treaties made, or which shall be made under their authority;" and further, congress are authorised by the constitution, "to pass uniform laws on the subject of bankruptcies throughout the United States." The judicial power has, in this respect, under the constitution, always been construed to be co-extensive with the legislative powers, upon the plain ground, that the constitution meant to provide ample means to accomplish its own ends by its own courts. Now, looking to the many objects and purposes of the bankrupt act of 1841 (chapter 9), it would seem strange, that congress should not have provided all the necessary and proper means to accomplish all its purposes. It is clear, that congress has no right to require, that the state courts shall entertain suits for such objects and purposes. The states, in providing their own judicial tribunals, have a right to limit, control, and restrict their judicial functions, and jurisdiction, according to their own mere pleasure. They may refuse to allow suits to be brought there "arising under the laws of the United States" for many just reasons; first that congress are bound to provide such tribunals for themselves; secondly, that state courts are not subject to the legislation of congress as to their jurisdiction; thirdly, that it may most materially interfere with the convenience of their own courts, and the rights of their own citizens, and be attended with great expense to the state, as well as great delays in the administration of justice, to allow their courts to be crowded with suits, arising under the laws of the United States; and fourthly, as in the present case, that it would involve the state courts in almost endless examinations and discussions of the principles and bearings of the bankrupt law, confessedly a system novel in our jurisprudence, intricate in its details, and involving questions exceedingly complicated and difficult in its practical operation. Suppose, upon considerations of this sort, any state legislature should prohibit its own courts from taking cognizance of any causes arising under the bankrupt act, no one could doubt, that it was a perfectly constitutional exercise of authority, and not justly to be complained of, as a want of comity or of justice. A due regard of a state to its own rights, and its duties to its own citizens, might require such a course, in order to prevent oppressive delays, and obstructions in the actual administration of

home justice; and, at all events, might justify it in preferring such claims to those, belonging appropriately to the national jurisdiction. Besides all these considerations, there is one, which cannot but be deemed of paramount importance in the administration of a system of bankruptcy. It is uniformity, promptitude, regularity, and efficiency in carrying into effect all its provisions. The courts, which are to administer such a system, must possess not only jurisdiction at law, but in equity; not only a right to proceed in a formal way, but to act summarily; not only to hold regular terms, but to be always open; not only to be bound to act, but to be governed by uniform rules and principles of interpretation and action, at least, as far, as from the diversity of human judgments, such uniformity of rules, principles, and proceedings, can be looked for in practice. But what can be expected from a hundred of state courts, organized upon no uniform system, governed by no uniform jurisprudence, and in their jurisdiction and modes of proceeding, admitting of almost endless diversities of practice and action? So far from any system of bankruptcy being capable of any uniformity of action throughout the United States, under such circumstances, it would be in no two states, perhaps in no two tribunals of the same state, the same. And if every decision in a state tribunal was to be subject to the appellate jurisdiction of the supreme court of the United States, instead of the proceedings in bankruptcy being completed, as the act of 1841 (chapter 9, § 10) manifestly contemplates, within two years from their commencement, a half century might elapse before such a consummation.

Now, it is precisely because considerations of this sort could not be supposed to escape the notice of congress, but must have pervaded the whole purposes of legislation on the subject of bankruptcy, that we should be utterly surprised, if adequate provisions were not made in the act of 1841 (chapter 9) to carry the entire system into effect, through the instrumentality of the courts of the United States, over which congress possess a complete authority, subject to no foreign control, or government, or obstruction. It was not necessary to say, that the courts of the United States should possess exclusive jurisdiction. It was only necessary to say, that they should possess full jurisdiction, and to leave to the state courts the exercise of any concurrent jurisdiction, which they could or might rightfully maintain. In this way, it would naturally follow, that after a little experience in the workings of the system, with the aid of some amendments by congress, the courts of the United States would soon attain punctuality, uniformity, and promptitude, in administering the system, so as to accomplish in the fullest manner all the ends of private, as well as of public justice.

Now, as it seems to us, this very object was designed to be attained, and can be attained, by the provisions of the 6th section of act of 1841 (chapter 9), already cited, if we give to the words their natural, and appropriate meaning, and infuse into them no subtleties, or doubts, or refinements, grounded upon the supposed intentions of congress, or upon technical doctrines, or upon particular local policy. If ever there can be a case for the application of a liberal interpretation of an act from its apparent objects, as well as from the argument ab inconvenienti, it seems to us, that this is the very case which will most forcibly illustrate its propriety and cogency. Let us look for a moment at some of the provisions of the act to see, what the courts, sitting in bankruptcy, are required to do. We have already seen, by the 10th section of the act of 1841, that it is required, "That all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the court within two years after the decree declaring the bankruptcy." How is this to be done, unless the court possesses jurisdiction, co-extensive with all the subject matters in bankruptcy, to enforce and adjust all claims? How can this be enforced, if the entire jurisdiction to collect debts, and to settle controversies in bankruptcy, belongs exclusively to the state courts? What control can the courts of the United States, sitting in bankruptcy, exercise over the state courts to regulate, or to speed their proceedings? Besides, the same section of the act declares: "That, in order to insure a speedy settlement and close of the proceedings in each case of bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof, at as early periods as practicable, consistently with a due regard to the interests of the creditors." Now, here the end is required of the court; and can it reasonably be doubted, that the means are also given to the court to accomplish it? Construe the clause in the 6th section of the act of 1841, where it extends the jurisdiction of the district courts "to all acts, matters, and things to be done under, and in virtue of the bankruptcy, until the final distribution, and the settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy," to include the jurisdiction to entertain suits to adjust all adverse claims, and to collect all outstanding debts (as its terms are sufficiently comprehensive to include), and we have exactly such a jurisdiction, commensurate to the end. Construe it otherwise, and the court sitting in bankruptcy is left crippled and maimed; and we require it to move onward, when it it chained to the earth.

These are some of the grounds, which satisfy our minds, that congress did not intend to leave the bankrupt system, for its practical operation, or success, or efficiency, to the good pleasure, or discretion of the states, or to their voluntary and gratuitous efforts to

enforce or sustain it. Congress meant to provide a system capable of entire self-execution by the national tribunals, without the assistance or co-operation of the states, if the parties interested should choose to rely upon the national arm. The jurisdiction given to the district courts is, as we construe it, ample for all such purposes; and we see no reason, why the general language, in which it is given, should be restricted, so as to defeat a single purpose of the act.

Such then being in our judgment the jurisdiction given by the act of 1841 (chapter 9) to the district courts, we are next led to the consideration of the jurisdiction of the circuit court; and if, as we think, the district court would have complete jurisdiction of the present case, we think that there can be no doubt that this court also possesses it under the 8th section of the bankrupt act of 1841 (chapter 9). That section declares: "That the circuit court within and for the district, where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such persons against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee." Now, there cannot be a doubt, that a debt claimed by and due to the bankrupt from any person is "a right of property" in the bankrupt. Every chose in action is a right of property, assignable in equity, if not at law (see Gray v. Bennett, 3 Metc. [Mass.] 522, 531); and it is clearly assignable under the bankrupt act; for that act declares (section 3) that upon the decree in bankruptcy, "All the property and rights of property, of every name and nature, real, personal, or mixed, of every bankrupt, &c., shall be deemed vested by force of the same decree in the assignee," &c.; and the assignee, is by the same section vested with full power and authority to sue for the same, as fully, to all intents and purposes, as the bankrupt himself might at the time of his bankruptcy. The debtor in every such case is necessarily in the sense of the act an adverse party; if he were not, he would pay the debt or claim; and his very resistance of it, upon suit brought, shows him to be, in form as well as in fact, an adverse party. So that, upon the plain terms and import of the section, the jurisdiction of the circuit court would become unquestionable in the present case. And, indeed, as it is a concurrent jurisdiction with the district court (designed doubtless to aid that court in cases of grave doubt and difficulty), it also shows, that this very class of cases was deemed to be within the jurisdiction of the district court, by and in virtue of the 6th section of the act already referred to. Each section reflects a strong light upon the other, and establishes the intention of congress to be, that its own courts should possess a plenary jurisdiction over all cases and controversies, connected with and growing out of any bankruptcy. See same point, Ex parte City Bank of New Orleans, 3 How. [44 U. S. 292].

Upon the whole, our opinion is, that the demurrer should be overruled.

MITCHELL (HARMONY v.). See Case No. 6,082.

MITCHELL (HAWLEY v.). See Case No. 6,250.

Case No. 9,663.

MITCHELL v. KELSEY et al.

[N. Y. Times, July 18, 1862.]

District Court, S. D. New York. 1862.

PRACTICE—REFERENCE—EVIDENCE—RECOUPMENT.

[1. An amended order, entered by consent, after defendant's default, referring the cause to a commissioner to ascertain the amount, "if any," due libelant, operates only to remove the defendants' default so as to permit him to contest libelant's claim; and the parties cannot by consent give the commissioner jurisdiction of matters set up in the answer, unless they extend to payment or satisfaction of libelant's claim.]

[2. Where libelant's claim is referred to a commissioner, his report is not objectionable in omitting a detail of allowances on which it is founded, unless defendant has demanded a specification of such allowance.]

[This was a libel by Andrew C. Mitchell against Charles Kelsey and others, owners of the bark Philena.]

BETTS, District Judge. This cause is brought into court as one of civil and maritime jurisdiction, in which a warrant of attachment was prayed against the defendants with a claim of foreign attachment. Such process was issued in October term, 1853, and was returned in the same term by the marshal, "personally served on Charles Kelsey, one of the defendants, others not found." No steps are shown to have been taken to bring the other respondents, who were joint owners of the vessel, into court. The libel is filed in the name of an assignor of the former master of the vessel, and demands $6,632.82, with interest from Sept. 10, 1853, for wages earned, advances and payments made by the master, on a voyage from this port to California, on the liability of the vessel and owners. The answer takes direct issue upon the allegations of the libel, charging the liability of the defendants, and also charges misconduct of the master on the voyage, his wrongful deviation therefrom, and other acts to the loss and prejudice of the defendants in his management of their business, and demands large damages. The averments of the answer are not stated more particularly, because they are not legally brought in review by the present form of the proceedings. The case proceeded dilatorily in court to April term, 1855, when the proctors for the libelant moved the default of the defendants on the calendar notice for non-ap-

pearance thereon, and for the usual interlocutory order which was granted, that the cause be referred to a commissioner of the court, to ascertain and compute the amount due to the libelant, and to report thereon to the court, &c. In August term, 1856, by written consent between the parties, the above order of reference was amended to read as follows: "This cause being called in its order on the calendar, ordered that it be referred to a commissioner, to ascertain and report the amount, if any, due the libelants." Both orders were obtained and entered in court when the late Judge Ingersoll presided therein, and if anything was intended to be granted or reserved between the parties out of the language of the orders themselves, it cannot now be made available further than implied waivers of mere irregularities in practice. Such had already occurred.

It appears on the commissioner's minutes of the hearing before him that it had commenced and been proceeded upon in October, 1855, and thenceforward continued under the amended reference as if that order had opened the whole controversy in favor of the defendants as well as the libelants. So, also, the course of procedure of both parties indicates that the commissioner was to investigate and report finally on the claims of every description raised by the answer against the master, (or libelant,) yet that fact nowhere appears in the order of reference, or the report of the commissioner in his minutes of the hearing before him, which is returned to the court as composing the evidence on the hearing. The reference was protracted before the commission until February, 1860, on the 27th of which day it was signed by the commissioner, but not filed by the libelant until the 15th of May, 1861. To render the proceedings more confused and incongruous, the defendant filed his exceptions to the commissioner's report, Nov. 10, 1860, nearly nine months after it was signed, and six months before it was filed in court, at which time the proctor for the libelant obtained an order that the case be placed upon the calendar for argument upon the exceptions at the same term. The argument was not, in fact, called on until April term, 1861. The whole course of procedure, from the initiation of the suit to the final hearing evinces a singular disregard of regular practice in such mode of action, and marked remissness and indifference of all parties concerned in the controversy, to the progress of the cause or the manner in which it was conducted or supported on either side. This is probably attributable to repeated change of proctors and advocates on the one side or the other, as the case was in the hands of skillful and experienced counsel. The cause, when put upon hearing in April term last, was orally discussed in court between the counsel for three days; who then proposed to give the court a clearer understanding of the subject by submitting all the depositions in writing, vouchers and other documents, together with written briefs and arguments. Those written points, briefs and arguments, covered more than one hundred pages of foolscap manuscript, but failed to elucidate the matters brought into question, so as to render the clear right and justness of the case, on the part of either litigant, satisfactorily plain or convincing to the court, and they leave the cause to be determined rather upon technical rules than the manifest legal or equitable title on the evidence rendered.

1. The writ was instituted in the name of a third party, who shows no priority of interest in the original contract between the defendants and his assignor; and being a near relative of the assignor, and coming into the controversy long after the cause of action accrued, it is at least equivocal upon the proofs whether he is not in the suit a speculator or volunteer, without having parted with valuable consideration for the assignment. 2. Capt. Swain, in whom all the interest in fact and in the origin of the claim in suit was vested, and against whom all the liabilities set up in the defence rested, was the main witness on the reference, and upon whose evidence the report of the commissioner must have been essentially founded. He was examined as a witness orally before the commissioner in October, 1855, and in December afterwards, de bene esse, before the commissioner, and it nowhere appears that objection was then or afterwards taken to his competency to testify in the case. 3. The exceptions point out no particular error in fact or law committed by the commissioner. 4. The argument assumes throughout that the reference imposed authority upon the commissioner to hear and determine in place of the court, the entire merits on the issues in the pleadings. Such exercise of power by the commissioner would be manifestly irregular unless expressly given him by the court. No other matter was before the commissioner under the default and order of reference, than the money demand stated in the libel. It appears to me that the course pursued on this hearing substantially overlooks the case which the court can only regard. The order of reference embraced nothing more than an inquiry into the state of the captain's account for wages due and money paid or supplies furnished by him for the owners. The default of the defendant in court legally excluded him from denying that such indebtedness existed, and the inquiry was legitimately directed to the ascertainment of the quantum of that debt alone. The report of the commissioner meets that inquiry by stating the balance due the master. There the authority of the commissioner ends under the order.

Whatever interest goes with the principal as a legal incident is not matter of fact for the commissioner to find and report. That report is not exceptionable in omitting a detail of allowances upon which it is founded.

The defendant should have demanded such specification if it was his right and important to him, and in omitting so to do, the court must acquiesce in that side of the report. Indeed, his exception would be fatal if directly falsifying the report unless it pointed to particulars which had been objected to on the hearing and were, notwithstanding the objection, allowed by the commissioner. The question would then legitimately arise and could be decided by the court, whether an error had been committed by the commissioner. The commissioner under this reference, had no authority to inquire into and pass upon any charges or allegations set up in the answer against the master in recoupment or otherwise, whether in relation to money or property or the acts or omissions of the master on the voyage, unless such doings or things so alleged were chargeable against the master and acquired by him in payment or satisfaction of the debt due him. If within the authority of the court so to refer the whole subject of the litigation to the commissioner, it was not done by these orders. The issues made by the pleadings were not per se proper subjects of reference. They should have been passed upon by the court, and the legal rights of the parties be fixed by direct decree. The default of the defendant withdrew in law the defence pleaded by him, and left the libelant entitled to a reference for the purpose only to obtain an adjustment of his account. The amendment in August term, 1856, to the original order, no way enlarged the former one. It would operate only to remove the defendants' default and permit him to contest the truth of the libelant's account before the commissioner. This has not been done either by impeaching any particulars allowed in the account, or afterwards calling upon the commissioner to give in a specification of these items and their offering to disprove them before the court upon exceptions or on re-reference. There is an error on the face of the report which the defendant is entitled to have rectified. The libel avers no liquidated debt or amount stated, and the report itself demonstrates that the amount charged was not a true balance due, and rejected nearly two-thirds of the face of it. The commissioner reports $1,683.50 interest on the balance of account allowed the libelant. This is erroneous. The account was unliquidated between the parties, and would remain so and not entitled to carry interest until judgment of the court upon the report of the referee was rendered.

Judgment must accordingly be rendered against the exceptions and in favor of the libelant on the report for $2,691.08, with costs.

[NOTE. The case came again before the court at a subsequent date, when the libelants moved to confirm the commissioner's report, and to modify the order of the court, which disallowed a certain sum for interest on the amount due. The motion was denied. Case No. 9,664.]

Case No. 9,664.

MITCHELL v. KELSEY.

[N. Y. Daily Times. August 2, 1862.]

District Court, S. D. New York.

PRACTICE IN ADMIRALTY—STALE CLAIM—INTEREST.

[In a suit upon stale claims not resting upon express contract, a court of admiralty in rendering a decree for libelant may refuse interest.]

[This was a libel by Andrew C. Mitchell against Charles Kelsey and others, owners of the bark Philena. The case was referred to the commissioner. Exceptions were taken to the commissioner's report. These exceptions were overruled. Case No. 9,663. It is now heard upon libelant's motion to confirm the report as a whole.]

Beebe, Dean & Donohue, for the motion.

Benedict, Burr & Benedict, for defendant.

BETTS, District Judge. This was an action brought by the master of a vessel to recover for his services on the vessel as master, miscellaneous supplies furnished by him for necessities, and an indefinite claim of commissions thereon. The suit was not commenced until a lapse of some years, and it did not appear that any of the charges, except for the wages, rested on any particular contract. The interlocutory decree was made directing a reference to a commissioner to ascertain the amount due. Upon the coming in of the report, the defendant excepted to various items, and among them to $1,683 allowed as interest. Upon the hearing of the exceptions the court disallowed this latter sum, and the libelants now moved for a modification of the order, and that they be allowed to recover the whole amount reported.

Held, that under the circumstances of this case the court would not allow the interest, and the motion to confirm the report as to that item must be denied.

MITCHELL (KIKINDAL v.). See Case No. 7,763.

MITCHELL (KIRKENDALL v.). See Case No. 7,841.

Case No. 9,665.

MITCHELL v. LIPPINCOTT et al.

[2 Woods, 467; 1 Cent. Law J. 265.][1]

Circuit Court, S. D. Alabama. April Term, 1874.[2]

HUSBAND AND WIFE—ALABAMA ACT—SEPARATE ESTATE — POWER TO MORTGAGE FOR HUSBAND'S DEBT—STATE ADJUDICATIONS.

1. Under the "married woman's law" of Alabama, as now construed, a married woman can

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 1 Cent. Law J. 265, contains only a partial report.]

[2] [Affirmed in 94 U. S. 767.]

in no case mortgage her separate estate, however acquired or held, for her husband's debts.

2. A married woman executed a mortgage on her separate estate to secure her husband's debt at a time when, according to the decisions of the supreme court of the state, such a mortgage was valid. By subsequent decisions of the same court, such a mortgage was declared invalid. *Held*, in a proceeding to enforce the mortgage, that the federal court was bound by the later adjudications of the state supreme court.

[Cited in Kimball v. Mobile, Case No. 7,774.]

In equity. This cause [against Lippincott & Co.] was heard for final decree upon the pleadings and an agreed statement of facts.

A. R. Manning and Percy Walker, for complainant.

T. N. McCartney and M. E. McCartney, for defendants.

WOODS, Circuit Judge. On the 19th of March, 1866, there was conveyed to the complainant, who was a feme covert, by a deed of that date, certain real estate in the city of Mobile. The deed in the granting clause purported to convey the premises to the said Nannie C. Mitchell, her heirs and assigns forever. The habendum et tenendum clause was as follows: "To have and to hold the above granted and bargained premises unto the said Nannie C. Mitchell, her heirs and assigns, to the sole and proper use, benefit and behoof of the said Nannie C. Mitchell, her heirs and assigns forever." On the 17th of February, 1869, the complainant jointly with her husband, executed a mortgage on this property to the defendants. The mortgage was not to secure any debt of the complainant, but was to secure one for which her husband expected to become liable. The mortgage contained a power of sale, and the debt secured thereby not having been paid in full, the defendants advertised the premises for sale. This bill was filed for a perpetual injunction to restrain the defendants from selling the property under the mortgage. The claim of the bill is that the premises were the separate property of the complainant as a married woman, and that under the laws and jurisprudence of this state, she could not incumber her separate estate for her husband's debts, and that her mortgage for that purpose is absolutely void.

The "married woman's law," as it is called, was passed in 1850, and is found in the Revised Code (section 2371 et seq.). Section 2371 declares that "all property of the wife held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband." The complainant claims that under this provision of the law, as now construed by the supreme court of the state, the mortgage upon her property was absolutely void for want of power in her to incumber it for the debt of her husband.

The defendants claim that under the decision of the supreme court of the state, construing the "married woman's law," the estate a feme covert might acquire, as at common law, was not interfered with by this act. So that after the passage of this act, a married woman in this state might hold two kinds of separate estate, each governed by different laws. One was called her separate estate under contract or deed, and the other her separate estate under statute, or statutory separate estate; that the distinction was, that if she held by a deed which used words of such significance as to exclude the marital rights of the husband, the deed itself gave her a separate estate, and the rules of the common law governing such an estate applied; but if the conveyance under which she held used no such words, or the estate came to her by descent, then she held it as separate estate under the Code, and the rules of law governing such an estate were laid down by the Code; that when the estate was a separate estate by deed or contract the wife might, as at common law, incumber it for her husband's debts, by mortgage properly executed. The defendants claim that this construction of the law was maintained by the supreme court of the state until after the execution of the mortgage to them by complainant; that under the law as so construed, her estate was a separate estate by deed, and she might well incumber it for her husband's debts. They cite Cowles v. Morgan, 34 Ala. 535; Paulk v. Wolfe, Id. 541; Gunter v. Williams, 40 Ala. 561; Nun v. Givhan, 45 Ala. 375. It is however conceded by the defendants, that since the date of this mortgage the supreme court of the state has adopted a different construction of section 2371 of the Revised Code, and that they now hold that there is no distinction between the two sorts of separate estates; that both are governed by the Code, and that in no case can a married woman mortgage her separate estate, however acquired or held, for her husband's debts. But the defendants insist that this court is not bound to follow these later adjudications, but should adhere to the law as construed by the court at the time the contract was made. In my judgment, this claim of the defendants is not well founded.

The mortgage to the defendants, as above stated, bears date the 19th of February, 1869. In January, 1869, the supreme court of the state decided the case of Bibb v. Pope, reported in 43 Ala. 190. In that case it appeared that on August 10, 1860, there was conveyed to Mrs. Evelyn Pope, who was then intermarried with Augustus Pope, the premises in controversy "to have and to hold the same to her, her heirs and assigns, to her use and behoof forever." On the 6th of April, 1866, Pope, the husband, borrowed $10,000 of the plaintiff Bibb, for which he gave his bill of exchange, and he and his wife executed to Bibb a mortgage, with power of sale on the premises, to secure the

payment of the same. Pope failed to pay the bill at maturity and Bibb advertised the property for sale. Thereupon Mrs. Pope, by her next friend, filed her bill for a perpetual injunction to restrain the sale, claiming that the mortgage was void. I have been thus particular in the statement of this case that it may appear how nearly it resembles in its facts the case at bar.

In deciding the case, the court said: "The only question discussed at the bar was whether Mrs. Pope was bound by said mortgage, and whether her statutory separate estate was liable to be sold under it to pay her husband's debts. This question has not heretofore been settled by any decision of this court." The court then decides that if the sale of the separate estate of the wife to pay the husband's debts was permitted, the whole purpose of the law, so far as it protects the wife's separate estate, would be defeated, and that the wife had no power to mortgage her separate estate for her husband's debts. Conceding that the decision of the supreme court of the state had been as claimed by defendants up to the case of Bibb v. Pope, it is clear that the rule was broken over by this case and a different one adopted. And this decision was made before the date of the mortgage. The ruling in this case has since been adhered to by the court. Cowles v. Marks, 47 Ala. 620; Ellett v. Wade, Id. 464; Denechaud v. Berry, 48 Ala. 591. But suppose, as claimed by the defendants, the rulings had been, as stated by them, until after the delivery of the mortgage and the construction of the law had then been changed, which construction ought this court to follow? The defendants say that we are bound to enforce the law according to the construction given it at the date of the mortgage. In support of this position, they cite the case of Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 206, in which the supreme court of the United States says: "The sound and true rule is, that if the contract when made was valid, by the laws of the state, as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of the legislature or decision of its courts altering the construction of the law." Also Havemeyer v. Iowa City, 3 Wall. [70 U. S.] 303; Olcott v. Supervisors, 16 Wall. [83 U. S.] 678; Ohio Life Ins. Co. v. Debolt, 16 How. [57 U. S.] 432.

It is to be observed that the case of 16 How. was the case of a contract made by the state, and the court held that the rules of interpretation which required the federal to follow the state courts in the construction of the laws of the state "were confined to ordinary acts of legislation, and did not extend to the contracts of the state, although they should be made in the form of law." The cases in 3 Wall. [70 U. S.] and 16 Wall. [83 U. S.] concerned the interpretation of laws upon which the validity of bonds issued by municipal and political corporations depended. On the other hand, in the case of Suydam v. Williamson, 24 How. [65 U. S.] 427, the supreme court of the United States held that when any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by the supreme court that would be applied by the state tribunals. In this case the supreme court, following a change in the decisions of the supreme court of New York, reversed its own decision in Williamson v. Berry, 8 How. [49 U. S.] 495, "although property had been bought and sold upon the faith of the opinion there delivered and the judgment pronounced by this court." So in the earlier case of Jackson v. Chew, 12 Wheat. [25 U. S.] 162, the court said: "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that when any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by this court as by the state tribunals." So also in Beauregard v. New Orleans, 18 How. [59 U. S.] 497, the court says: "The constitution of this court requires it to follow the laws of the several states whenever they properly apply, and the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title to lands. Upon cases like the present, the relation of courts of the United States to a state is the same as that of her own tribunals. They administer the laws of the state, and to fulfill that duty, they must find them as they exist in the habits of the people and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the states and the Union would be productive of the greatest mischiefs and confusion." In League v. Egery, 24 How. [65 U. S.] 264, the supreme court of the United States reversed its own decision, made in Arguello v. U. S., 18 How. [59 U. S.] 539, to the effect that the colonization regulations of Mexico of 1824 and 1828 did not prohibit the settlement of the littoral or coast leagues by natives under the authority of the governor of California and without the consent of the central government of Mexico. This was done without re-examining that opinion or making any attempt to account for or reconcile the differences, because the supreme court had found that a contrary opinion had prevailed in the courts of Texas, and had become a rule of property there. That the decisions of the state courts touching the title to lands are to be treated as binding authorities in the courts of the United States is held in the following cases: Polk v. Wendal, 9 Cranch [13 U. S.] 87; Rundle v. Delaware Canal Co., 14 How. [55 U. S.] 93; Thatcher v. Powell, 6 Wheat. [19 U. S.] 119; Elmendorf v. Taylor,

10 Wheat. [23 U. S.] 152; Ross v. Barland, 1 Pet. [26 U. S.] 655; McKeen v. Delancy, 5 Cranch [9 U. S.] 22. The settled construction of a state statute is considered as a part of the statute. Massingill v. Downs, 7 How. [48 U. S.] 767; Nesmith v. Sheldon, Id. 812; Van Renssalear v. Kearney, 11 How. [52 U. S.] 297; Webster v. Cooper, 14 How. [55 U. S.] 504; Green v. James [Case No. 5,766]; Woolsey v. Dodge [Id. 18,032]; Thompson v. Phillips [Id. 13,974]. In construing the statutes of a state, infinite mischief would ensue should the federal courts observe a different rule from that which has been long established in a state. McKeen v. Delancy, supra. In cases depending upon the statutes of a state, and more especially those respecting the titles to land, the federal courts observe the construction of the state, when that construction is settled or can be ascertained. Polk v. Wendal, supra. The supreme court uniformly acts under a desire to conform its decisions to the state courts upon local laws forming rules of property. Mutual Assur. Soc. v. Watts, 1 Wheat. [14 U. S.] 279. The supreme court holds in the highest respect decisions of state courts upon local laws forming rules of property. Shipp v. Miller, 2 Wheat. [15 U. S.] 316. When the construction of the statute of the state relates to real property, and has been settled by any judicial decision of the state where the land lies, the supreme court, upon the principles uniformly adopted by it, will recognize the decision as a part of the local law. Gardner v. Collins, 2 Pet. [27 U. S.] 58. In construing local statutes respecting real property, the courts of the Union are governed by the decisions of state tribunals. Thatcher v. Powell, 6 Wheat. [19 U. S.] 119. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. Leffingwell v. Warren, 2 Black [67 U. S.] 603, and cases there cited. If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, the federal courts will follow the latest settled adjudication. U. S. v. Morrison, 4 Pet. [29 U. S.] 124; Green v. Neil's Lessee, 6 Pet. [31 U. S.] 291; Leffingwell v. Warren, supra.

The question whether a mortgage of real estate is valid or not is certainly a question touching real property. The case at bar, therefore, falls within the decisions cited. The rule, established by the earlier decisions of the supreme court, is recognized in the case of Olcott v. Supervisors, 16 Wall. [83 U. S.] 678, cited by the defendants, in which Mr. Justice Strong, delivering the opinion of the court, says: "It is undoubtedly true, in general, that this court does follow the decisions of the highest courts of the states respecting local questions peculiar to themselves, or respecting the construction of their own constitution and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state which the federal courts adopt as rules for their judgments." Do not the adjudications of the supreme court of Alabama, construing the statute of the state regulating the rights of married women and the validity of mortgages executed by them upon their real estate, fall within the class of cases mentioned by Judge Strong, where the federal courts are bound to follow the state decisions? If the rule is ever to be applied to any case, it seems to me the construction of the "married woman's law" is a proper case for its application. The conclusion must therefore be that the mortgage of the complainant was void and the defendants ought to be restrained from proceeding under it to subject the mortgaged premises to sale. Decree accordingly.

[The respondents appealed to the supreme court, where the decree of the circuit court was affirmed: Mr. Justice Strong dissenting. 94 U. S. 767.]

Case No. 9,666.

MITCHELL v. McKIBBIN.

[29 Leg. Int. 412; 8 N. B. R. 548; 21 Pittsb. Leg. J. 77.] [1]

District Court, E. D. Pennsylvania. Nov., 1872.

BANKRUPTCY—EQUITY OF REDEMPTION — DEFEASIBLE CONVEYANCE—RIGHTS OF CREDITORS —SUIT BY ASSIGNEE.

1. The defendant, owning the lease, good-will, fixtures, furniture, and other contents, &c., of a profitable hotel, sold the same to his two sons, for a price equal to three-fifths only of the value, on a long credit payable in deferred instalments, bearing interest; and it was, at the same time, agreed between them that, on default in payment, the premises should, at the defendant's request, be reconveyed. Under this agreement his right of resumption was a mere security for the price, the transaction being the same, in effect, as if he had, on transferring the property and possession, received a mortgage from the sons for the price.

2. The form of words used was, in this respect, immaterial. An express provision that, in the event of default, the property should revest absolutely, without any equity of redemption, would not have been valid so as to debar the right of redemption, or foreclose it in advance.

3. If an exception from this rule were admissible, as between seller and buyer, in peculiar cases, the exception could not be admitted where the debt is of less amount than the value of the security, and the right of resumption is unilateral at the creditor's option, and is indefinitely protracted.

4. If this were otherwise the right of absolute resumption would not be exercisable on the debtor's insolvency, in derogation of the right of his other creditors to the benefit of the surplus in value, or equity or redemption.

5. After the purchase by the sons, the business of the hotel was continued by them in partnership, with great profit: but, through causes wholly extrinsic, they became, long after the last

[1] [Reprinted from 29 Leg. Int. 412, by permission. 8 N. B. R. 548, and 21 Pittsb. Leg. J. 77, contain only partial reports.]

instalment of the price fell due, insolvent. This was three years and four months after their purchase. They had not paid to the defendant, any part of the price; and were, on other accounts, both as partners, and each separately, indebted to him. On learning the state of their affairs, he demanded a return of the property; whereupon they, in professed execution of their former agreement, and in extinction of their debt for the price with its interest, made a retransfer to him. This retransfer was, in form, absolute. It was, in effect likewise, absolute, as between the parties to it.

6. Therefore, as against the sons themselves, it determined their equity of redemption, which had, until then, continued.

7. As against their creditors proceeding adversarily, the retransfer was wholly invalid, even as to the unpaid price, unless the actual and apparent possession was resumed, and retained by the defendant.

8. His resumption of the hotel was published in two daily newspapers of local general circulation; his name was substituted for the names of the sons on the register of guests, and at the heads of the bills rendered; new books of account, &c., were opened in his name; and the actual receipts and disbursements were by him. This, although one of the sons remained there, as a superintendent of the business, in the service of the defendant, was not an insufficient resumption and retention of possession by the defendant, if as full actual and apparent control as the nature of the subject reasonably admitted of, was fairly exercised by him. 14 P. F. Smith [64 Pa. St.] 352.

9. Although there was such a change of the possession sufficient as against creditors proceeding adversarily, yet the retransfer, having been made by the sons when insolvent, was invalid, as against such creditors, to such extent as the consideration may have, in part, been not valuable, but voluntary.

10. The property, when retransferred, was of considerably greater value than the debt for the price of the original sale, with interest. The consideration of the retransfer was not valuable, but voluntary, as to such excess in value.

11. In the absence of actual, as distinguished from constructive or legal fraud, the fact that a material part of the consideration was thus voluntary, did not preclude the defendant, so far as it was valuable, from asserting title under the retransfer, as against creditors proceeding adversarily.

12. He was entitled therefore, to retain the property, even as against such creditors, until he should receive payment in full of the debt for the price and interest, though as between the debtors and himself, it had been extinguished by his acceptance of the retransfer.

13. But, as the debtors were, at the time of the retransfer, insolvent, the property, subject to the defendant's right of repayment, was recoverable at the suit of such creditors, in equity; and so soon as he should be repaid in full, immediate possession was recoverable by such creditors under proper proceedings at law or in equity.

14. The defendant retained the property for some time, receiving from it profits of large amount, after which he sold out for a price exceeding considerably the amount of the original price with interest. The price at which he thus finally disposed of the property was a single entire consideration, unapportioned between the good will and the corporeal moveable effects. These effects and the good will were of about equal value. The amount of clear profits received by him since the retransfer, together with the value of the good will when the final disposition was made, exceeded the amount of the price of the original sale with interest. Two days before the defendant thus sold out, but more than six months after the retransfer, the survivor of the sons commenced, in this court, proceedings under which he was voluntarily adjudged a bankrupt; after which, the plaintiff, in the due course of these proceedings, became the assignee in bankruptcy; and subsequently sued the defendant in trover to recover the value of the corporeal effects. If the retransfer had otherwise been valid against creditors, and had been made invalid by the bankrupt law alone, the commencement of the proceedings in bankruptcy was here too late to enable the plaintiff, as assignee in bankruptcy, to set aside the defendant's title.

15. But the assignee in bankruptcy, representing the general body of the creditors, may sue adversarily on their behalf—where the bankrupt himself could not—to annul, or set aside, any act which, under the general law of debtor and creditor, is, in whole or in part, void or voidable as against creditors.

16. Whatever has been either actually or constructively fraudulent is thus void or voidable.

17. As to "all the property conveyed by the bankrupt in fraud of his creditors," the title of the plaintiff, as assignee, under the 14th section of the bankrupt act of the 2d of March, 1867 [14 Stat. 522], "related back" to the time of the commencement of the proceedings in bankruptcy. Therefore, if he could otherwise maintain the action, the defendant, who had not then disposed of the effects in question, could not apply the proceeds of the subsequent disposal of them in payment of any other demand which he may have had against the sons.

18. In the present action of trover the plaintiff could not recover more, in damages, than the value of the corporeal effects; nor could he recover to the amount of their value, unless they had been wrongfully converted by the defendant to his own use after the commencement of the proceedings in bankruptcy.

19. The only such conversion was the sale by which he finally disposed of the good will and the corporeal effects, together, for a single price. This would not have been such a conversion, if his relations had not then been adversary. The good will and corporeal effects could not have been sold separately without a sacrifice of each; and, as the debt rightfully secured to him was in part unpaid, the disposal of the whole together, by a single act, in order to effectuate the security, would not have been wrongful. In that case, the plaintiff's only recourse would have been for the surplus of the proceeds, for which he could not have sued in trover.

20. But if the defendant's possession of the whole was with assertion of exclusive right in himself, it was an adverse possession; and, if he sold with an existing intent and purpose to appropriate the whole avails to his own exclusive benefit, the sale, as made, was, it seems, a conversion such that the action of trover might be maintainable.

This was an action of trover, at the suit of James T. Mitchell, assignee in bankruptcy of Jeremiah McKibbin, surviving partner of the late firm of Jeremiah & William C. McKibbin, against their father Chambers McKibben, to recover the value of certain furniture and other effects in the Merchants' Hotel, in the city of Philadelphia.

Diehl & Archer, for plaintiff.

Sellers & Biddle, for defendant.

CADWALADER, District Judge (charging jury). The articles of agreement of 11th June, 1868, state that on February 1st, 1865, Chambers McKibbin was the owner of the lease and good will of the Merchants' Hotel, and of its furniture and fixtures of all kinds,

its bed and table linen, carriages and horses, and generally of its arrangements and appurtenances of every nature, for the transaction of the business of hotel keeping. At that time, February 1st, 1865, he was desirous of relinquishing the business in favor of his two sons, Jeremiah and William C. McKibbin. He deposes that the hotel was of the clear yearly value of from $15,000 to $20,000, and was worth $50,000 to a stranger, but that he was willing to dispose of it to them for $30,000, and to receive payment out of the future profits, because they were his sons, and had been concerned with him in the business and in building up its good will and character, and also because he hoped that certain debts which they owed him might, if they prospered, be repaid. The sale was made accordingly for $30,000, payable in six instalments, of $5,000 each, one in twenty days, and the other five, which were to bear interest, in six, twelve, eighteen, twenty-four, and thirty months, respectively. For each of the six instalments they gave to him their promissory notes. Except these notes there was no writing executed. But the subsequent articles state that it was agreed at the time of the sale that, in the event of default in payment of the notes, the premises should, at his request, be reconveyed. He testifies to an express understanding, that if anything happened that they could not pay, they were to return the property to him; and Mr. Joseph McKibbin testifies, that in the event of their failure to pay their father, for his protection the agreement was, that the property should be retransferred. Jeremiah McKibbin also deposes, that there was an understanding of the same effect as that mentioned in the articles. We may therefore understand what occurred as having been expressed in the language of the subsequent articles.

Jeremiah and William C. McKibbin carried on the business from February 1st, 1865, till 11th or 16th of June, 1868. In this time, say three years and four and a-half months, the cash receipts were $665,802; and the whole expenditures, including rent, $537,691; the profits being $128,111,—more than $38,000 yearly, and about $3,200 monthly; but Jeremiah McKibbin thinks that the business of the last year was not so good by about 20 per cent. as that of the former period, so that for the last year we may assume that they were not less than $30,000. Of the profits, amounting to $128,111, Jeremiah McKibbin drew out $51,403, and William C. McKibbin $57,219; together, $108,622,—leaving between $19,000 and $20,000, nominally at least, in the concern, ($19,489.) They had, however, incurred other liabilities, not on the books, nor arising from the business of the hotel, to a considerable amount; they had not paid to their father a cent on account of the $30,000 purchase money, for which he held their notes; and they were each on separate account indebted to him in a large sum.

Here, I may observe, that their father's title to the property in dispute in this case cannot be in any wise benefited or improved by reason of any debt of either of them to him, except the notes for $30,000. The jury may dismiss from their minds every other debt to him. The father, in June, 1868, received information of their embarrassments; and learned from themselves that the information was true. He then demanded the return of the hotel property; and they agreed, as he says, to give it back. The articles of agreement of June, 1868, which I have already mentioned more than once, were accordingly prepared and executed, containing a brief recital of what had occurred in 1865, stating that the whole purchase-money remained due and unpaid, and, in consideration of the surrender of the promissory notes, and of the debts which they represented, and in pursuance of the agreement and understanding made at the time of the original purchase, purporting to sell and transfer to him the lease of the Merchants' Hotel premises, then held by them, together with the good will, fixtures and appurtenances of the business then transacted in the hotel, and all and singular the furniture, bed and table linen, crockery ware, cutlery, horses and carriages, and generally all things for the transaction of the business of hotel keeping, to them belonging, and then to said premises and the business there transacted pertaining. This was, in form, an absolute transfer. What it was, in effect, as between the parties, and as against creditors, will be considered hereafter.

Mr. McKibbin, the father, conducted the business of the hotel until the 24th of May, 1869, between eleven and twelve months. What his receipts were, during this time, beyond the expenses, we do not know precisely. The bookkeeper could not tell, for a reason which the jury will recollect. Mr. McKibbin himself says, that the hotel was worth from $15,000 to $20,000 clear value every year. Jeremiah McKibbin testifies indistinctly. We know that the profits in the time of him and his brother had averaged $38,000. He says: "After the retransfer the business fell off about twenty per cent. I don't know, the books are here. I think the last year we were there the profits fell off about twenty per cent." Perhaps he means there was a two-fold falling off, first of twenty per cent. in their own last year, and again of twenty per cent. after the retransfer, say first to $30,000, and afterwards to $24,000. The lowest amount, on the father's own evidence, was not less than $15,000. On the 24th of May, 1869, he sold out the concern for $42,000. How much of this was the value of the furniture, and how much of the good will, is not precisely shown. The purchaser says, about half each, $21,000 furniture, and $21,000 good will. The furniture had been constantly insured, we are told, for $30,000; and therefore its value in the hotel was probably greater than $21,000. The purchaser seems to have made his estimate upon some notion of removing the fur-

niture. His valuation, though it may seem low, is, however, perhaps the safest estimate that we have in the evidence. But the whole subject of value is peculiarly one for the jury. William C. McKibbin died on the 3d of Oct., 1869; and on the 22d of May, 1869, two days before the elder Mr. McKibbin sold out, Jeremiah McKibbin, as surviving partner of J. and W. C. McKibbin filed his petition as a voluntary bankrupt. The title of the plaintiff, as assignee in bankruptcy, has relation to that day, that is to say, takes effect from the 22d of May, 1869. Representing the adversary rights of the general body of the creditors, he alleges that the sale by Mr. McKibbin on the 24th of May, 1869, was a wrongful conversion or disposition of the furniture and effects mentioned in the declaration to Mr. McKibbin's own use.

On behalf of the defendant I am requested to charge you:

1. That the transfer of June 11th, 1868, being more than six months previous to the filing of the petition in bankruptcy was not an act of bankruptcy. This proposition is affirmed.

2. That the transfer of June 11th, 1868, being valid by the laws of Pennsylvania, even though it preferred a creditor, the plaintiff in this case cannot recover unless the bankrupt has a beneficial interest in the goods, notwithstanding said transfer. This proposition is affirmed absolutely on the question of preference; and is otherwise affirmed throughout, except as it may be qualified, if the jury, under instructions hereafter to be given, shall find that the transfer, though absolute as against the debtors, was, under the general law of debtor and creditor, invalid as against creditors proceeding adversarily.

3. That if, at the time of said transfer, the defendant was a creditor of the bankrupt firm to an amount exceeding the value of the articles transferred, said transfer was valid, and the verdict should be for the defendant. This proposition is affirmed, if the value of the articles did not materially exceed the amount of the notes for $30,000, with interest.

4. That a transfer of the goods and chattels in 1868, vested the title and possession in the defendant legally, and the plaintiff cannot recover in a case founded on a tortious conversion. This proposition is affirmed, except so far as it may be qualified hereafter in the course of the charge to the jury.

5. That inasmuch as the plaintiff has in certain counts declared on a tortious conversion, and in other counts that there was a transfer in fraud of the bankrupt act, the verdict must be for the defendant. On this point the court instructs the jury that their verdict cannot, upon the evidence, be for the plaintiff upon any count of the declaration except the third;[2] and further than this, refuses to give the instruction requested.

6. If the jury believe that the transfer of the property to Chambers McKibbin, was an honest transaction, made in pursuance of the original agreement to make such transfer in case of non-payment, and for a bona fide consideration, the verdict must be for the defendant. This proposition is affirmed except so far as it may be qualified through the distinction between actual, and legal or constructive fraud, which will be explained hereafter.[3]

If the assignee in bankruptcy, who is here plaintiff, had no better right than J. and W. C. McKibbin, or no better right than Jeremiah McKibbin, as the surviving partner, the present action could not be sustained. But an assignee in bankruptcy may, in two respects, be able to sustain adversary proceedings where the bankrupt himself could not have done so if there had been no bankruptcy. In one of these respects, the assignee can sue to annul, set aside, or avoid acts which the bankrupt law makes void or voidable. In the other respect, he can sue to avoid or annul, or set aside, any act which, under the general law of debtor and creditor, is void or voidable as against creditors. In the present case, there has not been any act which the bankrupt law makes void or voidable, unless it would be so under the general law of debtor and creditor. But under the general law, the assignee represents the general body of the creditors; and may sue adversarily where the bankrupt himself could not. So far as may be necessary to annul or set aside, any act, in whole or in part, actually or constructively fraudulent as against the creditors, the assignee thus represents them. I say actually or constructively fraudulent, because there may be acts which would be perfectly justifiable on the part of a person who is not insolvent, but are fraudulent, as against creditors, when they have been done by an insolvent or an embarrassed person.

A great deal of the evidence on both sides bore upon the question, whether, upon the retransfer by the sons to the father, there had been a sufficient change of possession. As against creditors, a change of a debtor's ownership, without a change of the possession, does not protect moveable property against his creditors. But the law does not, in this respect, exact what is impossible. If such change as the nature of the subject admits of is fairly made, nothing more is, in general, required. In the present case, if the jury find, that, according to this rule, there was a sufficient change of possession in fact, the court cannot say that it was insufficient in law. On the contrary, the court cannot perceive that anything which ought to have

[2] This third count alleged property in the plaintiff and a conversion by the defendant to his own use. A date was erroneous, but being stated under a videlicet, the error was immaterial.

[3] These points were stated and answered by the judge at the outset of the charge. The six propositions, and the answers, are transposed because they will be more intelligible here to a reader who was not present at the trial.

been done was omitted. There was a public advertisement in the newspapers. The title or heading in the register was changed, and the bill heads were changed. Nothing more could be done, unless a circular notice were sent to all persons who had previously dealt with the hotel or its proprietors. The business of a hotel does not seem to be such as to require such a notice, or even to admit of it. But the question is wholly for the jury. It is true that Jeremiah McKibbin remained in the hotel; and he may have been the apparent and actual superintendent of the business. But the supreme court of the state has decided, that this may consist with an assumption of actual and apparent control by the new proprietor; and it is for the jury to determine whether the actual and apparent possession and control were not in Chambers McKibbin. If the case depended upon this question, I should not expect a verdict for the plaintiff.

The remaining inquiry is upon the effect of what was done between the father and the sons to deprive the creditors of the sons of the surplus value of the lease, good will, business and contents of the hotel above the amount of the six notes for together $30,000, and the interest on them which made this debt about $36,000. If you find the question of possession in the father's favor, as I assume that you will, I see no difficulty in his right to receive full reimbursement of this amount out of the property.

The other questions are, first, whether, upon the merits, he was the absolute owner of the property, so as to have a right, as against creditors, to keep the surplus for his own use; and secondly, a technical question, whether, if the merits are with the plaintiff, he can recover in the present form of action.

In considering the first point, it may be premised that the defendant, as between himself and his sons, had a right to this surplus, not under the sale or arrangement of 1865—though this, perhaps, may be immaterial—but, under the retransfer of 1868, which was, in form, absolute. If the sons had not been insolvent, or embarrassed, when the retransfer of 1868 was made, they could have done as they pleased with what was their own. But persons who are insolvent, or embarrassed with debts which they cannot pay, cannot bargain with one creditor so as to defeat any just right of other creditors. This proposition, as it will be applied hereafter, does not depend upon the bankrupt law, but upon the general law of debtor and creditor.

We may now go back to the original sale of February 1, 1865, in order to determine what were the defendant's rights under it. The most favorable view of the case which he can reasonably ask you to take is, that he may stand, in all respects, on the same footing as if he were not the father of the debtors, or in any relation of consanguinity to them. That he should stand, as against creditors of the sons, on any better footing, would shock every man's moral sense of propriety. But he should not stand on a worse footing than any other person who had made just such a contract with them on the 1st of February, 1865. He deposes, in effect, that the sale was made to them for three-fifths only of the then value of the property. He says that it was worth $50,000 to a stranger; but for the reasons which he states, he let them have it for $30,000. The subsequent articles, which all three of the parties executed, recite that in the event of default in payment of the notes, it was agreed that upon his request the premises should be reconveyed. This important contract was verbal. If written it might have been expressed as follows: Chambers McKibbin, proprietor of the lease, good will and fixtures, and furniture and effects of all kinds of the Merchants' Hotel, the same being of the value of $50,000, in consideration of his natural love and affection for his sons, Jeremiah and William C. McKibbin, and of thirty thousand dollars payable in six instalments, for which they have given him their promissory notes, each for $5,000, one of them payable in twenty days, and the other five payable with interest, in six, twelve, eighteen, twenty-four and thirty months, respectively, and for divers other good causes and considerations him thereunto moving, sells and transfers the same to them; and it is agreed, that in the event of a default in payment of the said notes, the said premises shall, at the request of the said Chambers McKibbin, be reconveyed. Now, such an agreement would be the most natural and proper and honest that, with the motives of the elder Mr. McKibbin, could have been executed. And if there had been a writing it would probably have been expressed as I have supposed it, except that the words of the value of $50,000, would probably not have been inserted. But though not inserted, the value would have been provable upon the question which we are about to consider; and, if material to the question, would have been of the same effect as if inserted. To simplify the question, I have therefore supposed it inserted, taking the defendant's own estimate of the then value. The legal or equitable effect would have been the same if the value inserted was $42,000, or any other amount in material excess of the consideration.

This excess in value simplifies the question, what was the effect of the agreement that in case of default, the premises were, upon the seller's request, to be reconveyed. The meaning and effect of such an agreement was that he was to retain them as a security for the $30,000, with interest, just as if they were mortgaged to him, and that if default should be made, he might, upon request, insist upon having possession of the premises restored to him, to hold them as a security till paid, or to be sold in order to effectuate the security. But he could not enforce the literal execution of the agreement to reconvey, in the sense of excluding the debtors from a right to redeem

the premises. He might, after a reasonable notice to the debtors, have sold for the payment of the $30,000, with interest; and the debtors would then have received the surplus. Whether he could have sold without the decree of a court, is an unimportant inquiry. So, it is not important to inquire whether he could have obtained a judicial decree limiting the time within which they might redeem. It is not necessary to answer every question as what he might have done without the consent of the debtors. It suffices to state what he could not have done. He could not have arbitrarily taken the law into his own hands, and compelled an absolute retransfer, according to the literal meaning of the words. He could no more have done so than the payment of the pound of flesh could be enforced literally by Shylock. This may be explained by considering the nature of a mortgage, not that of a pledge distinctively so called, nor the very peculiar case of stoppage in transitu, which has been supposed and argued by counsel. Whether there would have been any difference in the case of a pledge, it is not necessary to inquire. I do not know that there would be. But let us consider the case of a mortgage properly so called. When I say "properly so called," I do not refer particularly to any form of conveyance. I mean simply a security for a debt, where the debtor, and not the creditor, has possession of the property which constitutes the security, till default, and where, upon default, the creditor may take possession. When such a security is written, the form of the writing is unimportant. Sometimes the form is wholly different from the effect. My house may be worth $5,000. I may borrow $500 for a year on the security of the house, and mortgage it to the creditor. The ordinary form of the transaction is, that I give my bond in $1,000, conditioned to pay the $500 with interest; and I convey the house to the creditor to be held by him forever, provided that if I pay him the $500, with interest, within the year, the conveyance shall be null and void, and in that case I shall have back my house; or the mortgage may expressly provide that it shall be reconveyed to me. Here I may continue in possession of the house till I make default, though the mortgage purports on its face to convey the house at once to the creditor. If I make default, he may demand possession; and I must give it up. But if he takes possession, though the mortgage says that it is absolutely his house, in consequence of my default, yet it continues to be my house, though I have made the default; and he holds the possession of it only as a security for his $500 with his interest. As soon as he has received that amount from the rents or profits of the house, he must surrender the possession to me. Ordinarily, a creditor would not embarrass himself by taking possession, but prefers instituting proceedings to compel a sale of the house. This is ordinarily a sale by the sheriff under legal proceedings. But the mortgage may contain a power enabling the creditor to sell, and then legal proceedings may be dispensed with. But whether he sells, or the sheriff sells, he gets only his $500 with interest; and if the sale is for $5,000, or for any less sum, he gets no more, and I get the rest of the money, less costs. I get this money, as proceeds of the sale of my house, and not of his house, though, according to the words of the mortgage, it has been his house all the time.

Now, it is unimportant what may have been the form of the writing, if it was intended as a security for money. And it is a settled rule that the debtor cannot, at the time of the mortgage, make a contract relinquishing, or one which will bind him to forfeit or lose, his right to have the property back, or to redeem it, on payment of the debt with interest. If he could bind himself by such a contract, there would be no limit to extortion except that of the rapacity of the creditor; and the debtor and creditor between them, could cut off all other creditors from any recourse to the surplus value of mortgaged property.

Gentlemen, I said a little while ago that no contract can be made at the time of a mortgage by which the debtor can so give up his right to redeem that he will lose it. And here I will read a passage from Butler's Notes to Coke upon Littleton, because they are the catechism of young lawyers and a safe text for old lawyers; and because the passage states a most familiar and elementary proposition. Butl. Co. Litt. 205a, note 1; "As to what constitutes a mortgage;—no particular words or form of conveyance are necessary for this purpose. It may be laid down as a general rule, and subject to very few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself, or by any other instrument, it is always considered in equity as a mortgage, and redeemable, even though there is an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons." In one of the cases which he cites (1 Vern. 8) the register's book contains a declaration of Lord Nottingham, that certain deeds, "being but a security, the same could not be extinguished by any covenant or agreement at the time of making the mortgage." This has never been disputed; and it is not now disputed here. But in order to find out what is disputed, it is sometimes necessary to state what is indisputable. Thus far, there is no dispute.

Where the transaction is a sale, and the purchase money is to be secured in whole or in part, upon the property sold, there may be two writings, one of them a transfer, and the other a mortgage,—or the instrument

making the transfer may reserve or declare the security. In the latter case, one writing answers the purpose of both, and has the same effect as in the case of a writing made between these parties in the form which I have supposed. We may take the case of a writing made on the 1st of February, 1865, in the words in which the articles of the 11th of June, 1868, recite the agreement of the 1st of February, 1865, to have been made. If the agreement was, that the defendant should be secured upon the premises for the payment of his notes, with interest, the effect of this agreement was not such as to give him any different right than if the security had been in the form of a mortgage.

But it has been very ingeniously argued, that there may be a sale of such a kind that the whole consideration or price may be secured by a provision which will so take effect, that, if default is made in payment, the parties are remitted to their former relations, the property revested in the seller, and the debt for the price extinct. I will not say that there cannot be such a case. There may be exceptions from the general rule; and I will not say that there may not be just such an exception as the argument suggests, though I have some difficulty in admitting it, except where the sale has been a conditional one of such a kind as to prevent, suspend or qualify the vesting of the property in the purchaser. But, supposing that the case may be possible, in the abstract, the present is not one of the kind. The right of resumption was here in the creditor alone, without any reciprocity. This brought the case within the general reason of a mortgage. If this difficulty could be overcome, there was another one of a more serious kind. This was, that the consideration was materially less than the full value of the property. In such a case it is of the essence of the transaction that it should be deemed a mortgage.[4] If it be said that the surplus value was a conditional gift from the father to the sons, or from the creditor to those who became his debtors for the price, the objections are, first, that such is not the apparent effect of the contract, and, secondly, that such a contract, as it is said to have been carried into effect, could not have taken effect so as to impair the rights of other creditors. A sale of a subject of commercial business cannot be so made as thus to give, as to two-fifths of the value, an indefinite prospective exemption from liability to creditors. A stranger cannot do it; and of course a father cannot. He cannot give to his sons property to enable them to engage in commercial business, and exempt any part of the property, or any part of its value, from future liability to other creditors. So far as a creditor's own interest is concerned he may indulge his debtors; but he cannot so indulge them as to make two-fifths of the value of the subject of a transfer to them exempt from liability to demands of other creditors. If this were, in any case, doubtful, the exemption certainly could not be indefinitely protracted in duration, as was here attempted. The prospective immunity would be contrary to the nature of the ownership of such a subject. If the equity of redemption could otherwise have been bargained away, as between parties, such a bargain would be of no effect as against other future creditors.

The question of the defendant's alleged absolute ownership is thus reduced to a single point. It depends upon the effect of the articles of the 11th of June, 1868. I have already said that, as between the parties, these articles did vest the absolute ownership in the defendant; and that if the adversary rights of creditors were not in question he could have held the property from that time, as against the sons; and, of course, he could have kept the proceeds of sale, though they might have exceeded the amount of the debt secured. The simple reason is, that—except as against creditors—parties of full age can, as far as their own interest is concerned, do as they may please. But these two gentlemen, the sons, were then, as counsel on both sides concede, insolvent, at all events very much embarrassed, sufficiently so not to be the absolute masters of their property as between themselves and their creditors; because, gentlemen, a man who is indebted, and unable to pay, cannot, as against his creditors, part with his property, under the name of a sale, at an under-value, so as to give away the surplus value, to a father, a son, a friend, or a favored creditor.

It has been argued by counsel, with great zeal and ability, that we may here avoid meeting this question. Why any body should wish to avoid it I do not see. But the argument is, that because the debt of the sons for the price amounted, with the accrued interest, to $36,000, and the defendant finally sold out for $42,000, the difference being, it is said, only $6,000, therefore, this might be considered as equivalent to a seller's taking back the thing sold at a price about equal to the value, and that the question of the materiality of a difference of $6,000 might therefore be left for you, gentlemen of the jury, to speculate upon, as to the general honesty of the whole transaction. So I understand the argument. But gentlemen, recollect that we are considering the question of honesty, not speculatively as between near relations, but practically as to adversary creditors. I do not understand the reasoning upon the immateriality of a difference of $6,000, if it, in truth, were the whole difference. The amount is not, in itself, small. The dividend upon it might keep a creditor from starving. Nor is a sixth of the amount of the debt with interest an addition proportionally small.

[4] The Pennsylvania authorities on the whole subject are reviewed in Thompson v. Hanson, 29 Leg. Int. (March 22, 1872,) 93, and in the note to a fuller report of the same case, in 20 Am. Law Reg. (11 N. S.) 680, 690.

I do not think that you will be readily disposed to think it so. But if you were disposed to view the argument more favorably, I do not think the facts warrant even the statement of the proposition. Mr. McKibbin, when he finally sold out, had already kept this property for almost a year. He had, in this period, according to the evidence, received from it at least $15,000 before he sold. The profits for the year, according to some of the evidence, may have been $24,000, or more. They were, according to his own lowest figure, $15,000. He said, as you will recollect, that the yearly value was never less than $15,000 or $20,000. Now he could, as I have already intimated, after a reasonable notice to redeem or perhaps without any such notice, have sold out sooner than he did. Had he done so, he would have been accountable for a less amount of accrued income, in reduction of the debt. Yet he did not choose to sell sooner. He kept the property until he had received, say $15,000, if you so find. Therefore it is not, as the argument supposes, $6,000 only which he asks to retain over and above his own debt, as against the general creditors. He asks to retain against them in addition to the full amount of his own debt, a year's income in addition to the $6,000. Therefore, if the proposition could otherwise be considered more favorably than I can view it, the facts do not sustain its applicability.

Let us now apply the principles which have been stated. Mr. McKibbin the elder being entitled to the repossession of this hotel for the security of a debt of $30,000, with, say $6,000 interest, making it $36,000, repossesses himself; and having, while repossessed, received a clear income from it of, say at least $15,000, sells for $42,000 more, making at least $57,000. If he is entitled, as I think he is, to retain the $36,000, he has in hand $21,000 more, which, so far as I can see, does not equitably belong to him in any way. I do not impute bad motives to any body. But these gentlemen have taken a wrong and arbitrary view of the subject which is against the just rights of the creditors.

I said, in an earlier stage of my remarks, that any other debt of the sons, or of either of them, to Mr. McKibbin, than the $30,000, with interest, had nothing to do with this case, and should be excluded by the jury from consideration. He says, indeed, that each of them was indebted to him when he sold the hotel to them, and that his expectation then was that if they prospered in the business, they might pay to him those former debts. But there never was any contract which attached those debts to the property. As to any further debts which they may have owed him, when they made the retransfer, he may naturally have supposed likewise that he would be able to retain the surplus avails of the hotel property towards these debts. If so, there was nothing censurable in his motives. But the contract then made was in writing; and it contained nothing appropriating the hotel property to secure any such other debt. Through the intervention of the bankruptcy, it afterwards became impossible for him to set off any such other debt, in any way against the surplus avails. It will be recollected that the title of the assignee in bankruptcy attached, by relation, two days before any sale was made. Until the property was turned into money, there could be no right of retention, or set-off, legal or equitable.

(Under this head, the judge made some remarks upon a supposition that these other debts were all separately contracted by the sons, and were not partnership debts. This part of the charge is omitted because it was afterwards agreed by the counsel, and stated by the judge to the jury, that the sons were, in June, 1868, when the retransfer was made, heavily indebted to the defendant on joint as well as on separate account.)

I repeat that Mr. McKibbin's right of retention was limited to the $30,000 with interest, the amount of the six notes which, as between the sons and himself, were, according to the writing of June, 1868, surrendered.

To recapitulate: The question as to the change of possession, I have left to you, intimating my own impression of the sufficiency of the change. If you find, on this point, in favor of the defendant, it follows that he was entitled to retain, for his own use, the amount of these notes, $30,000 with interest, notwithstanding their extinction as a debt between himself and the sons. Upon the other question, it is for you to determine the value, whether $21,000 more or less, of what he has received and disposed of above the amount of $30,000 with interest. If the plaintiff representing, as he does, the creditors, can sustain their just rights in the present form of action, he is entitled to your verdict for this excess in value. I have no more to say upon the merits of the case.

A point of serious difficulty remains for consideration, upon the technical objection which is made to the action, in its present form. The question whether it could be supported had caused me a good deal of thought before Mr. Biddle's very able argument on the subject. I will now decide the question provisionally, reserving it for fuller consideration hereafter. In the meantime you will act upon my present opinion.

It is to be regretted that the plaintiff has proceeded at law instead of suing in equity. In a court of equity, it would not have required more than a few minutes to state the propositions which it has taken me an hour to explain to the jury. All questions of actual or constructive fraud, as well as questions of account, &c., could have been settled in such a court, or before its master, without any technical embarrassment. But the juris-

diction at law, though less convenient, is, to a certain extent, concurrent; and the plaintiff has invoked its exercise. In the present form of action he cannot recover more than the value of the furniture and other corporeal moveable effects. He could not recover in this action the profits received by the defendant or any part of them, or the value of the good will, if the defendant was liable to any extent under either of these heads. Therefore, though you should believe that the defendant has received more than the value of the furniture and other corporeal effects over and above the amount of the debt, you cannot find a verdict in the plaintiff's favor for the excess. Whether you can find in his favor as to the corporeal effects, depends technically upon another question. This question is, whether the defendant has wrongfully converted them to his own use. Unless he has done so, the plaintiff cannot recover at all. Then what is such a wrongful conversion by the defendant? If, having received clear profits to the amount of $15,000 and more, he had sold the lease and good will separately for $21,000, and had afterward disposed of the corporeal effects for $21,000, this question would have been attended with no difficulty. The debt would then have been paid in full before the disposal of the corporeal effects; and the disposal of them would have been a wrongful conversion. But the good will and corporeal effects were disposed of together for a single price; and there was no apportionment of this consideration, that is to say, there was no sale of the good will at a certain price, and of the corporeal effects for the rest of the consideration. Here the defendant's counsel, with great ingenuity and perfect fairness, argues thus: He says that the subjects of the sale, the good will, and the corporeal effects, were properly sold together, and that they could not have been sold separately without a sacrifice of each. The defendant, in order to render the security available to the best advantage, had a right to sell them together; nay, could not properly have sold otherwise, because to sever them would have injured the sale of each. The argument, then, is that the disposal as made, was not a wrongful act, and consequently not a wrongful conversion to his own use. This is very fair logic. But it may admit of an answer. I think that the argument does not cover the whole of the technical question. The part omitted arises from the adversary relation of the defendant; and is a proposition upon which the question of conversion has, if I am not mistaken, very often depended. Every person who is in possession of property, claiming an exclusive right in himself to the whole of it, has a possession which is adverse against every one else. The defendant's possession being thus wholly adverse to the plaintiff's rights, the proposition is that the defendant made the lumping sale in question for a purpose wholly adverse. This he did if he made it with an existing intent to appropriate the whole avails to his own exclusive use. On this point, all the evidence, in which his subsequent acts and omissions might, if it were necessary, be included, shows, beyond dispute, that his only purpose was appropriation of the whole for his own benefit. If so, the sale was, I think, a wrongful conversion of the furniture and other corporeal effects to his own use. If the good will and corporeal effects were, as Mr. Maugle testifies, of equal value, each worth $21,000, and the defendant made no distinct appropriation of either, I think that, as he could not retain both, the plaintiff might elect for which he would sue; and that this action was an election, the conversion having occurred before the suit, and after the time to which the plaintiff's title related. (As to the right of an assignee in bankruptcy to sue in trover for a conversion occurring before his appointment, but after the time to which his title had relation, the judge referred the counsel to Garland v. Carlisle, in the English house of lords,—4 Clark & F, 693,—and the authorities reviewed in that case).

According to my present opinion, there is no technical obstacle to prevent the plaintiff's recovery of the value of the corporeal effects, as damages for this conversion. The point, however, is reserved, as I have stated. This will not embarrass the jury, who will understand that it is decided, so far as they are concerned, in the plaintiff's favor. If you find for the plaintiff to the extent of this value, taking either Mr. Maugles's estimate of $21,000, or any other estimate that you may think more conformable to the evidence, your verdict will be for the plaintiff on the third count of the declaration, and for the defendant on the other counts. You may add interest for three years and a half, if you think it right, not in the ordinary sense of interest, but as a reasonable measure of damages for the detention.

The jury, not agreeing, were discharged, the judge telling them that they had made a mistake in not finding a verdict. The following are understood to have been his reasons for discharging the jury: The issues in the cases reported in 14 P. F. Smith [64 Pa. St.] 352, were upon sheriff's rules of interpleader. The levies had been made in September, 1868, on the same furniture, &c., which is the subject of the present action, under executions against J. & W. C. McKibbin. Their father, the present defendant, was the claimant. The levies were thus made eight months before he disposed of the property, and at a time when the greater part of the debt to him for the original price was unpaid. His right to retain the property till he should be paid, was thus unquestionable, as against the execution creditors, unless there had been either actual fraud, or insufficient change of possession. The

only contention therefore, under those issues, was upon those two questions, the first, of actual fraud, the second of constructive fraud on the point of possession. In the present case it was evident that the parties on each side came to the trial prepared for the contestation of the same two questions only, and principally the question of possession. But another question of constructive fraud had, in the meantime, arisen upon the defendant's adverse claim of more than a security for the debt. The latter question was apparently overlooked at the trial, until suggested from the bench as necessarily presented by the evidence. Until a late stage of the trial, the plaintiff's contention was upon the two former questions only; and the evidence on that side had apparently been adduced for its bearing on them only.

The evidence of the amounts of the defendant's receipts and expenditures, while he was in possession, was therefore indistinct; as was likewise the proof as to the value of the corporeal effects. The excess of the apparent amount of actual profits above the defendant's estimate of the former annual value, seemed also to require explanation. It might perhaps be conjectured that the difference arose in whole or in part, from his deducting a reasonable allowance for the time and services of himself and members of his family which did not appear upon the books of account. But this could only be a matter of conjecture. If these considerations had been out of the question, the judge, on being informed of the jury's difficulty in agreeing, might probably have directed a verdict in favor of the plaintiff—subject to the point reserved—for the value, without interest, of the corporeal effects, according to the lowest estimate in the testimony—unless the plaintiff had objected to such a direction.

MITCHELL (MOORE v.). See Case No. 9,770.

MITCHELL (NOELL v.). See Case No. 10,287.

Case No. 9,667.

MITCHELL v. The OROZIMBO.

[1 Pet. Adm. 250.] [1]

District Court, D. Pennsylvania. 1806.

SEAMEN—WAGES—SECOND MATE—INCOMPETENCY—MIDSHIPMAN ON FURLOUGH.

1. The second mate's wages disputed, because he was not a perfect seaman.

[2. Cited in Sherwood v. McIntosh, Case No. 12,778, to the point that if the master finds upon trial that there is on the part of the man either a want of fidelity, or a want of capacity which disqualifies him from the service, he will be justified in putting him upon a different duty. And in such a case the master will also be justified in making a reasonable deduction in the wages.]

[3. Cited in The Exchange, Case No. 4,594, and in Allen v. Hallet, Id. 223, to the point that emergencies arising during a voyage may render it necessary to displace a mariner from the situation for which he is shipped, and to allot him other services on board.]

[4. Cited in brief in Knee v. American Steamship Co., Case No. 7,877, to the point that one who is advanced to a position on shipboard having a higher rate of pay attached is entitled to this higher rate, notwithstanding he signed articles for a lower rate.]

The contract for wages in this case was not denied, but proof was adduced to shew that the complainant was incompetent, and did not understand perfectly the duty of a mariner.—Yet it appeared, that he had fulfilled all the duties commonly required from a second officer, about two weeks excepted, when he was sick. At the end of this period the master intermitted his office of second mate, and turned him before the mast. It appeared from circumstances, that the captain was personally acquainted with the complainant [George Mitchell] before the contract. It was in proof that he was a midshipman in the service of the United States, on furlough, and had acted in that capacity during several cruizes.

BY THE COURT. The true ground of all such enquiries is, whether or not, there has been fraud and imposition practised? If this fact is made out, the contract is not binding on the party deceived. This is a principle in both the common and maritime laws. If one ships as an officer, or mariner, and either expressly or impliedly, professes himself a mariner capable of thoroughly executing the contract, and it turns out otherwise, this court is in the constant habit of denying wages on the claim entirely; or allowing a quantum meruit, according to circumstances. The proof of such false professions must be made out, and the fraudulent conduct designated, in some satisfactory way. In the case before me it is my belief, that the master was acquainted with the capacity of the complainant, as to seamanship; and that no fraud was practised. He made the engagement under a knowledge of the true state of the complainant's nautical abilities, or deficiencies. I am neither desirous, or accustomed to decide on other than such as appear to me legal principles. Where these justify me, I will take every fit occasion to encourage our midshipmen (having leave of the executive so to do) to enter into the merchant service, as a laudable mode of perfecting themselves in seamanship, instead of dissipating and wasting their time. I have always considered our navy a great school, among its other benefits, for teaching young men of education and respectable connexions, nautical knowledge. Although they may not be perfectly competent in all the drudgery and details of seamanship, they may, and very many do, acquire a sufficient knowledge to qualify them for commands in merchant ships. Other qualifications than those of mere seamanship, are re-

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

quired in those who act as officers in ships. I have had too frequent opportunities of perceiving, that many of those who are capable before the mast, are miserably incompetent on the quarter deck. Qualities, not commonly discovered by mere seamen, are here indispensably called forth. However desirable it may be, that an officer shall have gone through every grade of the occupation to which he is devoted, it often happens that those who have not practically or manually acquired their knowledge of all the duties of mariners, are among the most intelligent and trustworthy masters and officers of ships. How far these general remarks apply to the complainant, I will not undertake to decide. This seems to have been his first essay in a merchant vessel, and the master was willing to join in the experiment. After a trial for four months it appears that the captain thought himself justifiable in displacing his second mate; and occasionally putting the carpenter in his berth. No testimony is offered to shew the impropriety of this conduct. It appears that the complainant, thereafter, performed the duty of an ordinary seaman. I therefore decree, that he be paid according to contract, for four months, the time he served as second mate; and thereafter as an ordinary seaman, for the residue of the voyage.

Case No. 9,668.

MITCHELL v. PRATT.

[Taney, 448.] [1]

Circuit Court, D. Maryland. April Term, 1841.

ADMIRALTY—MARITIME TORT—ASSAULT AND BATTERY—ACQUITTANCE—REASONABLE SATISFACTION.

1. A paper, purporting to be a receipt by a seaman to the master of his vessel, for twenty-five cents, "for assault and battery, in full of all dues and demands," with a witness's name to it, and on which are two wafer seals (in the absence of proof that either of the seals is that of the person giving the receipt), cannot operate as a release, in the technical sense of that word, as known to the common law.

2. Such receipt may operate as an acquittance, given upon the compromise and settlement of an unliquidated and disputed claim for damages for the assault, if the settlement was fairly made, when the seaman was free from improper influence, and had an opportunity of exercising his free and deliberate judgment.

3. But in order to entitle it to support, it must appear to be a reasonable satisfaction, or, at least, the contrary must not appear.

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

TANEY, Circuit Justice. This is an appeal from the decree of the district court, dismissing a libel filed by the appellant to recover damages from the appellee for an assault and battery. The appellant shipped as a seaman on board the schooner David Pratt, whereof Timothy Pratt was master, on the 9th of September 1840, at Portland, for a voyage to Turk's Island, and one more port in the West Indies, if required by the master, and back to the United States, and to Portland, if required by the master. It appears, that on the voyage to Turk's Island, the master, without any justifiable cause, struck the libellant a severe blow on the head, with an iron-bound water-bucket, which broke to pieces by the force of the blow, and afterwards beat him with a broom-stick, until he broke that also, and then with his fists. The schooner made the voyage to Turk's Island, and returned from thence to the port of Baltimore, where the libellant was discharged by the master, at his own request. At the time of his discharge, he received the balance due him for his wages, which were paid him in the cabin of the vessel, in the presence of the mate, and he signed the printed receipt endorsed on the shipping articles, which contains the usual release of all demands for assault and battery or imprisonment, and every other matter whatever.

It is stated by the mate, Barzillai Curtis, examined as a witness for the respondent, that after this receipt was signed, the master said to the libellant, that there was some little difficulty between them, and that he would give him twenty-five cents to settle it, which he took, and receipted the paper filed by the respondent, which he (the mate) witnessed. The receipt produced is in the following words:

"Baltimore, Oct. 27, 1840. Received of T. Pratt, twenty-five cents for assault and battery, in full for all dues and demands.

his
"Peter X Mickell. [Seal.]
mark

"Witness:—Barzillai Curtis. [Seal.]"

This receipt, it appears by the testimony of the mate, was signed about ten minutes after the wages had been paid and the receipt given on the shipping articles; that there was nothing said particularly about the assault and battery, at the time; that the respondent said he would give him twenty-five cents to satisfy him, but that there was no compulsion, and that he need not sign the receipt and take the money unless he pleased. Another seaman, named Jesse White, is said to have been present at the settlement, but he has not been called as a witness by either party.

This is the case upon the evidence, and it is very clear, that an assault and battery was committed by the master upon the libellant, and that the blow inflicted and the weapon used were altogether unjustifiable. This, indeed, is not controverted in the argument; the defence relied upon, is the settlement and receipt above mentioned; and it is insisted upon the part of the respondent, that this settlement and receipt is a full answer to the libellant's demand.

It is evident, that the paper in question,

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

cannot operate as a release, in the technical sense of that word, as known to the common law; for, although there are two wafer seals upon the paper, there is no proof that either of them is the seal of the libellant, or that either of them was on the paper at the time it was executed. It must be remembered, that the proof offered, is by the subscribing witness, who was called by the respondent to prove the execution of the paper; he says, that the libellant "receipted the paper," and this is all the proof he gives of its execution; not a word is said in relation to the sealing of the instrument; nor anything said from which it can be inferred that it was sealed by the seaman. Moreover, it contains no words of release; nor any words that can be construed as such.

The court, however, does not understand that the paper is relied on as a release, in the common law sense of the word, but as an acquittance given upon the compromise and settlement of an unliquidated and disputed claim for damages for the assault. And I do not doubt that, if this settlement was fairly made, when the seaman was free from improper influence, and had an opportunity of exercising his free and deliberate judgment, it ought to be supported; but in order to entitle it to support, it must (in the language of the court, in the case of Cumber v. Wane, 1 Strange, 426), "appear to be a reasonable satisfaction, or, at least, the contrary must not appear." And in this view of the matter, it is of no importance whether this paper be regarded as a release, or merely as a receipt, for it certainly cannot be supported, in either case, if it appears to have been obtained unfairly, or by improper influence.

It appears to the court, that there are insuperable objections to this paper, as a bar to the seaman's suit. In the first place, the amount stated to have been given in satisfaction, is obviously and grossly inadequate, and does not approach at all to a reasonable satisfaction; and in the second place, the paper was obtained under circumstances in which the sailor was evidently within the reach of undue influences, which he could hardly be expected to resist.

The sum given as an award and satisfaction, is merely a nominal one, and could have formed no real consideration in the mind of the parties; and upon principles of justice, this receipt has nothing more to recommend it, as a discharge to the respondent, than the usual printed receipt and release endorsed on the shipping articles. Yet, that acquittance, although it contains express words of release, is not held to be sufficient to discharge the master from damages for an assault and battery or imprisonment, without some further proof; because the relations which have been existing between the parties, the power of withholding the seaman's wages, and his inability, in general, to read and comprehend the legal effect of such instruments, give great advantages to the master over him, and bring just suspicion upon any contract of settlement and compromise between them, which, upon the face of it, shall show that the seaman was legally and equitably entitled to more than he received.

Now, the receipt in question is not only liable to the same objections with the printed acquittance above mentioned, but to a greater and more serious one. In ordinary cases, when the printed acquittance is signed, the voyage is ended, and the seaman entitled to his discharge, and he is, at least, free from the apprehension of personal ill-treatment by the master. It is true, that in this case, also, the libel states the voyage to be ended; but this is the error of the pleader; and according to the shipping articles, the seamen were not entitled to their wages here, if the master chose to require them to proceed from this place to Portland.

The case, then, upon the receipt relied on, is this. The libellant requests his discharge here, as proved by the mate (the master being at liberty to discharge him or not, as he pleases); the seaman is thereupon taken to the cabin and receives the balance of his wages, in the presence of the master and mate, to whose authority he has been accustomed to submit; and at the same interview, when he does not appear to have received any written or other discharge, which released him from the shipping articles, and when it was still in the master's power to compel him to continue with the vessel to Portland, he is desired to sign another paper, by which he relinquishes his claim for damages for a severe and unjustifiable battery, upon terms so utterly unjust to him, that it is impossible to believe that he could have assented to them, if he had felt himself entirely free, and understood the meaning of the paper. He was told, indeed, there was no compulsion, and that he need not sign the paper unless he pleased. But what would have been the consequences, if he had determined not to sign it? The seaman must have felt that his request to be discharged here, might, in that event, not be complied with, and that the master might compel him to perform the voyage to Portland. He was, at all events, in the power of the master in this respect, and he was not free and upon equal ground with him until he had received a legal and irrevocable discharge, and had left the vessel.

It does not appear that any discharge was given before the receipt was signed; he was on board the schooner and in the master's power, and the sum paid is so grossly inadequate, that the court is satisfied the acquittance must have been given under a sense of coercion, if the seaman understood its contents; and it cannot, under such circumstances, be supported as a bar to his claim.

The decree of the district court must, therefore, be reversed, and the court will award the libellant thirty dollars damages; but no costs in the circuit or district courts can be given, under the act of congress, as the dam-

ages recovered are under fifty dollars in this court.

See Harden v. Gordon [Case No. 6,047]; Thomas v. Lane [Id. 13,902]; Thompson v. Faussat [Id. 13,954]; Phillips v. The Scattergood [Id. 11,106.]

MITCHELL (SHAW v.). See Case No. 12,722.

MITCHELL (SICKELS v.). See Case No. 12,835.

MITCHELL (SILVERTHAIN'S ASSIGNEE v.). See Case No. 12,859.

Case No. 9,669.

MITCHELL v. THOMPSON et al.

[1 McLean, 96.] [1]

Circuit Court, D. Tennessee. Sept. Term, 1830.

PUBLIC LANDS—ENTRY AND SURVEY—ERRORS—FRAUD—STATUTE OF LIMITATIONS.

1. The land law of North Carolina, under which the land titles in Tennessee principally originated, is different from the Virginia law.

2. An entry must be surveyed in a square or oblong, if no form be expressed in the entry.

3. Errors in the survey should be corrected in a reasonable time.

4. A fraudulent title may be protected by the statute of limitations, from the time the fraud was discovered. And on the same principle may lapse of time be relied on. There is no reason why the statute should not begin to run from the time the fraud is discovered.

[Cited in Carr v. Hilton, Case No. 2,437; Tyler v. Angevine, Id. 14,306; Bailey v. Glover, 21 Wall. (88 U. S.) 348.]

[Cited in Wear v. Skinner, 46 Ind. 266.]

5. It is important that the facts, on which the fraud depends, should be investigated whilst they are within the recollection of witnesses.

6. Courts in England and in this country are more favorable now than formerly to the policy of the statute of limitations. It tends to the peace of society. Courts in England, in some modern cases, have regretted that they are bound by former adjudications, in many instances, to give little weight to the policy of statutes of limitations, which are properly denominated statutes of repose.

[This was a suit by David Mitchell against John Thompson and Sampson Williams for the possession of certain real property.]

Mr. Gibbs, for complainant.

Mr. Anderson, for defendants.

OPINION OF THE COURT. The complainant states in his bill, which was filed the 15th of June, 1824, that being entitled to a right of pre-emption, on the 17th of July, 1794, he entered six hundred and forty acres of land, lying on Brown's creek, adjoining a conditional line between the heirs of Roger Tapp and the complainant on the lower side; then running up the creek to adjoin a conditional line made with Samuel Barton by Roger Tapp, in behalf of the complainant; thence, as the law directs, so as to include his spring and improvement; that this entry was assigned to Joseph Erwin, who afterwards reconveyed it to the complainant. That, the 22d of October, 1791, Sampson Williams, knowing that the complainant had made the entry aforesaid, and the situation thereof, made an entry including about two hundred acres of the land covered by complainant's entry, and the 17th of April, 1793, obtained a grant therefor. That, being a deputy surveyor, the defendant Williams, on the 10th of December, 1792, made a survey of complainant's entry, and fraudulently, for the purpose of securing to himself a part of the land entered by the complainant, made the survey in such way as to exclude a part of the land covered by his entry, and extended it on land which had been appropriated by others. On this survey a grant was obtained. The bill further states, that Sampson Williams, two or three years before the filing of the bill, conveyed the land granted to him to John Thompson, one of the defendants, for little or no consideration, and who had full notice of the fraud before he received the conveyance. A decree for so much of the land granted to Williams as is included in complainant's entry is prayed for. In his answer, Thompson denies all knowledge of the fraud, and alleges that he purchased the land for two hundred and eighty-five dollars, a low price, on account of an interference of a survey of Thomas Thompson's pre-emption, and of the entry of one Davis. Williams also denies all fraud, and says that complainant and Erwin were present, and directed the survey. He says, from the thick growth of cane at that early day, it was difficult to make surveys accurately. Both defendants rely on the statute of limitations, length of time, &c. As stated in the bill, the entry of Mitchell was made on the 17th of July, 1784. It was transferred to Erwin on the 20th of December, 1785; and surveyed by Sampson Williams on the 29th of November, 1792. On this survey, one grant was issued on the 26th of June, 1793, for 401½ acres, and another for 582½ acres, dated June the 26th, 1793. The 20th of August, 1794, Erwin conveyed the 401½ acres to the complainant, and the 8th of February, 1811, by his attorney, conveyed the other tract. Sampson Williams' entry was made on the 22d of October, 1791, and surveyed October the 15th, 1792. The grant was issued the 27th of April, 1793.

The testimony is very voluminous. A great number of depositions have been read, a part to prove facts pertinent to the case; and a part to impeach the credibility of witnesses. In the discussion several points were made, and the facts in support of them respectively were adverted to; and also the principles of law which were deemed applicable to each. The last ground assumed in the defence is, that, under the circumstances of the case, the relief prayed for in the bill is barred by the lapse of time. This point will be first examined. The complainant contends that his entry was fraudulently surveyed, by Williams

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

the defendant, in such a way as to include the quantity, by interfering with older entries, and so as not to interfere with the junior entry which he had made. The claim of the complainant rests exclusively on the assignment of the right which Erwin is supposed to have had, to have the original entry accurately surveyed after it had been carried into grant, as above stated. The land law requires the surveyor to survey entries according to their priorities in date, either in a square or oblong figure. By the construction given the acts, under which such titles are acquired, in this state, the surveyor is not subject to the control of the enterer, further than his wishes may have been expressed in the calls of the entry. The surveyor is to act according to his own discretion in making the survey, with the single exception of a case where a conventional line has been agreed upon by persons where lands adjoin. The statute of 1796 provides a special mode by which the mistakes of a surveyor, in platting or making out certificates to the secretary's office, &c. may be corrected; but there seems to be no statutory provision for correcting the survey after the grant has been issued. An entry gives a right to the enterer, and if the form of the entry be not given in its calls, nor elder rights control it, the discretion of the surveyor must be exercised in giving the survey a square or oblong figure. If a subsequent entry be made which covers a part of the first, the elder entry may be surveyed without reference to the other, although it may have been surveyed and carried into grant. In such a case, it has been held that the elder entry may be surveyed in an oblong form, at the discretion of the surveyor, although a square figure might not interfere with the junior entry and survey. The surveyor is a public officer, and his mistakes, it is said, are not to prejudice the enterer; but it seems no where to be decided, that these mistakes may be corrected at any future time, after the emanation of the grant, by the aid of a court of chancery.

A court would undoubtedly take cognizance of the right of an enterer, if his entry had never been surveyed, on a caveat being filed to prevent an emanation of a grant for the same land, under a junior entry. And there may be cases in which the grantee, under a junior entry, has been decreed to convey his right to the elder enterer who held the superior equity. Although the mode of making entries under the land law of Virginia, as construed by the courts of Kentucky, is different from the land law of North Carolina, under which titles were acquired in Tennessee, yet no strong reason is perceived why the effect of a survey should be different. In both cases the surveyor is a public officer, whose duties are prescribed by law. Under the Virginia law it has been ruled frequently, that the survey of an entry fixes its limits, which cannot, afterwards, be altered to the prejudice of rights subsequently acquired. In the case of Galt v. Galloway, 4 Pet. [29 U. S.] 340, the supreme court say, "When an entry is surveyed, its boundaries are designated, and nothing can be more reasonable and just than that these shall limit the claim of the locator. To permit him to vary his lines so as to affect, injuriously, the rights of others, subsequently acquired, would be unjust." Until an entry shall be surveyed, unless its calls prescribe the form, a subsequent enterer cannot tell whether the survey will be executed in a square or oblong; and, consequently, he can acquire no rights which shall control the surveyor in running the elder entry. But if the elder entry has been surveyed, is it not notice to subsequent enterers of the limits of the entry. It is not the duty of every enterer to see that the survey has been accurately made; and if the surveyor, either through mistake or design, should disregard prior entries, and fix the boundaries so as to interfere with a paramount right, is he not bound within a reasonable time, to have the error corrected in any mode authorized by law? As there seems to be no provision in the statute on the subject, I doubt whether, afterwards the survey can be altered, to the prejudice of a junior right, so as to conform more strictly to the calls of the entry. It is believed that no court has decided that this may be done under the Virginia land law; and on this point no important distinction is perceived between the land law of North Carolina, and that of Virginia. Under the former law, the enterer, in many instances, purchased his land of the state at a fixed price, and under the Virginia act, locations were made on account of rights granted for military services. In both cases the right to enter land was given for a valuable consideration. If an error of the surveyor could be corrected at any future period, would it not produce great uncertainty in land titles? Although the legal form has been given to the survey, and it has been carried into grant, yet if it interfere with elder rights under this doctrine, the enterer may claim the right of re-surveying the entry, so as to include the number of acres called for, and avoid any conflict with superior equities. And this, too, in defiance of rights subsequently acquired. This would introduce a degree of uncertainty in land titles, in this state, against which there could be no effectual protection but the statute of limitations. No matter how long the elder entry had been surveyed, patented, and occupied by the claimant; no subsequent enterer or his assignee who was not sheltered by the statute of limitations, would be safe if any part of his land could be covered by a legal construction of the first entry. It may have been surveyed in an oblong, which causes an interference with a paramount claim, when a square figure would avoid this interference. This latter figure, according to this doctrine, may be given to the survey, at any future period to the destruction of junior entries.

This doctrine would seem to be fraught with too much injustice, to bona fide claimants, to be sanctioned; and it is believed that no decision has sustained it. A reasonable diligence, at least, should be imposed upon the elder enterer, to correct the errors of the survey after the grant shall have issued.

The complainant's counsel do not rely so much upon this doctrine as sustaining their right to a decree, as they do on the fraud which was committed by Samuel Williams, in making the survey. He interfered, it is contended, with the elder entries, with the express view of securing to himself the residue of the vacant land, and which ought to have been covered by Mitchell's survey. It is understood, then, that the fraud is the principal ground relied on by the complainants. At the time of the survey Erwin was the owner of Mitchell's entry; so that if a fraud were committed by Williams in making the survey, it was committed against Erwin and not Mitchell. He had long before sold to Erwin all his interest in the entry. In 1794, Erwin conveyed to Mitchell the 401½ acres, about which there is no dispute; but it was not until 1811, that the right growing out of this fraud was assigned. More than eighteen years had elapsed, from the time this alleged fraud was committed before the right of action was assigned to Mitchell. As no reference was made to this right, when the land was re-conveyed to Mitchell, it cannot be considered as appendant to that conveyance. It was an attempt to transfer a distinct and substantial right, and might as well have been invested in a stranger as in Mitchell. There is nothing then in Mitchell having been the first enterer, or the grantee of the 401½ acres, which gives any validity to his claim, under the assignment of 1811, that might not have been claimed under an assignment to any other individual. No injury had been done to the rights of Mitchell in making the survey. He is a volunteer purchaser and, perhaps, a speculator in the right set up. And he was a purchaser with a full knowledge of all the facts. It is impossible to suppose from the nature of the right asserted, that he could have been ignorant of the circumstances under which it originated. Had the bill been filed by Erwin, against whom the alleged fraud was committed, and whose interests were prejudiced by it, there would have been equitable considerations, which, if not inapplicable to the case, as now presented, are at least, far less forcible. We deem it unnecessary to investigate the nature of this right, for the purpose of ascertaining whether it is such an interest as can be transferred, so as to give a right of action to the assignee. There are other lights, in which the merits of the case may be considered. More than thirty years had elapsed from the time this survey was executed, until the filing of this bill. But it is said that the statute of limitations does not begin to run, nor the lapse of time in such a case, until the fraud is discovered. This is, as it regards the operation of the statute, a correct rule of law. At what time was this fraud discovered. Could Erwin, who lived in the neighborhood of the land, at the time it was surveyed, and for many years afterwards, have remained ignorant of it. The facts were before him, and he must have seen them, unless he closed his eyes against them. If he had notice or might have discovered the fraud, by the most ordinary diligence, is he not justly responsible for all the consequences of negligence. He might have traced the surveys of the adjoining tracts, and ascertained the dates of their respective entries, and the corners called for. Under all circumstances the law imposes an ordinary degree of vigilance, for the protection of rights. Can Mitchell set up any greater right, under this judgment. If the equity of the assignee should be considered equal to that of the assignor, about which doubts are entertained, it is clear that it cannot be greater. The assignment cannot be assimilated to a conveyance of land, by a fraudulent holder, to a purchaser without notice, and for a valuable consideration.

For several years past the courts both in England and in this country, have given a more favorable consideration to the statutes of limitations than formerly. The slightest pretext was once considered sufficient to take a case out of the statute; and in many modern decisions, the courts of England have regretted that they were bound to decide, by the force of prior adjudications, in violation of the policy of those statutes. The salutary effect of this policy is seen and acknowledged, and courts now endeavor to promote it. These statutes by withholding the remedy, after a limited period, impose reasonable diligence in the assertion of rights. They promote peace and harmony in society. By closing the door of litigation, they give security and confidence to the occupant, and his labor is cheerfully bestowed in the improvement of his estate. His domestic comforts are enlarged by the reflection, that he will enjoy the fruits of his industry. The principle of law founded upon lapse of time when judiciously applied, has the same salutary effect upon society. It may require a less degree of diligence than is required by the statute of limitations, in general, but the policy is the same. The statute of limitations may be set up in defence, in behalf of a claim founded in fraud, if a knowledge of the facts, which constitute the fraud were possessed by the adverse claimant. In neglecting to prosecute, he is presumed to acquiesce in the fraud; and after the statute has run the law will not aid him. This principle applies with equal, if not greater force to a claim which has lain dormant more than thirty years.

The facts relied on to show the fraud, in the case under consideration, except the fraud charged against Williams in making the chinkapin corner, were known or might

have been known to Erwin, in 1792, when the survey was executed. He takes no step to correct the error, or obtain relief from the alleged fraud. If Williams were guilty of fraud he was liable to an action for damages. From the year 1792 until 1811, a period of more than eighteen years, this right of action, or interest in the entry, arising from the alleged fraud of the defendant Williams remained in Erwin. But it seems he did not assert his right in any form; and it was not until the further lapse of nearly fourteen years, after the assignment, that the first step was taken by Mitchell to prosecute this suit. How are these delays to be accounted for? Mitchell it is said, is a resident of North Carolina. But did he not understand the nature of the right which was assigned to him by Erwin. He must have understood it, unless indeed the assignment was made to him without his knowledge. In the case of Townshend v. Townshend, 1 Brown, Ch. 551, the court on a possession of thirty years, by the defendants, presumed that the settlement, under which the complainant claimed was voluntary, and dismissed the bill. And in the case of Andrew v. Wrigley, 4 Brown, Ch. 125, where an executor had sold the testator's term specifically devised, under strong circumstances of fraud, Lord Thurlow refused relief from the lapse of time, although his decision would have been different, if an earlier application had been made. The same principle was recognized in the case of Morse v. Royal, 12 Ves. 373, and also in Beckford v. Wade, 17 Ves. 88. In the case of Bonney v. Ridgard, 1 Cox, Ch. 145, relief was refused from the lapse of time, though from the face of the assignment, fraud was apparent. And in a later case of Blennerhassett v. Day, 2 Ball & B. 104, it was decided, that "where the facts constituting fraud are in the knowledge of the party, and he lies by for twenty-five years, he cannot get relief." This doctrine is illustrated with great ability, by Lord Reddesdale, in Hovenden v. Lord Annesley, 2 Schoales & L. 608. In Peck [Tenn.] 30, an able and learned opinion is given, by the supreme court of this state in the case of Porter's Lessee v. Cocke, in which it is decided that fraud not being an exception in the statute of limitations, a deed, fraudulent against creditors, with possession, will constitute a bar. Where no interest has been paid, and the mortgagee has been in possession of the mortgaged premises for twenty years, and no special circumstances being shown, the mortgagor is barred from the equity of redemption. And also where the mortgagor has remained in possession for the same term, without the payment of interest or on such acknowledgment that the mortgage is still existing, he may rely on the lapse of time, against a bill to foreclose, and the court will presume the money paid. [Hughes v. Edwards] 9 Wheat. [22 U. S.] 489.

In these cases lapse of time is considered as operating by way of evidence, to show payment or satisfaction of the demand. There is no reason why the statute should not run in a case of fraud, after it comes to the knowledge of the party, as in any other case. It is important that the facts which constitute the fraud, should be investigated while they may be within the recollection of witnesses; and while the party implicated may be able to explain the circumstances. For this reason, even in cases of fraud, courts of chancery feel themselves bound by the statute. The spirit and policy of the statute are regarded, the same in chancery as at law. But, in the case under consideration, the fraud charged in the bill is denied by the answers; and Thompson insists that he is an innocent purchaser, for a valuable consideration, without notice. He purchased the land in dispute, paid the consideration, and received a conveyance about two years before the commencement of this suit. The consideration paid for this land is admitted to be inadequate, but it is alleged it was sold below its value, on account of the interfering claims of Thomas Thompson and one Davis. Sampson Williams, in his answer, denies all knowledge of interfering rights elder than Mitchell's when he made the survey. If the north-west cornor of Thomas Thompson's pre-emption should be established at the chinkapin oak as claimed by him, and Williams had knowledge of the fact; or if he did not in fact make that corner, or know that it was fraudulently made, there would be no sufficient ground to sustain the allegation of fraud. Duffield and Ellis swear that this corner was made in 1787 by Sampson Williams and Thomas Thompson, which is two years after Thompson's pre-emption is stated to have been surveyed. But both of these witnesses have been discredited, at least so far, as to render their statements under oath questionable; and in this particular they are positively contradicted by the oath of Thomas Thompson. Jason Thompson states that in 1789, Sampson Williams was at the red bud and white oak corner, but his credibility is impeached. Several witnesses of great respectability, and who have been long acquainted with the survey of Thompson, believe that the tree named is the north-west corner of Thompson's survey. Buchanan, an experienced surveyor and a man of high respectability, states that he marked Thompson's north-west corner, and that Mitchell's survey could not have been otherwise surveyed than it was, without interfering with the adjacent tracts. That the witness was usually directed by the owner in making surveys, where the calls of the entry were vague. Sampson Williams, it appears, lived six or seven miles from Mitchell's entry when he surveyed it, and was but little acquainted with the lines in the neighborhood, and had been a surveyor but a short time.

In making the survey, Thompson states that the surveyor acted under the direction of Matherall and himself. The cane was thick, so that it was extremely difficult to ascertain distances accurately, and great danger was apprehended from the Indians.

The above facts go very far to rebut the inferences of fraud, which are drawn from the facts of the case. They at least render the fraud charged extremely doubtful. If Buchanan, after tracing the lines and ascertaining the connections of the different entries, at this day, is able to say that Mitchell's survey was accurately and properly run, doubt may well exist whether, under the embarrassing circumstances which existed at the time Williams made the survey, there is sufficient ground to charge him with fraud. But it is contended that the entry of Williams shows he had a knowledge of the interfering claims. That entry calls to begin "at a black oak and mulberry, south corner of Thomas Thompson's pre-emption, running west and north, to include the vacant land between said Thompson's pre-emption, the heirs of Nicholas Gentry's pre-emption, and east and north to include the surplus land within the bounds of said Thompson's pre-emption." The act of 1787 authorizes an entry of the surplus land, as above described. The call for the black oak and mulberry, the south-west corner of Thompson's pre-emption, and the other calls of the entry, do not necessarily show that Williams was acquainted with the boundaries of Gentry's, Barton's and Tapp's claims, which interpose with the survey of Mitchell's entry. Believing that there would be surplus land in Thompson's pre-emption, he wished to cover it by his entry.

Under all the circumstances of the case, it does not appear that the charge of fraud is sustained; but if it were the lapse of time and knowledge of the facts possessed by Erwin would bring the case within the decisions referred to. The defendant, Thompson, is a purchaser without a knowledge of the circumstances which constitute the fraud if it exist; and the right set up by the complainant came into his possession by purchase with a knowledge of the facts. The land claimed by Thompson has been possessed more than twenty years, and valuable improvements have been made on it. Can a court of chancery in such a case give the relief prayed for. The right asserted by the complainant, was stale when he purchased it, and he has, to use a common expression, slept on it. If, under the circumstances, this was a doubtful right, when it was assigned to the complainant, it is much more so now. If the objection of staleness could then have been urged against it, the same objection must now be insuperable. Forty years have nearly elapsed since this survey was executed, and more than thirty years before the complainant's bill was filed. The repose of society seems to require that more diligence should be used in the investigation of controverted rights, than has been shown in this case. It is enough to settle the disputes of the present generation, without looking into the dormant transactions of the past. The bill must be dismissed at the costs of the complainant.

MITCHELL (TILGHMAN v.). See Cases Nos. 14,041–14,043.

MITCHELL (UNITED STATES v.). See Cases Nos. 15,787–15,792.

MITCHELL (VAN METRE v.). See Cases Nos. 16,864 and 16,865.

Case No. 9,670.

MITCHELL v. WALKER.

[7 Reporter, 425; 8 Reporter, 232; 25 Int. Rev. Rec. 64, 185; 36 Leg. Int. 74, 158; 2 Nat. Bank Cas. (Browne) 180; 19 Alb. Law J. 182; 26 Pittsb. Leg. J. 95; 4 Cin. Law Bul. 172.] [1]

Circuit Court, W. D. Pennsylvania. Jan. 16, 1879.

NON-NEGOTIABLE NOTES—RIGHT OF ASSIGNEE TO SUE IN HIS OWN NAME—FORM OF ASSIGNMENT—JURISDICTION OF UNITED STATES COURTS—CURRENCY ACT.

1. In Pennsylvania the assignee of a note not under seal containing a warrant to confer judgment may sue in his own name.

2. No particular form of assignment is necessary; it is sufficient that the intent to assign appear.

3. In cases under the national currency act [13 Stat. 99], the circuit courts have jurisdiction of all actions brought by or against any national banking association established in the district for which the court is held, without regard to the citizenship of the parties or the amount involved in the case.

In this case judgment had been entered on a note not under seal containing a warrant of attorney to confess judgment. The note was made by the defendant to the order of Mitchell and by him assigned to the First National Bank of Butler. The defendant took a rule to set aside the judgment for want of jurisdiction.

[The following is an exact copy of the note and endorsement on which the action in Mitchell v. Walker [Case No. 9,670], in the circuit court of the United States for the Western district, was brought:

["$1400. Butler, Pa., May 31, 1878.

["Five months after date I promise to pay to the order of Alex. Mitchell fourteen hundred dollars, without defalcation, value received; payable at the First National Bank of Butler, Pa.

["And I do hereby authorize and empower any attorney of any court of record in the United States, or elsewhere, to appear for me and confess judgment against me as of

[1] [Reprinted from 7 Reporter, 425, by permission. 19 Alb. Law J. 182, gives only a partial report.]

any term for the above sum, with costs of suit, attorney's commission of —— per cent., and release of all errors, hereby waiving inquisition, and agreeing to condemnation of any property that may be levied upon by any execution which may issue forthwith, on failure to comply with the conditions hereof, without stay of execution; also hereby waiving the benefit of any exemption laws, or stay laws, or any act of assembly relative to execution now in force, or hereafter to be passed. [Saml. Walker.

["(Endorsed)—For value received I do hereby assign the within to the First National Bank of Butler, Pa., and guarantee the payment of the same at maturity, waiving protest and notice of protest.

["Alex. Mitchell."] [2]

A. N. Sutton and W. S. Purviance, for the rule.

Miller, McBride, and C. McCandless, contra.

McKENNAN, Circuit Judge, in delivering the opinion of the court, said: Under the Pennsylvania decisions the instrument in suit is a non-negotiable promissory note. Such instruments are not assignable at common law and hence are suable only in the name of the original payee. The state statute of May 28, 1715, provides for the "assignment of bonds, specialties, and notes in writing," and that the assignee thereof may maintain suit in his own name. Under the first section of the act any form expressive of the intent of the assignor to vest the ownership of the instrument in the assignee would effectuate its intent, but the eighth section requires a seal and attestation by two witnesses of "bonds and specialties," while the assignment of "notes in writing" is not restricted by any prescribed formula. The note here was duly assigned so as to enable the First National Bank to bring suit in its own name. Can such suit be maintained in this court, both parties being citizens of Pennsylvania? Under the judiciary act of 1789 [1 Stat. 73], it is clear it could not [both because the legal parties are not citizens of different states, and because the assignor of the note in suit could not maintain it on account of his residence in this district.] [3] But the national currency act seems to have abrogated the conditions of that act so far as they may affect national banks organized under the currency act. That act (section 57) gives to the circuit courts original jurisdiction "of all suits by or against any banking association established in the district for which the court is held under any law providing for national banking associations." This is reënacted by Rev. St. c. 7. The enactment was not necessary to confer jurisdiction upon the circuit courts of suits by and against banking associations, because as separate bodies they might sue and be sued in such courts under the judiciary act when the conditions prescribed by that act existed. That was manifestly not its object. But it is an unconditional grant of jurisdiction of all suits by or against national banks to the circuit court of the district in which such banks are established, and is limited to these courts. Hence the more reasonable hypothesis is that it was intended to enable national banks to sue and be sued in the circuit courts of their several districts alone, irrespective of the conditions as to the amount in controversy and the citizenships of the parties which are imposed upon the right by the judiciary act. So it has been held in several cases where suits were instituted by national banks as indorsees of commercial paper. The note in this case is not negotiable, but although in most of their characteristic qualities the instruments are unlike, and the legal effect of their transfer is in some respect different, yet what reason is there for a discriminating application of the statutory provision, where the right to sue in his own name by an assignee or indorsee is just as full and complete in the one case as in the other. The terms of the statute embrace all suits alike, and their fair import is that of all suits which a national bank may rightfully institute in its own name the circuit court of the district in which it is established may entertain jurisdiction. Motion to set aside denied, and leave given plaintiff to amend by striking out the name of "Alexander Mitchell, for use," [so that the First National Bank shall stand as the legal plaintiff on the record.] [3]

[2] [From 36 Leg. Int. 158.]

[3] [From 36 Leg. Int. 74.]

Case No. 9,671.

MITCHELL v. WILSON.

[3 Cranch, C. C. 92.] [1]

Circuit Court, District of Columbia. May, 1827.

REPLEVIN—NO APPEARANCE—EXCUSE—NEGLECT OF DEFENDANT'S COUNSEL—DISCONTINUANCE.

1. If the defendant in replevin does not appear at the return of the writ, and the plaintiff takes no step to obtain an appearance at that term, the cause is discontinued, and the clerk will not bring it forward upon the docket of the next term, and the court will not reinstate the cause at the subsequent term, although the defendant's attorney make affidavit that he was employed by the defendant to appear for him at the preceding term, and promised and intended so to do, and thought he had done so, but finds his appearance was not entered, and presumes it was because he had forgotten to give the order to the clerk; and although the defendant make oath that, before the sitting of the last court he went to the clerk's office, and informed one of the clerks that he should defend the said suit, and that Mr. Key was his attorney.

2. After the discontinuance of the replevin, the goods are no longer in the custody of the law, and the defendant is not guilty of a contempt in taking possession of them.

Replevin for a negro woman named Mahala.

The defendant [William Wilson] did not ap-

[3] [From 36 Leg. Int. 74.]

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

pear at the last term (to which term the writ was returnable), and the plaintiff [Thomas L. Mitchell] took no step to obtain an appearance; no continuance was entered or ordered, and the clerk did not bring the cause forward upon the docket of this term, considering it as discontinued; and of that opinion was THE COURT (THRUSTON, Circuit Judge, absent). It did not appear to be the misprision of the clerk. The court had decided the point in some previous cases.

Mr. Key moved the court to reinstate the cause and to order it to be brought forward upon the docket of the present term, and made affidavit that he was employed by the defendant to appear for him in the suit, at the last term, and promised, and intended to do so, and thought he had done so, but finds that his appearance was not entered; and presumes it arose from his forgetting to give the order to the clerk. The defendant Wilson also made affidavit that before the sitting of the last court, he went to the clerk's office and informed one of the clerks that he should defend the said suit and that Mr. Key was his attorney.

But THE COURT (THRUSTON, Circuit Judge, absent), refused to reinstate the cause.

Mr. Coxe, for plaintiff, moved for an attachment of contempt against the defendant, for having since the last term taken possession of the replevied goods.

But THE COURT refused; being of opinion that when the action of replevin was discontinued, the goods were no longer in the custody of the law.

[For subsequent proceedings in this case, see Case No. 9,672.]

Case No. 9,672.

MITCHELL v. WILSON.

[3 Cranch, C. C. 242.] [1]

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

DEED—GRANTING CLAUSE—HABENDUM—DEED OF SLAVE—POSSESSION—EVIDENCE OF TITLE—REPLEVIN—POSSESSION TAKEN BY DEFENDANT.

1. Whatever may be the words of grant in a deed, it is the office of the habendum, to limit and confine them, and to ascertain the commencement and duration of the estate created or conveyed by the deed.

2. A deed of bargain and sale was made, (and duly acknowledged and recorded,) by J. W. to his brother T. W., of a negro woman named Bet, and her increase, and a negro boy named Patrick, "from and after the date hereof," "with this reserve, that they are to remain with J. W. my father, who is to hold and have the entire use and benefit of them during his life, and at his decease my said brother Thomas, his heirs, executors, administrators, or assigns, to take, hold and possess them ever after; to have, and to hold, the said negro woman Bet, and her increase, as aforesaid, and negro boy Patrick, (from and ever after the decease of my father, as aforesaid,) unto my said brother Thomas Wilson, his heirs, executors, administrators, and assigns, with general warranty from and after the decease of my father, as aforesaid." T. W. died in the lifetime of the father. *Held*, that neither T. W. nor the father took any thing by the deed.

3. The possession of a slave for twenty years, is primâ facie evidence of a good title in a plaintiff in replevin, against everybody who does not show a better.

4. If a replevin be discontinued, the defendant is not guilty of a contempt, in taking possession of the goods, they being no longer in the custody of the law.

Replevin for a negro woman named Mahala. This cause, which was discontinued at December term, 1826, for want of the defendant's appearance, was by consent of the parties, at May term, 1827 [Case No. 9,671], reinstated, with a mutual release of errors, and it was agreed that upon a motion for the return of the property, the whole merits of the cause should be decided. The motion to return the property was accordingly made.

Mr. Coxe and Mr. Ashton, for plaintiff in replevin.

Mr. Key, for defendant.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). This is an action of replevin, brought on the 15th of May, 1826, by Thomas L. Mitchell, against William Wilson, administrator of Thomas Wilson, for a female slave, named Mahala, about twenty-one years of age. Mahala was the daughter of Bet. On the 20th of July, 1787, Joseph Wilson, son of Lancelot, made a bill of sale of his slave Bet, then about six years old, and three other slaves, to his son Joseph Wilson, Junior, and his heirs and assigns, in consideration of £105 paid by him to, or for his father. This bill of sale was recorded on the 7th of August, 1787, but was never acknowledged. Joseph Wilson, Junior, was then about twenty-seven years old, had a wife and family, and lived in the same house with his father, who delivered the slaves to him, and who was an intemperate man, and in embarrassed circumstances, and for whom his son had paid debts to the amount of £105. The slaves remained in the joint family of the father and son until the father and son moved into separate houses in the same neighborhood, when the slaves, excepting Bet, remained with the son, but were often in the service of the father. Bet lived with the father, and was an idiot, lame, and worthless. On the 31st of December, 1801, Joseph Wilson, Jr., made a bill of sale, under seal, in consideration of £25, to his brother, Thomas Wilson, of Bet, then said to be about twenty-three years of age, "and all her increase, from and after the date hereof, and her son, a negro boy named Patrick, about eighteen months old; with this reserve, that they are to remain with Joseph Wilson, my father, who is to hold and have the entire use and benefit of them during his life, and, at his decease, my said brother, Thomas Wilson, his heirs, executors, administrators, or as-

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

signs, to take, hold, and possess them ever after: To have and to hold the said negro woman, Bet, and her increase, as aforesaid, and negro boy, Patrick, (from and after the decease of my father, as aforesaid,) unto my said brother, Thomas Wilson, his heirs, executors, administrators, and assigns," with general warranty, "from and after the decease of my father, as aforesaid." This bill of sale was, on the day of its date, acknowledged before a justice of the peace in Prince George's county, and enrolled on the 2d of January, 1802. Bet continued in the possession of the father. In the spring of 1805, however, she was found, with her child, Mahala, then from six to nine months old, living in the family of Thomas L. Mitchell, the plaintiff, whose wife was the daughter of the said Joseph Wilson, of Lancelot, and sister of Joseph Wilson, Jr. Mahala continued in the possession of Thomas L. Mitchell, from that time until two or three days before this writ of replevin was issued; when the defendant, William Wilson, son of Thomas, having then recently taken letters of administration in this District, on the estate of Thomas Wilson, who died about the year 1805, probably before the birth of Mahala, and certainly several years before the death of his father, Joseph Wilson, of Lancelot, seized upon Mahala, and claimed her as part of his father's estate; in consequence of which seizure, Thomas L. Mitchell obtained this writ of replevin. On the 1st of February, 1806, Joseph Wilson, of Lancelot, by deed of bargain and sale, duly acknowledged and recorded, conveyed to Thomas L. Mitchell and his wife the slave Mahala, and all her posterity, she then being and remaining in their possession. Bet was always in possession of Wilson, the father, or of Thomas L. Mitchell, from the time of the separation of the families of the said Wilson and his son, Joseph, until the death of Wilson, the father, about fifteen years ago. Neither Bet nor Mahala was ever in the possession of Thomas Wilson, who lived in Ann Arundel county. Wilson, the father, and his son Joseph, lived in Prince George's county, near Bladensburgh. It does not appear how many children were left by Thomas Wilson nor of what age. If he died in 1805, the youngest must be now at least twenty-one years old. This is a motion by the defendant for a return of the property replevied; and it is agreed that the court shall, upon that motion, decide the whole merits of the case, without a jury.

On the part of the defendant it is contended that, by the deed of 1787, from the father to his son Joseph, the legal title of Bet was transferred to the son; and that, by his deed of 1801, it was conveyed to his brother, Thomas Wilson, and that Mahala, whether born before or after the death of Thomas Wilson, became part of his estate, which has never yet been legally distributed or settled. The possession having always been in Mitchell, the burden of proof is upon the defendant to show a better title. It seemed to be admitted by Mr. Wilson, in his testimony, that the possession of Bet always remained in his father until his death. But if the deed of 1787 were bona fide, and for a valuable consideration, that circumstance did not prevent the operation of the deed. The title was transferred to his son. Act Md. 1729, c. 8, § 5, for the relief of creditors against secret sales, does not make void the sale against any person claiming under the vendor; and Supplementary Act 1763, c. 13, applies only to gifts, not to bona fide sales. The fact of its being a bona fide sale, for valuable consideration, depends principally upon the testimony of the witness, the vendee, and the averment in the deed itself. He swears positively and unequivocally, that he paid upwards of £100 of his father's debts, and that such payment was the consideration of the deed. His testimony is corroborated by that of other witnesses, who have spoken of the embarrassed situation and bad management of the father, and, by the fact that the creditors of the father have never pursued this property in the hands of the son. An attempt has been made to discredit the general reputation of the witness for veracity; but, upon the whole, we think his credit is sustained, although there seemed to be a strong bias in favor of the defendant. We take the fact, therefore, to be, that the deed of 1787 was bona fide, and for a valuable consideration, and transferred the legal title in Bet to Joseph Wilson, the son. It is not so clear what was the effect and operation of the deed of 1801, from Joseph, the son, to his brother, Thomas. It purports to be for a valuable consideration, and bona fide, and is duly acknowledged and recorded; but did it pass a present interest to Thomas Wilson? It purports to bargain and sell the negro woman, Bet, "and all her increase, from and after the date hereof," and the negro boy, Patrick, "with the reserve, that they are to remain with Joseph Wilson, my father, who is to hold and have the entire use and benefit of them during his life, and at his decease my said brother, Thomas Wilson, his heirs," &c., "to take, hold, and possess them ever after: To have and to hold the said negro Bet and her increase, as aforesaid, and negro boy, Patrick, (from and ever after the decease of my father, as aforesaid,) unto my said brother, Thomas, his heirs," &c. Whatever may be the words of grant in a deed, it is the office of the habendum to limit and confine them, and to ascertain the commencement and duration of the estate created, or conveyed by the deed. Here, in the very terms of the grant, there is a reserve of the possession and entire use and benefit of them to the father, during his life; and it was uncertain whether Thomas would survive him, and, in fact, he did not. And it is further said, in the terms of the grant, that "at his," the father's, "decease," the brother was "to take, hold, and possess them." If he could not take,

hold, or possess them, nor have any use or benefit of them during his father's life, and he died before his father, did any thing vest in him by the deed? But the habendum is decisive. He was to have and to hold after the decease of his father. The estate was not to commence until the death of his father. He died before his father, and therefore the estate never did commence. Nothing ever passed from Joseph Wilson, Jr., by that deed. It created no estate in his father, because his father was not a party, and because there are no words of grant, or habendum, to the father. Thomas cannot be considered as holding the legal estate as trustee for the father, because the legal estate never vested in Thomas. It remained in Joseph Wilson, Jr.; and the contest must now be between his legal title and the possession of Mitchell, for the father having no legal title, could convey none, by his deed of 1806, to Mitchell, after the death of Thomas. The question remaining is, whether the long possession of Mitchell is a bar to the legal title of Joseph Wilson, Jr. Upon that point we should like to hear an argument.

At the adjourned October session of May term, 1827, the point was argued by Mr. Key, for the defendant, and by Mr. Jones and Mr. Ashton, for the plaintiff.

Mr. Key contended that the possession of a chattel does not give title. The statute of limitations is only a bar to the remedy, not to the right. It does not destroy the cause of action. If it destroyed the right, it would not be necessary to plead it. It might be given in evidence on the general issue. 1 Cranch [5 U. S.] Append. 466; Quantock v. England, 5 Burrows, 2628; Hodsden v. Harridge, 2 Saund. 63; Ballantyne, 188, 267. The only cases opposed to this principle are the Virginia cases, in which it has been decided that five years' possession of a negro gives good title against all the world. But they depend upon the peculiar statutes of frauds of Virginia, in respect to the transfer of negroes. They are a peculiar kind of estate, being neither chattels nor lands. They were formerly considered as real estate, subject to dower and curtesy; but in 1792 the legislature of Virginia enacted that they should be no longer real estate. The cases do not say that possession of any other chattel gives title. Newby v. Blakey, 3 Hen. & M. 57; Elam v. Bass' Ex'r, 4 Munf. 301; Garth v. Barksdale, 5 Munf. 101; Gay v. Moseley, 2 Munf. 545; St. Va. 1792, c. 103, § 49; Old Rev. Code, p. 192; 1705, c. 3. In 1725, they were exempted from execution for debt; and, in 1758, they could be only transferred by deed, or will, like lands. Old Va. Justice, 318; Taylor v. Horde, 1 Burrows, 119. Entry is necessary to maintain ejectment. Runn. Eject. 99. By the Maryland acts of February, 1777, c. 15, § 7, and 1780, c. 5, § 14, and Appendix 1782, c. 55, § 5, exceptions to the act of limitations may be given in evidence, on a general replication to the plea of limitations. In England, twenty years' possession of land gives good title, because the statute takes away the right of entry after that time, not merely the legal remedy; so that the statute of limitations need not be pleaded in ejectment. This case is to be decided according to the law of Maryland; and in Smith v. Williamson, 1 Har. & J. 147, it was decided that, in replevin, the statute of limitations must be pleaded; because it only goes to the remedy, not to the right.

Mr. Coxe and Mr. Ashton, contrâ. The court has decided that neither the plaintiff nor the defendant has a documentary title. The question, then, is, whether twenty years' possession of the slave is a good title for a plaintiff in replevin? The object of the statute of limitations is, to protect the possession under a title supposed to be good. It was founded upon great principles, and upon like principles has been expounded by the courts; and they have applied its principles to analogous cases, not embraced in the letter of the act. Thus, set-off may be objected to on the trial, if barred by the statute of limitations. Ballantyne, 94. When a party can plead it, he must; but when he cannot plead it he may give it in evidence. In trespass, as well as in ejectment, twenty years' possession gives good title. The same reason applies to chattels; and the same reason which applies to negroes, is applicable to any other chattel. Shelby v. Guy, 11 Wheat. [24 U. S.] 371; Brent v. Chapman, 5 Cranch [9 U. S.] 358. The supreme court did not rely on the statute of frauds of Virginia, but on the statute of limitations. This is a motion for a return of the property, with an agreement that the court may decide upon the whole merits of the case. If, then, the plaintiff could, in any way, plead the statute of limitations, it will be considered by the court as pleaded. While Mitchell had the possession, he had a good title, of which he could not be deprived by any legal process, or remedy; and there is no legal right without a remedy. Under the agreement in this suit, the plaintiff cannot be prevented from availing himself of the protection of the statute of limitations.

Mr. Key, in reply. If the act of limitations went to the right, it would be unconstitutional, because it would impair the obligation of the contract. The statute does not say, that the owner shall not retake his property, after the lapse of the three years which bars his action. A man who loses his goods, or whose slave runs away, may lawfully take peaceable possession of them wherever he can find them, and then holds them in all his original right.

THE COURT took time to consider until this term, and on the 2d of January, 1828, CRANCH, Chief Judge, delivered the opinion of the court.

This is an action of replevin for a female slave named Mahala. Upon a motion for a

return of the slave to the defendant, this court, at the last term, (May, 1827,) was of opinion that the legal title was not in the defendant, and it appeared that the slave never was in the possession of the defendant's intestate, nor of the defendant, except for two or three days before the writ of replevin was issued, when the defendant, claiming title as administrator of Thomas Wilson, took possession of her. There was no evidence of title in the plaintiff, except that he had been in possession of her, claiming title, ever since she was six or nine months old, when she and her mother Bet, were seen by the witness in the possession of the plaintiff; and the probability was, that Mahala was born in his possession, his wife being the daughter of Joseph Wilson, of Lancelot, the former owner of Bet, who was a crippled and worthless idiot.

The court, on examination of the evidence upon the motion for a return of the slave, was of opinion that the documentary legal title of Bet, at the time of the birth of Mahala, was in Joseph Wilson, Junior, the son of Joseph Wilson, of Lancelot, and requested an argument upon the question whether the long possession of the plaintiff, Thomas L. Mitchell, either gave, or was evidence of, such a title as would enable the plaintiff to maintain replevin against the present defendant, William Wilson, the administrator of Thomas. That argument was heard at the adjourned session of May term, in October. It was contended for the plaintiff, that such a possession as would have been a good bar to an action of detinue constituted a valid title against everybody. On the other hand, it was said, for the defendant, that there was no limitation against a man's taking possession of his goods and chattels. That the statute of limitations was a bar only to the action, not to the right. That it was not like the possession of lands, for in that case, the statute takes away the right of entry, without which the action of ejectment cannot be maintained. That in ejectment, it is not necessary to plead the statute, because the plaintiff must show a right of entry, as a part of his title to recover; but in mere personal actions, it is necessary to plead it, because it is only a bar to the remedy. That in Maryland it has been decided, that in replevin, the statute must be specially pleaded. Smith v. Williamson, 1 Har. & J. 147. That the cases in Virginia, in which it has been decided, that five years' possession of a slave gives a substantive title to a plaintiff in detinue, were cases under the peculiar statute of frauds of that state, where slaves were, for a long time, considered as real estate.

In reply to which, it was said, for the plaintiff, that the supreme court of the United States, in the case of McIver v. Ragan, 2 Wheat. [15 U. S.] 29, said, that "the statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those, who have remained in possession, under color of a title believed to be good." That such is emphatically the case, in the present instance. That the principles of the statute have been found to be so beneficial, that courts, both of law and equity, have extended them to analogous cases, not embraced by the letter of the statute; and although courts of law have decided, that it must be pleaded where it can be pleaded, yet, where, it cannot be pleaded, they have permitted it to be given in evidence, as in the case of a set-off barred by the statute, &c. That the principle of the rule, that twenty years' possession of lands gives a substantive title upon which a plaintiff in ejectment may recover, applies equally to the case of personal chattels; and has been so applied by the court of appeals, in Virginia, in the case of Newby v. Blakey, 3 Hen. & M. 57, and by the supreme court of the United States in the cases of Brent v. Chapman, 5 Cranch [9 U. S.] 358, and Shelby v. Guy, 11 Wheat. [24 U. S.] 371. That although there were cases of slaves, yet the principle, the reason, and the law, upon which those cases were decided, are equally applicable to chattels of any other description. These cases were not decided upon the statute of frauds, but upon the statute of limitations, as clearly appears from a remark of the supreme court, in its opinion in the case of Shelby v. Guy, 11 Wheat. [24 U. S.] 374, where the judge observes, that "the dates and facts do not bring the case within the operation of the statute of frauds of 1785." These cases and principles seem to me to be decisive of the present question.

It is not necessary, in this case, to decide that the possession of the plaintiff gives him a good title against all the world. It is sufficient in this action, and against this defendant, who has no title or right of possession, that it is prima facie evidence of title, and is sufficient against everybody who does not show a better. It having been agreed, that the court should, upon this motion for a return of the property, decide the whole merits of the cause, I am of opinion that the defendant ought to confess judgment for one cent damages and costs.

Judgment for the plaintiff.

MORSELL, Circuit Judge, concurred. THRUSTON, Circuit Judge, absent.

Case No. 9,673.

MITCHELL v. WINSLOW et al.

[2 Story, 630; [1] 6 Law Rep. 347.]

Circuit Court, D. Maine. Oct., 1843.

CHATTEL MORTGAGE—AFTER-ACQUIRED STOCK—BANKRUPTCY—RIGHTS OF ASSIGNEE.

1. Assignees in bankruptcy, except in cases of fraud, take only such rights and interests as

[1] [Reported by William W. Story, Esq.]

the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and they are affected with all the equities, which would affect the bankrupt himself, if he were asserting those rights and interests.

[Cited in Fletcher v. Morey, Case No. 4,864; Re Gregg, Id. 5,796; Coggeshall v. Potter, Id. 2,955; Ex parte Ames, Id. 323; Re Arledge, Id. 533; Nichols v. Eaton, Id. 10,241; Scammon v. Bowers, Id. 12,431; Casey v. La Societe de Credit Mobilier, Id. 2,496; Williamson v. Colcord, Id. 17,752; Rollins v. Twitchell, Id. 12,027; Yeatman v. New Orleans Sav. Inst., 95 U. S. 766; Casey v. Cavaroc, 96 U. S. 487; Re Smith, Case No. 12,990; Thrall v. Crampton, Id. 14,008; Schulze v. Bolting, Id. 12,489; Stewart v. Platt, 101 U. S. 739.]

[Cited in Martin v. Bowen, 51 N. J. Eq. 458, 26 Atl. 825; Hersey v. Elliot, 67 Me. 527. Cited in brief in Williams v. Jackman, 16 Gray, 516. Cited in Gay v. Bidwell, 7 Mich. 532; Brown v. Brabb, 67 Mich. 22, 34 N. W. 405; Kittredge v. Warren, 14 N. H. 532; Kirk v. Roberts (Cal.) 31 Pac. 622; Goodsell v. Benson, 13 R. I. 246; Pond v. Campbell, 56 Vt. 678.]

[See In re Clark, Case No. 2,798.]

2. To make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment. A mere possibility is not assignable.

[Cited in Woodworth v. Sherman, Case No. 18,019. Distinguished in Crampton v. Jerkowski, 2 Fed. 493.]

[Cited in Field v. Mayor, etc., of New York, 6 N. Y. 186. Cited in brief in Hart v. Farmers' & Mechanics' Bank, 33 Vt. 257; Union Manuf'g Co. v. Lounsbury, 41 N. Y. 367.]

3. But courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things, which have no present actual potential existence, but rest in mere possibility only.

[Cited in Wright v. Shumway, Case No. 18,093; Coe v. Pennock, Id. 2,942; Brett v. Carter, Id. 1,844; Miller v. Jones, Id. 9,576; Calhoun v. Memphis & P. R. Co., Case No. 2,309. Cited in brief in Pennock v. Coe, 23 How. (64 U. S.) 130. Cited in Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 300, 10 Sup. Ct. 548. Distinguished in Crampton v. Jerkowski, 2 Fed. 493. Cited in Parker v. New Orleans, B. R. & V. R. Co., 33 Fed. 696.]

[Cited in Apperson v. Moore, 30 Ark. 56; Kane v. Clough, 36 Mich. 439. Cited in brief in France v. Thomas, 86 Mo. 82. Cited in Williams v. Briggs, 11 R. I. 478. Doubted in Chynowith v. Tenney, 10 Wis. 403.]

4. Where a mortgage or a lien is created on chattels by contract, it is competent for the parties to agree, that the possession and use thereof shall be retained by the mortgagor until the breach of the condition, or by the debtor until the creditor shall assert his rights against it as a security for the debt.

[Cited in Fletcher v. Morey, Case No. 4,864; Dunham v. Cincinnati, P. & C. R. Co., 1 Wall. (68 U. S.) 268; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 300, 10 Sup. Ct. 548; Brett v. Carter, Case No. 1,844; Miller v. Jones, Id. 9,576.]

[Cited in De Wolf v. Sprague Manuf'g Co., 49 Conn. 289; Edwards v. Peterson, 80 Me. 372, 14 Atl. 937; Reading v. Wilson, 38 N. J. Eq. 446; Ludlum v. Rothschild, 41 Minn. 222, 43 N. W. 137; Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co., 6 Dak. 357, 43 N. W. 808; Pierce v. Langdon (Idaho) 28 Pac. 403; Collins's Appeal, 107 Pa. St. 602; Williams v. Cunningham (Ark.) 12 S. W. 1072.]

5. A. and B. being engaged, in 1839, in the manufacture of cutlery, borrowed of C. a sum of money, payable in four years, with interest semi-annually, and on the same day gave him a deed of all the machinery in their manufactory, with all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery for the use of the said manufactory, which they might at any time purchase for four years from that date, and also all the stock, which they might manufacture or purchase during the said four years. On the 26th of August, 1842, A. and B. filed their petition to be declared bankrupts, and subsequently were so declared, and an assignee was appointed. On July 16th, 1842, for breach of the conditions of the mortgage, the agent of C. took possession of the property, including the machinery, &c. which were in the possession of the factory when the mortgage was made, and also machinery, tools, and stock in trade, which had been made and purchased after the execution of the mortgage. On petition of the assignee in bankruptcy of A. and B. for an order of court authorizing him to take possession, it was *held* that the mortgage and the possession taken on July 16th, 1842, constituted such a lien in favor of the mortgagee to the property acquired subsequent to the time of executing the mortgage, as is protected under the provision in the second section of the bankrupt act [of 1841 (5 Stat. 440)].

[Cited in Scammon v. Bowers, Case No. 12,431; Sixpenny Sav. Bank v. Estate of Stuyvesant Bank, Id. 12,919; Re Baker, Id. 762; Brett v. Carter, Id. 1,844; Barnard v. Norwich & W. R. Co., Id. 1,007; Ellett v. Butt, Id. 4,384; Whithed v. Pillsbury, Id. 17,572. Distinguished in Crampton v. Jerkowski, 2 Fed. 493. Cited in Freights of The Kate, 63 Fed. 714.]

[Cited in brief in Tucker v. Daly, 7 Grat. 331. Distinguished in Gay v. Bidwell, 7 Mich. 525. Approved in Wright v. Bircher, 72 Mo. 187. Cited in brief in France v. Thomas, 86 Mo. 81. Cited in First Nat. Bank v. Turnbull, 32 Grat. 701; Parker v. Jacobs, 14 S. C. 112; Pierce v. Emery, 32 N. H. 506; Griffith v. Douglass, 73 Me. 537; Collins' Appeal, 107 Pa. St. 602; Cook v. Corthell, 11 R. I. 491.]

6. Such stipulations in a mortgage, in regard to property subsequently acquired, protect such property from other creditors of the mortgagor.

[Cited in National Shoe & Leather Bank v. Small, 7 Fed. 842.]

[Distinguished in Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 321. Cited in McCaffrey v. Woodin, 65 N. Y. 467; Parker v. Jacobs, 14 S. C. 112; Cock v. Corthell, 11 R. I. 489; Collins' Appeal, 107 Pa. St. 602. Cited in brief in Collender Co. v. Marshall, 57 Vt. 234.]

7. Quaere, as to the effect at law of such stipulations, in a controversy between a first and second mortgagee, as to property acquired, and in esse after the execution of the first mortgage, and before the execution of the second, both the mortgagees being bonâ fide purchasers for a valuable consideration, and the second mortgagee having no notice of the prior incumbrance.

[Cited in Gregg v. Sanford, 24 Ill. 20; Hamlin v. Jerrard, 72 Me. 76; Cook v. Corthell, 11 R. I. 487. Distinguished in Jones v. Richardson, 10 Metc. (Mass.) 488. Cited in brief in France v. Thomas, 86 Mo. 82.]

This was a petition of Mitchell, assignee of George and David N. Ropes, praying for an

order of court, authorizing him to take possession of certain property in the possession of Neal Dow, one of the respondents, and alleged to belong to the estate of the bankrupts. The facts were these; in 1839, the Messrs. Ropes were engaged in the manufacture of cutlery in Westbrook, and on the first of December of that year, borrowed of Jeremiah Winslow, of Havre, in the kingdom of France, $15,000, payable in four years, with interest semi-annually, and on the same day made and executed a deed, conveying to Winslow "all and singular all the machinery of every kind, which is in and belonging to our cutlery manufactory at Saccarappa, in Westbrook, with all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery for the use of said manufactory, which we may at any time purchase for four years from this date, and also all the stock which we may manufacture or purchase during said four years. To have and to hold, &c." (with covenants of title and warranty, &c.) "Provided, nevertheless, that if the Ropeses paid to Winslow, within four years, the principal sum borrowed, with interest, semi-annually, then the deed, with certain notes of hand given to secure the same, to be void. Provided, also, until default of or in the payment of said sums of money, or of some part thereof, or of the interest therefor, contrary to the true intent and meaning of the preceding proviso, it shall and may be lawful to and for the said George and David N. Ropes, their heirs and assigns, quietly and peaceably, to hold and enjoy, all and singular the premises hereby granted, and to secure and take the rents and profits therefor, to and for their own use and benefit, without denial or interruption of or by the said Jeremiah, his heirs or assigns, or any other person or persons claiming by or under him." This deed was duly recorded in the records of the town of Westbrook, pursuant to the provision of the law of the state. On the 12th of July, 1842, the bankrupts stopped payment, and on the 26th of August, filed their petition to take the benefit of the bankrupt law, and were duly declared bankrupts by a decree of the court, on the 25th of October, 1842. On the 16th of July, 1842, the interest on the notes being in arrear and unpaid, Nathan Winslow, as the agent of Jeremiah, who was then absent from the country, took possession of the property, and on the —— of October, before the filing of the petition of the assignee of the Ropeses, sold the property to Neal Dow. The bankrupts continued their business up to the 12th of July last, when they stopped payment, and in the property on hand on the 16th of July, when the agent of Winslow took possession for breach of the conditions of the mortgage, were included the machinery and tools, which were in the factory, and in possession of the bankrupts, when the deed was executed, and also, other machinery, tools, and stock in trade, which had been made and purchased after the execution of the deed.

The case came on to be heard in the district court, on a petition and answer, and the district judge ordered the following questions, arising on the facts stated in the petition and answer, to be adjourned into the circuit court for a final decision. [Case unreported.]

1. Whether the deed of mortgage executed by George and David N. Ropes, on the first of December, 1839, together with possession, taken July 16th, 1842, by N. Winslow as agent of Jeremiah Winslow, created such a lien in favor of the mortgagee, on the machinery, tools and stock in trade, acquired by the mortgagors, either by purchase or otherwise, and put into the factory subsequent to the time of executing the mortgage deed, as is protected under the proviso in the second section of the bankrupt law.

2. Whether, admitting, that as between the mortgagor and mortgagee, the stipulations of the contract might be a good and sufficient authority for the mortgagee to take possession of, and apply the subsequently acquired machinery, tools and stock, to the payment of the debt, such stipulations in a deed of mortgage do protect such property from other creditors of the mortgagor.

The case was argued at this term by Mr. Preble, for the assignee, and by Mr. Fox, for the respondent.

Mr. Preble, after citing and relying upon Goodenow v. Dunn, decided by the supreme court of Maine, and not then reported (since reported in 21 Me. 86), and upon Winslow v. Merchants' Ins. Co., decided by the supreme court of Massachusetts, and not then reported (since reported in 4 Metc. 306), but of both of which manuscript copies were produced, referred to the cases of Sumner v. Hamlet, 12 Pick. 76, and Macomber v. Parker, 14 Pick. 497, and Leslie v. Guthrie, 1 Bing. N. C. 697; and contended, that they were all distinguishable from the present case. In Sumner v. Hamlet, the goods were in esse, and were selected and set apart, as security for the creditor. In Macomber v. Parker, the lessees, the creditors, were in possession of the brickyard, where the bricks were made, and held by them as security for advances made to their debtor, who was employed to make and sell the bricks upon certain terms, and to account for the proceeds to the creditors. In Leslie v. Guthrie, the assignment was of the freight for a then contemplated voyage of the ship, and was in the course of being earned. But it was clear, that the freight of a ship could not be permanently and indefinitely separated from the ship itself. Robinson v. Macdonnell, 5 Maule & S. 228. The present case is different from all these cases. Here the mortgage is not only of property now in esse, but of future property, which should come into the factory for four years, and the present and future stock purchased for the factory,

within the same period. Yet the mortgagors were to hold and enjoy all the mortgaged premises, and to take the rents and profits thereof, present and future, for their own use and benefit, until there should be a breach of the condition. This gave the mortgagors a complete power and dominion over the whole mortgaged property, and is inconsistent with the assumed rights of the mortgagee, and cannot, in point of law, be valid. How can the mortgagee have a right to the manufactured stock, when the mortgagors have full right to sell it, from time to time, for their own use? Even if stipulations of this sort were valid between the parties, they could not be binding as to creditors, and certainly not in bankruptcy against the assignee. It would be against the policy of the bankrupt act to give effect to such transactions. The mortgage may be good as to the machinery and stock, existing at the time of its execution, but not as to future stock or future machinery.

Mr. Fox, for respondent, argued, that the assignment was valid throughout.

STORY, Circuit Justice. Two questions are presented for the consideration of the court. (1). Whether the present mortgage created a valid lien, in favor of the mortgagee, upon the machinery, tools, and stock in trade, acquired by the mortgagors, and put into the factory after the execution of the mortgage, within the true intent and meaning of the proviso in the second section of the bankrupt act of 1841, c. 9. (2). Whether, admitting the stipulations of the mortgage might, as against the mortgagor, be a good and sufficient authority to the mortgagee to take possession of, and apply the subsequently acquired machinery, tools, and stock, to the payment of the debt due to him, the mortgage is good, so as to protect the property against the claims of the other creditors of the bankrupts.

The proviso of the bankrupt act, above alluded to, is in the following words: "And provided, also, that nothing in this act contained, shall be construed to annul, destroy or impair any lawful rights of married women, or any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." I am not aware, that the present mortgage has been contended to be inconsistent with any thing contained in any section of the act. It was executed long before the bankrupt act was in existence; and there is no pretence to say, that it is designedly fraudulent, or that the mortgagee has waived any of his rights under the mortgage.

The present is a mortgage of personal property, and has been duly recorded according to the act of 1839, c. 390, of the state of Maine, (which is substantially in the same language as the act of Massachusetts on the same subject,) and no objection arises on this head. The question, therefore, in effect, resolves itself into this, whether the mortgage, quoad future machinery, tools, and stock in trade, is a valid mortgage or lien, by the laws of the state of Maine, as between the parties themselves, and also as between the mortgagee and the creditors of the mortgagors. If it be valid, either at law or in equity, (it is wholly immaterial which,) then the decision must be in favor of the respondent; otherwise, it must be in favor of the assignee.

It is material here to state, that the present is not a controversy between a first and second mortgagee, as to property acquired and in esse after the execution of the first mortgage, and before the time of the execution of the second mortgage, both the mortgagees being bona fide purchasers for a valuable consideration, and the second mortgagee having no notice of the prior encumbrance. That might, at law, present a very different question, and is precisely that which is understood to have been decided in the case of Winslow v. Merchants' Ins. Co. in Massachusetts. Neither is this a controversy between a mortgagee of a thing in building (as, for example, a ship in building) before it is completed, and a subsequent attaching creditor, or a subsequent purchaser, after it is completed, which seems to have been the important point in Goodenow v. Dunn, and Bonsey v. Amee, 8 Pick. 236, and which might, also, at law, admit of very different considerations. The present is a question between the assignee of a bankrupt, acting for the benefit of all the creditors, and the mortgagee, claiming title under his mortgage; and it arises upon a petition, partaking of the character of a summary proceeding in equity, and not in a suit at the common law, or governed by its principles. Now, it is most material to bear in mind, under this aspect of the case, that it is a well-established doctrine, that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and, consequently, they are affected with all the equities, which would affect the bankrupt himself, if he were asserting those rights and interests. This was expressly laid down by Lord Hardwicke in Brown v. Heathcote, 1 Atk. 160, 162, where he said: "The ground, that the court go upon, is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could. Therefore, assignments of choses in action for a valuable consideration, have been held good against such assignees." The same doctrine was recognised by his lordship, in Jewson v. Moulson, 2 Atk. 417, 420. Sir William Grant (M. R.), in Mitford v. Mitford, 9 Ves. 87, 100, said:

"I have always understood the assignments from the commissioners, like any other assignment by operation of law, passed his (the bankrupt's) rights, precisely in the same plight and condition as he possessed them. Even where a complete title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shows, that they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed, a distinction has been constantly taken between them and a particular assignee for a valuable consideration; and the former are placed in the same class as voluntary assignees and personal representatives." The same doctrine was held by Lord Thurlow in Worrall v. Marlar, reported in Mr. Coxe's note to 1 P. Wms. 459. It has ever since been firmly adhered to (see Parker v. Muggridge [Case No. 10,743]; 1 Cooke, Bankr. Law, 4th Ed., 1799, pp. 267–270, c. 7, § 2; 1 Deac. Bankr., Ed. 1827, pp. 320, 321, c. 10, § 3; 2 Story, Eq. Jur. §§ 1229, 1411), and has been fully recognized at law, in cases of bankruptcy (Lord Chief Justice Willes, in Scott v. Surman, Willes, 402, and the reporter's note; Gladstone v. Hadwen, 1 Maule & S. 517, 526; Com. Dig. "Bankrupt," D, 19; Leslie v. Guthrie, 1 Bing. N. C. 697; Carvalho v. Burn, 4 Barn. & Adol. 382, 393; Meyer v. Sharpe, 5 Taunt. 74; Simond v. Hibbert, 1 Russ. & M. 719).

It may be admitted to be true, what, indeed, seems to be the result of the authorities cited at the bar, as well as of others equally entitled to respect, that to make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment; and that a mere possibility is not assignable (Wood & Foster's Case, 1 Leon. 42; Grantham v. Hawley, Hob. 132; Robinson v. Macdonnell, 5 Maule & S. 228; Com. Dig. "Assignment," c. 3; Id. "Grant," D); although, perhaps, the doctrine may require some qualifications under special circumstances, as for example, in cases of the assignment of freight in the course of earning at the time of the assignment, as is shown in the case of Leslie v. Guthrie, 1 Bing. N. C. 697, 708, 709. But this admission will carry us but a very little way in the present case. For here the true question is, not whether the assignment of the property to be acquired in futuro, is good at law, but whether it is good in equity; for if it be, then, independently of any fraud (which is not pretended), as the assignee can take only what the bankrupt had a title to, subject to all equities, it follows, as a matter of course, that the petitioner (the assignee) has no claim, on which he can found himself for relief under his petition. So that the question is, in reality, narrowed down to the mere consideration of this, whether the present mortgage as to the future machinery, tools, and stock in trade, to be put into the factory (for there is no controversy as to those in esse at the time of the assignment), is valid or not against the mortgagor.

Upon the best consideration, which I am able to give the subject, I think it is good and valid. Courts of equity do not, like courts of law, confine themselves to the giving of effect to assignments of rights and interests, which are absolutely fixed and in esse. On the contrary, they support assignments, not only of choses in action, but of contingent interests and expectancies, and also of things, which have no present actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true, that the assignment can have no positive operation to transfer, in presenti, property in things not in esse; but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come in esse; and it may be enforced as such a contract in rem, in equity. Lord Hardwicke, in Wright v. Wright, 1 Ves. Sr. 409, 411, expressly recognised this doctrine; and said, that an assignment of a contingent interest or possibility of an inheritance was equally allowable with an assignment of a possibility of a personal thing or chattel real. And he added: "An assignment always operates by way of agreement or contract, amounting in the consideration of this court, to this, that one agrees with another to transfer, and make good that right or interest, which is made good here by way of agreement." In the very case, then before him, he admitted, that the assignor had no immediate claim or demand, but a mere possibility in the property assigned, and that it was well assigned by the word "claim," which well described it, in presenti and in futuro. He also relied on the case of Beckley v. Newland, 2 P. Wms. 182, which (he said) was an agreement on marriage to settle all such lands as came to the party by descent or otherwise from his father; and it was carried into effect by the court, notwithstanding an expectancy of an heir at law is less than a possibility;[2] and Hobson v. Trevor, Id. 191, was fully to the same effect. In Carleton v. Leighton, 3 Mer. 667, Lord Eldon is said to have held, that the expectancy of an heir, presumptive or apparent, was not an interest or possibility, nor was capable of being made the subject of assignment or contract. But there is some reason to doubt the accuracy of the language as to assignment or contract; for he is reported immediately to have added, that the cases cited

[2] The case of Beckley v. Newland, 2 P. Wms. 182, was not exactly as stated by Lord Hardwicke. But it was an agreement between two survivors, who had married two sisters, to divide equally between them whatever should be left to them by the father of their wives. But the principle was the same. The case of Hobson v. Trevor, Id. 191, was that probably in Lord Hardwicke's mind. See, also, 2 Story, Eq. Jur. § 1040b, and note.

(referring to the cases of Beckley v. Newland, and Hobson v. Trevor,) were cases of covenant to settle or assign property, which should fall to the covenantor; where the interest, which passed by the covenant, was not an interest in the land, but a right under the contract. This is strictly true, but still the contract was obligatory and sufficient to enforce a specific performance thereof. In the case of Carleton v. Leighton, the sole question was, whether the mere expectancy of an heir, who became bankrupt, passed by the assignment of the commissioners. Lord Eldon held, that it did not; for it was not an interest or even a possibility in the land. It seems clear, that the language of Lord Eldon ought to receive some modification from other language used by him on other occasions. Thus, in Lord Dursley v. Fitzhardinge, 6 Ves. 260, 261, he expressly admitted, that an heir or the next of kin might enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate; for the law would frame an interest in respect of the contract. Again, In re The Warre, 8 Price, 269, note, in reference to the doctrine of Lord Ellenborough in Robinson v. Macdonnell, 5 Maule & S. 228, Lord Eldon said, that he should find it extremely difficult to say, that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings forever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title, till that debt should be paid. Again, in Curtis v. Auber, 1 Jac. & W. 526, 532, where an assignment was made of the present and future earnings of a ship, Lord Eldon supported it, and said: "In one case I think it was held, that although you might assign the wool then growing on the backs of the sheep, you could not assign the future fleeces. See Grantham v. Hawley, Hob. 132. See 1 Madd. Ch. Prac. (2d Ed.) 549. But still it was a good equitable assignment, and rendered the future earnings liable to equity."

The same doctrine was maintained by Mr. Vice-Chancellor Shadwell in Douglas v. Russell, 4 Sim. 524; and his decree was afterwards affirmed by the Lord Chancellor (1 Mylne & K. 488), upon appeal, as to an assignment of freight earned and to be earned on an outward and homeward voyage, then about to be undertaken. And it was acted upon and supported in a like assignment of freight to be earned on a particular voyage in the case of Leslie v. Guthrie, 1 Bing. N. Cas. 697, 708, 709, where the whole subject was argued at large, in a suit of the assignees under a bankruptcy.

But the latest case, and certainly one of the most important and satisfactory in its reasoning, as well as its conclusion, is that of Langton v. Horton, 1 Hare, 549, before Mr. Vice Chancellor Wigram. There, a deed of assignment by way of mortgage was made of a whale ship and her tackle and appurtenances, and all oil and head matter and other cargo, which might be caught and brought home in the ship on and from her then present voyage; and the question arose between an execution creditor of the assignor, and the assignee, whether the assignment was good as to the future cargo obtained in the voyage after the assignment. The learned vice chancellor decided, that it was. Upon that occasion he said; "Is it true, then, that a subject to be acquired after the date of a contract, cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least, that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title, I do not now advert to; but cases recognising the general proposition are of common occurrence. A tenant, for example, contracts that particular things, which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a court of equity will enforce such contracts, where they are founded on valuable consideration, and justice requires, that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies, in terms, to implements, which shall be there at the time specified; and here neither construction nor decision has confined it to those articles, which were on the property at the time the lease was granted. But it is not necessary, that I should refer to such cases as these; for Lord Eldon, in the case of The Warre, 8 Price, 269, note, and in Curtis v. Auber, 1 Jac. & W. 526, has decided all, that is necessary to dispose of the present argument. Admitting that those cases are not specifically, and in terms, like the principal case, they are not of the less authority for the present purpose; for they remove the difficulty, which has been raised in argument, and decide that non-existing property may be the subject of valid assignment. I will suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of £5,000 to pay the crew and furnish an outfit; and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred to, that a court of equity,

upon a contract so framed, would hold, that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see, why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage, the whales taken, or the oil obtained, shall be his security for the amount of his advances. I cannot, without going in opposition to many authorities, which have been cited, throw any doubt upon the point, that Birnie, the contracting party, would be bound by the assignment to the plaintiffs."

Now, it seems to me, that this reasoning is exceedingly cogent and striking; and it stands upon grounds entirely satisfactory and conclusive upon the whole subject. What, then, is there to distinguish the case before the court from this reasoning? I confess myself unable to perceive any. It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily, or with notice, or in bankruptcy. See 2 Story, Eq. Jur. § 1231, and the authorities there cited; Cross, Liens, pp. 187, 188, 191, 192, c. 12; Prebble v. Boghurst, 1 Swanst. 309; Needham v. Smith, 4 Russ. 318; Randall v. Willis, 5 Ves. 262, 274, 275; Simond v. Hibbert, 1 Russ. & M. 719.

But, then, it is argued, that here the possession of the property was during the whole period of four years to remain in the mortgagors, and they were to take the rents and profits thereof for their own benefit. Nay, that they had the power to dispose of the stock in trade and the other property by sale, and thus they acquired and retained the full dominion over the same during that period which is inconsistent with the nature and objects of such a mortgage, and against the policy of the law. In short, that as to creditors, it operates a virtual constructive fraud upon their rights. As to the possession and use of the property, and taking the rents and profits thereof, there is nothing in that part of the objection, which will invalidate the mortgage. Nothing is more common in mortgages of real estate than an agreement, that the mortgagor shall take the rents and profits until breach of the condition thereof. And as to chattels, there is as little question, that, where a mortgage or a lien is created on chattels by contract, it is entirely competent for the parties to agree that the possession and use thereof shall be retained by the mortgagor until the breach of the condition, or by the debtor until the creditor shall assert his rights against it as a security for the debt. Even in cases of bankruptcy, a qualified possession of the property by the debtor will not oust the creditor of his rights, as leaving the property in the order and disposition of the debtor under the statute of 21 Jac. I. c. 19, §§ 10, 11, or the statute of 6 Geo. IV. c. 16, § 72. That was expressly held in Crowfoot v. London Dock Co., 2 Cromp. & M. 637, where the possession of the debtor was not exclusive, but was mixed up with that of the creditor, the property (steam engines and other apparatus,) being employed by the debtor in operations, conducted by the company, the possession of the debtor being in pursuance of an arrangement, under which he had a right of user for the purposes of the contract. The case of Hawthorn v. Newcastle & N. S. Ry. Co., reported in Cross, Liens, Append. 408, carried the doctrine a step farther; and decided, that a covenant in a contract to build a bridge for the company, made by the builders, that the company should have a lien upon the machines, implements, and materials of the builders, in or upon the land or grounds, where the bridge was to be built, as a security for the completion of the works, was good in favor of the company, in the case of the bankruptcy of the builders, as a lien, in the nature of a shifting lien, upon such materials, as happened for the time being to lie upon the actual line of the railway, or upon the adjacent land in possession of the company. Under the statute of Maine for the recording of mortgages of personal property (Act 1839, c. 390), where the mortgage is recorded, it is valid, without possession of the property mortgaged being delivered to the mortgagee; and a stipulation, that it shall remain in possession of the mortgagor until breach of the condition, has been upheld as within the true spirit and intendment of the act. Forbes v. Parker, 16 Pick. 462; Rev. St. Me. (Ed. 1841) p. 558, c. 125, § 32; Abbott v. Goodwin, 20 Me. 408.

Then, as to the supposed right of sale, of the stock in trade and other mortgaged property. Admitting it to exist, and to be fairly deducible from the language of the instrument (which certainly is not a strained construction of its apparent object and intent), that right, conceded by the mortgagee, is not inconsistent with the validity of the mortgage; for still the proceeds, or other equivalent property may be substituted for it, and if the parties consent to such an arrangement, there seems no legal objection to it. The case of Abbott v. Goodwin, 20 Me. 408, manifestly proceeds upon this ground. In that case, it was expressly decided, that if the mortgagor should, under a stipulation in the mortgage, giving him that authority, sell the goods mortgaged, and with the proceeds should purchase other goods, the latter goods would represent the first, and be substituted for them; and would be, equally with the first, subject to the lien of the mortgagee. Now, in effect, precisely what the court thus

decided to be the result of law, is provided for by the agreement of the parties in the present mortgage. Macomber v. Parker, 14 Pick. 497, affirms the same doctrine; and both proceed upon principles analogous to those held in Hawthorn v. Newcastle & N. S. Ry. Co., already cited.

This objection, then, falls to the ground, and leaves the case stripped of every other consideration, except the argument, that the mortgage is a virtual fraud upon the other creditors, and is against the policy of the law, and, therefore, cannot be protected against the claims of the other creditors, however it might stand valid as between the parties themselves. And this, in effect, is the remaining point arising upon the second question propounded at the hearing. Now, if the considerations already suggested are sound, they seem to dispose of this part of the controversy. There is no pretense of any fraud, either actual or constructive, intended by the mortgagor and mortgagee. So far as their intentions are concerned, they were upright, and honest, and correct. The mortgage was recorded, and there is no ground to suggest any intentional concealment. The possession of the property by the mortgagors, and the power to use it and dispose of it, was not only consistent with the deed, but was positively avowed and provided for by it. The creditors, therefore, were not allured by any false colors or false credit held out to mislead them. Now, I am not aware of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it by the exercise of reasonable diligence. Indeed, the law makes the registration of the deed constructive notice of its contents to all persons; since it was required to be registered, and was registered in conformity to law. What ground is there, then, to assert, that the conveyance was against the policy of the law? The phrase itself is somewhat indefinite, and in its actual application here, is difficult to be grasped and comprehended. I profess, that I am not able to perceive any; and, as far as authorities go, they point the other way. Besides; the assignees here stand before the court affected with all the equities of the original debtors; and the creditors here assert their rights through and under the assignee and not by any paramount title.

In every view, therefore, which I am able to take of the case, it seems to me, that the claim of the assignee is not maintainable, and that his petition ought to be dismissed.

Under all the circumstances, as the questions are of a somewhat novel character, I incline to think, that the respondents ought not to be allowed their costs; and that the costs of the assignee should be a charge on the bankrupts' estate. But this is a matter for the consideration of the district judge.

I shall, accordingly, direct a certificate to be sent to the district court, answering both the questions adjourned into this court in the affirmative.

Case No. 9,674.

In re MITTELDORFER et al.

[Chase, 276; [1] 3 N. B. R. 39 (Quarto, 9).]

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

BANKRUPTCY—DECISION OF ASSIGNEE—REVERSAL—NOTICE—CLAIMS AGAINST ESTATE REPRESENTED BY BANKRUPT.

1. Assignees in bankruptcy of a firm sent back to the register for additional proof of a certain claim of M., proved by the oath of a member of the firm as trustee of the claimant. On application to the district judge by the counsel of the trustee it was ordered that dividend on the claim be paid.

2. The assignee had no notice of the application, and petitioned the circuit court to review the case, and to reverse the said order.

3. The district court has power upon petition of the contesting creditor, to reverse the decision of an assignee rejecting his claim, but the mode of proceeding must be regular, and the assignee should have opportunity to answer and contest the claim; order of the district court reversed.

4. Semble: That a member of a bankrupt firm can not represent claims against the estate.

Unto the Honorable Salmon P. Chase, Chief Justice of the United States of America, &c.: The petition of Andrew Rutherglen, of the city of Richmond, one of the assignees of Mitteldorfer & Co., bankrupts, respectfully showeth:

That on this date (March 30, 1869), his honor Judge Underwood, was pleased to issue an order in the following terms:

"United States District Court, District of Virginia, Clerk's Office, Alexandria, Virginia, March 30, 1869. In the matter of Moses Mitteldorfer, Bankrupt. In Bankruptcy. On February 20, 1869, an order having been made in this cause directing the payment by Messrs. Rutherglen and Kent, the assignees, to Moses Mitteldorfer, the trustee to Mrs. Marcus, the wife of Jonas Marcus, of the dividend proven by her said trustee to which she is entitled, in common with the other creditors, unless within thirty days the said assignees should show cause why such dividend should not be paid, and no steps having been taken by said assignees in this wise, that order is now made final, and the assignees are hereby directed to pay the said dividend at once to the said trustee, Moses Mitteldorfer. Jno. C. Underwood, Dist. Judge.

"A true copy. Teste. Ed. J. Underwood, Dist. Clerk."

That your petitioner feels himself aggrieved by said order, and, therefore, prays that it be reviewed by your honor, and that upon this review your honor may be pleased to re-

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

verse the same, or to alter, vary, or do otherwise in the premises as the circumstances set forth in the following statement of facts and reasons may warrant:

Statement of facts: 1. Of this date (September 24, 1867), the firm of Mitteldorfer & Co. (the partners whereof being Moses Mitteldorfer, Charles Mitteldorfer, and Jonas Marcus) was in a state of hopeless insolvency, and notwithstanding their perfect knowledge of this fact, they determined to "struggle on" in business, evidently for the purpose of getting certain properties of Moses Mitteldorfer's disposed of in fraud of the firm's creditors, and said properties were so sold and to the persons as follows: First, September 26, 1867, a lot and house to Julius Straus, a son-in-law of the said Moses Mitteldorfer, for two thousand six hundred dollars. Second, November 25, 1867, a lot and house to David Mitteldorfer, a son-in-law of Moses, for two thousand dollars. Third, lots and houses on Navy Hill and Third street, to L. Straus, for twelve thousand five hundred dollars. 2. Of this date (January 13, 1868), after further attempts for a period of four months by Mitteldorfer & Co. to effect a compromise with their creditors, Messrs. Lathrop, Ludington & Co. of New York, to whom the bankrupts were indebted in the sum of ten thousand four hundred and seventy-three dollars and five cents, filed a petition in the bankruptcy court of the city of Richmond, praying the court to adjudicate the said Mitteldorfer & Co. bankrupts. 3. Of this date (January 23, 1868), the said firm was adjudged bankrupts by his honor, Judge Underwood, accordingly. 4. Of this date (January 25, 1868), the case was referred to Mr. Register Bond for further action. 5. Of this date (February 26, 1868), the usual warrant to the marshal as messenger, was issued by Mr. Register Bond; said warrant was returned executed on March 2, 1868. 6. Of this date (March 20, 1868), Andrew Rutherglen and Horace L. Kent, were appointed assignees in said bankruptcy, and on the following day notified their acceptance of said appointment. 7. Of this date (March 24, 1868), the assignees having obtained possession of the premises, stock in trade, and books and papers of the bankrupts in so far as surrendered by them, your petitioner made up an inventory of said books and papers accordingly. 8. That in the course of his investigations of said books and papers, your petitioner found that several books, indispensable to the assignees in their examination of the bankrupts' affairs, had been concealed or destroyed, and although repeatedly applied for, and threats made of enforcing the 44th section of the act against the bankrupts, no surrender of said books has been made. 9. That your petitioner of this date (September 28, 1868), proceeded to examine the proofs and claims of creditors filed with the register, and in consequence of absence of Ledger A (one of the concealed or destroyed books), your petitioner had to pass over claims or pretended claims, chiefly among Moses Mitteldorfer's own family and personal friends, amounting to twenty-five thousand two hundred and seventy-five dollars and one cent, until the production of said Ledger A. 10. That among these claims (in suspense) is the one made by the bankrupt, Moses Mitteldorfer, as trustee for his daughter, the wife of his partner, Jonas Marcus, for six thousand eight hundred and forty dollars. This claim your petitioner is satisfied is fraudulent, and will on the production of Ledger A prove it to be so. 11. That of this date (February 18, 1869), an order in the following terms was served upon your petitioner (but no copy of such order was ever served on his colleague, Mr. H. L. Kent): "The within named assignees are hereby ordered to comply with the prayer of the within petitioner, or show cause for their failure to do so, forthwith, before the district judge. (Signed) Jno. C. Underwood, District Judge. Feb. 18, 1869." No copy of the "within petition" was ever exhibited to, or served either upon your petitioner or his colleague, Mr. Kent. It is said to have been at the instance of Mrs. Rosalie Marcus, but for some cause it has never been filed in the clerk's office. 12. That your petitioner at once obtempered said order by appearing before the district judge, and averred and plead that the claim was one that could not be sustained until the production of the concealed or destroyed Ledger A; that his honor fixed the following Saturday, February 20, 1869, to hear parties thereon. 13. That on February 20, 1869, as fixed, your petitioner attended the district judge in chambers, along with counsel for the claimant; parties having been fully heard, his honor indicated an opinion that he would issue an order requiring the assignees, within thirty days thereafter, to adduce their evidence why the claim should not be sustained. 14. That of this date (February 20, 1869), being the last day of term, and his honor much pressed with business of the court, requested your petitioner to draw such an order as would meet his views of the case; this your petitioner had done, but on presenting it for his honor's signature, he said he would require to make an alteration which, when made, he would leave with Mr. Hunter in the clerk's office. The same evening your petitioner called at the clerk's office for the order, but found it had not been left; he proceeded to the Spotswood and saw the judge, who stated that he had not been able to overtake a number of little things, this order among them, but in a few days it would be sent from Alexandria. Your petitioner repeatedly applied at the clerk's office for the said order, but the invariable reply was, that none such had ever been received. On March 22, petitioner saw the judge, personally, at Alexandria on the subject, who promised that it would be transmitted to Richmond by the middle of that week. 15. That your petitioner

(of this date April 9, 1869) received with no little surprise the imperative order, by Judge Underwood, dated March 30, 1869, declaring the order of February 26, 1869, final, an order which your petitioner had troubled himself so much to obtain, and which neither of the assignees in this bankruptcy ever saw or had served upon them, and which required them forthwith to pay to the bankrupt, Moses Mitteldorfer, as trustee for his daughter, Mrs. Marcus, the sum of one thousand three hundred and sixty-eight dollars, of the money of Mitteldorfer & Co., creditors, without any proof in support of the claim except the oath of the said Moses Mitteldorfer, bankrupt, who was incompetent to make such proof of debt even had proof of it existed. 16. From the preceding statement of facts and following reasons, your petitioner respectfully submits that the order by Judge Underwood, of March 30, 1869, be recalled, and the assignees allowed a proof of their averments in the premises.

Reasons: 1. Because the petitioner and Mr. H. L. Kent are assignees of Mitteldorfer & Co. as a company, and not of Moses Mitteldorfer in his individual capacity. 2. Because the funds in the possession of the said assignees are the moneys recovered from the assets of Mitteldorfer & Co., and can only be applied in payment of the company's debts. 3. Because the pretended claim of the bankrupt Moses Mitteldorfer, as trustee for Mrs. Rosalie Marcus is fraudulent, and his oath, which has been sustained by the district court as the ground for issuing the order of March 30, 1869, is not only no proof of debt of itself, but it is illegal and incompetent in respect of the said Moses Mitteldorfer's bankruptcy. 4. Because, were the claim of Mrs. Marcus a just and valid claim against Mitteldorfer & Co., the proof in her favor could only be made by the assignees in bankruptcy of Moses Mitteldorfer, unless the court had made a new appointment of trustee to Mrs. Rosalie Marcus, which in this case it has not done. 5. Because in the absence of Ledger A, fraudulently concealed or destroyed by the bankrupts, Moses Mitteldorfer, Charles Mitteldorfer, and Jonas Marcus, the individual partners thereof, have rendered themselves amenable to the penal section of the bankrupt act, which provides that to "part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove or cause to be removed, the same or any part thereof out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of the United States, shall be punished by imprisonment with or without hard labor, for a term not exceeding three years." 6. Because the bankrupts have removed, concealed, or destroyed Ledger A, for the purpose of hindering, impeding, and delaying your petitioner in his investigations into the affairs of their said firm, and more especially as regards the pretended Marcus transaction. Your petitioner avers, and will on the production of the said Ledger A, prove, that for their purpose of carrying through this fraudulent claim the books of the firm of Mitteldorfer & Co. have been falsified. 7. Because the proceedings in the district court in this case are irregular and inapt, in respect that the order of February 18, 1869, was issued on the mere petition (it is said) of Mrs. Rosalie Marcus, coupled with certain ex parte statements of her counsel, but who has proved no debt against Mitteldorfer & Co., and said petition is unknown in the proceedings. 8. Because, that on such an application being made, your petitioner avers that the duty of the judge was to order service of said petition upon the assignees, requiring them within a specified time to file answers thereto, but instead of order and form, a series of irregularities go on, ending in the issuing of orders which are not obeyed, because they never reach the parties on whom by order of the court they ought to be served. Assignees are bound to protect creditors at all hazards, and in the present case they would have been derelict in their duty, had they not resisted the payment to an undischarged bankrupt of this sum of one thousand three hundred and sixty-eight dollars of the creditor's money without one tittle of evidence that the firm was in any way responsible for such claim beyond the oath of Moses Mitteldorfer, wholly unsupported by any evidence whatever, and which oath clearly proves his own malfeasance as trustee to his daughter, and for which he is alone responsible.

In respect to the foregoing facts and reasons, your petitioner respectfully craves that your honor will be pleased to recall the entire proceedings, and of new, order the petition of Mrs. Rosalie Marcus to be served upon the assignees of Mitteldorfer & Co., and ordain them within a reasonable time to file their answers thereto, remitting the case to Mr. Register Bond to take the evidence of parties and report, or do otherwise in the premises as to your honor may seem proper. In respect whereof,

Andrew Rutherglen, for Petitioner.

Mr. Rutherglen, for petitioner.
L. H. Chandler, for respondent.

CHASE, Circuit Justice. It appears in this case, that Moses Mitteldorfer, one of the bankrupts, filed with the register a claim in behalf of Rosalie Marcus for six thousand eight hundred and forty dollars. This claim proved by the oath of Mitteldorfer, was referred together with the others against the

estate of the bankrupts by Register Bond, to the assignees, Andrew Rutherglen and Horace L. Kent. Upon examination, some of the claims were allowed, and others rejected. The claim of Mitteldorfer, in behalf of Mrs. Marcus, was among the rejected claims, and with the others, was returned to the register for further proof if any could be made.

In this state of facts, a petition was presented to the district judge, for an order directing the assignees to pay a dividend on this claim to Mitteldorfer as trustee, equivalent to that paid on the admitted claims. This dividend was 20 per cent. on six thousand eight hundred and forty dollars, and amounted to one thousand three hundred and sixty-eight dollars. The first order to this effect was made on February 20, 1869. This order not having been complied with by the assignees, a peremptory order was made on March 30, 1869, reciting the original order, and requiring a compliance with it.

The object of this petition is to obtain a revision and reversal of these orders. The act, in the 22nd and 23rd sections, requires that the proof of claims be made before the register, or commissioner, and transmitted to the assignee, who is to examine the same and compare it with books and accounts of the bankrupts, and register the names of the creditors who have proved their claims.

This seems to have been done in the bankruptcy under consideration. The claim of Mitteldorfer as trustee for Mrs. Marcus, was sworn to before the register, and transmitted to the assignees, and upon examination rejected by them and returned to the register to be held for further proof. No further proof in this claim seems to have been offered, but Mitteldorfer presented his petition directly to the district judge for the orders referred to.

It does not appear that due notice of this petition was given to the assignees, or that opportunity was given them to contest the claim.

It is not doubted that the district court has power, upon the petition of any creditor whose debt has been rejected, to revise the decision of the assignee rejecting. But the mode of proceeding in the present case seems to me to have been irregular. The assignees should have an opportunity to answer the petition and contest the claim, and if upon consideration the court had determined that it should be allowed, an order should have been made requiring the assignees to place it upon the list of admitted claims, and to pay dividend accordingly. It does not appear to me clear that one of the bankrupts should be allowed to represent any claim against the estate; but I leave this matter for the present to the consideration of the district judge.

The order complained of will be reversed, and the case remanded for further proceedings.

[See Cases Nos. 9,675 and 12,175.]

Case No. 9,675.

In re MITTELDORFER.

Ex parte ROWLAND.

[Chase, 288; [1] 3 N. B. R. 1 (Quarto, 1).]

Circuit Court, D. Virginia. 1869.

BANKRUPTCY — EXPENSES IN SECURING ADJUDICATION—REIMBURSEMENT—REASONABLENESS OF CLAIM.

1. When one or more creditors petition for and procure an adjudication of bankruptcy against a debtor, they may on motion be reimbursed their reasonable expenses.

[Approved in Re New York Mail S. S. Co., Case No. 10,208. Cited in Re Mead, Id. 9,364. Criticised in Russell v. Farley, 105 U. S. 445.]

2. The fund is the fruit of the diligence of such creditors, and it would be manifestly unjust to compel them to bear alone the expenses incurred for the benefit of all.

3. Whenever a claim for reasonable expenses so incurred is made and admitted by the assignee, an order should be made by the district judge for its payment.

This was a petition under the second section of the bankrupt act, for the review of an order of the district judge allowing a claim for expenses incurred by the petitioning creditor, in procuring the adjudication of bankruptcy in this case. These parties, Moses and Charles Mitteldorfer, were adjudicated bankrupts upon the petition of Messrs. Lathrop, Ludington & Co. of New York, creditors, and assignees were duly chosen and qualified and took possession of the assets. S. S. Rowland, styling himself attorney, and purporting to act for and at the instance of a majority of the creditors, submitted a bill of expenses and disbursements made on their behalf. The items were as follows:

Deposit fee	$ 50 00
Keeper's fee in charge of store to February 1	70 00
Marshal's fee taking inventory	185 00
Insurance on stock goods	40 00
Expenses and services in attending trial and adjudication of bankruptcy	220 00
Attending meeting of creditors, and representing majority in number and amount in electing assignees.	150 00
Trial and examination of bankrupts during three weeks	490 00
Paid E. Y. Cannon, extra counsel	250 00
	$1,455 00

Mr. Rowland swore before Register Bond, that the said disbursements and expenses had been necessarily and actually incurred and paid by him in the said proceedings in bankruptcy. Register Bond endorsed his opinion on the bill that it should be paid before any general distribution of the assets, and the district judge approved and allowed the same by order of the court. The assignees refused to pay the said bill, whereupon the district judge made an order stating that it "appeared to the satisfaction of the court that the costs and disbursements incurred in the proceedings in this matter have been duly taxed before

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

the register in bankruptcy and certified to this court, and that an order allowing the same has been duly entered and served upon one of the assignees, and it further appearing, by the affidavit of S. S. Rowland, that the said assignee disregards the said order and denies the authority of the court in respect to the same," and directing the assignees in bankruptcy "forthwith upon the service of the order to draw their warrant or check upon the funds of said estate in their hands, for the sum of fourteen hundred and fifty-five dollars, negotiable and payable to the order of Lathrop, Ludington & Co.," and deliver the same to H. G. Bond, register. The assignees thereupon petitioned the circuit court averring that the said orders were erroneous, and asking that the same may be reviewed and reversed for the reasons: (1) Because there has never been a taxation of the costs in the said cause. Such a taxation was demanded by one of your petitioners in behalf of himself and his co-assignee, and it was refused by the register, H. G. Bond, Esq. (2) Because what is pretended to be a taxation of costs, is nothing more than the account of the said S. S. Rowland, endorsed with the written opinion of the register in bankruptcy that it ought to be paid before any general distribution of the fund. (3) Because the said account is unsupported by any vouchers. (4) Because no opportunity was allowed to your petitioners to contest the items of said claim, it having been presented to the register in bankruptcy and irregularly endorsed by him, was ordered by the district court to be paid without having been referred to your petitioners for examination. (5) Because the said account is upon its face extortionate and unjust, the major part of said claim being for services as counsel, that is to say the sum of eleven hundred and ten dollars, of which eight hundred and sixty dollars are for the legal services rendered by the said Rowland, the remaining two hundred and fifty being for the services of E. Y. Cannon, Esq., a regular practicing attorney in the said court. (6) Because the said Rowland, while he pretends to be an attorney, is in truth and in fact as your petitioners are informed and believe a regular employee in the house of Lathrop, Ludington & Co., at a regular annual salary. He is certainly not a regular practicing attorney in this city, and has never paid the license tax required by the state of Virginia and city of Richmond to be paid by all practicing attorneys. (7) Because the services of one regular practicing attorney were quite sufficient for all the purposes of the case, and the fee said to have been paid by said Rowland to E. Y. Cannon, Esq., was ample remuneration for the necessary legal services. (8) Because the money pretended to have been paid by the said Rowland, was in truth and in fact paid by his employers, and this "bill of costs" is but another attempt upon the part of the said Rowland to secure for his employers an undue share in the proceeds of the bankrupt's effects. (9) Because the said Rowland being regularly in the employ of said Lathrop, Ludington & Co., was required by them as their employee to do what he now pretends to charge for as counsel, and if other creditors agreed to unite with his employers in the proceeding and requested the said Rowland to act for them, it is the duty of such creditors to contribute their rateable proportion out of their private funds, to pay him; they certainly have no right to require that other creditors, who neither employed Mr. Rowland nor desired his services, should be required to contribute to pay him (or his employers) anything, much less the unnecessary, extravagant, and extortionate claim for legal services said to have been rendered by him at the request of a majority of the creditors. So far as the proper charge for the services of Mr. Cannon, who was regarded as the counsel in this case, and other proper items in the account have been paid by Messrs. Lathrop, Ludington & Co., there of course will be no objection to refunding them, when proper vouchers are produced by them; but it would be monstrous that one fourteenth of the whole assets should be absorbed by this "bill of expenses," and thus increase the dividend of Lathrop, Ludington & Co., and diminish that of every other creditor in the cause.

Thomas P. August, for petitioner.

L. H. Chandler and H. G. Bond, for respondent.

CHASE, Circuit Justice. This is a petition for a revision of the allowance by the register in bankruptcy, and confirmed by the district court, allowing a certain compensation as counsel to S. S. Rowland, for services in procuring the adjudication of the bankruptcy. The claim of Rowland, who styles himself attorney, was presented to Register Bond, purporting to be an account of expenses and disbursements in behalf, and at the instance of a majority of the creditors. It amounted to one thousand four hundred and fifty five dollars, including a counsel fee of two hundred and fifty dollars, paid to E. Y. Cannon, Esq. The account was sworn to by Rowland, and received the endorsement of the register to the effect that he should be paid before any general distribution of the funds, and was afterwards, on May 5, allowed by the district court. Afterwards, on October 28, 1868, the district court made an order, reciting, among other things, that it appeared to the satisfaction of the court that the costs and disbursements incurred in the proceedings had been duly taxed before the register in bankruptcy, and certified to this court, and that the order allowing the same had been duly entered, and served upon one of the assignees, and that it further appeared by the affidavit of S. S. Rowland, that the assignee disregarded the order, and denied the authority of the court in respect to it; and thereupon the court ordered the assignee

forthwith to pay the sum by warrant, or check upon the funds of the estate for the sum of one thousand four hundred and fifty dollars, negotiable and payable to the order of Lathrop, Ludington & Co., and deliver the same to Register Bond, if sufficient funds belonging to the estate of the bankrupts were in the hands of the assignee.

The petitioners claim that the orders were erroneous, and ask that they be reversed. They insist that there has been no taxation of costs in this case, that what has been called a taxation of costs is nothing but the account of Rowland, with the opinion of Register Bond endorsed upon it that it should be paid before any general distribution of the funds; that the account is unsupported by any vouchers; and that it had not been sent to them for their examination and report; and that no opportunity to contest the items of the claim had been afforded to the petitioners; that the account itself is exorbitant and unjust, a great part of the claim, that is to say, one thousand one hundred and ten dollars being for services as counsel; of which eight hundred and sixty dollars are for legal services rendered by Rowland, the remaining two hundred and fifty dollars for the services of E. Y. Cannon, Esq., attorney, Richmond; that Rowland was not an attorney, but an employee of Lathrop, Ludington & Co. at a regular annual salary; that the money pretended to be paid by Rowland was in fact paid by his employers; and that the bill of costs is but an attempt on their part to secure an undue share in the proceeds of the bankrupt's effects.

There can be no doubt where one or more creditors petition for, and procure an adjudication of bankruptcy against a debtor, they may on motion be reimbursed for their reasonable expenses. The fund is the fruit of the diligence of such creditors, and it would be manifestly unjust to compel them to bear alone the expenses incurred for the benefit of all. Such was the opinion of Judge Benedict, in Re Schwab [Case No. 12,498]. In his opinion the judge cites the opinions of other district judges to the same effect.

It is clear, therefore, that all reasonable expenses incurred by Lathrop, Ludington & Co., as the petitioning creditors in this case, should be allowed to them, and it will be proper when their claim is made and admitted, that an order should be made to this effect by the district judge. The assignees, however, complain that the allowance made is excessive, and I am inclined to think, with reason; certainly an opportunity must be afforded them to contest the items of the claim.

I shall, therefore, reverse the orders made in the district court, and the case will be referred back to that court with instructions to allow the petitioning creditors to file a claim for the expenses incurred by them, and to allow such sum as shall appear just and reasonable in the circumstances, having due regard to the interests of the other creditors. In re Williams [Case No. 17,704], per Judge Bryan; In re Jaffray [Id. 7,170], per Judge Lowell.

[NOTE. The case was heard at the same term of the court upon petition of the assignees for review of order of district court ordering the assignees to pay certain money over to Moses Mitteldorfer, trustee. Case No. 9,674.]

Case No. 9,676.

MITTLEBURGER v. STANTON.

[3 West. Law Month. 246.]

Circuit Court, N. D. Ohio. 1860.

INJUNCTION — PRELIMINARY — ANSWER FILED DENYING EQUITY OF BILL—ENGLISH RULE—EXCEPTIONS.

1. A preliminary injunction, staying proceedings in an action at law, or staying the collection by execution, of a judgment recovered at law, will be dissolved, upon the coming in of an answer denying the whole facts alleged as constituting the equity of the bill.

2. Such is the English rule, and it seems to extend to all cases. But it seems that in this country an exception may be allowed, where the dissolution of the injunction may subject the party obtaining it to irreparable damages, or in certain cases where the party enjoined has not the requisite responsibility to meet the damages that may be occasioned by his being allowed to proceed.

[This was a bill in equity by William Mittleburger against Erastus H. Stanton.]

Hovey & Prentiss, for complainant.
Adams & Canfield, for defendant.

WILLSON, District Judge. This is a motion to dissolve a preliminary injunction, heretofore granted to stay proceedings at law. The bill sets forth, among other things, that, on the 1st day of July, 1857, the complainant purchased of the defendant one-eighth of a co-partnership interest in the Hammondsville Mining Company, for a consideration of thirty-five hundred dollars; that he paid, at the time of purchase, fifteen hundred dollars in cash, and executed and delivered his two several promissory notes for the residue, each bearing date June 1, 1857; one for $1,106.98, payable in four months, and the other, payable in ten months, for $1,058.98. That the first of said notes was sued and a judgment obtained upon it on the law side of this court; that a suit has also been commenced by the defendant, in the same court, for the recovery of the amount appearing to be due upon the other of said notes, which suit is now pending. It is averred in the bill, that the complainant was induced to make this purchase by the false and fraudulent representations of the defendant, and that he was thereby deceived and became greatly defrauded in various particulars, which are specifically set forth in the bill.

The complainant seeks, by this proceeding, to have the contract of the purchase set aside and annulled by reason of the alleged fraud; to obtain a decree for the restoration of the

$1,500, paid as aforesaid; and to have the judgment upon the first note declared inoperative, and the second note cancelled and delivered up to him. The defendant has filed his answer, duly verified by his oath, denying all the equities of the bill; and also denying the specific allegations of fraud which it contains. He now comes and files this motion for a dissolution of the preliminary injunction. It is rule of practice well settled by the court of chancery in England, that when a preliminary injunction has been granted to stay proceedings at law, and an answer is filed denying all the equities of the bill, the injunction will ordinarily be dissolved, on the motion of the defendant, as a matter of course. Nor is there any distinction between the injunction staying the execution and staying trial. In the former case, the chancellor requires a full discovery before he will decide that the proceedings shall not be further staid; in the latter, a full answer is equally necessary; and there is no distinction as to the rules for ascertaining whether the answer is or is not complete. Those rules, securing a full discovery, are just as applicable to the one case as to the other, and are universal in their application. In Earnshaw v. Thornhill, 18 Ves. 485, Lord Eldon said, that "among the numerous cases that had occurred of injunctions extended to stay trials, he did not recollect, either in the books or in practice, a single instance of an application to dissolve an injunction, so far as it restrains the trial, separating that from an application to dissolve it generally." And so in this case, if the injunction is dissolved at all, the order must extend, as well to the case where the respondent has obtained judgment, as to the suit now pending, in which no trial has been had.

In the absence of specific rules prescribed by the supreme court of the United States, or by the circuit court itself, this court, in all matters of practice, is governed by the established usages of the English court of chancery. It is well settled, in England, that if a plea to the whole bill be allowed, the claimant may move for a dissolution of the injunction; because a plea, allowed, is to be considered as having the effect of a full answer. The defendant is not compelled to wait until he has proved his plea; he is entitled to a dissolution of the injunction as soon as the chancellor has decided that the plea, if true, is a good defence to the action. Hence, the English courts, by parity of reasoning, have held, that if the respondent sets up his defence by answer instead of by plea, he is equally entitled to a dissolution of the injunction, upon the court being satisfied that the matter set up in the answer, if true, would constitute a good defence. In all the English authorities, there can be found only a single case that contravenes this doctrine. That is the case of Allen v. Crobcroft, in Barnad. Ch. 373. That book, says the reporter, in the case of Zouch v. Woolston, 2 Burrows, 1142, Lord Mansfield absolutely forbids citing, for the reason that it would mislead those who were put upon reading it.

In Poor v. Carleton [Case No. 11,272], Mr. Justice Story admits, that in cases of special injunctions, if the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But he says there are exceptions to the doctrine; and that these exceptions are fairly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement of partnership concerns, of asserted violations of copy-rights, or patent rights. But he concedes that the doctrine obtains in England as laid down by the lord chancellor in Clapham v. White, 8 Ves. 36, where it is said, that if the answer denies all the circumstances upon which the equity is founded, the universal practice, (as to the purpose of dissolving the injunction,) is, to give full credit to the answer; and that is carried so far, that, with few exceptions, though five hundred affidavits were filed, not only by the complainant but by many witnesses, not one could be read as to this purpose. No irreparable mischief can result from dissolving the injunction in this case. The bill contains no averment of the insolvency of the defendant, nor is it apparent that the plaintiff will be remediless in case the prayer of his bill is granted on the final hearing.

It is, therefore ordered that the preliminary injunction heretofore granted in this case be dissolved.

NOTE. The principle of this case seems equally applicable to a preliminary injunction order, granted under the Code of Civil Procedure.

MIX (BAKER v.). See Cases Nos. 774 and 775.

MIX (LAMSON v.). See Case No. 8,034.

Case No. 9,677.

MIX v. PERKINS.

[3 App. Com'r. Pat. 196.]

Circuit Court, District of Columbia. Aug. 29, 1859.

PATENTS—LATER INVENTOR—MORE DURABLE PRODUCT—DELAY—NOTICE OF CLAIM.

[1. Priority of invention entitling the inventor to a patent is not affected by the fact that a later inventor first perfected machines for manufacturing the patented product.]

[2. The fact that a subsequent equivalent invention makes a more durable product will not affect the question of priority.]

[3. An inventor is not prejudiced by a delay in applying for a patent where he is diligently experimenting as to other forms of the same invention, and machinery to perfect it, especially as against one having notice of his claim.]

Appeal from the decision of the commissioner of patents, refusing to grant a patent to [Garry J.] Mix, for his invention, of an improvement in the construction of iron spoons, and awarding priority of invention to R. B. Perkins.

MORSELL, Circuit Judge. The application by appellant for a patent is dated February 15, 1858, and filed February 22. He states his claim: "First. The method substantially as therein described of making the handles of iron spoons. Second. Forming a tongue D, upon the bowl blank, and corresponding recess or inlet D, upon the handle or vice versa, substantially as and for the purpose therein set forth." The first clause of this specification was afterwards stricken out by an amendment. He states particularly various modes by which to unite the bowl to the handle, and amongst them the one for which he claims the patent in this case. This, I think, is substantially the same with the description of the invention for which a patent was granted to Perkins, bearing date October 27, 1857, the peculiar features of which the examiner states to be "consisting of beveling the V or other shaped tongue, and turning over the lips of the recess which is formed to receive said tongue, the closing of the joint being effected by a rivet, struck by a drop and die, and finished by turning." The report further states that "this interference has been asked for by Mix to enable him to prove invention in making spoons in the manner set forth, and upon which invention he believes he has suffered from infringement at the hands of Perkins." He proceeds to state what he conceives to be the testimony. He says: "According to the testimony, E. I. Bull, machinist for Mix, made dies for a spoon having a V shaped tongue sometime during the last half of May, 1857, using as a pattern a spoon made by Marcy, another witness, in December, 1856. A cavity in the end of the handle received a tongue formed on the bowl of the spoon, the two being secured by riveting and soldering. But few spoons were made by these dies, the manufacture of them being abandoned, for others having no tongue, nor corresponding cavity. These latter were found to be defective, and the original plan was again resorted to for supplying the market. Also, according to the testimony, Perkins directed his machinist H. W. Cook, about the last of March or first of April, 1857 (subsequently proven to be April 8) to prepare dies for making similar spoons. The dies were finished about May 1st, and spoons were immediately made from them to the extent of several hundred gross. The dies made by Cook were different from those above mentioned. They provided for the ordinary V tongue and corresponding cavity, but at the same time beveled the edge of the tongue to admit of the closing over of the edges of the recess or cavity in the handles. In the manufacture of the spoons a drop and die were found necessary to effect this closing over in connection with the riveting. This difference between the dies and manufacture is testified to by Marcy, one of the witnesses on the part of Mix. Three peculiar features are secured to Perkins in his patent above referred to. From all the above it is inferred that Perkins was the first to make spoons in the peculiar manner described in his patent; and so far is now as before fully entitled to its use and benefit. In so far also as the application of Mix describes and claims the features peculiar to Perkins' patent it is rejected without prejudice to any remaining matter of novelty which may be contained therein." His report was adopted and confirmed and priority of invention adjudged to Perkins by the commissioner, and the application of Mix, so far as it conflicts with the patent of Perkins, rejected.

To this decision six reasons of appeal were filed by the appellant. They are thought specially to cover all the grounds of objection raised by said report, and will be substantially considered, and therefore are not particularly stated. In the commissioner's reply to the reasons an allusion is made to the application of Mix dated Oct. 27th, 1857, in which case it is said with respect to the V shaped joint in itself that a decision on that occasion was acquiesced in by Mix, who conceded that these were well known metallurgic processes, and a claim to them was withdrawn, &c. He says: "It is all important to remember the distinction between the invention of Mix and Perkins. In Mix's application the edges of the joint both of the bowl and the handle were square, being fastened together by a rivet, some solder and the stroke of a die-press. The corresponding edges of the joint in Perkins' invention were beveled, or undercut, so as to make a dovetailed joint, the tongue of the one part being inserted in a corresponding groove in the other. In Mix's patent there is this defect, that a strain applied to bowl and handle simultaneously would easily separate them by loosening both solder and rivet, but in Perkins' the addition of the dovetail joint enables it to bear such a strain without injury, &c."

In this state of the case, all the papers were duly laid before me, and after due notice of the time and place of hearing being given to the parties, arguments in writing by their respective attorneys were filed, and the case submitted. The first question is as to the proof of the invention on the part of Mix, the appellant. He relies principally on three witnesses, John J. Marcy, E. Y. Bull, and William Mix. Marcy was the machinist. He says that he had been in the employ of Mix, for three years; that the first iron spoon ever made, to his knowledge, with the handle made of iron wire was made by witness in the first part of December, 1856; that he made it by the direction of said Garry I. Mix; that the spoon as made by him in December, 1856, was made as follows: One end of the handle, viz. the one taken hold of by the hand, was swaged into its form by a drop and die and the other, viz. the one attached to the bowl was formed by forging and filing and by other tools. At the end was a cavity in the handle of the spoon fitted to receive a tongue

formed on the bowl of the spoon, which dovetailed under the iron of the handle of the spoon. The bowl of the spoon was like the ordinary spoon, the tongue came from the back part of the bowl and ran up about half an inch into the handle, and fitted into it and was riveted on, and then soldered. One end of the spoon, he says, to which he refers, was made by a drop and die, and one end by hand. The witness says, that he made a die for forming the handle of spoons like the one he had described sometime in the month of May, 1857. He thinks about the middle of the month, he commenced it, and Mr. Bull finished the work. The dies which he made at that time left a cavity to receive the tongue of the bowl of the spoon, and also made two rivets from the wire, leaving them solid, forming a part of the handle. Witness also states that he made a die in March, 1857, in all other respects resembling the spoon described by him except with no handle to receive the tongue, and no tongue upon the bowl.

William Mix, in his deposition, states in substance the same facts, in describing the spoon made in the early part of December, 1856. Bull, the other witness, testifies that the iron spoon was made by Mix in the month of December, 1856, as stated by him, that "the bowl was made with a tongue from three-eighths to half an inch long which fitted into a cavity in the handle, the handle being made with a brace, and also with a cavity to receive the tongue of the bowl. The handle of the spoon was riveted to the bowl, but I don't know whether it was soldered or brazed. The metal of the handle closed over the end of the tongue projecting from the bowl," &c.

The commissioner supposes that the testimony of Bull does not sustain that of the two other witnesses Marcy and Mix, but shows a fatal discrepancy and unsoundness, and that this is offered to be explained away by Mix, &c. Neither of these witnesses state expressly whether it was the square edged joint or the beveled edge. Whether however they are or are not substantially alike it is not of importance to decide. I do not understand that it is denied. Two of them, Marcy and Mix, prove that the handle of the spoon was fitted to receive a tongue formed on the bowl of the spoon which dovetailed under the iron of the handle of the spoon; and the other that "the metal of the handle closed over the end of the tongue, projecting from the bowl." I cannot discover any substantial discrepancy, between these witnesses. I understand the words used by the two witnesses as applicable to the point of fact about which they were testifying. The only sensible meaning which can be given I think is, that the metal of the handle closed over the tongue in agreement with which the other witnesses say, that it thus dovetailed. I cannot conceive of a fastening or jointing that could be stronger, or even so strong,—an equivalent of course for any other, used by the appellee.

Why then is not this invention of appellant discovered in December, 1856, substantially identical with that of the appellee, which was not discovered until sometime in May, 1857, several months after? As to the testimony on the subject of the comparative strength of the spoon (if relevant), I do not think it sufficient to set aside the positive proof by these witnesses of the invention as proved.

If the proof shows that the appellant was the original and first discoverer of the invention involved in the issue in this case, has he lost his right to claim the same by abandonment? To sustain this ground a number of authorities are referred to by the counsel for the appellee in his argument. The application of this doctrine of abandonment depends upon the circumstances of each case, and implies laches on the part of the original inventor. All the cases cited will appear to turn on such principles. The specific grounds upon which the abandonment is supposed to appear are not clearly stated. As before noticed, the commissioner has stated that an application was made in the year 1857, in which case one of the claims of appellant was withdrawn, and a certain concession made as to the novelty, that is, that the V shaped joint in itself was well known, &c. There can be nothing conclusive in this act. This, however, is a very different thing from the claim set up and proved in this case. If such a claim was made he had certainly a right to withdraw it and reform it to meet the truth of his case without prejudice. As to the ground of want of diligence, the proof is that the appellee had early notice of the claim of the appellant, and that he meant to apply for a patent, and although the circumstances are that though for a short time he suspended the use of this particular mode, he was experimenting diligently, and at length discovered that a suitable die would perfect this mode of making spoons, which he accordingly had made and used in connection therewith, and shortly afterwards made the application in the present case. He was certainly entitled to a reasonable time to experiment and perfect his invention. It seems, then, that he has been rather unfortunate than negligent in making his application for a patent.

My opinion therefore is that the decision of the commissioner is erroneous, that priority of invention ought to have been awarded to the appellant and a patent granted to him accordingly.

MIXTER (GORHAM v.). See Case No. 5,626.

Case No. 9,678.

MIZNER et al. v. VAUGHN. LAMB v. SAME. SQUIRES v. SAME.

[2 Sawy. 269;[1] 17 Int. Rev. Rec. 10.]

Circuit Court, D. Oregon. Nov. 18, 1872.

GRANTS—OREGON DONATION ACT—SETTLEMENT—CHILDREN OF SETTLER—DEATH BEFORE PATENT ISSUED—LIMITATION.

1. A settler on the public lands under the donation act (9 Stat. 477), had a present grant by force and operation of such act from the date of his settlement, unless such settlement preceded in point of time the passage of the act, in which case the grant took effect from the date thereof, and not before.

[Cited in Wythe v. Haskell, Case No. 18,118; Bear v. Luse, Id. 1,179.]

2. Where a settler under section 4 of said act dies intestate, after complying with the act, and before the issue of patent, his estate in the land terminates, and the remainder at once vests in his children, by purchase as the donees of the United States, and not by descent as the heirs of such settler.

3. A settler under said act is seized, at the date of his settlement, of a conditional fee in the land settled upon, and thereafter his right to the possession is not barred by lapse of time, unless it appears that the party claiming the benefit of such bar, either by himself or in connection with others with whom he is in privity, has actually occupied the premises adversely to the title of such settler, continuously for the period of twenty years subsequent to such seizin.

4. The title of such settler does not take effect by relation, prior to the passage of the donation act.

On September 26, 1870, the plaintiff [Lansing B.] Mizner commenced separate actions to recover possession of an undivided three fifths of lots two and eight in block fifteen, lots one and three in block five, and the south one half of lot four in block two, in the city of Portland, against thirteen persons then in the actual occupation of certain parts and parcels of said lots and half lot respectively. The occupants having answered that they were in possession only as the tenants of the defendant [George W.] Vaughn, on application of said Vaughn, an order was made admitting him to defend said action in place of said tenants, and that the same be consolidated. On May 17, 1872, the defendant answered as follows: (1) Denying that the plaintiff had any legal estate in the premises, or right to the possession thereof. (2) That the action was barred by the statute of limitations, because neither the plaintiff, nor those under whom he claims, were seized or possessed of the premises in controversy within twenty years before the commencement of this action. (3) The pendency of a suit and cross-suit in equity in this court, between the defendant and the grantors of the plaintiff concerning a partition and the right and title to the same property. On motion of plaintiff, the third defense was stricken out as being irrelevant and immaterial, and because, if a defense at all, being matter in abatement of the action, it could not be joined with a plea to the action, it could not be joined with a plea to the merits. Afterwards, the plaintiff replied to the plea of the statute of limitations, and in pursuance of the stipulation of the parties, the cause was tried by the court without a jury, on June 12. On the same date, the plaintiffs—Lamb and Squires—commenced separate actions against the same persons to recover the possession of an undivided one tenth each of the same premises. In these actions, Vaughn was also admitted to defend, and the same issues were made as in the action brought by Mizner, and by stipulation of the parties the three were tried together. On the trial it was agreed that either party might use as evidence, if otherwise competent, any pleading, exhibit or deposition in the suit and cross-suit in equity—decided March 28, 1872, in this court concerning the same property, entitled Lamb v. Vaughn [Case No. 8,023].

W. Lair Hill and E. C. Bronaugh, for plaintiffs.

Erasmus D. Shattuck and Theodore Burmester, for defendant.

DEADY, District Judge. Practically, it is admitted that the plaintiffs have the legal title to the premises, and are entitled to recover the possession of them, unless their right to maintain these actions is barred by the statute of limitations. The evidence establishes the following facts: On September 22, 1848, Francis W. Pettygrove abandoned the land claim embracing the lots in controversy, and Daniel H. Lownsdale settled thereon, and after the passage of the donation act of September 27, 1850, namely on March 11, 1852, he made his notification of such settlement in the proper land office, and otherwise complied with the provisions of said act, and died intestate thereon, and before the issue of the patent, on May 4, 1862, leaving children, Mary E. Cooper, James P. O., and Millard O. Lownsdale and Ruth A. Semple, and children of his deceased daughter Sarah, the plaintiffs Lamb and Squires.

The patent certificate showing compliance by Daniel H. with the conditions of residence and cultivation required by the donation act issued to the deceased on October 17, 1860, and the patent on June 6, 1865. Prior to the settlement of Daniel H., the land claim described in the patent was occupied by F. W. Pettygrove and Benjamin Stark, who held the bare possession under the laws of the provisional government, but without any claim of right to, or interest in, the soil, which then belonged to the United States.

During this occupancy said Pettygrove and Stark sold and quitclaimed the lots in controversy, except lot 2 in block 15, and south ½ of lot 4 in block 2, as follows: Lots 1

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

and 2 in block 5 to Thomas Stephens, on March 8, 1849; lot 3 in block 5 to Albert E. Wilson, on March 8, 1849; lot 8 in block 15 to Hugh D. O'Bryant, on March 13, 1847.

A deed was offered in evidence, but rejected for want of proof from one Geer to Atwood for lot 2 in block 15, dated January 25, 1846, and a witness testifies that Geer purchased of Pettygrove; and that he purchased of Atwood, and was in possession in September, 1848, and March, 1849; but there is no evidence to connect the defendant Vaughn with either the alleged purchase from Pettygrove, or deed to Atwood.

Vaughn testifies that he purchased south ½ of lot 4 in block 2, in 1855, of James Anderson, and that he had improved it in 1861, and occupied it since the purchase. He also states that before purchasing he conversed with Daniel H., who told him that the lot was in the Pettygrove title or tract, which consisted of 15 or 16 blocks that Pettygrove had laid off into town lots during his occupation of the land, and that he had given a bond to make title when he got one from the United States.

Lot 1 in block 5 is the only part of the premises to which the defendant proves a paper title back to Pettygrove, but when, if ever, he entered into actual possession of it does not appear; neither does it appear whether his immediate grantor, Thomas Stephens, was in possession at the time of the deed to him or not.

The law arising upon these facts is in the main well settled in this court, and need not be more than stated here. Daniel H. being in the occupancy of this land when the donation act passed, and having subsequently proven his compliance with the law, became the owner in fee of the premises from September 27, 1850, by virtue of the grant contained in section 4 of such donation act (9 Stat. 497), subject to the contingency that if he died before patent issued and intestate, his estate terminated, and the remainder should vest in his children in equal parts. Fields v. Squires [Case No. 4,776]; Lamb v. Starr [Id. 8,022].

This contingency actually happened, and on May 4, 1862, the four children of Daniel H. became the owners in fee of the premises, as the direct donees of the United States, and not as the heirs of their father. This being so, the plaintiff Mizner, and his grantors, Lownsdale, Cooper and Semple, at the commencement of this action, had been seized of the premises within twenty or even ten years, and therefore he is not barred from maintaining it for the possession. In other words, the cause of action did not arise until after the death of Daniel H. and the vesting of the remainder in his children.

But, from this construction of the act, it necessarily follows, that neither Lamb nor Squires took any interest in the remainder, the same being limited by the act to the children of Daniel H. They are not his children, but the children of his daughter, who died before him, and therefore before the remainder vested. Neither can they take an interest in such remainder as his heirs, because although the act limits the estate to the "children or heirs" of the deceased settler, it does not grant it to both children and heirs if these terms should include different persons, as in this case. The natural and most reasonable meaning of the phrase is, to the children first, and in default of those, to whoever may constitute the legal heirs of the deceased. Lamb v. Starr [Id. 8,021]. As to these plaintiffs, then, the finding of the court must be that they are not the legal owners of one fifth each of the premises, or any other portion thereof, and therefore judgment must be given against them; while the plaintiff Mizner is entitled to recover a three fourth interest instead of a three fifth.

But it is contended for the defendant that Daniel H. died seized of an estate of inheritance in the premises, which thereupon descended to his children as his heirs, and that, therefore, neither they nor their grantee, Mizner, can maintain this action, unless he could if living. If the premises are correct, the conclusion follows. Let it be assumed, then, for the present, that the children of Daniel H. took as his heirs and not as donees of the United States—or, in other words, that he died seized of an estate of inheritance, could he, if living, have maintained this action? Counsel for the defendant admit that he could, being the owner of the legal estate, unless he would be barred by the statute of limitations.

This question involves the inquiry, when did the title vest in Daniel H., and thereby give him a cause and right of action against an adverse occupant; and what is the nature and effect of the occupancy of the premises as shown on behalf of the defendant? It is the settled law of this court, until otherwise determined by a superior, that a settler under the donation act had a present grant by force and operation of such act from the date of his settlement, unless such settlement preceded in point of time the passage of the act, in which case the grant took effect from the date thereof, and not before. Fields v. Squires [Case No. 4,776]. This being so, Daniel H., if living, might have maintained this action, even admitting that the defendant by himself, or those with whom he is in privity of possession, had been in the continuous, open and adverse possession of the premises from the date of the grant by the United States to Daniel H., up to the commencement of this action, because he would have been seized at the date of such grant, which was within twenty years prior to the bringing of the action.

In Doswell v. De La Lanza, 20 How. (61 U. S.] 32, the defendants were in possession of the premises in controversy, without title,

prior to the seizin of the plaintiff, and the court said that "in regard to him, they cannot be considered as having ejected him by their entry, his legal title not having then accrued."

The defendant entered without title, and has never acquired any, and unless there has been a continuous adverse occupation of the premises for twenty years by him, or those with whom he is in privity, the plea of the statue of limitations cannot be upheld. It is urged, however, that for the purpose of preventing a recovery in this case, and protecting the defendant in his possession, the court ought to hold that the title of Daniel H. took effect by relation from the date of his settlement in 1848.

The insuperable objection to this proposition is, that the occupation of Daniel H. was not commenced under the act making the grant, and, prior to its passage, had no relation to it whatever. Fields v. Squires, supra. In Gibson v. Choteau, 13 Wall. [80 U. S.] 101, Mr. Justice Field, delivering the opinion of the court, says: "The doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title."

Now, if the defendant had entered under Daniel H., or claimed an interest in or right to the land, in pursuance of some contract made with the latter while he was in the occupation of the premises, there would be some propriety in holding that the grant to Daniel H. took effect by relation from the commencement of such occupation, if that were necessary to protect the defendant's rights under such entry or contract. But in the case at bar, the application of the fiction of relation would work an injustice rather than otherwise. The defense is simply an adverse possession for twenty years. There is no privity between the parties to this action. Vaughn and those under whom he claims are strangers to Daniel H. and his title. So far as he and his children are concerned, they are and always were mere intruders upon the premises.

As was said by the court, Sawyer, C. J., in the opinion in the equity suit above mentioned: "There is no direct contract relating to these lots, either verbal or written, upon any consideration moving between the parties, Lownsdale and complainant Vaughn, or any of the latter's grantors. * * * He (Lownsdale) never purchased the lots, and never had or claimed any interest in them, till he acquired an interest under the said donation act. It was, therefore, a matter of no concern to him what use was made of them by the parties in possession, before he himself acquired any rights therein, and he had no occasion to object to, or interfere with, the action of the possessor, or the claimants under Pettygrove." [Lamb v. Vaughn, Case No. 8,023.]

But it is not admitted that Vaughn's possession has any of the elements necessary to make it a bar to this action, even if the grant to Daniel H. were held to take effect by relation from September 22, 1848, the date of his occupation.

In the first place, he is not shown to have any privity with any one that ever was upon or about the premises, either by deed or actual possession, except Stephens, as to lot one in block five. In that instance the evidence shows that Vaughn obtained a deed from Stephens, the grantee of Pettygrove and Stark, on September 26, 1856. But admitting that Stephens occupied the lot adversely to Daniel H. for some years after the grant to the latter, there is no evidence as to the character or even the fact of Vaughn's possession.

As to lot three in block five, there is no direct evidence that the defendant ever had possession of it, or that he is connected by deed with Pettygrove. A deed, dated September 24, 1858, for this lot, executed by Thomas Smith as guardian of his minor son, A. C. Smith, the grantee of Albert E. Wilson, aforesaid, to the defendant, was offered in evidence, but not admitted, for want of authority in the guardian to make the sale. So it is probable that the defendant's claim to this lot does not go back farther than that date.

Lot 8 in block 5 was attempted to be conveyed to defendant on February 17, 1857, by Gilbert and Rockwell, the successors in deed to Hugh O'Bryant, Pettygrove's grantee, by Pomeroy, as their attorney in fact; but no authority to Pomeroy being shown, the deed was not admitted. There is no testimony to show that the defendant ever actually occupied the lot, and his claim to it probably commenced at the date of this supposed deed from G. and R., and grew out of it.

Lot 2 in block 15 is not shown to have ever been claimed or occupied by the defendant, and there is no proof that he is the successor by deed or possession of Pettygrove or his grantees. The south ½ of lot 4 in block 2, on which there are valuable improvements, was purchased of Anderson in 1855, but how long prior thereto, and under whom or what circumstances he occupied it, does not appear. The defendant testifies that he has been in actual possession since the purchase from Anderson, but makes no proof that he is the successor by deed or possession of Pettygrove or his grantees.

As to the claim under which the defendant occupied the lot, it may reasonably be inferred from his deposition and the statements in his cross-bill aforesaid, that he regarded Daniel H. as the legal owner of the property, but expected to get a title from him in pursuance of a certain bond given by Daniel H. to Pettygrove upon the abandonment of the land claim by the latter; and it is probable

that all the other lots in controversy were claimed under the same circumstances and expectation.

Upon the evidence, then, there is no ground to maintain that Vaughn or any one with whom he is in privity either by deed or possession, taken separately or together, had occupied any of these premises in any manner continuously for twenty years before the commencement of this action, unless it be lot 1 in block 5, and in that case, admitting all that is claimed for the defendant, the possession of himself and predecessors could not be held adverse to the title of Daniel H. before it came to him from the United States by the passage of the donation act on September 27, 1850.

The defendant in the actions by Lamb and Squires is entitled to judgment that they take nothing by said actions and for costs; and the plaintiff, Mizner, is entitled to judgment for the possession of an undivided three fourths of the premises, and for costs.

Case No. 9,679.

The M. K. RAWLEY.

[2 Lowell, 447; [1] 22 Int. Rev. Rec. 49; 3 Cent. Law J. 56.]

District Court, D. Massachusetts. Dec., 1875.

CHARTER-PARTY — BILL OF LADING — VENDOR'S RIGHTS—DUTY OF MASTER—COMPULSION.

1. A shipper of goods has the right to have the bill of lading made to his own order; and, if the master has been instructed by the charterers not to sign such a bill, his only alternative is to reject the goods. He is not entitled to keep the goods and refuse to give such a bill.

2. Though the vendor of goods may be bound by his contract with the vendee to ship them to the order of the vendee, the master of the ship chartered by the vendee must take the delivery in such manner as the shipper makes it, or reject the goods altogether.

3. Where a master made his bill of lading to the order of the shipper, and the shipper, by his possession of the bill, induced the owners and consignees of the goods to accept and pay a draft, quaere, whether this acceptance and payment were made under compulsion, and whether the amount of the draft could be recovered of the master, even if he were not justified in signing a bill of lading in that form.

This libel was filed by Messrs. Moseley, Wheelwright, & Co., of Boston, charterers of the schooner M. K. Rawley, against that vessel, for an alleged breach of the charter-party. The case for the libellants was, that they took up the schooner for a voyage from Port Royal, South Carolina, to Brunswick, Maine, and agreed to furnish a full cargo of hard pine lumber, at an agreed rate of freight; that the libellants were bound to furnish the lumber with despatch at Brunswick, and ordered the cargo of Mr. Hudgins, a manufacturer of lumber, in Charleston, at twenty dollars per thousand, free on board. They alleged that Hudgins, with whom they had a running account, was indebted to them for the full value of this cargo, or that they had advanced such value to him. Hudgins shipped a part of the lumber, and took a bill of lading to his own order, which he indorsed to a third person as security for a draft on the libellants for $1,000; which the libellants accepted and paid. Thereupon the libellants procured the brokers who had negotiated the charter to write a letter to the master, of which the material parts are these: "Your charterers, Messrs. Moseley, Wheelwright, & Co., wish us to write you not to sign any bill of lading, except it reads to Moseley, Wheelwright, & Co.; they do not want it to order. They say if the shipper will not furnish bill of lading to them, go off without one, and they will hold you harmless. They do not care to have you say that you are acting upon their advice." When the letter was received, most of the cargo had been delivered; but the second bill of lading had not been presented, and the master requested Hudgins to make it to the libellants, which he declined to do, and threatened the master that he would not let him leave the port unless he signed a bill of lading, as before; which the master then did. Then Hudgins telegraphed the libellants that he had procured a bill of lading to his own order, and should indorse it to some one else, unless the libellants would consent to accept a draft; they replied that they would accept to a moderate amount, and he drew for $1,650, which they paid. The damages sought to be recovered of the ship were the amount of the draft of $1,650, which the libellants alleged that they were forced to accept and pay in order to obtain possession of the cargo; the bill of lading having been indorsed by Hudgins to a bank in Boston, as security for the draft. The answer asserted the claimants' ignorance of the state of accounts between the shipper and the libellants, and averred that the master was bound and obliged to give the bill of lading in the form demanded by the shipper. It was understood that Hudgins denied that the state of the account was such that the cargo had been fully paid for; but for the purpose of a preliminary hearing it was admitted that the libellants' view of the account was the true one, the right being reserved to take evidence upon that point afterwards, if necessary.

J. C. Dodge, for libellants.
I. T. Drew, for claimants.

LOWELL, District Judge. The libellants contend that the lumber was delivered to them when it was sent on board the ship which they had chartered to transport it. If this is so, their next point is sound, that the vendor had no right to revoke his acts and reassert a dominion which he had once parted with. Ogle v. Atkinson, 5 Taunt. 759;

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

Stanton v. Eager, 16 Pick. 467; Bolin v. Huffnagle, 1 Rawle, 9.

A vendor, however, may make a conditional delivery, by which he does not divest himself of the control of the property, but makes the carrier his own agent. Mitchel v. Ede, 11 Adol. & E. 888; Wait v. Baker, 2 Exch. 1; Ellershaw v. Magniac, 6 Exch. 570, note. A delivery at the wharf is an incomplete act, ambiguous in itself, and to be explained by the vendor at the time, or before the shipment is finished. In this case the act was explained not only by what followed, but by what had gone before, because in shipping a former part of the same cargo the shipper had demanded and received a bill of lading in his own name.

The simplest mode of stating the rights of the parties is, that however strongly one may be bound to convey his property to another, the title does not pass until the owner chooses to pass it, or until a court of equity compels him to do so; and, therefore, if, against all reason and right, he insists on retaining the possession, until the transit is ended, he does retain it. The only alternative for the master in this case was to refuse to receive the goods on these terms. But this is not what the libellants wished, nor is their complaint that he failed to reject the cargo. They were not willing to pay dead freight; and therefore required him to do what he had no right to do, promising to hold him harmless. He had no right to receive the goods on any other terms than those on which they were offered: he must accept or reject. If Hudgins had been a mere agent to forward the goods, the libellants might have revoked his agency; but a vendor, even if paid, is not a mere agent.

The question has been lately decided in favor of the master in the court of exchequer in England, by two judges against one; and it seems to me that the opinion of the majority is sound, for the reasons already given. The case was a very hard one for the buyers of the goods, but the principles that must decide it were considered too strong for the equities of the case. Kreeft v. Thompson, L. R. 10 Exch. 274. In that case the master had not been notified by the charterers what sort of bill of lading he was expected to sign, further than the charter-party itself might inform him. But this is immaterial; because the decision turned upon the right of the shipper to dictate the terms upon which he would deliver his goods, which would be the same though the charterers themselves had been present. They could not have accepted in part and rejected in part.

But if we grant that the property had once passed to the charterers, can the master be held to pay as damages for delivering the bill of lading a sum of money which the libellants have paid to the shipper? The latter could not by obtaining such a document revest the property in himself, or transfer a good title to one claiming under him, even in good faith. Ogle v. Atkinson, 5 Taunt. 759; Stanton v. Eager, 16 Pick. 467; Kreeft v. Thompson, L. R. 10 Exch. 274. The bill of lading, then, would be waste paper as against the libellants, though it might give the shipper the means of deceiving others. Where, then, was the legal compulsion upon the libellants to accept the draft? If Hudgins had retained actual possession of the cargo, the payment would have been compulsory; but if he had only a paper title which was worthless, can it be so considered? A slight duress or obstruction might be enough, as between the party exacting the payment and him who makes it, to deprive the payment of its voluntary character, and to warrant an action of assumpsit to recover it back. The question is, whether a third person has not a somewhat different position; whether, if the master was wrong in giving this bill of lading, he should be held liable for damages which are not the legal and natural consequences of his act.

Those natural consequences would seem to be the possible injury to third persons, who should advance money on the bill of lading in ignorance of its invalidity; and I am not at all prepared to say that a master might not be liable in tort, in some cases, for damage of that character. So far as the shipper is concerned, the master is presumed to know that his bill of lading cannot avail against the true owner, though for any expense or trouble to which the latter might be put to vindicate his title there might be a liability. None such were suffered in this case; the libellants yielded to a demand which could not be enforced; wisely, perhaps, but still not under a strict necessity. As, however, I consider the first point a clear one against the libellants, I do not decide this. Libel dismissed with costs.

Case No. 9,680.

The M. M. CALEB.

[4 Ben. 15.] [1]

District Court, E. D. New York. Jan., 1870.

DAMAGES—MARITIME TORT—TOW-BOAT AND TOW.

1. Where a tug was employed to take a schooner out of a slip from alongside another vessel, and the men on the schooner gave no directions as to the mode or time of taking her out, and, in taking her out, her stay caught the yard-arm of the other vessel, and her topmast was carried away: *Held*, that the tug was bound to adopt a method of taking the schooner out without injury.

2. The method selected was manifestly hazardous, and the tug was liable for the damages occasioned by her want of success.

[Cited in The Merrimac, Case No. 9,478.]

In admiralty.

BENEDICT, District Judge. This action is brought to recover the damages caused to

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

the schooner Edward Reed by reason of her topmast rigging catching the yard-arm of the steamer England, while she was being towed from alongside that steamer by the steam tug M. M. Caleb.

The steamer was lying upon the north side of pier 47, nearly up to the bulkhead, and the schooner was lying alongside, bow in, and nearly up to an elevator which was lying at the bulkhead.

The wind was blowing heavily from the N. W., the tide was ebb, and slack in the slip. The tug, as it appears, undertook to transport the schooner from the position above described to a position on the lower side of the pier, and for that purpose made fast a line to the schooner's bow, which was carried aft on the schooner, and held by a slip at the larboard quarter. The tug then started the schooner astern by the hawser, but as the schooner moved aft, her stay caught in the yardarm of the steamer, and, before she could be stopped, the topmast was carried away and other damage done to the rigging.

The evidence does not show that any action of the schooner contributed to the accident; the men on board of her gave no directions as to the mode of fastening or as to the mode or time of taking the schooner out. All this was determined on by those on the tug, who saw the position of the schooner, and were bound to select a method of taking her from the side of the steamer without injury.

The method selected of taking her out by a stern line was manifestly attended with risk of carrying away the masts, if the schooner swung at all, as she was quite certain to do under the action of the tug.

Having adopted a hazardous method of performing the duty, the tug must be held responsible for the damages arising from the failure of success. Proper care on her part, would, in my opinion, have enabled her to remove the schooner in safety, heavy as the wind was.

Let the decree be for the libellants, with a reference to ascertain the amount.

Case No. 9,681.

The M. M. CALEB.

[5 Ben. 163.] [1]

District Court, E. D. New York. May, 1871.[2]

DAMAGES—MARITIME TORT—TOW-BOAT AND TOW.

A boat in tow of a steamtug was run on shore by reason of the breaking of the rudder-chain of the tug-boat. The chain was worn out and insufficient, and this was known to the owner of the tug when the boat was taken in tow. *Held*, that, to tow the boat while having such a rudder-chain was negligence, and that the tow-boat was liable for the damage.

In admiralty.

R. D. Benedict and F. A. Wilcox, for libellants.

Scudder & Carter, for respondents.

BENEDICT, District Judge. It is clear upon the evidence that the libellant's vessel, while being towed by the steam tug Caleb, was run on shore by reason of the breaking of the rudder-chain of the tug. It is equally clear that the breaking of the rudder-chain was owing to a palpable defect in the chain itself. The tug's rudder-chain was worn out and insufficient, and this was known to the claimant at the time the libellant's vessel was taken in tow. It was manifest negligence to attempt to tow the libellant's boat with such a chain, and the tug is accordingly responsible for the damages which ensued. Decree for the libellants, with an order of reference.

[An appeal was taken to the circuit court, which affirmed the decree above entered, but allowed the claimants to take proof upon the question of certain set-offs, should they so desire. Case No. 9,683.]

Case No. 9,682.

The M. M. CALEB.

[9 Ben. 159.] [1]

District Court, S. D. New York. June, 1877.

SEAMAN'S WAGES—JURISDICTION—TENDER—COSTS.

1. D. was hired as deck hand on a tug, at $30 a month, as he claimed. The tug sank at a pier but was raised again, and, after she was raised, he worked on board, in repairing her. Afterwards, filed a libel against her to recover wages for the whole time. The claimants deposited in court $24.50 to meet his claim, besides costs, amounting, in all, to $63.82, claiming that he was only entitled to $20: *Held*, that D. was entitled to recover $15, for half a month's wages.

2. The court had no jurisdiction in respect to his claim for services after the boat sank.

[Cited in Tarleton v. Mallory, Case No. 13,753.]

3. The libelant could withdraw $15 out of the $63.82 and the rest of it must be returned to the claimants, and the libellant must pay the claimant's costs.

This was a libel by Edward J. Dunn, for seaman's wages. The libellant alleged that he was hired as deck hand on the tug, on November 18th, 1876, at $30 a month and found, that he served on board as such till November 29th, when the tug sank at a pier, and that she was raised on December 9th, when he went aboard again and served till January 13th, 1877. He claimed to recover $93.75. The owners of the tug alleged that the libellant's wages were but $20 a month; that he was discharged when the boat sank; that, after she was raised, he did some work on board, in repairing her, &c., but not as a seaman; that of this part of his claim the court had no jurisdiction; and that there was

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

[2] [Affirmed in Case No. 9,683.]

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

but $24.50 due him for all his services. This sum, with costs, amounting to $63.50, in all, they deposited in court.

Robertson & Robertson, for libellant.
Owen & Gray, for claimants.

BLATCHFORD, District Judge. The libellant is entitled, I think, to half a month's wages at $30 a month. I think the sinking of the boat put an end to the contract for his services as a deck hand, and that this court has no jurisdiction in respect of the services he rendered after the boat sank and after she was raised. I, therefore award, to the libellant $15. The claimants deposited in court $24.50, to meet the claim made in this suit, exclusive of costs. As the libellant refused to accept that sum, I cannot award costs to the libellant. Therefore, I cannot allow the libellant or his proctors to withdraw the amount deposited for costs. The $24.50 was deposited under the protest that the court could not take cognizance of any claim for services after the vessel sank, and the costs were deposited as costs proper to go to the libellant only in case the court held him entitled to as much as $24.50 for his claim. Out of the $63.82 in court the libellant may withdraw $15, and he must pay the fees of the marshal and clerk. The rest of the $63.82 will be returned to the claimants, and they must have costs against the libellant.

Case No. 9,683.

The M. M. CALEB.

[10 Blatchf. 467.] [1]

Circuit Court, E. D. New York. Feb. 25, 1873.[2]

ADMIRALTY—MARITIME TORTS—NEGLIGENCE—TUG BOAT AND TOW—RUDDER CHAIN—TOTAL LOSS—FREIGHT.

1. A steamtug was towing two schooners lashed alongside of her, through Hell Gate. One of them, laden with coal, on freight, struck the rocks, and sank. The tug, being sued for such loss, set up in defence, the arising of a violent wind, and the failure of the schooner that sank to anchor, when directed to, and the breaking of the rudder chain of the tug, and that the accident was inevitable. The libel specified no particular negligence in the tug, but alleged her negligence, generally, as causing the loss: *Held*, that the breaking of the rudder chain was the immediate cause of the disaster, that no excuse was shown, in respect of the violence of the wind, and that the tug was liable, the rudder chain having broken from an imperfection which might have been, and ought to have been, known.

[Cited in Bust v. Cornell Steam-boat Co., 24 Fed. 190; The Bordentown, 40 Fed. 686.]

2. The libellant sold the wreck. She was repaired by the purchaser. The actual time spent, in removing and repairing her, was thirty-one days. The commissioner, in the district court, reported, as damages, the cost of removing and repairing her, and the gross freight on the coal, for her whole voyage, and interest on those items, and an allowance for the value of the use of the vessel, during the thirty-one days, which he denominated "demurrage." Exceptions, by the claimant, to the allowance of the whole freight, and of the "demurrage," were overruled by the district court. The allowance of the entire freight, not deducting anything for the time and expense incident to the completion of the voyage, was made by the commissioner, as a set-off for the time which he supposed the libellant would have consumed in arranging to raise and repair the vessel, if he had not sold her: *Held*, that it was correct, not to allow as for a total loss, and not to allow the value of the vessel, less the proceeds of sale, and that, therefore, it was proper to allow for the loss of the use of vessel, while she was being removed and repaired.

3. It not appearing what became of the coal, except that it was saved, the allowance of the full freight, on the principle of such set-off, was erroneous, because conjectural; and the claimant, if he desired, should be allowed to elect, whether to enquire into the disposition of the coal, and into the actual loss of freight money, (the libellant being permitted to open the question of "demurrage," with a view to increase its amount,) or to waive such enquiry and the exception as to the allowance for freight money, in which latter case, the decree below would be affirmed, with interest, without costs of appeal.

[Cited in The Thomas Melville, 31 Fed. 489.]

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

In admiralty.

Franklin A. Wilcox, for libellants.
James C. Carter, for claimant.

WOODRUFF, Circuit Judge. The libel herein alleges an undertaking by the master of the steamtug M. M. Caleb, on the 22d of November, 1870, to safely tow and pilot the schooner Baltimore, (belonging to the libellants, and then at anchor in the harbor of New York) through Hell Gate to Riker's Island; that the service was begun, and the tug, with the schooner on her port side and another on her starboard, had reached a place known as "Negro Point," when it was discovered that the Baltimore was ashore on the rocks; that, after some time, she was got off, and the tug proceeded on, and had reached a point about off the sunken marsh, on Ward's Island, when it was discovered that the Baltimore was ashore on the rocks at that point; that the master of the tug immediately threw off the lashings, saying that the tug was itself aground, and he could render no assistance; that the Baltimore settled upon the rocks, and was so broken and damaged that she became a total wreck; that she still lies there, sunken, and her fragments will not produce the sum of five hundred dollars; that, at the time the libellants' vessel was controlled by, and under the management of, the said tug and those navigating her; that the master of the tug, instead of safely towing and piloting the said vessel, as he undertook to do, so negligently and carelessly behaved, in the premises, as to cause said damages; and that the said damages are, in no way, the fault of, nor were they caused by, the libellants, or their agents, but "were solely the fault of, and caused by, the negligent acts

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

[2] [Affirming Case No. 9,681.]

of those navigating the said tug M. M. Caleb." The libel also states, that the Baltimore had on board a cargo of coal, received at Philadelphia, to be transported to Boston, for an agreed freight, amounting to six hundred and eighteen $^{80}/_{100}$ dollars; that the Baltimore was of the value of six thousand five hundred dollars; and that the damages are the sum of six thousand dollars, for the vessel, besides the loss of the said freight, amounting to six thousand six hundred and eighteen $^{80}/_{100}$ dollars, besides interest.

The answer admits that the steamtug agreed to render her services in towing the Baltimore through Hell Gate, and took her in tow for that purpose. It alleges the commencement of a violent wind from the east, when opposite Astoria, which continually increased; that, when opposite Negro Point, the tug was unable to tow the two vessels, with the wind and tide as they then were, and her master requested both of the schooners to anchor; that those on board the starboard vessel did so, but those on the Baltimore neglected to comply with the request; that the anchor of the one schooner would not hold the tow, and they drifted towards the shore, till the Baltimore touched bottom; that the tug then separated from both, took the other vessel to a place of safety, then returned, drew off the Baltimore, and was proceeding with her towards a safe anchorage, when the rudder chain on the port side of the tug parted, and the tug became thereby unmanageable, and both drifted upon the sunken marsh on Randall's Island; that the disaster was not caused by any careless, negligent, or unseamanlike act or conduct of those on board of the tug, or any of them, or because of any weakness or unseaworthiness in her, or by any means which it was possible for those on board of her to prevent; but, that the same was caused, solely, by the negligent, improper, and unseamanlike conduct of those on board of said schooner Baltimore, in omitting to cast her anchors when requested to do so by those on board the tug, and by inevitable accident.

In the district court, the libellants had a decree for their damages [Case No. 9,681], and it appeared, on an inquiry into the amount, that the libellants sold the wreck, on the recommendation of the port wardens, after they had made an official survey thereof, and she brought the sum of seven hundred and thirty dollars, at public auction. She was taken off the rocks by the purchasers, her coal was taken out, and she was again sold. The purchasers at this second sale repaired her. The time actually spent in her removal, and in the actual making of repairs, was ascertained to be thirty-one days. The commissioner reported, as damages, the cost of removing her from the rocks, the cost of making the repairs, (including towage to the place of repair,) the whole amount of freight, above stated, and interest on these items, and, also, an allowance for the value of the use of the vessel during the thirty-one days actually spent in her removal and repairs, which he denominated demurrage. On exceptions to the allowance of the whole freight, and to the allowance thus called demurrage, the district court overruled the exceptions. From the decree thereupon this appeal is taken.

The ground upon which the decision proceeded in the court below as appears by the opinion of the district judge, was, that the breaking of the rudder chain of the tug was the cause of the wrecking of the schooner; that the breaking of that chain was owing to a palpable defect in the chain itself, the same being worn, weak, and insufficient; that this was known to the claimant, when he took the libellants' schooner in tow; and that it was manifest negligence to attempt to tow the libellants' schooner with such a chain.

In the report of the damages, the commissioner gives a reason for allowing to the libellants the full freight money, as follows: "As to demurrage, I take into account only the time when the work of raising the vessel, and of making the repairs at Lissenden's yard, was actually being proceeded with, namely, thirty-one days. Some additional time would, of necessity, have been consumed in arranging for this work, if the libellants had undertaken to raise and repair the vessel, and, to offset, I have allowed the entire freight, without any deduction for the time and expense which would have been incident to the completion of the voyage."

The facts upon which the conclusion of the court below was based are, I think, clearly established by the evidence. Even taking the narrative given in the answer of the claimant herein, the breaking of the rudder chain was the immediate cause of the disaster; and it is, also, plain, I think, that the wind which the tug encountered was not of such unusual or extraordinary violence as to excuse her. It was not an exigency which ordinary care and prudence did not require her to be prepared to meet, before she assumed the duty of conducting two other vessels through a difficult and dangerous passage such as Hell Gate; and, moreover, there is great force in the argument of the libellants, that if the gale was of so extraordinary a character as to form any excuse to her, then it was negligence and improper management in her not to seek shelter and safety before entering that channel, which she might easily have done. I think, also, the proof establishes that the chain was worn, weak, and insufficient for the service; and that the master of the tug had such knowledge of its condition as makes him chargeable with negligence in relying upon it. Besides, it was his duty to know it, when the defect was apparent on inspection, as it is proved it was. The claimant, however, insists, that, as this defect in the chain was not specified in the libel as a cause of the disaster, the evidence on that subject should be disregarded. The

charge of negligence is, in the libel, very general. I think, that, if the libel had been excepted to, for want of proper specifications, such exception would have been sustained, and, had it been made specific without mention of the use of an insufficient rudder chain, the case of McKinlay v. Morrish, 21 How. [62 U. S.] 343, would have gone very far to sustain the position of the counsel for the claimant here. But, even then, the neglect of the tug to come to anchor below would have been a serious hindrance to the exoneration of the tug.

The proof fails, wholly, to establish the only defences which are set up in the answer. The accident was not inevitable. Any attempt to urge that is met, at once, by the admission, that the rudder chain broke, and by the proof of its imperfection. The charge of negligence in the schooner rests solely on the statement that she was requested to anchor and neglected to do so. The proof makes it doubtful whether any such request was made, or attempted to be communicated to the Baltimore, and it shows, at least, that no such request was heard or understood by those on board the Baltimore.

The amount awarded for damages to the schooner was properly ascertained without reference to the value of the vessel, or the price for which the wreck was sold. There was no sufficient, proper evidence which would justify the libellants in claiming for a total loss; and, not having appealed from the decree, the libellants are concluded upon that question. On the other hand, the claimant not having excepted to the mode of ascertainment, nor to the amount allowed, it is not open to him to object thereto, on the appeal. In fact, as the amount is much less than would be awarded on the basis of a total loss, or a loss of the value of the vessel, less the proceeds of sale, it was not for the interest of the claimant to object thereto. The mode of ascertainment was, however, upon the evidence, correct, and it is material so to declare, because it bears upon the exception to the allowance for the use of the vessel during the time necessary for her removal from the rocks, and for the repairing of her injuries. Having been, in fact, removed and repaired, it was just to hold, that the vessel bound to make indemnity for the injury was in no worse condition than if the libellants had removed and repaired her; and, on the other hand, if the offending tug was not liable for the full value of the vessel, less the proceeds of the sale, then, surely, to ascertain their loss, it was competent to show the necessary cost of removing and repairing; and this, whether it was done or not, and by whomsoever done, was, at least, a just measure of the damage to the vessel, sustained by the injury. Hence, the enquiry on this point properly proceeded as if the libellants had themselves removed and repaired the vessel, and the fact of a sale became wholly immaterial. It necessarily follows, that an allowance for the loss of the use of the vessel during the time reasonably necessary for such removal and repairs, became a proper element in the assessment of the loss. Denying to the libellants the value of the vessel, they could not otherwise be indemnified. The exception to such allowance was, therefore, properly overruled.

The claimant also excepted to the allowance of the full freight which would have been earned by the completion of the voyage and the delivery of her cargo; and, on that subject, there is some embarrassment. The proofs do not show what became of the cargo. It was proved, that the coal was taken out of the schooner, but what was done with it does not appear. Did the owners of the cargo accept it, when taken out of the schooner, and so become liable for freight pro rata itineris? Or, did the libellants send on the cargo by some other vessel, and so become entitled to full freight? Or, was the cargo detained until after the schooner was removed and repaired, and (treating the libellants, as between them and the owners of the tug, as still having the control of the schooner,) might they have reladen the cargo, and proceeded on the voyage, and made delivery thereof, and received full freight? Upon these questions, no information is furnished, by the proofs. I greatly doubt, that further enquiry on this subject will be of any benefit to the claimants of the tug; but, I fail to see the propriety of what seems, in the report of the commissioner, a conjecture, that what he might properly have allowed as further necessary time of detention for preparation for removing the schooner, is equal to any sum which could have been saved out of the freight money, by sending or carrying the coal to Boston, and that there might be a set-off based on that conjecture. There was no such proof. Non constat that the libellants did not receive freight. Non constat that they did not send on the cargo, as, I think, it was their duty to do, if practicable, and receive therefor full freight, in which case their necessary expenses of sending and delivering would represent their loss of freight. While, therefore, I am of opinion that the decree below was correct, in all respects, except in the matter of this set-off, I am compelled to say, that, if the claimant desires a further enquiry into the actual disposition made of the cargo, and into the saving which the libellants did make, or, in the due discharge of their duty might have made, out of the freight money, (permitting the libellants, at the same time, to open the question of allowance in the nature of demurrage,) he may have a reference to the commissioner, to ascertain the further facts, and to determine thereupon the actual loss of freight by the disaster, and whether any and how much further loss is due to the greater time of detention for repairs, if any competent proof can be given showing that the allowance already made is not adequate. If the claimant should

not desire such a reference, and shall, within twenty days, file his waiver thereof, and of his exception in respect to the allowance for freight, then, let the libellants have a decree for the amount awarded by the decree appealed from, with interest, without costs of this appeal. If no such waiver is filed, let an order of reference be entered. A preliminary or interlocutory order, in conformity with these directions, may be entered.

Case No. 9,684.

The M. M. CHASE.

[2 Hask. 270.] [1]

District Court, D. Maine. Oct., 1878.

COLLISION — CLOSE-HAULED — RULE 16 — DUTY TO PORT HELM—STARBOARD TACK—LOOKOUT—WITNESS—TESTIMONY MANIFESTLY UNTRUE.

1. The testimony of the respective owners of colliding vessels being manifestly untrue, the court considered the testimony of a competent witness, who saw the collision from the land, the most reliable evidence.

2. Colliding vessels, sailing with a north wind, one a course east by north within seven points of the wind, and the other west by north two points free, are neither close-hauled.

3. Vessels so sailing approaching each other end on and in danger of collision, one upon the port tack and the other upon the starboard tack, should, under rule 16, both seasonably port their helms.

4. Those in charge of vessels so approaching each other have a right to presume that rule 16 will be seasonably complied with; and if one vessel puts her helm aport soon enough to avoid a collision if the other should do the same at the same time, she is blameless; and if a collision ensue, for failure to so port the helm, the vessel failing to do it would be in fault, and liable for the damages.

5. If vessels approaching in opposite directions on courses diverging two points, neither being close-hauled, are not governed by rule 16, the vessel on the port tack must keep clear of the vessel on the starboard tack.

6. A lookout must be kept to apprise the man at the helm of approaching vessels.

This was a libel in rem by the master and owners of the Emma B. Shaw against the M. M. Chase for damages from collision of the two vessels, occasioned by fault of the Chase. The owners of the Chase filed their answer, denying any fault on the part of the Chase, and the cause was heard upon libel, answer, and proofs.

George F. Holmes and A. A. Strout, for libelants.

Geo. E. Bird and William W. Thomas, for claimants.

FOX, District Judge. This libel is instituted against the schooner, M. M. Chase, of Portland, by the master and owners of the schooner, Emma B. Shaw, of Philadelphia, to recover for damages sustained by the Emma B. Shaw, from a collision with the M. M. Chase, on the morning of February 19, 1878, which took place at the western entrance of the Vineyard Sound, between the lightship and Cuttyhunk island.

The Emma B. Shaw was a schooner of two hundred and forty-eight tons, loaded with ice, bound from Boothbay to Philadelphia. The M. M. Chase was bound from Virginia to Portland, with a cargo of oysters.

The libel alleges that the course of the Emma B. Shaw at time of collision, was west-northwest, and that she was on her starboard tack, close-hauled, with the wind north by west; and that the M. M. Chase was seen two or three miles off, on a course of east by north with free wind.

The answer admits that the M. M. Chase was sailing on a course east by north, but avers that the wind was north-northeast to northeast by north, and that she was on her port tack close-hauled; that the Emma B. Shaw was first seen on the starboard bow of the M. M. Chase, about a half-mile distant, sailing on a course west-southwest, with the wind free, and that the Emma B. Shaw afterwards changed her course to the northwest, and thereby occasioned this collision.

The master and mate of the Emma B. Shaw, in their depositions, fully sustain all the allegations in the libel; and on the other hand, the testimony of the master, mate, and one of the seamen of the M. M. Chase, corroborates the allegations in the answer. Each side has also produced the testimony of a witness from the island of Cuttyhunk.

Albert F. Church, a pilot, who is the son-in-law of Mr. Smith, the light-keeper, testifies in his deposition that he was on the island that morning watching for a vessel which he expected to pilot through the sound; that he saw both the schooners from where he stood previous to the collision; that he did not see them when they were together, but saw them after the collision; that the wind was about north by west, a good wholesale breeze, and so continued through the morning; that the Chase was on her port tack, heading about east by north, but for a portion of the time she was obscured from his sight by a barn. He says, "Her sheets were off some, cannot tell exactly how much, but so that I could notice them distinctly; she was not close-hauled, but was running free with her boom about one third of the way off, as I should judge. About half an hour after seeing the M. M. Chase, I saw the top of the Emma B. Shaw sail across the hollow in the island; she came out by, so that I could see her hull in twenty or thirty minutes; she was then on her starboard tack, was not close-hauled, heading about west as near as I could judge; the vessels then were two or three miles apart; she afterwards luffed up into the wind, trimmed off and was headed north by west as near as I could tell; she was close-hauled, sharp to the wind, heading west-northwest as near as I could tell; I should judge the vessels were about a mile or more

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

apart; the two vessels were within an eighth of a mile of each other when I last saw them before the collision."

On cross examination, he says, "The true course for a vessel through the sound and bound to Philadelphia is about west by south; the wind was quite steady that morning; it very likely blew by flaws, as far eastward as north. I did not look at any compass, there was a vane in sight; I did not look at the vessels after they were within a mile of each other, because I stepped into the house to do something or other. If the Emma B. Shaw had kept on the course she was on when I first saw her, the collision would not probably have occurred."

S. Austin Smith, the keeper of Cuttyhunk light, was called by claimants, and testified that at about 6.40 on morning of February nineteenth, "I went up into the lantern of the lighthouse and saw the M. M. Chase coming in on a course of east by north. I saw the collision. The vessels were about S. S. W. from the lighthouse at the time; the wind was due north, veering round to N. N. E.; the two vessels came nearly end on, and I watched them, fearing a collision; they were neither of them close-hauled; they both held their course, the Emma B. Shaw being a little southerly until a moment before the collision, and then the E. B. Shaw put her helm hard to port and came under the bow of the M. M. Chase, and the collision occurred almost immediately; the M. M. Chase did not change her course. I noticed the course of the wind at the time of the collision, which took place about a mile from me. The sun was up and as clear a day as ever was. Saw the man at the wheel of the M. M. Chase exerting himself to bring her up into the wind. If the E. B. Shaw had starboarded her helm, the vessels would have gone clear. The wind, at the time, varied from N. N. E. to N. by W. at lighthouse. The E. B. Shaw would have passed to the north of the lightship, I think. She changed her course a little after she opened by the bluff of the island, and steered a little more to the north. My attention was fixed on the vessels, as I expected a collision; they were two hundred to two hundred and fifty feet apart when the E. B. Shaw ported her helm. If both vessels had held their course, think a collision would have occurred. After leaving Tarpaulin cove, the course of the E. B. Shaw, with wind north, would have been about west by south, to pass near the lightship. I suppose she may have kept on to north of that, when I saw her, to go north of lightship. She may have kept up to north of west, say a point, a point and a half."

In the present case, as in most others of a similar character, there is an irreconcilable conflict in the testimony of those on board the respective vessels upon material points, upon which the court has not the charity to believe that the differences are wholly owing to errors of judgment. The officers and crew of colliding vessels most usually are quite ready to exonerate themselves from blame by statements, which upon careful examination and comparison with the testimony of disinterested spectators, if to be had, are generally shown to be gross perversion of the facts as they actually occurred.

In this case, all of the evidence is in deposition, excepting that of Smith, the lighthouse-keeper; and the court, not having had the other witnesses before it, has not had the opportunity of seeing them, and, from their appearance, forming its own judgment as to what extent they may have designedly misrepresented the state of the wind and other matters at the time of the collision. It is sufficient to say, that this testimony, on one side or the other, is most manifestly untrue; and in the opinion of the court this remark is not applicable exclusively to the witnesses on either side; but on both sides, the facts have been so much perverted by them, that the court is not inclined to consume any time in attempting to discern if either approximates to the truth, or which side is farthest therefrom. Mr. Smith, the keeper of Cuttyhunk light, was produced as a witness at the hearing, and while he manifested some peculiarities as a witness, the court was impressed with his truthfulness, and is of opinion that he intended to give a correct statement of what occurred when the collision took place. He has followed the sea forty years; been fourteen years keeper of the light; has had charge of one of the coast life-stations; and is manifestly a man of experience in maritime matters, and of standing character.

He says, he watched the vessels until the collision occurred, fearing from their respective courses, as they were nearly end on, that they would collide. He swears that they were only a mile distant from him, and that he noticed the wind at the time, and it was due north, varying by spells from N. by W. to N. N. E. Smith was up in the lantern of the lighthouse with a clear unobstructed view through the light of plate glass, and with a vane before him, and with his experience of fourteen years in that office, could not but have known the exact course of the wind. Church, his son-in-law, was on the ground, and represents the wind as about N. by W. He is not positive and precise upon this point, while Smith is; and it may be that, at the moment that Church noticed the wind, it may have been in the direction stated by him; but the court is inclined to accept the statements of Smith upon this point, on account of his exactness upon a matter, in respect to which, if observed by him as he says, he could not be mistaken.

The testimony by deposition of these pilots has been taken by claimants, and they say that, on the morning of the collision, they were in the vicinity of Gay Head, and that the wind then was north-northeast. It is not improbable that such was the course of the wind further up the sound, as the testimony tends to show that the wind frequently hauls

more to east of north after passing the northern entrance of the sound; so that, with the wind north at Cuttyhunk, it might be two or three points to the eastward when near Gay Head. Upon the whole case, my judgment is, that the wind was north where the collision occurred, and if so, the M. M. Chase, being on a course of east by north, as is admitted by both sides, was sailing within seven points of the wind, which gave her a free course, and she could not have been closehauled.

Mr. Smith swears that neither vessel was close-hauled; and whether this was so or not must depend on the course of the E. B. Shaw with a northerly wind. I am inclined to the opinion that, after she passed the bluff on Cuttyhunk, she at first was on a westerly course, which was changed, as Church says, soon afterwards more northerly; and this statement of Church finds corroboration in the testimony of Smith, who thinks that, after passing the bluff, she hauled more northerly, intending to go inside of the lightship, which, according to Smith's statement, would give her a course one to one and one-half points north of west, say about west by north, which I am inclined to think was the course she was on just previous to the collision.

With a north wind, sailing west by north, the Emma B. Shaw must have been two points free; and I therefore find that neither vessel was close-hauled. I am aware that Church says the Emma B. Shaw was close-hauled, and he gives the course when he saw her as about N., N. W.; but he does not pretend to be exact; and I prefer to rely on Smith's testimony, which is positive, that neither vessel was close-hauled. This view draws some strength from the fact that the two vessels were so approaching each other that Smith feared a collision would take place. This might be with one sailing E. by north and the other W. by N., which were within two points of directly opposite courses; but, if the divergency was much greater, it could never have occurred to Smith that they might come together.

Neither vessel being close-hauled, but one so sailing on a port tack, and the other on her starboard tack, what was required of each vessel? If the case is to be considered as within rule 16, applicable to vessels meeting end on or nearly end on, the helms of both should be put to port. The M. M. Chase did nothing but hold her course, so that she clearly violated this rule. The Emma B. Shaw ported her helm; but it is claimed that it was not seasonably done; that she hailed the M. M. Chase, and received no reply, and therefore she should have understood that those on board of the M. M. Chase were not aware of her approach, and that the Emma B. Shaw should have, at once, under rule 24, taken such measures as were necessary to avoid the collision.

It is sufficient answer, in the opinion of the court, that those on board of the Emma B. Shaw must have known that the Chase had a man at the helm whose duty it was to comply with the rules so long established, and that those in charge of the Emma B. Shaw had a right to act on the presumption that these rules would be obeyed. If such had been the case, and the helm of the M. M. Chase had been ported at the same time as the Emma B. Shaw's, both vessels would have passed without contact as, in the short time remaining, the course of the Emma B. Shaw, by this movement, was changed nearly to right angle, as she was struck amidships, nearly head on, by the M. M. Chase.

In this view, the fault was entirely that of the M. M. Chase; and while the Emma B. Shaw was somewhat dilatory in her change of course, it would have been successful, if the other vessel had done the same at the same time.

The answer alleges that the course of the Emma B. Shaw was about west-southwest, which would bring the two vessels end on, and require from the M. M. Chase a compliance with rule 16, as neither vessel was close-hauled. On her own admissions, the M. M. Chase was in fault; and it does not appear that the conduct of the Emma B. Shaw was so in violation of the rules, as to render her accountable for the damages incurred.

It is not yet absolutely decided, so far as the court is advised, that two vessels, approaching in opposite directions on courses diverging two points, are to be governed in their movements by rule 16. See The Manitoba [Case No. 9,029]. Doubts have certainly been suggested, in some cases, that in such position the vessels are not to be deemed as meeting end on, or nearly end on; but rather that they come within rule 17, which requires of two sail vessels, when crossing so as to involve risk of collision, if they have the wind on different sides, that the vessel with the wind on the port side shall keep out of the way of the vessel with the wind on the starboard side; except when the vessel with the wind on the port side is close-hauled and the other vessel free, in which case, the latter vessel should keep out of the way.

Neither being close-hauled, it was the duty of the M. M. Chase, as she was on her port tack, to keep out of the way of the Emma B. Shaw, she being on her starboard tack. The M. M. Chase, it is conceded, did nothing; and the Emma B. Shaw held her course as she was required to do until the collision was imminent. Within a moment of the collision, as Smith says, she then ported her helm, her helmsman having a right to presume that the approaching vessel would do the same, as it would bring her more before the wind and allow her to pass, and in that way "keep out of the way of the other vessel."

If the Emma B. Shaw had pursued a different course and starboarded her helm, and the M. M. Chase had ported hers, then a collision must have been inevitable, and the M. M. Chase might have well been held chargeable for the consequences. On the contrary, she

did what it was her duty to do, attempted to get away from the M. M. Chase when it was evident that the two vessels would come together, unless something was done to prevent it, acting on the presumption, that the M. M. Chase would endeavor to accomplish, in the easiest way, the same purpose; this she failed to do. She was, moreover, in fault for want of a proper lookout, who should sooner have discovered the other vessel and notified the man at the helm of her approach, and must be held accountable to the Emma B. Shaw for the damages so occasioned by her neglect. Decree for libelants.

MOBERLY (JARROTT v.). See Case No. 7,223.

MOBILE (KIMBALL v.). See Case No. 7,774.

MOBILE (SIBLEY v.). See Case No. 12,829.

MOBILE & O. R. CO. (DUNCAN v.). See Cases Nos. 4,137–4,139.

MOBILE & O. R. CO. (KETCHUM v.). See Case No. 7,737.

MOBILE LIFE INS. CO. (BERRY v.). See Case No. 1,358.

MOBILE SAV. BANK (WILLIAMS v.). See Case No. 17,729.

MOCKBEE (GODDARD v.). See Case No. 5,493.

Case No. 9,685.

The M. M. HAMILTON.

[1 Hask. 489.] [1]

District Court, D. Maine. Feb., 1873.

COLLISION—WIND FREE—FACTS TO BE STATED IN LIBEL—LIGHTS—LOOKOUT.

1. A vessel sailing with the wind free must take proper measures to avoid collision with a vessel close-hauled. The latter must hold her course.

[See The Argus, Case No. 521.]

2. In cases of collision, a libel should narrate the particular facts and circumstances that cause the disaster; and an omission to so allege a material fact is strong evidence of its falsity.

3. A neglect to show lights and have a lookout as required by law prejudice the offending party with courts of admiralty.

In admiralty. Libel in rem in a cause of collision, heard on libel, claim, answer and proofs.

Sewall C. Strout and Bion Bradbury, for libellant.

Thomas B. Reed, for respondents.

FOX, District Judge. This libel is promoted by the master in behalf of himself and the owners of the schooner Addison Gilbert, of Gloucester, against the sloop M. M. Hamilton of Portland, to recover the value of the schooner and her outfits, totally lost in a collision between these two vessels off the entrance of Portsmouth harbor on the morning of the 7th of January, between one and two o'clock. About half past twelve, the schooner left her wharf in Portsmouth, destined for the shore fishery, without any lights. She ran down by Fort Constitution, and after one o'clock, a watch of two men was set, and orders were then given by the master to put up the lights. Lee was ordered on the lookout as he swears, and Boon to the wheel. The master went below. Russell went to the forecastle for the lights, lighted them, had the green light fixed, he says, in its proper place in the starboard rigging, was in the act of climbing into the port rigging with the red light, when he perceived a vessel on their lee bow, standing towards them about fifty yards off. He dropped the red light and ran aft shouting to the vessel, which was the sloop M. M. Hamilton, to keep off; but instead of complying, as he says, she luffed up, and struck them on the port side just forward of the main rigging.

It is admitted that the wind was from northwest to northwest by north, that it was a clear cold night, the moon having set just after midnight, and that the course of the schooner, after she passed Fort Constitution, was nearly south. The lookout Lee says, that when he first saw the sloop she was making a westerly course, but that in a very short time, he again looked, and she was then heading northeast, about two points on the schooner's weather bow; that he did not notice her when she tacked, his attention being attracted by the movements of Russell in putting up the lights, nor did he give any notice to the man at the helm, that the sloop was near by. Boon, who was at the helm, says that he discovered the sloop, she being on the starboard bow, making towards their starboard cathead and standing north-northeast, the schooner standing south; that he at once called the captain from below, who came immediately on deck, without hat or boots, and put the helm to port, which caused the schooner to luff.

The sloop is of 110 tons, was from Boston bound to Portland, loaded with railroad iron, and was making for Portsmouth for a harbor, being badly covered with ice; after she had reached near to Whale Back Island, she stood to the westward, and when about half way across the channel, discovered the schooner nearly up to Fort Constitution without lights, but the mate of sloop, who was then acting as master, the captain not being on board, supposed the schooner was then standing out to sea. The distance from the fort to Whale Back Island is about one mile, and it is about half that distance across from the island to the west shore. The sloop ran out her westerly tack as far as it was deemed prudent, and then stood about on the easterly tack, and laid her course about north-northeast. The mate says, he saw the

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

schooner after the sloop tacked about three points on the sloop's lee bow, and if both vessels had held their course, they would have passed 100 yards apart in safety; that the next he saw was the schooner's bowsprit pass by the sloop's to windward, and thereupon his lookout cried, "hard up," which he did as soon as possible; that the two vessels immediately came together, the sloop not having a headway of more than two knots.

It is not controverted by the libellant that the schooner was sailing with the wind free, and that the sloop was close-hauled, and that by the 12th article of the rules adopted by act of congress in 1864 [13 Stat. 60] it was the schooner's duty to take proper measures to avoid collision, and the sloop was bound to keep her course. It is therefore attempted to establish on the part of the libellant, that the schooner was justified in luffing, and that instead of holding her course the sloop also luffed, and by so doing occasioned the disaster. There is no dispute as to the law of the case, and the only question of fact in controversy is whether the sloop luffed, and upon this there is the usual conflict. All of the crew of the schooner, who were on deck at the time, admit that she luffed, but they assert that the sloop also luffed, which latter assertion is denied by all of the crew of the sloop.

By the 23d admiralty rule of the supreme court of the United States, it is required that the libel shall pronounce and articulate in distinct articles the various allegations of facts upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article.

In Quinn v. The Transport [Case No. 11,516], an exception was taken to the libel, and the court, Benedict, J., says: "The libellant in a collision case has contented himself with simply stating a bare cause of action, and has omitted the full and frank narrative of the material circumstances attending the accident, which the general practice of the admiralty requires in cases of this description. * * * I am unable to see why the circumstances as thus seen should not be set forth for the information of the court, and to save labor in proving facts about which there may be no dispute, as well in this as in any case. The reason of the rule, which is applied in all ordinary cases of collision, would seem to exist in full force in these triangular cases, in which above all others the need of a full statement of the facts is felt. To make these cases exceptions to the general rule as claimed would be to permit the parties to come to trial without any preliminary statement from either party, which would be of any assistance to the court, or would apprise the parties most in interest of the facts which they are called on to meet."

In the present case at the time and locality of the collision the libel states "that there was a fresh breeze from the northwest," the schooner's course being south; that "the man at the wheel, who was on the lookout," discovered a strange sail about three points on the weather bow of the schooner, approaching in a direction north by east on the wind about 150 yards distant, and southwesterly from the schooner; that immediately the schooner's wheel was put hard to port to bring her up into the wind and allow the approaching vessel to pass to leeward; that the schooner's helm remained in that position until the collision, and that the vessel was the sloop, which struck the schooner forward of the main rigging, cutting her down so that she filled; that after the sloop was first seen by the schooner, it was impossible for the schooner to have done anything more than she did to avoid the collision, the night being clear; that the schooner could have been seen by those on board the sloop at a sufficient distance for her to have avoided the collision if any one had been at the wheel of said sloop, or proper attempt had been made to keep her clear, said sloop being on the wind; that the collision was caused wholly by the negligence and want of care of the sloop.

This is the whole statement contained in the libel relating to the collision and its cause, and it is quite extraordinary that while it does assert that the schooner's helm was put to port, and she came up into the wind, it no where charges that the sloop did any thing of the kind. It is not any where suggested (as the learned counsel frankly admitted in reply to an inquiry from the court) that the sloop luffed or changed her course in any degree; on the contrary, the plain inference from the charge against her as it stands in the libel is, that she did nothing but hold her course, as the allegation is "that the sloop could have avoided the collision, if any one had been at the wheel of the sloop, or proper attempts made to keep her clear." The negligence and fault of the sloop is, that no one was at the wheel to change her course, and instead of her crossing and getting in the way of the schooner, the complaint is, that she took no steps to get out of her way. Her alleged sin is that of omission, instead of commission, as is now attempted to be maintained.

In my opinion, no one acquainted with navigation could possibly gather from this libel, that the cause of complaint was the sloop's luffing; on the contrary, I think it would be understood that the claim was, that the sloop was bound to take measures to keep out of the way of the schooner, as much as the schooner was to keep out of the way of the sloop; that the schooner did her part by luffing, but that the sloop took no measures to accomplish it. The theory on which this libel was drawn, if the libellant had any clear notion on the subject, I think was, that when the vessels came in sight of each other, they were approaching so nearly end on,

that it was the duty of the sloop to port and not to hold her course. The averment in the libel, that the schooner was sailing south and the sloop northeast within one point would tend to confirm this view, as under those courses, it may be that each vessel is bound ordinarily to keep out of the other's way; and I apprehend that this idea was not abandoned, until it was found that the direction of the sloop was not such as to render obligatory upon her the duty of changing her course, and then the attempt was made to charge the sloop, as is now claimed.

The libel should contain a narrative of the facts and circumstances attending the collision for the information of the court, as well as of the adverse party. The respondents must be given to understand the facts which they are called upon to answer; and certainly they were not in this libel required to justify the luffing of the sloop at the time of the collision. I consider the entire omission from the libel of any suggestion, that the sloop by luffing occasioned the collision, most cogent and conclusive evidence, that when this libel was drawn by his proctor, and the facts as they occurred here related by the master and stated in the libel as the material circumstances attending the accident, and by which the sloop had become accountable, he must have known that the sloop did not luff; for if she had so manifestly violated the rules of navigation, the libel would have openly explicitly charged her with so doing, as the ground for her liability.

Between these two vessels, I hold the responsibility of avoiding the danger rested upon the schooner. I have no question, if the master when he came on deck, had held his course instead of luffing, the vessels would have passed without injury. The course adopted by the schooner was taken too late to escape the disaster. It contributed to or rather occasioned it; and the sloop is not shown to have been in any way negligent or managed so as to render her accountable.

Before concluding this opinion, the court feels called upon to remark upon the gross negligence on the part of the schooner in not complying with the provisions of law, both as to lights and a competent watch. Her lights were not brought on deck until she was well past the fort, and then only one of them had been in place before the collision. It may be that Pat Lee had been assigned to duty on the lookout forward, although the libel charges, that Boon, who had the helm, was on the lookout; but it is quite certain that Lee was negligent and inefficient, not informing the helmsman that the sloop was near by, although he swears that he saw her on her westerly tack. He paid no regard to her subsequent movements, and did not notice her when she came about, nor until she was close by on her easterly tack, his attention being attracted by the movements of Russell in putting up the lights, instead of watching neighboring vessels. Such neglect to comply with the requirements of law, as to lights and competent lookout, will be visited most severely on the offending party by courts of admiralty in any case where it shall occasion the disaster. Libel dismissed with costs.

Case No. 9,686.

MOAN v. WILMARTH et al.

[3 Woodb. & M. 399.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

ARREST—IMPRISONMENT FOR DEBT—BENEFIT OF INSOLVENT LAW—PRACTICE IN FEDERAL COURT.

1. If a debtor, after being sued in this court, takes the benefit of the insolvent laws of Massachusetts, he is entitled under the acts of congress, as to imprisonment for debt, to have execution issue against his property alone.

2. The body of private debtors, when they are sued in the courts of the United States, is imprisoned or not, on execution, according to the laws and policy of each state where the execution issues, while that of debtors to the United States is governed by the uniform and fixed laws of congress.

This was assumpsit on a promissory note, running from the defendants [George L. Wilmarth and others], citizens of this state, to the plaintiff [Augustus R. Moan], a citizen of New York. The action was brought February 19, 1846, and the defendants proposed to be defaulted, having since gone into insolvency under the laws of Massachusetts, and were defaulted and then moved the court that in issuing execution, it should go, not against their bodies, but only their estate.

Mr. Eldridge, for plaintiff.

Mr. Morton, for defendants.

WOODBURY, Circuit Justice. The motion in this case is founded on the acts of congress of February 28, 1839, and January 14, 1841 (5 Stat. 321, 410). The first act abolishes imprisonment under process from the courts of the United States in any state where "imprisonment for debt has been abolished," and if in any state imprisonment is allowed under certain restrictions, the same shall be adopted in the courts of the United States. The last act is "supplemental" to the former, and merely declares that the former "shall be so construed as to abolish imprisonment for debt on process issuing out of any court of the United States, in all cases whatever, where by the laws of the state in which the said court shall be held, imprisonment for debt has been and shall hereafter be abolished." There is no difference between these two statutes in respect to the point now raised, except that the first one applied only to imprisonment in states where it had then, viz., in 1839, been abolished, whereas, the second act applies to all states where it had since been abolished up to 1841, or might

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

afterwards be abolished. The plaintiff contends that neither of them was meant to refer to any state where abolition of imprisonment for debt had not been introduced generally or in all cases, whereas in Massachusetts it has been applied only to cases of insolvents who have surrendered all their property under her insolvent system. There, in such cases only, and none others, are they to be discharged "from arrest and imprisonment in any suit or proceeding" for their previous debts. St. 1838, c. 163. But a part of the first act of congress seems studiously provided to reach such a case, as it provides that "where by the laws of the states imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States." 5 Stat. 321. Now this provision remaining, as it does, unaffected by the last act of congress, the design of this last being only to include states passing laws to abolish imprisonment for debt after 1839, it follows that an abolition of imprisonment, as in Massachusetts, where property has been surrendered, is one of those abolitions under certain "conditions and restrictions," which we are required to conform to, as much as when the abolition is total. The reason for conforming to it also applies quite as strongly in one case as in the other, because the design of congress is to follow the action of the states on this subject, whether partial or general, and in no case to continue to imprison debtors in suits between individuals in any state, unless those states continue to do it, forbearing where they forbear, and to their extent. Congress adopted, as it well might, other and fixed rules as to imprisonment for its own debtors. See cases and acts. But for private debtors, wisely left them to the policy of their own respective states. This is also in analogy to the original adoption of state forms in writs, executions, &c. These are to remain as they were in 1792 in each state, however diverse, unless changed by the supreme court or congress by subsequent provisions. And these in the circuit courts of the United States differed then as the processes differed in different states in the same manner as the abolition of imprisonment. 1 Stat. 275; [Wayman v. Southard] 10 Wheat. [23 U. S.] 1; Craig's Case [Case No. 3,325]; [Ross v. Duval] 13 Pet. [38 U. S.] 45; [Amis v. Smith] 16 Pet. [41 U. S.] 303. This course accords, too, with the rule of decision under the judiciary act [1 Stat. 73] between private suitors in the courts of the United States, changing in each state, where state legislation changes, and being different in each, if the laws in each differ. See U. S. v. Ames [Case No. 14,441]; Clark v. Sohier [Id. 2,835], and cases there cited.

The great object in all these instances, is to mould the administration of the laws and the effects of it in the courts of the United States, to those in the state courts respectively, except when the constitution or laws of the United States for wise reasons make different provisions in a few special cases. Congress thus allows individuals to have their rights settled on like principles in both courts, but by a tribunal supposed in theory to be more impartial when the action is between a citizen and a nonresident or foreigner, and is brought in the courts of the United States. Bradly v. Currier [Case No. 1,777], Mass. Dist., 1848. By conforming to the laws in each state on all these topics, collision and jealousy are avoided. The conclusion on this question is strengthened by the circumstance that all constructions ought to lean in favor of personal liberty in cases of mere civil indebtedness, where no violence, fraud or crime have been practiced. 1 Tidd, Prac. 546. Finally, the state court of Massachusetts has recently in Bristol county decided that the case of these defendants is one entitled to the privilege of having their bodies exempt from arrest on execution under the state laws, and have thus removed any ground for the idea that in yielding such an exemption here, we do not conform to the state law and its judicial interpretation in its own tribunals, so far as regards the rights of these defendants under them. Let the motion be complied with.

Case No. 9,687.

MOCKBEE et al. v. UPPERMAN et al.

[5 Cranch, C. C. 535.] [1]

Circuit Court, District of Columbia. March Term, 1839.

TAXATION—TAX TITLE—INFANT'S LAND—RIGHT TO REDEEM.

Infants whose property has been sold for taxes due to the corporation of Washington, have a right to redeem at any time within one year after they have arrived at full age.

Bill in equity by [Eliza Ellen Mockbee and others against Anna Maria Upperman and the heirs of Benjamin B. Myers] to redeem property in Washington sold for taxes, and to cancel the deed made by the corporation of Washington to the purchaser at the tax-sale; or to obtain a reconveyance of the property to the infants. The complainants were the mother and two infant children; who claimed the south half of lot No. 9, in the square No. 293, in Washington, under a deed from James N. Edmonston to the mother in trust for the two children during their joint lives and the life of the survivor of them, with remainder to the mother in fee. The property was assessed in the name of Sarah Edmonston and Benjamin B. Myers; and more than two years' taxes being due thereon, it was advertised as their property and sold in June, 1832, by the collector to the said Benjamin B. Myers, who paid the amount of the taxes due thereon, namely.

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

($17.78,) but died without obtaining a deed from the mayor of Washington, according to the provisions of the charter; who on the 8th of July, 1834, made a deed to "the heirs of Benjamin B. Myers, deceased," without naming them. By the tenth section of the charter of 1820, it is provided, "that minors, mortgagees, or others having equitable interests in real property, which property shall be sold for taxes as aforesaid, shall be allowed one year after such minors coming to, or being of, full age, or after such mortgagees, and others having equitable interests, obtaining the possession of, or a decree for the sale of, such property, to redeem the property, so sold, from the purchaser or purchasers, his, her, or their assigns, on paying the amount of purchase-money so paid therefor, with ten per cent. interest thereon as aforesaid, and all the taxes that have been paid thereon by the purchaser or his assigns, between the day of sale and the period of such redemption, with ten per cent. interest on the amount of such taxes, and also the full value of the improvements which may have been made or erected on such property by the purchaser or his assigns, while the same was in his or their possession."

One of the children had arrived at full age when the bill was filed, but the year had not elapsed which was allowed for redemption. The other child was still under age.

THE COURT was of opinion that they were in time to redeem, and decreed accordingly.

MOE (ANDERSON v.). See Case No. 359.

MOFFAT, The (DE GRAFF v.). See Case No. 3,748.

Case No. 9,688.

MOFFAT et al. v. SOLEY.

[2 Paine, 103.] [1]

Circuit Court, S. D. New York. May Term, 1827.

COURTS — FEDERAL JURISDICTION — CITIZENSHIP — JUDICIARY ACT.

1. The 11th section of the judiciary act [1 Stat. 78] confines the jurisdiction of the circuit courts on the ground of citizenship to cases where the suit is between a citizen of a state where the suit is brought and a citizen of another state; and although the constitution gives a broader extent to the judicial power, the actual jurisdiction of the circuit courts is governed by the judiciary act.

[Cited in Wiggins v. European & N. A. Ry. Co., Case No. 17,626; Sands v. Smith, Id. 12,305; Grover & B. Sewing-Mach. Co. v. Florence Sewing-Mach. Co., 18 Wall. (85 U. S.) 580.]

[Cited in Wills v. Home Ins. Co., 28 Iowa, 546.]

2. Nor do the subsequent clauses of the 11th section as to the defendant's arrest, &c., enlarge the jurisdiction.

3. Therefore, where a citizen of New York and a citizen of Georgia sued a citizen of Massachusetts, in New York, where he was arrested, it was *held*, that the court had not jurisdiction.

At law.

On the argument, R. Sedgwick, for plaintiffs, made the following points: I. The act of congress ought, if possible, to be so construed as to confer the whole jurisdiction authorized by the constitution. II. All the clauses of the eleventh section of the judiciary act, taken together, should be so construed as to effect this object. III. The third clause of the act was intended to prevent writs being served in one district and returnable in another. The fourth clause was intended to authorize a trial between citizens of different states, wherever or in whatever district the defendant might be arrested. IV. If such be not the construction of the fourth clause, it means nothing. If such be the construction, it follows that each of the plaintiffs had a right to sue defendant in New York.

THOMPSON, Circuit Justice. The single question in this case is whether this court has jurisdiction of the cause. One of the plaintiffs is alleged to be a citizen of the state of Georgia, and the other a citizen of New York; and the defendant is avowed to be a citizen of Massachusetts, but arrested, of course, in the state of New York.[2] By the constitution of the United States, the judicial power is declared to extend, among other cases, "to controversies between citizens of different states." By the judiciary act of 1789 (eleventh section), jurisdiction is given to the circuit court when the suit is "between a citizen of a state where the suit is brought and a citizen of another state." It will be perceived, therefore, that although by the constitution, the judicial power is declared to extend generally to controversies between citizens of different states, the judiciary act of '89, in parcelling out that jurisdiction, is not so broad as to the jurisdiction of the circuit courts, but extends it only to a suit between a citizen of the state where it is brought and a citizen of another state; and the courts of the United States have always considered their jurisdiction governed by the act of congress, although perhaps the constitution would admit of a broader interpretation.

It was decided very early (1806), by the supreme court of the United States, in the case of Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267, that when the plaintiffs or defendants

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

[2] The act of congress of September 24, 1789, provides that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars: 1. When the United States are plaintiffs or petitioners: 2. When an alien is a party: 3. When the suit is between a citizen of the state where the suit is brought, and a citizen of another state.

are numerous, or consisting of more than one person each, one must be capable of suing or being sued in the circuit court, in order to give the court jurisdiction; and this has been the uniform doctrine of the court ever since. To test the present case by that rule, each of the plaintiffs was not competent to sue the defendant in this court. The citizen of Georgia could not sue the defendant, who is a citizen of Massachusetts, in this court, because neither party would be a citizen of the state where the suit is brought; and if all the plaintiffs must be capable of suing him, it follows, as matter of course, that one who could not sue him, being united with another who could, will not give this court jurisdiction. But the plaintiff, to sustain the jurisdiction of the court, relies upon the subsequent provision in the same eleventh section of the act, which declares, that no person shall be arrested in one district for trial in another, in any civil action, in any district or circuit court; and no suit shall be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. This part of the section is certainly not entirely free from obscurity. The general object, undoubtedly, is to guard against a person being arrested in one district and taken into another district for trial, and anything more than this would seem to be no more than affirming what would be the rule of law independent of the statute. But, whatever may be the construction, there is no reason to suppose it was intended to enlarge the jurisdiction of the circuit court as limited by the first branch of the section, and extend it to cases where neither party was a citizen of the state where the suit is brought. This would be repugnant to the express terms of the first part of the section, and would, in effect, be by implication repealing by subsequent words in the section, the positive and express antecedent provision, which would be a violation of every sound rule of interpreting statutes. We are, accordingly, of opinion that this court has not jurisdiction of the cause, and that judgment must be entered for the defendant.

NOTE. The right of exclusive legislation or jurisdiction within the limits of any of the states, can be acquired by the United States only by purchase of territory from the states, for the purpose and in the mode prescribed by the constitution of the United States. People v. Godfrey, 17 Johns. 225. A state court has no jurisdiction of criminal offences against the United States, nor of the penal laws of the United States; nor can such jurisdiction be conferred by act of congress. U. S. v. Lathrop, Id. 4. Therefore, an action for a penalty incurred for selling spirituous liquors without a license, contrary to the act of congress of August 2, 1813 (Cong. 13, Sess. 1, c. 38 [3 Stat. 72, c. 39]), cannot be brought into the supreme court of this state. Id. The act of congress of the 17th of April, 1800 (volume 5 [Smith's Ed.] 88 [2 Stat. 37]), declares, that whenever any patent right shall be infringed, the party offending shall forfeit a sum equal to three times the actual damages sustained, "which sum shall be recovered by action on the case, founded on the act, &c., in the circuit court of the United States, having jurisdiction thereof." Parsons v. Barnard, 7 Johns. 144. The act of congress of 21st February, 1793 (volume 2 [Folwell's Ed.] 203 [1 Stat. 318]). also declares, that, in certain cases, when judgment shall be rendered for the defendant, the patent shall be declared void. Id. As the judicial power of the United States extends to all cases in law and equity arising under the laws of the United States, and as the act of congress, on the subject of patent rights, has declared that the suit for the infringement of them shall be brought in the circuit court of the United States, and gives the court power, in such cases, to declare the patent void, the state courts have, of course, no jurisdiction in the cases; and judgment must be rendered for the defendant. Id. The supreme court of the United States has not exclusive jurisdiction of a suit brought by a state against the citizen of another state; but such suit may be prosecuted in a state court. Delafield v. State, 2 Hill, 159. It may be questioned, it seems, whether the federal courts have any jurisdiction whatever of suits prosecuted by a state, except in the single instance where the parties on both sides are states. Id. The constitution of the United States has not, by its own force, divested the state courts of any of their former jurisdiction. Id. A mere grant of jurisdiction to a particular court, without words of exclusion as to other courts previously possessing the like powers will only have the effect of constituting the former a court of concurrent jurisdiction with the latter. Id. It seems, where the supreme court of the United States has original, it cannot exercise appellate jurisdiction, unless the circumstances be such that jurisdiction depends on the nature of the cause as well as the character of the party. Id. An attachment against a non-resident debtor is a suit within the meaning of the judiciary act of the United States, giving exclusive jurisdiction of all suits against consuls to the district court of the United States. In re Aycinena, 1 Sandf. 690. An affidavit or suggestion, if uncontradicted, is sufficient for the officer issuing such attachment, to discharge the same, and without costs. Id. The majority of the court, although they refused the allowance of a habeas corpus to bring up a soldier of the United States, thought it necessary to disclaim having jurisdiction, in any case, where the imprisonment or restraint was under color of the authority of the United States. In re Ferguson, 9 Johns. 239. Thompson, J., observed, "The Case of Roberts [2 Hall, Law J. 192], referred to by the chief justice, seems to be the only one where this question has received a judicial decision; and although in that case, the habeas corpus was denied, yet Nicholson, C. J., said there might be cases in which it would be the duty of the state courts to interfere. The immediate object of the habeas corpus is to liberate the party from an illegal restraint. The allowance of it does not necessarily draw after it an inquiry into any offence, committed either by the party imprisoned, or by him who assumes the right of restraint." Id. He added also: The state courts must have the power, in many cases, to determine upon the extent and operation of the laws of congress. As in the case now before us, if a civil suit should be brought for false imprisonment, the legality of the enlistment, under the act of congress, would probably be involved, and must be determined collaterally. And this is the only inquiry upon the habeas corpus. Id. The objections, however, stated by the chief justice, against the jurisdiction of this court, are entitled to great consideration, and as the allowance of the writ, in term time, rests in sound legal discretion, and as the party may have relief by application to one of the judges of the supreme court of the United States, or of the

district court for this district, whose jurisdiction in the case is unquestionable, I think the application ought to be denied. Id. Consent will take away error, but neither that nor confession will give jurisdiction. Coffin v. Tracy, 3 Caines, 129. And this applies to consent in creating a tribunal as well as to consent in submitting a matter to a subsisting tribunal, which the law has excluded from its cognizance. Germond v. People, 1 Hill, 343. The circuit court of the United States is a court of general jurisdiction: the only limitation is as to the parties who can litigate there; but when a cause is depending in that court it is to be presumed to be regularly there. If necessary, however, to show jurisdiction, an averment that the parties are citizens of the separate states, obviates the objection. Griswold v. Sedgwick, 1 Wend. 126. Bonds given for duties to the United States, may be sued in the state courts, which have concurrent jurisdiction with the courts of the United States, of all suits at common law, where the United States are plaintiffs. U. S. v. Dodge, 14 Johns. 95.

MOFFAT, The FRANK. See Case No. 5,060.

Case No. 9,689.

MOFFIT et al. v. VARDEN.

[5 Cranch, C. C. 658.] [1]

Circuit Court, District of Columbia. March Term, 1840.

EXECUTORS — LEGACY OVERPAID — REMEDY — DEVISES — CHILDREN — WHEN IN ESSE — LAPSED LEGACY — PER STIRPES — ABSENCE FOR OVER SEVEN YEARS.

1. If the executors, inadvertently, pay to some of the legatees more than their shares of the residuum, and to others of the legatees less than their shares, and the estate is not sufficient to make good the deficiency, the executors must suffer the loss, or look for reimbursement to the legatees who have been over-paid.

2. If property be devised to the children of A. B. to be divided among them, when they arrive at the age of maturity, the established rule of construction is, that all the children then living, (that is, when the eldest shall have arrived at the age of twenty-one,) shall come in for their share, whether born before or after the death of the testator.

3. The shares of those who have died in the mean time, will have lapsed into the general residuum, to be divided among the survivors; and the children born in the mean time, become entitled to their equal shares with the other children.

4. If one die after the eldest arrived at the age of twenty-one and before actual distribution, his share goes to his next of kin, and does not lapse into the residuum.

5. A person who has not been heard of for more than seven years, will be presumed to have died at the end of the seven years.

6. When the devise is directly to the children of the testator's brother and sister, the devisees take per capita, and not per stirpes.

Bill in equity by some of the legatees of Joseph Varden, against the executors and the other legatees. The bill was filed on the 30th of November, 1836, and charges, 1. That Joseph Varden, after bequeathing $1,000 to Bishop Neale, in his will made on the 7th, and proved on the 9th of October, 1809, says, "Item, I leave all my other property, both real and personal, to be equally divided among the children of my brother, Richard Varden, and my sister, Henrietta Mickum, when they arrive at the age of maturity, that is, twenty-one years old; and I hereby appoint Mr. William Brent and Daniel Brent, of Washington city, executors of this my last will and testament, to see the same carried into effect." 2. That Richard Varden, at the death of the testator, had four children, namely, the complainant, Elizabeth Moffit, widow of Robert Moffit, and the complainant, Matilda Ann Moffit, wife of the complainant, John Moffit; John Varden who had been absent the last six years, and had not been heard from; and Joseph Varden, a minor, about nineteen years old (at the filing of the bill); and Richard Varden, "born after the death of the testator." That the testator's sister, Henrietta, at the time of his death had two sons, Samuel Mickum, and William Mickum. 3. That the executors took possession of the whole estate, real and personal, rents, issues, and profits, and have from time to time paid various sums of money for the support and maintenance and education of the devisees, but the fair proportion to which the complainants are entitled has not been paid to them. 4. That the complainants, and several of the other devisees, are of full age, and entitled to demand and receive their respective shares. 5. They pray for an account, &c., and that the real estate may be sold by a trustee, &c. Richard Varden, the infant, answers by guardian that he has been informed and believes, that he was born about three weeks after the death of the testator, and insists upon his right to a share of his uncle's estate under the will. Joseph Varden, on the 4th of December, 1828, being of full age, answered, and consented to the sale of the real estate, and admits the facts stated in the bill, and that his brother Richard is entitled to an equal share of the estate. He states that his brother John went to sea, more than eight years ago, and has not since been heard of. Samuel Mickum answers for himself, and as trustee of Wm. P. Mickum, and admits the facts stated in the bill, in relation to the families of Richard Varden and Henrietta Mickum. He states that he has received less than his share, but is opposed to the sale of the real estate, at this time, (1829,) because it would not then sell for its value. He denies the right of Richard Varden, to any share of the estate, not being in esse at the death of the testator, but born perhaps five or six months afterwards. He states that John Varden left Alexandria, as a sailor, on a foreign voyage, in November, 1819, and has never since been heard of except in the early part of 1820, by the master of the vessel in which he sailed, who reported

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

that John had left him in the port to which they were bound. That if John died under age, this defendant claims a proportion of the share which would have fallen to him. That as trustee for Wm. P. Mickum under the insolvent law, he claims his share of the estate. The executors, (June 7, 1828,) answer, and admit the facts concerning the family of Varden stated in the bill, and that they took possession of the real and personal estate, as executors and trustees under the will, from which they have realized a considerable sum of money, all of which, and more, they have expended in the support and education of the devisees, in keeping the houses in repair, and in the payment of debts, and the legacy of $1,000 to the bishop; and they refer to their accounts settled in the orphans' court, and exhibit an abstract of payments made by them for the benefit of the devisees, (Exhibit A) amounting to more than $8,000. They say they have no objection to the sale of the real estate, and pray to be reimbursed out of the proceeds thereof, whatever may be found due to them for their advances. On the 16th of January, 1830, the usual notice to absent defendants having been published, as to John Varden, the bill was taken for confessed against him, and the papers in the cause were referred to the auditor, to audit and state the account of the executors, and report the sums paid by them to the devisees respectively. On the 8th of January, 1833, the auditor reported a balance due to the executors of $637.52. That the whole amount advanced by them to the devisees was $8,044.90; the equal proportion of which to each of the seven devisees, including John and Richard Varden, is $1,149.27¼. That the following devisees have received more than their respective proportions, the sums annexed to their names, namely: Joseph Varden, $158.47½; Richard Varden, $301.10½; William P. Mickum, $463.54½,—$923.12½. And that the following have received less than their respective proportions, namely: John Varden, $318.41; Elizabeth Moffit, $453.71¾; Matilda Moffit, $92.64¾; Samuel Mickum, $58.34½,—$923.12. The auditor suggests, in his report, that the sum of $923.12, which has been overpaid to some of the devisees, and the sum of $637.52, advanced by the executors, should be paid out of the sales of the land. The auditor states the objection, made by Samuel Mickum, to the claim of Richard Varden to a share of the estate, and suggests that John Varden may now be considered as dead, and that his share should go to his brothers and sisters, as his next of kin; and should not, as a lapsed legacy, fall into the residuum devised to all the children of the testator's brother and sister. On the 28th of March, 1833, the cause was set for hearing, by consent, upon the bill, answers, exhibits, replication, auditor's report, and other proceedings, and the same having been heard, the court, on the 29th of March, 1833, decreed a sale of the real estate mentioned in the bill. On the 27th of January, 1837, the trustee reported the sales made in 1833 and 1836, amounting to $721.

CRANCH, Chief Judge. The cause is now submitted for final decree. No exception is taken to the balance of $637.52, reported by the auditor, as due to the executors for advances made by them to the devisees; nor to the principle assumed by the auditor, that those who have received less than their share of those advances should be compensated out of the proceeds of the sales of the land; and that the balance due to the executors should be reimbursed out of the same proceeds, if they should be sufficient to pay both; that is, to put those, who have received less than their share of the advances, upon a par with those who have received more than their share, and also to pay the balance due to the executors. It appears by the report that it will require $923.12, to put all the devisees upon a par as to the advances made by the executors, which, added to the balance of $637.52, due to the executors, makes the sum of $1,560.64, to be raised by sales of the land, to do justice to all parties. But the sales produced only $721; and the question is, how is that money to be applied. Shall the executors receive it and apply it to the settlement of the balance due to them, and leave the deficient devisees to get their money from those who have received more than their shares; or shall those deficient receive it and compel the executors to resort to the devisees who have been overpaid? If those deficient devisees should sue the executors for the balance of their legacies, or proportion of the sales of the real estate, would it be a good defence for the executors to say that they had overpaid the other devisees? If the deficient devisees should bring a suit against the other devisees to compel them to refund the surplus which they have received, could they recover? Have not the executors made these advances and over-payments in their own wrong? And should they not have taken security to refund? I am inclined to think that the proceeds of the sales of the land should be applied to the equalization of the devisees; and that the executors must look to those devisees who have been overpaid to get back their money. Then, if the proceeds of the sales of the lands are to be divided among the devisees, it becomes necessary to ascertain who they are; and this presents the question, whether Richard Varden, who was born after the death of the testator, was entitled to an equal share with the other children. I am of opinion that he was. He was in ventre sa mere, at the death of the testator; and if the devise had been to all the children living at the testator's death, he would have been a legal devisee. See Clarke v. Blake, 2 Ves. Jr. 673; 3 Brown, Ch. 320, 2 H. Bl. 379; and the cases collected in 8 Com. Dig. Append. 425, 426, 1 Am. Ed. by Day, § 5. But by this will the property is to be equally divided among

the children "when they arrive at the age of maturity." In such case the legacies do not vest in possession until the eldest of the children arrives at the age of maturity; that is, twenty-one years of age; and in such cases the established rule of construction is, that all the children then living, (that is, when the eldest shall have arrived at the age of maturity,) shall come in for their share, whether born before or after the death of the testator. See Barrington v. Tristram, 6 Ves. 345, and the cases in 8 Com. Dig. 425, 426; Titcomb v. Butler, 3 Sim. 417; and Balm v. Balm, Id. 492.

The reason of this rule is, that when one of the legatees becomes entitled to receive his share, it is necessary to ascertain the whole number of legatees among whom the estate is to be divided. The shares of those who have died in the mean time, will, I apprehend, have lapsed into the general residuum, to be divided among the survivors; and the children born in the mean time become entitled to their equal shares with the other children. The time when the eldest of the children arrived at the age of maturity is not ascertained in these proceedings, nor the precise time of the birth of Richard Varden. He states, in his answer, that he has been informed and believes that he was born about three weeks after the death of the testator, who died on the day of the date of the will, or on the next day; for the will was made on the 7th and was proved on the 10th of October, 1809; so that unless one of the legatees came of age within three weeks after the death of the testator, Richard was entitled to his share. The time of the death of John is not ascertained. If he died before the eldest of the children came of age, his share lapsed into the residuum. If he died after, his share vested in him, and goes to his next of kin, in equal degree. He went to sea in 1819, and had not been heard of since the beginning of the year 1820. In analogy to the statute of bigamy, the presumption of death arises if seven years have elapsed since the party has been heard of; so that it may be presumed that he died in the beginning of the year 1827. The bill in this case was filed November 30, 1826, and states that the complainants, and several of the other legatees, were then of full age; so that there is a strong presumption that John's legacy vested before his death; and that it should go to his next of kin, namely, his brothers and sisters. The devise in this case, being directly to the children of the testator's brother and sister, the devisees take per capita, and not per stirpes; and each is entitled to an equal share.

MORSELL, Circuit Judge, concurred in the result of this opinion, but thought the legacies vested in possession in the legatees at the death of the testator, and not when the eldest child came of age. THRUSTON, Circuit Judge, absent.

Case No. 9,690.

MOFFITT v. GAAR et al.

[1 Fish. Pat. Cas. 610; 1 Bond, 315; 7 Pittsb. Leg. J. 346.] [1]

Circuit Court, S. D. Ohio. April, 1860.[2]

PATENTS — HOW RIGHTS ACQUIRED — SURRENDER FOR REISSUE—INFRINGEMENT BEFORE REISSUE.

1. An inventor has no legal rights or immunities under a patent, except such as are conferred by the statute. With whatever solemnity or observance of legal form it may have issued, if wanting in any substantial statutory requisite, it is a nullity.

2. The surrender of a patent for reissue is equivalent to a distinct admission made in the most solemn form, that the patent has no validity in the sense of entitling the patentee to an action for its infringement.

[Cited in Brown v. Hinkley, Case No. 2,012; Burrell v. Hackley, 35 Fed. 834.]

3. The statute gives no right of action for an infringement occurring under the original and void patent, and before the reissue of the new patent.

Letters patent of the United States were granted to John R. Moffitt November 30, 1852 [No. 9,432], for an "improvement in grain separators." This patent was surrendered and reissued to him March 23, 1858 [No. 540]. Suit was brought against the defendants [Abraham Gaar, John M. Gaar, and William G. Scott], March 22, 1859, to recover damages for the infringement of the reissued patent. After the bringing of the suit, and before the rule day for plea, the plaintiff surrendered his patent for the purpose of obtaining a second reissue. Thereupon the defendants set up, by way of plea, "that since the commencement of this action, and before the 17th day of May, 1859, to-wit: on the —— day of ——, the said John R. Moffitt surrendered to the United States the patent before that time issued to him, and for the alleged infringement of which this suit is brought, and this he is ready to verify," etc. This plea was filed October 25, 1859. To this the plaintiff demurred, claiming: first, that a plea of surrender only, was not sufficient, that it did not appear that the patent was surrendered for reissue or for any cause that rendered it void: and, second, that the reissue of a patent did not necessarily admit the invalidity of the original, and that suits upon such original, pending at the time of the surrender, might be maintained.

G. M. Lee and S. S. Fisher, for plaintiff.

N. C. McLean and H. Stanbery, for defendants.

LEAVITT, District Judge. This suit is brought for an alleged infringement of the exclusive right of the plaintiff to an improvement in grain separators, or threshing machines, secured to him by patent. The declaration avers that a patent issued to the

[1] [Reported by Samuel S. Fisher, Esq.; reprinted in 1 Bond, 315; and here republished by permission.]

[2] [Affirmed in 1 Black (66 U. S.) 273.]

plaintiff on November 30, 1852, which was afterward surrendered by him, and reissued on March 23, 1858. The infringement alleged is, that subsequently to the reissue of the patent, the defendants constructed a large number of the separators, or machines, on the improved plan of the plaintiff's improvement, and in violation of his right.

The defendants, in their plea, set up as an answer to the plainiiff's claim, that since the commencement of this action he has again surrendered his patent to the United States. To this plea the plaintiff has filed a general demurrer; and the question which it presents is, whether an action can be maintained for an infringement of a patent which has been surrendered under a provision of the statute authorizing that procedure.

In the argument of the demurrer, no case was referred to in which the perecise point before the court has been judicially determined. It is believed there is no such reported case, and we are left, therefore, without the light of any direct authority bearing upon it.

The inquiry is not, whether a surrendered patent is for all purposes to be regarded as a nullity, but whether the patentee has a remedy for its infringement. The thirteenth section of the patent act of July 4, 1836 [5 Stat. 122], provides, "That whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative or invalid, by reason of a defective or insufficient description, or by reason of the patentee claiming in his specification as his own invention, more than he had a right to claim as new, if the error has or shall have arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor for the same invention, for the residue of the period then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification."

It is also provided in the same section, "that the patent so reissued, together with the corrected description and specification, shall have the same effect and operation in law, on the trial of all actions hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing of the original patent."

It is an undoubted truth, that an inventor has no legal rights or immunities under a patent, except such as are conferred by the statute. With whatever solemnity or observance of legal form it may have issued, if wanting in any substantial statutory requisite it is a nullity. And such defect is always available as a defense in a suit for an infringement. By the sixth section of the act just referred to, every inventor, before he is entitled to a patent, is required to describe his invention or improvement "in such full, clear and exact terms," that its precise character, and the manner of its use and application, may be known. And where the invention consists in an improvement, or new and useful application of something before known, he must carefully distinguish between what is old, and what he claims as his invention. And it is every day's practice in judicial trials, to declare patents void for a failure to comply with statutory requirements.

In the liberal and benignant spirit in which our patent system has been conceived and carried out, the thirteenth section of the act of 1836, gives to the patentee a right to correct his description or specification, when its imperfection has resulted from inadvertency, accident, or mistake. This is effected by a surrender of his patent, and obtaining a new patent upon an amended specification. By this means he is protected from some of the effects of his error, and secured in the enjoyment of all his rights as an inventor, after the emanation of the new or corrected patent. But the statute gives no right of action for an infringement occurring under the void patent, and before the reissue of the new patent. In the present case, the grounds on which the old patent was surrendered, and a reissue authorized, are not before the court. But the court must presume that they were such as, by the language of the thirteenth section, authorized the surrender of the old patent, and the granting of a new one. The only condition on which this can be done, is that the original patent is "inoperative or invalid" by reason of a failure to comply with the requirements of the statute. The proceeding is, therefore, equivalent to a distinct admission made in the most solemn form, that the patent has no validity in the sense of entitling the patentee to an action for its infringement. The new patent can be operative only from its date, as affording the patentee a remedy for an infringement. The statute expressly negatives the idea that it was intended to give a retrospective operation to the new patent, and entitle the patentee to an action for an infringement previously accruing. It was, doubtless, competent for the legislature to have declared that the new patent should have this effect, but the language used imports the opposite intention. The statute provides, in express terms, that the reissued patent "shall have the same effect and operation in law, on the trial of all actions hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form, before the issuing of the original patent." Now, the allegation of the plea in this case is, that after the cause of action accrued, and after the commencement of this action the plaintiff surrendered his patent. The demurrer admits the truth of this averment. The claim of the plaintiff, then, is based on infringement occurring under the old patent,

and not for a cause of action accruing after the date of the reissued patent. Clearly the statute affords no remedy for such an infringement. Any other construction of the statute would result in the absurdity of conferring on the patentee, as the result of the surrender of what he admits to be an invalid patent, rights and immunities which he could not claim without such surrender. In other words, the legal effect of the reissued patent would be to give force and vitality to the original patent, in the face of the admission of the patentee that it was inoperative and invalid. This may be illustrated by supposing that the patentee had made no surrender, but had chosen to rest his rights on the original patent. Is it not clear, that there could have been no recovery in that case for an infringement? The patentee would have been met with the unanswerable objection, that the patent was invalid, from a fatal omission to comply with the requisition of the statute. And there can be no pretense for claiming, that by the surrender of the old patent, and the emanation of a second one, the patentee, as to infringements occurring under the original patent, is placed in a better situation, than if there had been no surrender and reissue.

In any aspect of this question, we are clearly of the opinion that the plaintiff is not entitled to recover, and that the demurrer to the plea must be overruled.

[This case was taken by the plaintiff to the supreme court, on a writ of error, where the judgment of the court below was affirmed. 1 Black (66 U. S.) 273.]

Case No. 9,691.

MOFFITT v. ROGERS et al.

[4 Ban. & A. 225.] [1]

Circuit Court, D. Massachusetts. April, 1879.[2]

PATENTS—MACHINE FOR FORMING SHOE COUNTERS—PATENTABILITY.

1. The invention patented to the complainant, May 21st, 1872, numbered 127,090, for forming heel stiffeners or counters, by means of two rollers, is not infringed by a machine, for similar purposes, patented to Louis Coté, which operates with one roller working in a stationary mould.

2. The question of the patentability of defendant's invention, as affected by the practicability of his machine when compared with the complainant's, considered.

[This was a bill in equity by John R. Moffitt against Samuel B. Rogers, Stephen Moore, and Homer Rogers, for the infringement of reissued letters patent No. 6,162, granted to complainant December 8, 1874, the original letters patent No. 127,090 having been granted May 21, 1872.]

E. F. Hodges and J. E. Maynadier, for complainant.

Chauncey Smith and T. L. Wakefield, for defendants.

LOWELL, Circuit Judge. The complainant obtained a patent in 1872, for an improvement in heel stiffeners or counters for boots and shoes. In his specification he describes a roller, shaped like the heel of a boot or shoe, set on a swing frame, and having a reciprocating or continuous rotary motion. This roller he calls a "former," and beneath it he places a roller having a profile the converse of, and conforming to, that of the "former." The mode of making a counter, as described, is, to place a piece of leather of suitable size and shape (usually called in the record a counter blank) centrally upon the "former," which is then brought down by a treadle, and the leather is rubbed or rolled, between the upper and lower rollers, as long as may be necessary to give it the shape of a counter. Two additional or auxiliary rollers are shown in one of the drawings, and are mentioned in the specification.

The defendants work under a patent granted to one Coté in 1874, in which a machine is described consisting of a spherical or spheroidal roller or head, rotating concentrically upon a shaft, in combination with a stationary mould, made concave in conformity with the head; the patent says that the head may be grooved to facilitate its grasp of the leather. The leather is drawn through, between the head and the mould, by the revolution of the head.

The Coté machine turns out counters of a spherical contour; but they are found to be useful, though they require to be brought to the exact shape of a heel by another operation. This machine has gone into use, and has proved of great advantage to the manufacturers, and the question to be decided is, which of the parties really invented the Coté machine?

The plaintiff is right, I think, in his contention that the Coté machine makes counters by rolling and rubbing, and not by moulding, and, therefore, the machine, as described, have a similar mode of operation. But the defendants insist that the Moffitt machine was not a practical working device, and would never have developed the utility of Coté's machine, and that the latter is not a mere modification or improvement of Moffitt's, but the first actual operative invention. There is no doubt that Moffitt had the idea of a machine to make counters by rolling and rubbing, as distinguished from moulding. He described a machine which he supposed would accomplish this result, but had not, at that time, proved it by experiment. About the time that Coté's patent came out, Moffitt made experiments, and built machines. It seems probable that Coté intended and expected to avoid the Moffitt patent, and that Moffitt intended and expected, by his reissue, to cover the Coté machine. And the question is, which has succeeded?

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

[2] [Affirmed in 106 U. S. 423, 1 Sup. Ct. 70.]

Upon the evidence, I find the real meritorious invention was Coté's. The plaintiff had the idea, but had not reduced it to practice so as to be able to describe a machine, which any person skilled in the art might construct, and make satisfactory counters. It is true, that if, instead of the roller or rollers of Moffitt, you make a stationary mould, so called, though it does not operate like a mould, corresponding to the forming roller, and if you crease or roughen the roller so that it will pull the leather through this stationary mould, you have the Coté machine, which is a very powerful and thoroughly working device; but it seems to require something more than ordinary mechanical skill to pass from one to the other, and without some such changes, the rollers of Moffitt will not make merchantable counters, as a practical every-day business, in a machine such as he describes. From this point of view the difference between a heel-shaped roller and a spherical one, though apparently slight, is not unimportant. The attempt of Moffitt was to make a perfect counter by one operation. A heel-shaped roller would do this, if it did anything satisfactorily; while a spherical roller makes an unfinished counter, which, to be sure, turns out to be of practical utility, because it works so rapidly and efficiently that the artisan can afford to apply another machine or operation to bring it to exact shape. The perfect counter has not yet been made, practically, by one operation. The counter which is nearly made is Coté's.

Finding these facts to be so, I must either construe the claims of the plaintiff's reissued patent to include only a machine with rollers, or hold them void as claiming more than he has described. Either way the defendants must prevail.

Bill dismissed with costs.

[On appeal to the supreme court the decree of this court was affirmed. 106 U. S. 423, 1 Sup. Ct. 70.]

Case No. 9,692.

The MOHAWK.

[Affirming Case No. 9,693. Nowhere reported: opinion not now accessible.]

Case No. 9,693.

The MOHAWK.

[7 Ben. 139.] [1]

District Court, E. D. New York. Jan., 1874.[2]

TUG AND TOW—CHOICE OF COURSES—NEGLIGENCE.

Where several courses are open to the master of a tug-boat in an emergency, and damage results to a boat in tow from the course which he chooses to adopt: *Held*, that, to warrant an action against the tug, for negligence in taking such course, clear proof must be given that the course taken was manifestly the most dangerous.

[Cited in The James P. Donaldson, 19 Fed. 266; The Allie & Evie, 24 Fed. 749; The Wilhelm, 47 Fed. 93; The Battler, 62 Fed. 614.]

In admiralty.

R. H. Huntley, for libellant.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. The tow-boat Mohawk, while engaged in taking a tow of eleven canal-boats from Port Johnson to the East river, after turning the buoy at Robbins' Reef, encountered a wind which raised so heavy a sea as to make it unsafe to attempt to continue her course across the bay against the tide, and she thereupon bore away for the shelter of the breakwater at Gowanus. As the tow was about turning the end of the breakwater, and before reaching still water, some of the canal-boats sunk, and among them, one loaded with coal belonging to the libellant, who now brings this action to recover its value from the tow-boat. The negligence charged is that the tow-boat had taken too large a tow, and, because of insufficient power to do otherwise, took a course for Gowanus, whereby she improperly imperiled the canal-boats and caused the loss of the libellants' coal.

Upon the proofs, I am of the opinion that the wind and sea which this tow encountered was no more than might reasonably be anticipated at this season of the year, in the locality in question. I am further of the opinion that the obligation is upon owners of tow-boats, towing in this locality, to limit the size of their tows to the capacity of the boats to move the tows with reasonable dispatch to the safest shelter at hand, in case of meeting a wind too heavy to permit the tow to keep on across the bay against the wind.

For a tow situated as this one was, several courses are open. She may turn back into the Kills, or go down to Quarantine, or keep up along the Jersey shore, or bear away before the wind for Gowanus breakwater. The latter course was selected by the Mohawk. It is made evident by the proofs that, with a tow of eleven boats, no other course was possible for her, owing to her inability to move such a tow against the wind and tide. But it is not shown by a clear preponderance of evidence that any of the other courses above indicated as open for a boat so situated involved less danger to the tow than the one selected by this boat.

Upon the evidence produced in this cause, I am unable to decide that the course which this boat pursued is not as safe a proceeding as either of the others.

The master of a tow situated like the present should not be held guilty of negligence in selecting one of several courses open in

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

[2] [Affirmed by the circuit court; case unreported.]

such an emergency, unless it be made to appear, by a clear preponderance of evidence, that he selected a course manifestly more dangerous than the others. In the absence of a clear weight of evidence to that effect, I must hold that the negligence charged has not been proved against the tow-boat, and the libel must be dismissed.

This decision was affirmed by the circuit court on appeal; [case unreported.]

MOHLER, The MOLLIE. See Case No. 9,701.

Case No. 9,694.

MOHR v. COTZHAUSEN.

[15 Alb. Law J. 392.]

Circuit Court, E. D. Wisconsin. April 4, 1877.

JURISDICTION OF COURT OF SPECIAL AUTHORITY—WHERE ESTABLISHED.

Where the jurisdiction of a court of special authority appears upon the record, its action and decision can no more be collaterally inquired into than can the action and decision of a court that has authority over all questions and controversies.

Case No. 9,695.

MOHR et al. v. MANIERRE.

[7 Biss. 419;[1] 9 Chi. Leg. News, 270.]

Circuit Court, E. D. Wisconsin. April 4, 1877.[2]

REAL PROPERTY—SALE OF LUNATIC'S ESTATE—CONFLICT OF LAWS—COLLATERAL ENQUIRY.

1. In Wisconsin, where a proper case is made in a petition to the county court, for a license to sell the estate of a lunatic, the power of the court is set in motion and it has jurisdiction of the case; and the fact that the court had decided erroneously as to notice, etc., cannot collaterally affect the rights of a bona fide purchaser under the sale decreed by the court.

2. As to general principles of law the federal court has the right to follow its own views, and is not bound by the decisions of the state courts. [Cited in Marshall v. Wabash R. Co., 46 Fed. 271.]

3. Where the jurisdiction of a court of special authority appears upon the record, its action and decision can no more be collaterally inquired into than can the action and decision of a court that has authority over all questions and controversies.

Ejectment for the recovery of about thirteen acres of land on the borders of Lake Geneva, in Walworth county. The land belonged to Mathias Mohr, against whom a commission of lunacy was obtained, and a guardian having been appointed under the laws of this state, application was made to the county court of Walworth county, for the sale of the land, for the support of the lunatic or to pay his debts. A sale was accordingly made of this and other tracts of land, and the defendant [Anna Manierre] claims under the sale. The plaintiff Mohr, having recovered his reason, and the commission of lunacy being revoked, and he having in the meantime transferred an undivided interest in the property to Mr. Cotzhausen, brought this action of ejectment, on the assumption that the proceedings in the county court of Walworth county, which resulted in a sale of the land, were illegal, and that no title passed.

Cotzhausen, Sylvester & Scheiber, for plaintiffs.

S. U. Pinney, for defendant.

DRUMMOND, Circuit Judge. Of course the question turns upon the validity of the sale made by the guardian of the lunatic. If that were invalid, then the plaintiffs are entitled to recover. The petition which asked for the action of the court, was not strictly in compliance with the statute, the allegations not being so full as the statute seemed to require; and perhaps there might be some doubt, if it were a new question, whether or not the allegations of the petition were sufficient. But the decisions, both state and federal, seem to agree that a petition such as was filed in this case was sufficient to set the court in action; in other words, to show that the court was called upon to proceed in the way pointed out in the statute to obtain the necessary means from the sale of the land for the payment of debts or the support of the lunatic. And as to this very petition, in a case that went up to the supreme court of the state upon a sale of a portion of the property which took place at the same time as that under which the defendant claims, that court says: "The petition may be defective in some particulars, but it is sufficient in substance to call into exercise the power of the court." Mohr v. Tulip, 40 Wis. 76. It was, therefore, so far as the petition is concerned, sufficient to give jurisdiction to the court. This is the effect, also, of the decisions of the supreme court of the United States, in two cases that went up from this state. Grignon's Lessee v. Astor, 2 How. [43 U. S.] 319; and Comstock v. Crawford, 3 Wall. [70 U. S.] 396. And although they were cases decided under the territorial laws, the principles involved were substantially the same. And in those cases, the supreme court of the United States held, that it was the petition that gave jurisdiction to the court, and set its machinery in motion, and that, if upon the face of the petition it appears that the objects which the law had in view in such cases were clearly set forth, that was sufficient. So there is a concurrence of opinion both in the federal and in the state courts that the petition was sufficient. The law of Wisconsin applies substantially the same conditions to the sale of the real estate of lunatics, as to decedents.

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

[2] [Affirmed in 101 U. S. 417.]

We come to another question, where there is a difference of opinion between the federal and state courts, upon this point; the statute required a certain notice to be given of the time and place for hearing the petition, and it seems the requisite notice was not given. The state court holds that was in the nature of process to bring the parties before the court, and was jurisdictional; that unless the notice which was required by the statute was given, the court had no jurisdiction to act, and therefore, all proceedings before it were void. The supreme court of the United States takes a different view, and holds in the cases referred to, that the proceeding to sell real estate in such circumstances, is one in rem and that there are no adversary parties. The manner in which the precedent was established in this state, as I understand, was this: A case was decided by a circuit judge, (it being understood that the case would go to the supreme court of the state,) in a somewhat informal manner. A similar point in principle arose in that case, and it was held that the adjudication of the probate court did not foreclose the party in a collateral proceeding. That case went to the supreme court of this state. Sitzman v. Pacquette, 13 Wis. 292.

The circuit judge, having in the meantime become one of the judges of the supreme court, did not sit in the case, and it was submitted to two judges. The judges differed in opinion on the case, and so the judgment of the court below stood affirmed; and this has been the foundation of a rule, which we must consider as established in the supreme court of the state, that it is a question of jurisdiction—namely: whether proper notice had been given for the hearing; because, in accordance with the principle decided in the first case, they have proceeded in other cases referred to in Mohr v. Tulip, 40 Wis. 66; in the last case though, Salter v. Hilgen, Id. 363, the court cites with approval, the language of Dixon, C. J., in Tallman v. McCarty, 11 Wis. 401, as follows; "No order which a court is empowered, under any circumstances, in the course of a proceeding over which it has jurisdiction to make, can be treated as a nullity, merely because it was made improvidently, or in a manner not warranted by law or the previous state of the case. The only question in such a case is, had the court or tribunal the power, under any circumstances, to make the order or perform the act? If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive, until reversed by a direct proceeding for that purpose. In the case before us, it was for the circuit court to determine, in the first instance, when and how the authority, with which it was invested to direct a sale, should be exercised; and if, in so doing, it committed an error, no matter how egregious, whether in the construction of the statute, or otherwise, still the order was valid until reversed on appeal. It was a mere error or irregularity which could only be taken advantage of by appeal, but cannot be inquired into in this proceeding."

This is in harmony with the ruling of the supreme court of the United States in the two cases referred to. In the original case of Sitzman v. Pacquette, supra, where an opinion was given by Judge Paine, that the decision of the court below was correct, he seemed disinclined to follow the rule of the supreme court of the United States in Grignon's Lessee v. Astor, supra, and held it should not apply to that case. Judge Cole gave an opinion to the effect that the decision in Grignon's Lessee v. Astor, ought to rule that case. It is difficult to understand that there is any difference in principle to affect the validity of the sale in the two cases.

I think that the doctrine established in the case of Grignon's Lessee v. Astor, followed by the decision of the case of Comstock v. Crawford [supra], is founded upon the clearest principles of justice and of equity. It is this: That when, in a case like this, a court has jurisdiction by the filing of a proper statement of a case before it, to proceed and adjudicate upon the case, and has so done, that wherever a decree or judgment there entered comes up collaterally, the decision of the court is conclusive upon the rights of parties. In other words, where it is a question, whether or not there was proper notice in conformity with the law, and the court has decided that there was, and has adjudicated upon that assumption, or upon the sufficiency of any proof on which it acted in the case; collaterally, the decision of the court must be considered as conclusive. So that when a man seeks to purchase real property, and the title depends upon the adjudication of a court of competent jurisdiction, he need not look further than the decree and the sale under it; he is not bound to follow every step which may have occurred in the course of the proceeding to see whether this or that fact exists, or this or that technicality has been complied with.

The only question is, had the court jurisdiction of the case? This was the rule laid down in Grignon's Lessee v. Astor. It is founded, as I think, upon the plainest principles of right. This was followed in the case of Comstock v. Crawford, although the decisions of the supreme court of this state, which laid down a different rule, were there cited by counsel, and it cannot be doubted that the supreme court of the United States dissented from the opinion of Judge Paine in Sitzman v. Pacquette. See 3 Wall. [70 U. S.] 403, 404.

Now if the question is, whether or not a court has jurisdiction of a case, must we follow the decisions of the supreme court of this state, when those decisions are contrary to the decisions of the supreme court of the United States? For instance, the supreme

court of this state has said that whether or not due notice was given, was a question of jurisdiction. The supreme court of the United States has said that it is not a question of jurisdiction, and has clearly stated in Grignon's Lessee v. Astor, what constitutes jurisdiction in a court. I think we must follow the rule laid down by the supreme court of the United States, and especially when that court has had before it a case, going up from this state, where these decisions were cited and considered. Although one was under the territorial law and the other under the state law, the principles involved in the cases were precisely the same, and if these cases were decided rightly in the supreme court of the state, and the federal courts were bound by them, then the supreme court of the United States ought not to have decided Comstock v. Crawford as it did.

I am fully aware of the very serious consequences growing out of a difference between the federal and state courts, and especially in deciding any question affecting the right to real estate. The rule would be undoubtedly different in the state court, from that which we lay down here, following the decision of the supreme court of the United States. But if we examine Grignon's Lessee v. Astor, and Comstock v. Crawford, it will be found that this court cannot hold this sale invalid without reversing the opinion of the supreme court in each of these cases, and saying that as the supreme court of this state has decided differently, we must follow the decision.

I admit it seems rather difficult to lay down any absolute rule as to where the highest court of the state is to be our guide, but this, I think, has been established by the supreme court of the United States, that as to a general principle of law, the federal court has the right to follow its own views of the law and is not bound by the decision of the state court. Now what shall constitute jurisdiction in a court is a general principle of law, and, as I understand, the supreme court of the United States would hold in this case that the county court of Walworth county had jurisdiction of the case. It makes no difference that the county court of Walworth county was a court of a particular jurisdiction, that is, jurisdiction over particular subjects.

Its action and its decision, within its province, were just as binding as though it had general jurisdiction over all subjects and controversies. This is a universal rule.

Those courts whose decisions were considered in the two cases referred to, were courts of a particular jurisdiction, and yet the supreme court of the United States held they were conclusive.

On these principles, therefore, the judgment of the court will have to be in favor of the defendant in this case, on the ground that a judgment of the county court of Walworth county having ordered a sale of the property of a lunatic, and the presumption being that all the requisites of the law had been complied with as found by that court; that the sale was made, and reported to the court and confirmed, we must hold the title under the sale to be valid. And it will be recollected that the defect here is not one included in section 62 of chapter 94 of the Revised Statutes of Wisconsin, or section 23 of chapter 93 (if that applies), 2 Taylor, 1178 and 1193, provided we are correct that the court had jurisdiction. The license to sell was given. A bond was duly approved. The oath was taken. Notice of the time and place of sale was given as prescribed. The property was sold, and the sale confirmed by the court to a person who purchased in good faith.

It is not material, as I understand, that a portion of the property was the homestead; this property was no part of the homestead, and because it may be that a portion of the property sold, ought not to have been sold, it would have no effect upon this particular part of the property. Neither is there any evidence on the face of the record of the case in the county court, from which fraud is established, so as to connect the purchaser with it and thereby prevent him from being a purchaser in good faith.

[The judgment in this case was affirmed upon error in the supreme court, Mr. Justice Field delivering the opinion. 101 U. S. 417.]

For cases in which the federal courts are not bound by the constructions or decisions of the highest state tribunals, consult Bradley v. Lill [Case No. 1,783]; Ex parte Robinson [Id. 11,932]; Schenck v. Marshall Co. [Id. 12,449].

MOIES (LONSDALE CO. v.). See Cases Nos. 8,496 and 8,497.

Case No. 9,696.

MOIR v. The DUBUQUE.

[3 Chi. Leg. News, 145; 4 Am. Law T. Rep. U. S. Cts. 84.]

District Court, E. D. Michigan. Jan. 17, 1871.

CONFLICT OF LAWS — ADMIRALTY JURISDICTION — STATE STATUTE — LIEN CREATED THEREBY.

1. The remedy by proceedings in rem, given to the state courts by the watercraft law of Michigan, is an exercise of admiralty jurisdiction, and in conflict with the judiciary act of 1789 [1 Stat. 73], and therefore void.

2. These proceedings being the only ones authorized for the enforcement of the liens provided for by the act, and being illegal, the liens themselves fall with the remedy, and are also void.

3. Maritime liens cannot be created by state statute.

[Cited in The Kate Tremaine, Case No. 7,622.]

4. The power of a state to pass laws effecting vessels fully considered, and various authorities cited and reviewed.

The claim of George Moir, as set up in his petition, and proven at the hearing, is for

services in repairing the machinery of the vessel, as follows:

1868. April 1, to 10 days' repairing machinery @ $3	$ 30 00
1869. March 1, to 58 days' repairing machinery	174 00
	$204 00

These repairs were furnished at Detroit, the home port of the vessel, and a lien on account of them is claimed, not by the maritime law, but by the laws of the state of Michigan. Laws Mich. 1864, p. 107; Laws Mich. 1865, p. 672; Laws Mich. 1867, p. 112. This claim is opposed by the Second National Bank of Detroit, intervening for its interests as mortgagee, on several grounds set forth in its exceptions and answer, the only one of which material to be stated for the purposes of this decision, is substantially that the said state laws of Michigan, purporting to create a lien in favor of such claim for repairs in the home port, are invalid.

A. Russell, for petitioner, George Moir.

H. B. Browne, for claimant, the Second National Bank.

LONGYEAR, District Judge. The following points are well established, and are not disputed in this case: That a lien upon the vessel must at some time have existed in favor of the petitioner's claim, to entitle him to participate in the proceeds of the vessel; that the repairs constituting the basis of the claim, having been furnished in the home port of the vessel, no lien exists by the maritime law, and therefore that the claim of lien is based solely on the statutes of Michigan above cited, commonly called "the Watercraft Laws." The act upon which this claim of lien is based, was passed in 1864. Laws Mich. 1864, p. 107. Section 1 repeals a previous act upon the same subject. (In previous act and amendments thereto, see 2 Comp. Laws Mich. 1313.) Section 2 as amended in 1867 (Laws 1867, p. 112), so far as it relates to this case, provides that: "Every water craft of above five tons burthen, used, or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon. First. For all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft, * * * on account of work done * * * by mechanics, tradesmen or others in or about the * * * repairing, fitting, furnishing or equipping such craft." The residue of the act, with a few exceptions, which will be hereafter noticed, is devoted to prescribing the procedure for enforcing the lien created by section two. The process and proceedings are in rem, against the vessel by name, and in close analogy to the process and proceedings in the federal admiralty courts. It is unnecessary to recite these portions of the act, as there is no dispute as to their character.

In 1844, the supreme court of the United States adopted a rule in admiralty (rule 12), authorizing process in rem, against "domestic ships, where, by the local law, a lien is given to material men for supplies, repairs, or other necessaries." In December term, 1858, rule 12 was amended so as to take from the admiralty courts the process in rem in such cases, for the reason expressly stated by the court in Maguire v. Card, 21 How. [62 U. S.] 251, that such right had been assumed upon the authority of a lien given by state laws, and that such assumption had its foundation in an error which originated in that court in the case of The Gen. Smith, 4 Wheat. [17 U. S.] 439. Since the alteration of rule 12, in 1858, it has been uniformly held by the supreme court of the United States, in a large number of cases, and may now be considered as settled law, that all state laws conferring admiralty jurisdiction upon the federal courts or upon state courts, or in any manner authorizing proceedings in rem against domestic vessels as in admiralty, for the enforcement of maritime liens, are in direct conflict with section 9 of the judiciary act of 1789, and therefore null and void. See Maguire v. Card, 21 How. [62 U. S.] 248, 251; The St. Lawrence, 1 Black [66 U. S.] 522; The Hine v. Trevor, 4 Wall. [71 U. S.] 555; The Belfast, 7 Wall. [74 U. S.] 624; also The Josephine, 39 N. Y. 22.

In The Hine v. Trevor, an exception was made in favor of such state laws, of cases arising on the lakes and their connecting waters; which exception was founded exclusively on the act of congress of February 26th, 1845 [5 Stat. 726], by which concurrent jurisdiction in such cases was expressly conferred upon the state courts. But in the same case it was decided that state statutes which attempt to confer upon state courts a remedy for marine torts and marine contracts, by proceedings strictly in rem in all cases not covered by the act of 1845, were void, because they were in conflict with the act of 1789. That decision, as to all cases of marine torts and marine contracts not arising on the lakes and their connecting waters has not been in any manner changed or affected, but it is the law to-day. Not so, however, as to the excepted class of cases. The Hine v. Trevor, was decided in 1866. In 1868, the supreme court, in the case of The Eagle, 8 Wall. [75 U. S.] 25, held that the act of February 26th, 1845, must be regarded as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury, when requested, and that the district courts must be regarded as having conferred upon them a general jurisdiction in admiralty upon the lakes and the waters connecting them, by the 9th section of the original act of 1789. This of course wipes out the exception made in The Hine v. Trevor in favor of cases of marine torts and contracts arising on the lakes and connecting waters, and makes the rule there laid down invalidating state statutes, which confer upon state courts a remedy by proceedings strictly

in rem applicable to all cases alike. Since the case of The Eagle, therefore, it must be regarded as settled law that all state statutes which attempt to confer upon state courts a remedy for marine torts and contracts by proceedings strictly in rem in all cases are void and of no effect. The learned counsel for the petitioner has called the attention of the court to an ingenious attempt which has been made to draw a distinction in favor of such state statutes between cases in which a lien existed by the maritime laws, and those in which it did not exist, and to deduce therefrom the conclusion that while state statutes cannot confer upon state courts the right to proceed in rem in the former class of cases, it may in the latter. (See 4 Am. Law Rev. 664–670. And the learned counselor argued from this, that as no lien attached by the maritime law to a contract for repairs in the home port, therefore the state statute of Michigan conferring upon the state court jurisdiction to enforce such contract by proceedings strictly in rem, is not in conflict with the act of 1789, and is therefore valid. The supreme court has not yet had occasion to speak authoritatively upon this question. All the cases which have been before that court involving the validity of these state statutes, have been cases in which a lien existed by the maritime law. I think, however, that the distinction thus attempted to be drawn is founded in a misconception of the true meaning and scope of the jurisdictional clause of the 9th section of the act of 1789. That clause is as follows: "And shall also have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 76.

It will be observed that the exclusiveness of the jurisdiction is made to depend upon the "cause," and not upon the question of lien in any sense whatever. Jurisdiction attaches to the cause, the contract, the claim, without any reference whatever to whether there is or is not a lien. The question of lien becomes important only when we come to consider the remedy, and the proceedings to enforce it. If there be no lien, the remedy is enforced by proceedings in personam alone. If there be a lien, then either in personam or in rem. The saving clause is of a common law remedy, where the common law is competent to give it. Now the common law is competent to give the remedy by proceedings in personam, but not in rem. But the proceedings in rem can take place only where there is a lien. Therefore if the cause of action be maritime in its character, and there be a lien upon the vessel, the remedy to enforce the lien must be sought in the admiralty alone, because the common law not being competent to give this remedy, it is not included in the reservation, and the jurisdiction of admiralty is exclusive. No matter how the lien arises, whether it attaches by the maritime law, or is created by statute. In either case it is a mere incident to the cause or claim, and if that be maritime in its character, then the lien is a maritime lien, and the exclusive jurisdiction of admiralty attaches.

The contract or claim in this case is for repairs, and clearly constitutes a cause of admiralty and maritime jurisdiction. Dunl. Adm. Prac. 41–43; The Josephine, 39 N. Y. 22; De Lovio v. Boit [Case No. 3,776]; The Gen. Smith, 4 Wheat. [17 U. S.] 438; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611; Andrews v. Wall, 3 How. [44 U. S.] 568, 573; The St. Lawrence, 1 Black. [66 U. S.] 529; 12th Adm. Rule as amended in 1858. This case therefore so far as the validity of the procedure part of the statute of Michigan in question is involved, is fully covered by the cases cited, and on the authority of those cases, as well as on principle, I hold that so far as that statute confers upon the state courts jurisdiction of proceedings in rem to enforce a lien for repairs as in this case, or for any contract, claim or cause of action, maritime in its character, it is in conflict with the 9th section of the judiciary act of 1789, and is void.

The question as to the validity of a state law conferring such jurisdiction upon state courts in cases other than those above specified, depends upon other and different considerations. But as that question is not involved in this case, I shall refrain from discussing it in this connection. What has been said of course has no relation to proceedings upon executions, or even attachments, authorized by state statutes against boats and vessels, in suits where there is a personal defendant or to proceedings to enforce liens created by any such statute, according to the cause of the common law; but has relation solely to suits and proceedings in which the vessel is proceeded against as the offending thing according to the course of the maritime law. I have said this much in regard to the remedy prescribed by the statute of Michigan in question, on account of the bearing that the question of its validity is deemed to have upon the main question in the case which I shall now proceed to consider. That question is as follows: Does the lien created by section 2 of the statute of Michigan of 1864 (Laws 1864, p. 107, amended in 1867,—Laws 1867, p. 112) remain, notwithstanding that the only remedy prescribed by the statute for the enforcement of the lien, has failed and cannot be resorted to? The statute of 1864 is substantially a re-enactment with some additions, of the statute repealed by section 1, with the exception that in the former statute no provision was made for a hearing and adjudication by the court of uncontested claims, but the vessel was authorized to be sold, and the proceeds distributed in a summary manner, unless released on bond being given. In a suit brought upon a bond which had been given

for the discharge of the vessel seized under that statute, the supreme court of Michigan held that the provision of the statute authorizing a sale of the vessel without trial and judgment, was in violation of that provision of the state constitution that "no person shall be deprived of life, liberty or property, without due processoof law." Parsons v. Russell, 11 Mich. 113. But what is more important to the present consideration is, that the majority of the court held, virtually, in that case that because of the failure of that one important feature of the remedy provided, the whole act failed. The court did not say this in so many words, but the conclusion they arrived at cannot be explained on any other hypothesis, and Judge Manning, in his dissenting opinion, so understood it.

I might be justified in stopping here and resting my decision upon that time-honored custom of the federal courts to accept the decision of a state court of last resort, giving construction to a state law or state constitution, as final, and say, the supreme court of Michigan having decided that in a former statute in which the lien and the remedy therein provided, bore the same relations to each other as the lien and the remedy bear to each other in the present statute, the remedy having failed for unconstitutionality, the whole statute is void; therefore, the remedy in the present statute having failed for a similar reason, the present statute is also void. But I do not choose to rest my decision on so important a question, on that basis alone. Aside from the case of Parsons v. Russell, the attention of the court was called to but two cases, (and I believe there are no others reported) in which the distinct question here under consideration was in any way involved. The first of these cases was that of The St. Joseph [Case No. 12,229], in the Western district of Michigan. In that case, this question was not presented. It seems to have been taken for granted by counsel and court that the lien existed, and the only question considered and adjudicated, was that of priority as between such lien, and the previously recorded mortgage. The other case was that of In re Scott [Id. 12,517], in bankruptcy, in the Northern district of Ohio, in which state there is a statute similar to the one here under consideration. The contest in that case was also between state lien-holders and mortgagees; and although the distinct question here under consideration was ably presented by the counsel for the mortgagees (whose printed argument is before me) the learned judge who made the decision, did not in his opinion as published, enter into a discussion of the question, or give any expression of his views upon it, any further than to hold in general terms, that the state of Ohio having by her statutes declared that the class of claims then in question should be liens, and should at once attach upon the property at the time of the creation of the debt, that court, as a bankruptcy court, recognized those statutes, and would be governed by them so far as possible in the distribution of the proceeds of property sold, and in the hands of the assignee. Therefore, aside from the case of Parsons v. Russell, the question under consideration, viz: "Whether the lien remains the remedy prescribed by the statute creating it for its enforcement, having failed," may be considered an open question, unenlightened by any former adjudication, and unembarrassed by any conflicting judicial opinions. To that question we will now direct our attention. The lien provided for by the statute was unknown to the common law, or to equity jurisprudence. It is solely the creature of the statute. It was a new right conferred upon a creditor. Where a right originally exists at common law, and a new remedy is given by statute without any negative, the party has his election, either to sue at common law, or proceed under the statute. But where a new right is created by statute, and a specific remedy provided for its enforcement, the remedy is confined to that given by the statute. Sedg. St. Const. 93, 94, and cases there cited.

We see then that if the lien remains at all, it is by virtue of the naked declaration of the right of lien contained in section 2 of the act, without any provision whatever in the statute, or recognized process for its enforcement, unless, as was contended on the argument equity will reach out and enforce it by its process and decrees. It may be seriously questioned whether the legislative intent having been declared as to the remedy, all other remedies are not excluded, and, that remedy failing, whether any remedy whatever remains, even in equity. "Expressio unius, est exclusio alterius." The question whether or not an equitable remedy exists, comes in question here, however, only incidentally; and aside from the consideration above stated, it depends primarily, upon the same question involved in the assertion of the right to participate in surplus proceeds here under consideration, viz. whether, that part of the statute providing a remedy for the enforcement of the lien being void, the part providing for the lien itself is valid. A statute may no doubt be good in part, and bad in part. This depends wholly upon the relations of the different parts to, their connection with, and dependency upon, each other. Judge Cooley, in his recent work on Constitutional Limitations, lays down the rule in this respect, as gathered from the numerous authorities cited by him, and I think with entire correctness. I cannot do better than to quote his language. He says: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so

connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. * * * If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed wholly independent of that which is rejected, it must be sustained. * * * If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently; then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." See Cooley, Const. Lim., 177–179, and the cases there cited, particularly Warren v. Mayor, etc., of Charlestown, 2 Gray, 99; State v. Com'rs of Terry Co., 5 Ohio St. 507; Slauson v. City of Racine, 13 Wis. 398.

Let us apply this rule to the statute under consideration.

First. Section 2 of the act, in which a lien is provided for, does not declare when the lien shall attach, (differing in this respect from the Ohio statute, under which the Case of Dwight Scott, cited above, was decided, that statute declaring that the lien shall attach at once on the creation of the debt,) and we are therefore left to inference, or to other provisions of the act to ascertain when the lien was intended to attach. Section 2 simply provides that certain specified "water craft" "shall be subject to a lien thereon," for certain specified debts. Section 3 provides that "any person claiming to have any such lien, may file a complaint, etc." Section 12 provides that all liens, "which shall not be filed hereunder, before sale under decree or judgment, as hereinafter provided, shall cease." And section 45 provides that such lien shall not be enforced as against bona fide purchasers without notice, after one year from the time the same accrued, unless complaint shall have been filed within that period. It seems to me that these provisions admit of but one rational construction, and that is, that by the operation of section 2, the creation of the debt conferred upon the creditor the right to obtain a lien by complying with the other provisions of the statute in relation to filing of complaint, etc. This right to obtain a lien thus accruing on the creation of the debt, was inchoate merely, and could become complete only by filing the same in the proper court, in the form of a complaint under section 3, setting up the facts upon which the party's claim to have a lien is based. If I am right in this construction, then it is clear that the right of a lien, under section 2, was made so dependent upon the void portions of the statute for its full and complete existence and exercise, that it cannot be sustained under the rule above laid down.

Second. Section 33 fixes the order and priority in which all claims, filed before sale, shall be paid; and section 34 does the same thing as to claims filed against surplus proceeds. Section 45 fixes certain limitations as to proceedings under the act, and is in the following words: "Liens may be enforced under this act at any time within six years from their origin: provided, that no lien shall be enforced against a water-craft in the hands of a bona fide purchaser without notice, unless the complaint to enforce the same shall have been filed in the proper courts, in the county where the party claiming the lien resides, within one year from the time when the same accrued." These provisions depend for their validity upon, are, in fact, a part of the proceedings prescribed for the enforcement of the lien, and of course fall with those proceedings. If these provisions had been independent, such might not have been the effect, but it will be observed that the preference prescribed is dependent upon, or at least can be applied only in case of a sale of the vessel under the act, and that the limitations prescribed are confined to proceedings to enforce liens under the act. These provisions, therefore, can have no general application, and no application whatever, other than in proceedings under the act, and those proceedings being void, these provisions can have no application whatever. Can it be presumed that the legislature would have passed section 2, providing for liens, without fixing the order of preference in which such liens should be paid as expressed in sections 33 and 34, or prescribing the limitations of proceedings to enforce the same as expressed in section 45? Clearly not. To enforce section 2 without the qualifications and restrictions of sections 33, 34, and 45, as it must be enforced if at all, in view of the fact that those sections are void and of no effect, would be to enforce that which the legislature did not enact. It is clear to my mind, therefore, that section 2, and the other sections named, are so mutually connected with and dependent on each other as to warrant the belief that the legislature intended them as a whole; and that those other provisions being void, no effect can be given to section 2.

Third. Maritime liens cannot be created by state statutes. The Belfast, 7 Wall. [74 U. S.] 644. By the maritime law, no lien exists for repairs furnished in the home port; and so as to several others of the matters provided for in the state statute here under consideration. The contract for repairs, however, as we have already seen, is a maritime contract, and, as such, the admiralty courts have and entertain jurisdiction to enforce it, in

personam. The contract being maritime in its character, if congress were to enact that a lien should attach on account of it, can there be any doubt that the lien thus created would be a maritime lien, and as such enforceable in the admiralty, in rem, the same and in the same manner, as in case of a lien for repairs finished in a foreign port? I think clearly not. Now, when we once recognize the existence of a lien, on account of such contract, it can make no difference by what authority it was created, whether federal or state, it is a maritime lien all the same. A lien, in any case, is but an incident, and of course takes its character from the debt or contract, and the debt or contract being maritime, the lien is maritime also, by whatever authority created. In order to arrive at the effect and true intent of the statute, we must look at it as a whole, just as it came from the hands of the legislature, and, so doing, we see, in addition to the fact that the contract is maritime in its character, that the lien created is invested with all the attributes of a maritime lien. The statute treats the vessel as the offending thing, to be proceeded against and condemned by name, not to be reached through a personal defendant, and to the extent of his interest merely, as in the case of a common law remedy, but by process purely in rem, and without any reference to the extent of the interest of the owners or persons with whom the contract was made; a process known only to courts exercising admiralty and maritime jurisdiction, and applicable only to maritime liens.

If, therefore, the lien declared by section 2 is recognized as valid, it must be so recognized as a maritime lien, and, if so recognized, then jurisdiction for its enforcement in the admiralty cannot be refused, which is a recognition of the right of a state legislature to confer jurisdiction upon the federal courts, a power which no one will contend belongs to such legislature, under the present state of decision in the supreme court of the United States. The Orleans v. Phoebus, 11 Pet. [36 U. S.] 184. It is true, the supreme court did at one time authorize the enforcement of such liens in the district courts (see rule 12), but this authority was afterwards taken away (see rule 12, as amended in 1858), and it was subsequently declared by the court (see The St. Lawrence, 1 Black [66 U. S.] 530) that the state lien "was enforced, not as a right which the court was bound to carry into execution upon the application of the party, but as a discretionary power which the court might lawfully exercise for the purposes of justice, where it did not involve controversies beyond the limits of admiralty jurisdiction." Section 2 declaring a lien, and the remaining portions of the statute under consideration, have therefore such an intimate mutual relation to and connection with each other, as to stamp the lien created by section 2 as a maritime lien, a lien which a state legislature has no power to create. I do not wish to be understood as expressing an opinion that a state possesses no power or authority, as between her own citizens, and in relation to property within her jurisdiction, to declare what shall and what shall not constitute liens, and to prescribe remedies for the enforcement of them, through a personal defendant or otherwise so long as such liens and remedies do not go beyond the spirit of the reservation contained in the 9th section of the judiciary act of 1789, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," and do not invade the domain of admiralty jurisdiction.

Having arrived at the conclusions above stated, a consideration of the other questions raised becomes unnecessary. The petition must be dismissed.

[For a libel against the same vessel filed by the master, see Case No. 4,110.]

MOIR v. The DU SAQUE. See Case No. 9,696.

Case No. 9,697.

MOITEZ v. The SOUTH CAROLINA.

[Bee, 422.] [1]

Admiralty Court, Pennsylvania. 1781.

SEAMEN—WAGES—GOVERNMENT VESSEL — LIBEL.

Mariners enlisting on board a ship of war or vessel belonging to a sovereign independent state, cannot libel against the ship for wages due.

[Cited in Briggs v. Light Boat, 93 Mass. (11 Allen) 180.]

[This was a libel by Pierre de Moitez against the South Carolina.]

On a plea to the jurisdiction, it was adjudged, that mariners enlisting on board a ship of war, or vessel belonging to a sovereign independent state, cannot libel against a ship for wages due.

Case No. 9,698.

MOKE et al. v. BARNEY.

[5 Blatchf. 274; [2] 2 Int. Rev. Rec. 157.]

Circuit Court, S. D. New York. Oct. 27, 1865.

CUSTOMS DUTIES—ACTION TO RECOVER BACK—PROTEST—UNASCERTAINED AND ESTIMATED DUTIES—FINAL LIQUIDATION.

1. The act of February 26th, 1845 (5 Stat. 727,) requiring a written protest against the payment of duties, in order to sustain an action against the collector, to recover them back, applies to the payment of unascertained and estimated duties, which are to be afterwards liquidated, and the protest may be made at the time of the final liquidation.

2. The fact that the collector exacts duties in violation of instructions, does not supply the want of a protest.

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

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

This was an action against [Hiram Barney] the collector of the port of New York, to recover back an alleged excess of duties paid by the plaintiffs [George Moke and others], but not under protest, on the importation of certain merchandise which was subject to duty by weight, under the act of March 2d, 1861 (12 Stat. 178). At the time of the entry, the duties were estimated on a given number of pounds, as shown by the entry, and the amount thus estimated was paid and a permit granted to land the goods, with the usual directions to the government weigher to weigh the selected packages. The goods were weighed and reported with the customary allowance for tare, but no allowance for draft. This occurred at the final liquidation of the duties, and after the secretary of the treasury had issued his circular of March 21st, 1861, instructing the officers of customs that allowances on account of tare and draft would be governed by the 58th and 59th sections of the act of March 2d, 1799 (1 Stat. 671, 672).

George T. Curtis, for plaintiffs.

E. Delafield Smith, Dist. Atty., and Mr. Lowrey, for defendant.

NELSON, Circuit Justice. The only question presented in the case is—are the plaintiffs entitled to recover the excess of duties, not having protested at or before the final liquidation of them? This court has decided (Napier v. Barney [Case No. 10,009]) that, under the 58th and 59th sections of the act of March 2d, 1799, the merchant is entitled to allowances or deductions for both tare and draft, on articles the duties on which are to be ascertained by weight.

The act of February 26th, 1845 (5 Stat. 727), which revived the right of action against the collector to recover back an excess of duties paid, which right had been taken away by the 2d section of the act of March 3d, 1839 (5 Stat. 348) as interpreted by the supreme court, in Cary v. Curtis, 3 How. [44 U. S.] 236, contains this provision: "nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." A previous clause in the section had declared, that nothing in the act of 1839 should take away, or be construed to take away, or impair, the right of any person, who had paid, or should thereafter pay, money, as and for duties, under protest, in order to obtain his goods, to maintain an action against the collector to recover back duties not authorised or payable by law. The construction that has been uniformly given to this act of 1845, since it became a law, is, that to entitle the merchant to a suit against the collector to recover back duties illegally exacted, there must not only be a protest made against the payment at or before the payment, but it must be in writing, and in the form, substantially, that is prescribed by the statute. The question before us is, whether or not the facts stated and agreed upon in this case take it out of this construction of the act of 1845, no protest in writing having been made.

One ground taken by the learned counsel for the plaintiffs, to exempt this case from the protest required by the act, is, that the act does not apply to the case of the payment to the collector of "unascertained duties," which are payments in gross, on an estimate as to amount, and where the merchant, on a final liquidation, will be entitled by law to allowances or deductions, which do not depend on the rate of duty charged, but on the ascertainment of the quantity of the article subject to duty; that, in this class of payments, no question of law is, in general, supposed to arise between the merchant and the government; that the other class of payments, "for duties paid under protest against the rate or amount of duties charged," comprehends payments where the merchant claims that the rate has been illegally levied; and that, in this class, a protest is required, in order to give notice of the illegality of the assessment. This distinction is supposed to have been recognized and acted on by the court in the case of Cary v. Curtis, 3 How. [44 U. S.] 236, in expounding the act of 1839, and to have been carried into the statute of 1845. I cannot yield assent to this view. On the contrary, the payment of "unascertained duties" by the merchant, in order to obtain the permit to land his goods, is made without reference to the nature or character of the questions that may arise before the appraisers, measurers, or weighers, or the collector, and affords time to those officers to ascertain the quality, quantity, weight, or measure, and also the rate or amount of duty to be paid, while, at the same time, the merchant acquires possession of the bulk of his shipment and entry, and may deal with the goods as his own. This payment is but preliminary and indefinite, a sum in gross and by estimate, intended to be large enough to cover the actual legal amount of duty, when ascertained. The ascertainment of the duty is subsequently made, in conformity with the report of the proper custom-house officers, the money in hand is applied, and any balance found, on liquidation, over and above the legal duties, is refunded to the merchant. When this practice was first introduced at the customs, there was some embarrassment as to the time when the protest should be made, and more especially since the act of 1845, requiring it to be made in writing; but it was finally agreed, and such has been the practice since, that if the protest was made at the time of the final liquidation and refunding of the balance, it was in time.

The reference to the two classes of duties, in the act of 1839, to wit, the payment of

"unascertained duties," and of duties paid under protest, and the direction that they should be placed to the credit of the treasurer of the United States, and kept and disposed of as other moneys paid for duties, and the enactment itself, grew out of large and repeated defalcations by collectors, which it was difficult, if not impossible, for the government to prevent, on account of the conditions of these funds. The payment of "unascertained duties" had the effect to keep, at all times, large masses of money in the hands of the collectors, of which no return was made to the secretary of the treasury till the final liquidation of the duties. Many hundreds of thousands of dollars of this fund were constantly in the possession of the collector, and were sometimes used by him for his own private purposes. In the other class, duties paid under protest, the collector claimed the right to detain them while in litigation, as he was personally responsible for the amount, if ultimately decided to be illegally exacted, and this afforded him an opportunity to use them in the meantime. This act of 1839 struck at the root of the evil, by requiring the collector to pay the moneys into the treasury, the same as in the case of all other duties. The great design of the act was to prevent these frauds and defalcations, and it effectually accomplished it. Under the decision of the court in Cary v. Curtis [supra], the collector was no more liable to suit for "unascertained duties" paid over to the treasury, than in the case of duties paid under protest. Both stood upon the same footing, and were governed by the same principle.

The other ground urged by the learned counsel, to take the case out of the act of 1845, is, that the excess of duties paid to the collector by reason of the refusal to make the proper abatement for draft, was in direct violation of the instructions of the secretary of the treasury. This ground is plausible, and would seem not destitute of principle, because the payment is an exaction in violation of the duty of the officer, who was bound to obey his superior. But the answer is, that there is no such exception in the act of 1845, and, also, that the provision is positive and explicit—"nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, &c., setting forth distinctly and specifically the grounds of objection, &c." The instructions of the secretary would have been good ground of protest against the payment of the duty. The omission must be attributed to the neglect of the merchant rather than to the law. I am satisfied, therefore, that there is no well-grounded distinction in the act of 1839, or in the judgment of the court in Cary v. Curtis, or in the act of 1845, as it respects the necessity of a written protest under the latter act, between the payment of "unascertained duties" and of duties paid under protest; that a protest must be made, in both cases, in order to give a right of action against the collector; that such has been the established construction of the act of 1845, and the practice under it, in this court, since it went into operation.

Actions have been maintained against the collector without protest, but they were cases not falling within the act, such as the case of Ogden v. Maxwell [Case No. 10,458], to recover back fees illegally exacted for constructive permits to land passengers, and the case of Hunt v. Schell [unreported], to recover back money paid by mistake, for duties which had already been paid. The act of 1845 applies to the payment of duties, and not to fees or money paid by mistake. Judgment must be rendered for the defendant.

Case No. 9,699.

In re MOLLER et al.

[8 Ben. 526.] [1]

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

BANKRUPTCY—VALUE OF PREMISES—FORECLOSURE SALE—WAIVER—TAXES AND ASSESSMENTS—PROOF OF DEBT.

1. After an adjudication of bankruptcy, a suit was brought in a state court to foreclose two mortgages on real estate, which had been made by the bankrupt. The suit was commenced without obtaining the leave of the bankruptcy court. The bankrupt and his wife and the assignee in bankruptcy were made parties defendant and were served with process. The bankrupt and his wife made default. The assignee appeared and answered, but afterwards withdrew his answer, on a stipulation that he should receive notice of sale under the decree of foreclosure. The decree of foreclosure was made and the assignee received notice of the sale, as stipulated, and he himself advertised the sale, and, at the sale, the premises were bought by the mortgagee. The mortgagee then applied to this court for an order that the purchase price, less the expenses of the suit and the sale, be taken to be the ascertained value of the premises, under the provisions of section 5075 of the Revised Statutes, and be the amount to be deducted from the claim of the mortgagee against the estate of the mortgagor. He also applied for an order directing the assignee to pay in full a certain tax and assessment and water rate on the mortgaged premises. The tax was laid and the assessment made before the proceedings in bankruptcy were commenced, while the bankrupt owned the premises, and the water tax was laid while they were occupied by the assignee in bankruptcy. No applications had been made by the authorities of the state for their payment, and the mortgagee had not put in any proof of such claims: *Held*, that the provision of section 5075 of the Revised Statutes, that the property covered by a mortgage shall be sold in such manner as the bankruptcy court shall direct, is a provision for the benefit and protection of the unsecured creditors represented by the assignee, and he may, for himself and them, waive it.

[Cited in Bradley v. Adams Express Co., 3 Fed. 897.]

2. The action of the assignee amounted to a waiver of such provision, in this case.

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

[2] [Affirmed in Case No. 9,700.]

3. The water tax should be paid in full by the assignee, as a part of the proper expense of his administration of the estate.

4. The tax and assessment should also be paid by the assignee in full.

5. No formal proof of debt in respect to such claims was needed.

In bankruptcy.

E. Coffin, Jr., for applicants.
Scott & Crowell, for assignee.

BLATCHFORD, District Judge. The executor of Douglas Sloane petitions for an order that the sum of $21,100, bid for the mortgaged premises, on sales of them under decrees of foreclosure made in two suits in the state court, less the expenses of the suits and of the sales, be taken as, and declared to be, the ascertained value of the premises, under the provisions of section 5075 of the Revised Statutes, and be the amount to be deducted from the claims of such executor against the estate of the bankrupt, William Moller, who was the mortgagor, on the bonds to secure which the mortgages, two in number, were given, in the same manner as though said sales had been made under the order of this court. The bonds were executed in January, 1875. One of them was conditioned to pay $13,000 and the other $8,578.94. Their full amount, with interest from August 1st, 1875, became due. One of them was secured by a mortgage on one piece of land, and the other by a mortgage on another piece of land. The adjudication of bankruptcy herein was made November 20th, 1875. On the 7th of March, 1876, the executor, without having first obtained the leave of this court for the purpose, brought suits in the state court to foreclose the mortgages, making the bankrupt and his wife and the assignee in bankruptcy parties defendant to the suits, and duly serving them with process. The bankrupt and his wife made default. The assignee in bankruptcy appeared in the suits and put in an answer in each suit, but afterwards withdrew the answers, by stipulation, with the reservation that notices of sales under the decrees of foreclosure, if the same should be made, should be given to him. Decrees of foreclosure were rendered on the 16th of June, 1876, which directed that the mortgaged premises should be sold at public auction, under the direction of a referee. The sales were duly advertised, and due notice of the same was given to the assignee, and he himself further advertised the sales in certain newspapers. The sales took place and the premises were purchased by the executor for $21,100.

It is provided by section 5075 of the Revised Statutes, that, when a creditor has a mortgage of real property of the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, "to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct, or the creditor may release or convey his claim to the assignee upon such property and be admitted to prove his whole debt;" that "if the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein, on receiving such excess, or he may sell the property subject to the claim of the creditor thereon;" that "in either case, the assignee and creditor respectively shall execute all deeds and writings necessary or proper to consummate the transaction;" and that, "if the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt." In opposition to the application, it is contended, for the assignee in bankruptcy, that the value of the mortgaged premises has not been ascertained by agreement between him and the creditor, and that there has not been a sale of them made in such manner as this court has directed, and that, therefore, the creditor cannot be allowed to prove any part of his debt; that the creditor has chosen to rely upon his security, and has abandoned all right to prove any debt for a deficiency in the value of the security, because he instituted his foreclosure suits without the leave of this court first obtained and after the adjudication in bankruptcy; and that he cannot be heard to make this application, because, prior to making it, he had not proved his claim in this court, either as a secured claim, or otherwise.

A court of bankruptcy is a court of equity. The assignee in bankruptcy represents the creditors. As between the creditors other than this executor, such creditors have been represented by the assignee and have been heard through him and have acted through him. He was duly made a party to the foreclosure suits and appeared in them, and put in answers, which he then withdrew, stipulating only that he should have notice of any sales to be made under decrees of foreclosure which might be entered in the suits. He had thus a full opportunity to set up by answer any defence he had, whether alleged want of jurisdiction in the state court, or otherwise. He made no application to this court to enjoin the creditor from disposing of the property of the bankrupt by sales under the decrees or to stay proceedings in the suits. It is not alleged that there was any misfeasance or irregularity in the proceedings of the creditor, or that the premises did not produce on the sales as much as they ought to have produced on any sale made at the time. Under these circumstances, the assignee must be held to have assented to and acquiesced in the sales, and to be estopped from questioning them. The value of the premises has been substantially, and to all intents and purposes, ascertained by agreement between the creditor and the assignee, within the meaning of section 5075. The assignee voluntarily submitted to have the

premises sold under the decrees of the state court. The provision of section 5075, that the property covered by a mortgage shall be sold in such manner as the bankruptcy court shall direct, is a provision for the benefit and protection of the unsecured creditors represented by the assignee, and he may, for himself and for them, waive such benefit and permit the property to be sold in a suit in the state court, by regular proceedings of foreclosure, and its value to be thus ascertained. He does make such waiver, if he, with full notice, acts as the assignee in this case acted. The state court had prima facie jurisdiction to foreclosure the mortgages, even though the foreclosure suits were commenced after the adjudication in bankruptcy. The assignee virtually assented, by his conduct, to the proceedings in the state courts, and it is too late now for him to object to them, especially in this collateral way. Mays v. Fritton, 20 Wall. [87 U. S.] 414; Doe v. Childress, 21 Wall. [88 U. S.] 642; Scott v. Kelly, 22 Wall. [89 U. S.] 57; Eyster v. Gaff, 91 U. S. 521.

The executor also applies to this court for a direction to the assignee to pay in full certain taxes and assessments and Croton water rents upon the said mortgaged premises, as preferred debts to be paid in full, under the third subdivision of section 5101 of the Revised Statutes, on the ground that they are taxes and assessments made under the laws of the state of New York. In 1875, and before the proceedings in bankruptcy were commenced, a tax of $470.40, under the laws of that state, became payable by the bankrupt as owner of the mortgaged premises, being the annual tax for the year 1875. This tax was assessed and laid upon the bankrupt as the owner of the mortgaged premises. In March, 1875, and before the proceedings in bankruptcy were commenced, and while the bankrupt owned the mortgaged premises, an assessment under the laws of New York, for constructing a sewer, was made upon the bankrupt as the owner of said premises, for the sum of $41.84. On the 1st of May, 1876, and after the adjudication of bankruptcy herein, and while the premises were owned and occupied by the assignee in bankruptcy, a water tax of $31, to be collected from the owner or occupant of said premises, became due under the laws of New York. By the laws of New York these taxes and assessments are made liens on the premises, prior to the liens of the mortgages, and the executor will be obliged to pay the same before he can obtain a clear title to the premises under the foreclosure sales. The assignee has funds enough to pay these taxes and assessments in full. In opposition to this application, it is contended, for the assignee, that such taxes and assessments are a lien on the premises; that the premises are first liable for such taxes; that the mortgages were taken, subject to the right to impose the taxes and assessments on the premises; that the executor is not entitled to assert such priority in the absence of any application by the authorities of the state for the payment of such taxes and assessments out of the personal assets of the bankrupt; and that the executor has not put in a proof of this claim.

Although, for the protection of the state and to give it security for the collection of taxes and assessments, they are made liens on the premises in respect of which they are levied and made, and which are owned by the person against whom they are assessed, yet, under the laws of New York, they are personal debts of the person against whom, as owner of the premises, they are assessed. The owner of lands is assessed for the lands he owns, and the tax is imposed upon him personally, and can be collected from his property. It is, therefore, a personal debt due from him to the state for a tax or assessment. If the tax or assessment in this case be not paid, and the land be sold by the state to pay it, the sale will be a sale to satisfy a liability of the bankrupt. Rundell v. Lakey, 40 N. Y. 513. As the bankrupt failed to discharge this liability, and as such liability can now be discharged only by a sale of the premises, unless discharged by the assignee in full, and as such liability is made by section 5101 a preferred claim, and as the premises have passed into the hands of the executor, it is entirely reasonable and proper that such liability should be discharged by the assignee in full, in exoneration of the premises and of the executor. If, instead of being sold under the decrees of foreclosure, the premises had been sold by the assignee, the purchaser would have had a right to call upon the assignee to pay these taxes and assessments in full, under the facts in this case. The water tax ought to be paid in full by the assignee, as a part of the proper expenses of his administration of the estate.

As to the objection, that the claims have not been proved, there is no claim in respect to the taxes and assessments which needs any proof of debt, inasmuch as it does not appear that the executor has paid the taxes and assessments; and in respect to the claim for a deficiency on the sale of the mortgaged premises, it will be sufficient if the claim be proved when the amount of it shall be definitely fixed.

The applications must, both of them, be granted, but, if it be necessary to have a reference to ascertain exact amounts, one may be had.

[The decision in this case was affirmed in the circuit court upon appeal by the assignee. Case No. 9,700.]

Case No. 9,700.

In re MOLLER et al.

[14 Blatchf. 207.] [1]

Circuit Court, S. D. New York. May 2, 1877.[2]

BANKRUPTCY — FORECLOSURE OF MORTGAGE AFTER ADJUDICATION—JURISDICTION OF STATE COURT—PROOF OF DEBT FOR DEFICIENCY — PRIORITY — TAXES.

1. A creditor of a bankrupt, after the adjudication in bankruptcy, brought a suit in a state court for the foreclosure of a mortgage made to him by the bankrupt, and made the assignee in bankruptcy a party defendant to the suit, without obtaining the permission or direction of the bankruptcy court to bring such suit: *Held*, that the state court had authority to entertain the suit; that its prosecution was not a contempt of the authority of the bankruptcy court; and that the proceedings in it were not void.

[Cited in Re Litchfield, 13 Fed. 867.]

[Cited in Merrill v. Jordan, 60 N. H. 426.]

2. The bankruptcy court had power to allow the creditor to prove a debt for the deficiency arising on the sale under the decree in the foreclosure suit, although no preliminary permission had been obtained from it to institute the suit.

3. The decision of the district court in Re Moller [Case No. 9,699] as to the priority of certain debts of the bankrupt for taxes, assessments and water rates, under subdivision 3 of section 5101 of the Revised Statutes, affirmed.

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

In bankruptcy.

William H. Scott, for assignee in bankruptcy.

John E. Parsons, Edmund Coffin, Jr., and Jacob F. Miller, for creditors.

JOHNSON, Circuit Judge. An adjudication of bankruptcy was had against William Moller, George H. Moller and William F. Moller, on the 20th of November, 1875, upon a petition of their creditors, filed October 28th, 1875, in the district court of the Southern district of New York. William A. Booth, having been elected assignee, received an assignment of the bankrupts' property on the 13th of December, 1875. In the course of his administration of the estates of the bankrupts, questions arose which were presented to the district court [Case No. 9,699.] Its determination being adverse to the positions taken by the assignee, he has brought the questions before this court by six appeals; and, either as appeals, or as applications for the exercise of the superintending jurisdiction of the circuit court, they are properly before the court for determination.

In four of the cases, the creditors, who were mortgagees of one or more of the bankrupts, commenced suit for the foreclosure of their respective mortgages in the state courts, after the adjudication in bankruptcy, and made the assignee in bankruptcy a party defendant, without obtaining any leave or direction of the district court in bankruptcy, permitting or directing the bringing of such suit. It is claimed, on the part of the assignee, that the state courts had no authority to entertain these suits, that their prosecution was a contempt of the authority of the bankruptcy court, and that the proceedings are void. These positions are not consistent with the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. Section 5056 of the Revised Statutes imposes the only condition which is required by the bankrupt act, in terms, to be performed before suing an assignee in bankruptcy, and that is, that twenty days' notice shall be given him before suit for anything done by him as such assignee. But it is not necessary or suitable that the question should, in this court, be examined as an open one, since the supreme court of the United States has decided it. In Eyster v. Gaff, 91 U. S. 521, 525, the court says: "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court, by the service of a rule to show cause and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee, in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts." In the particular case, the bankruptcy occurred after the commencement of the suit, and the decision might, in terms, have been limited to that special state of facts; but the court chose to put it upon the broader grounds which it has expressed, and which apply equally to cases where the bankruptcy precedes the suit in a state court. The views of the supreme court of the United States upon this subject were further explained in Burbank v. Bigelow, 92 U. S. 179. In that case, the complainant filed a bill for an account against one Edmond B. Bigelow, in the circuit court of the United States for the district of Louisiana. Shortly before the filing of this bill Bigelow had been adjudi-

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

[2] [Affirming Case No. 9,699.]

cated a bankrupt in the district court of the United States for the district of Wisconsin, but his assignment was not made until three days after the filing of the bill. No reasons were assigned in the circuit court, showing the grounds upon which it dismissed the bill; but the supreme court of the United States understood the dismissal to have proceeded on the ground that the controversy belonged exclusively to the bankruptcy court in Wisconsin, as an incident to the bankruptcy of Edmond B. Bigelow. After the assignee's appointment, Bigelow answered on the merits, and then an amended and supplemental bill was filed, making the assignee in bankruptcy a party, who subsequently appeared, and having, by order of the court, been subrogated to the rights of Bigelow, filed an answer adopting the defence previously set up by the bankrupt. The assignee afterwards filed another answer, claiming that the district court of Wisconsin alone had jurisdiction. Upon this case the supreme court, after asserting the jurisdiction of the circuit court, under section 4979 of the Revised Statutes, proceeds to show, that, without reference to the jurisdiction conferred by that section, the circuit court had jurisdiction to maintain the suit. The argument is, that, when the state courts have jurisdiction, the circuit courts of the United States have it also, if the proper citizenship of the parties exists; and that, as such citizenship existed in the case before the court, and as it was within the jurisdiction of a state court, a circuit court of the United States also had jurisdiction. In regard to the point of state jurisdiction the court says: "We recently held, in the case of Eyster v. Gaff [supra], that the bankrupt law has not deprived the state courts of jurisdiction over suits brought to decide rights of property between the bankrupt, or his assignee, and third persons; and, whenever the state courts have jurisdiction, the circuit courts of the United States have it, if the proper citizenship of the parties exists. In the case last referred to, a suit to foreclose a mortgage was commenced before the mortgagor went into bankruptcy; but the decree was not rendered until after that event and the appointment of an assignee. We decided that the validity of the suit or of the decree was not affected by the intervening bankruptcy; that the assignee might or might not be made a party; and, whether he was or not, he was equally bound with any other party acquiring an interest pendente lite."

The principle of these cases derives confirmation, if that be necessary, from the cases of Norton v. Switzer, 93 U. S. 355, and Claflin v. Houseman, Id. 130. I entertain no doubt, therefore, that the general proposition on which the appellant in these cases relies is unfounded, and that the state courts had jurisdiction to maintain the several actions which were instituted to foreclose the mortgages involved in them. No question is presented as to the power of the district court to enjoin the prosecution of any of those suits, if, in its judgment, that course had been deemed conducive to justice. Such an injunction was asked for in only two of the cases and was denied in each. The grounds of these applications do not appear upon the appeal papers, and no question was made in respect to them, at the bar.

In the next place, it is claimed, on the part of the appellant, that the district court had not power to allow the mortgage creditors to prove for a deficiency in four of the cases in which no preliminary permission to institute the foreclosure suits had been obtained from the district court. The appellant's position is based upon the provisions of section 5075 of the Revised Statutes, which enacts, that a mortgage creditor of the bankrupt shall be admitted as a creditor only for the balance of the debt, after deducting the value of the mortgaged property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. It then provides, that, "if the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein, on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and, in either case, the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction." It then enacts, that, "if the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt." Upon this section, it must be observed, in the first place, that the secured creditor may proceed, without the order or the sanction of the bankrupt court, to realize his security; and, in the second place, that, with the sanction of the court or of the assignee, he may avail himself of the full value of his security, and be admitted as a creditor for the deficiency. The statute is not modal in its provisions, but substantial. It does not concern itself with the order of time in which the business shall be transacted, but with the fact that the court approves, or the assignee agrees.

In four of the cases before the court, which are in the papers respectively designated as the Fifth Avenue, Westchester, Sugar-House, and Sloane Cases, the circumstances are slightly different, though, in each, dower rights or other incumbrances existed, which made a title under the decree of a court of general jurisdiction more marketable than any that could be given under the direction of the bankrupt court alone.

In the Fifth Avenue Case, the assignee was made a party defendant, but did not answer, and a decree was regularly passed by the state court, and a sale was had, in which the creditor, being the highest bidder, became

the purchaser. He then, without attempting to take possession, applied to the court in bankruptcy, averring that he had bid the full value of the property, asking the sanction of the court, and offering to submit to a resale of the clear title, and to convey accordingly, if the bankruptcy court should so order. In answer to this application, it was not shown that the full value had not been bid for the property, nor was any ground taken in opposition, except the somewhat inconsistent legal grounds, that the proceedings in the state courts were inoperative, and that, having taken them, the creditor ought not to be allowed to prove for the deficiency. The court refused to sustain either of these grounds, sanctioned the sale which had taken place and permitted the creditor to prove for the deficiency. This decision is supported by the case of In re Iron Mountain Co. [Case No. 7,065], before Judge Woodruff, in all points except as to deficiency. In regard to that, Judge Woodruff remarks, at the close of his opinion, that, by electing to pursue the mortgaged premises, the claimants of the lien would deprive themselves of any right to prove their debt for the deficiency. This remark was not necessary to the decision of the cause, and was not, probably, intended to refer to anything but a final election not to submit to the authority of the bankruptcy court, in ascertaining the value of the property.

The Westchester Case did not differ greatly from that which has just been considered. The assignee answered in the state court, setting up, in substance, the alleged want of jurisdiction and was beaten in that court. He had also previously applied to the district court to enjoin the further prosecution of the suit, and this application was denied. These circumstances do not serve to take the case out of the rule previously stated.

In the Sugar-House Case, after the suit in the state court was ready for a decree, the assignee being a party, and having applied to the district court for an injunction, which was denied, the creditor applied to the district court to order a sale and to fix the deficiency, and this was granted, and correctly granted, unless what has been already said in this opinion is completely erroneous.

In the Sloane Case the assignee was made a party defendant, answered the bill in the state court, then, by stipulation, withdrew his answer, reserving the right to special notice of the sale, received such notice, and himself also advertised the sale. In respect to this part of the case, the circumstances of which are particularly discussed in the opinion of Judge Blatchford, in the district court,—In re Moller [Case No. 9,699],—I think it unnecessary to add anything.

The Sloane Case, as well as those of Gerdes and of Cooper, present questions in respect to the payment of taxes, assessments and water rates by the assignee, as debts entitled to priority in payment, under section 5101 of the Revised Statutes, sub-division third. These questions are amply discussed in the opinion of Judge Blatchford, and are disposed of in accordance with my understanding of the law. In both branches of the Sloane Case, and in the Gerdes and Cooper Cases, that opinion is adopted by this court. The orders appealed from are affirmed, with costs.

MOLLER (HICKS v.). See Case No. 6,461.

MOLLER (UNITED STATES v.). See Cases Nos. 15,793 and 15,794.

MOLLIE, The (UNITED STATES v.). See Case No. 15,795.

Case No. 9,701.

The MOLLIE MOHLER.

[2 Biss. 505;[1] 4 Am. Law T. Rep. U. S. Cts. 145.]

District Court, E. D. Wisconsin. April, 1871.[2]

TOWAGE — LIABILITY FOR NEGLIGENCE—RUNNING BRIDGE—BILL OF LADING—DANGERS OF NAVIGATION—BURDEN OF PROOF.

1. A steamboat with loaded barges in tow descending the Mississippi river about night-fall, the general bent of the weather being tempestuous, is in fault for running bridge piers; and the fact that the wrecking of a barge by collision with a pier was caused by a gust of wind does not relieve the liability.

2. The carrier, in order to avail himself of the exceptions of "dangers of navigation," must show due diligence and proper care to avoid the accident, and that it was unavoidable.

3. The burden of proof for this purpose is upon the carrier.

This was a libel by the Home Insurance Company, insurer, against the steamboat Mollie Mohler, to recover the value of 700 bags of wheat, shipped on the 12th day of May, 1866, at Mankato on the Minnesota river, on the barge Erickson, in tow of the steamer, to be delivered at St. Paul in good order, "dangers of fire and navigation only excepted." The wheat, having been damaged and lost to the owner, was surrendered to the company. Negligence, carelessness and unskillfulness of the master and crew of the boat were alleged in the libel, and denied in the answer.

Emmons & Van Dyke, for libellant.

J. W. & A. L. Cary, for respondent.

MILLER, District Judge. It is confessed in the answer that the barge in tow of the steamboat was sunk in the Mississippi river, whereby the wheat was lost to its owner. And it is alleged in the answer, that the steamboat and barge proceeded on their voyage without accident until they reached the

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

[2] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 21 Wall. (88 U. S.) 230.]

port of St. Peter, where they took in tow another barge called Eclipse, loaded with wheat, and then proceeded to the port of Belle Plains, where they took in tow another small barge called the Banty, also loaded with wheat. They proceeded without interruption or accident until on the 14th May, at about eight o'clock in the evening, when they reached a point in the Mississippi river about two miles above St. Paul, where there were several stone piers erected for the purpose of a railroad bridge across said river. The answer further states that just before they reached the piers, and while proceeding with due care and caution, the steamboat and barges being in the widest and best channel of the river, and the master and his mariners and servants being respectively in their proper places, a strong gust or gale of wind coming from a southerly direction suddenly arose and struck the steamboat and barges with great force and violence, so much so as to change their course, notwithstanding the best efforts of the master and mariners to keep them in their course. The wind, with the current of the river, which sets towards the middle of the piers, drove the steamboat and barges towards the middle pier, and in spite of the best efforts of the master and crew, the barge Eclipse struck the middle pier with great violence, which stove a hole in its side, by reason whereof it filled with water and sunk immediately; that the jar caused by the striking of the barge Eclipse against the pier, and the consequent sudden stoppage of the steamboat and barges and the swift current of the river, caused the barge Erickson to careen and fill with water, and sink.

It appears from the evidence, that the barge Eclipse was on the larboard side of the steamboat, the Erickson on the starboard side of the boat, and the Banty also on the starboard side, at the stern of the Erickson, following right after. The steamboat was 125 feet in length, 23 feet beam, had two engines and two boilers and stern wheel; and was staunch and able to handle the barges. The barges were not overloaded, were sufficient for the trade, and in good handling order. The boat and barges arrived at Mendota, the junction of the Minnesota and Mississippi rivers, about an hour before sundown on the 14th of May. The wind blowing hard that afternoon they remained at that port for it to lull, so that they might run the bridge piers at that place.

The wind having lulled so as to enable them to run those piers, they put out for St. Paul about sundown. The wind being southeasterly on the Mississippi river, they passed down on the right hand side of the river for about five miles, under the lee of continuous high bluffs, when they crossed over to the other side about the ferry landing, half a mile above the bridge piers, where the accident occurred, and there they encountered a high wind blowing in squalls or gusts. The water clear across the river was ten feet deep. They could have landed between the ferry and the cove, more than a quarter of a mile above the piers. There was no difficulty in making a landing near the ferry. The wind was blowing hard in gusts or squalls from the south-east, and continued so until the collision took place. They made no effort to land, but proceeded towards the piers, claiming the privilege of a descending boat to pass an ascending boat on the starboard side, in her efforts to run the piers. They made no effort to back, or head to the shore, doing nothing but to run the piers against the gusts or squalls of wind, stricking broad-side, about eight o'clock at night.

The distance between the piers was 165 feet and the breadth of the steamboat and tow was 65 feet. There cannot be fault found in the attempt to run the piers within this space, nor in the management of the boat at the time, nor with the conduct of the master and crew, as they all seem to have been at their respective posts of duty. The fault lies in not making a landing on discovering the boisterous state of the weather while crossing the river to the left hand bank, where there were two landing places, or putting back. The event cannot sanction the excuse of a sudden gust of wind as the cause of the collision. The master was admonished half a mile above, to secure his boat and tow by turning back or effecting a landing, and not to attempt running the piers at nightfall, while the general bent of the weather was tempestuous and boisterous.

It is incumbent on the master, in order to bring himself within the exception in the bill of lading, "of dangers of navigation," to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. The carrier must satisfy the court that there was no default on his part, and that every reasonable effort was made to avoid the accident. The burden of proof is on him to bring himself within the exception. When a collision or loss occurs, in the absence of fault on the part of the carrier, under circumstances beyond his control from vis major, as from storm, or waves, or reflex of the tide, or lightning, he is not held liable even on a clean bill of lading. In the case of The Lady Pike [Case No. 7,985], the boat towing three loaded barges down stream, on approaching the same bridge piers as in this case, too closely to back or stop, one of the barges was driven against a pier by a sudden and unanticipated gust of wind. I decreed that the carrier was not liable for the loss of the cargo of the damaged barge. In that case the accident could not be avoided. In this case the master was admonished in time by the boisterous and tempestuous state of the weather not to run the piers, but to make a landing or put back, either of which he could have done nearly half a mile above the piers. In the opinion in the case of The Lady Pike [supra], I remark: "If the piers

had been approached under a high wind, the boat should be condemned for unskillfulness of the officers; but there was a calm until the approach to the piers was too close to admit of avoiding the effect of an unanticipated and sudden gust of wind." See, also, Amies v. Stevens, 1 Strange, 128. The collision with the pier was the result of recklessness on the part of the master, and the decree must be for the libellant.

[NOTE. The claimants of the Mollie Mohler, upon appeal, took the case into the circuit court, where the decree of this court was affirmed. Case unreported. Upon further appeal the case was taken to the supreme court, where the decree of the circuit court was affirmed. 21 Wall. (88 U. S.) 230.]

Case No. 9,702.

MOLSON et al. v. HAWLEY.

[1 Blatchf. 409.] [1]

Circuit Court, N. D. New York. Oct. Term, 1849.

BILLS AND NOTES — ACCOMMODATION PAPER — HOLDER WITH NOTICE—GIVEN FOR PRIOR DEBT—AMOUNT RECOVERABLE.

1. Where a promissory note was endorsed by H., without restriction, for the accommodation of T., and was applied by T. to the payment and satisfaction of a note of like amount held by M. against T., then due and unpaid: *Held*, that M. could recover against H. on the note, although M. when he received the note knew that it was accommodation paper.

[Cited in brief in Faulkner v. Faulkner, 73 Mo. 335.]

2. Especially could M. recover, where the prior note held by him was a note endorsed by H., on which H. stood at the time charged as endorser.

3. Where a note was endorsed by H., without restriction, for the accommodation of T., and was applied as security for the payment of a subsisting account due from T. to M.: *Held*, that M. could recover against H. on the note, whether M. when he took the note knew or did not know that it was accommodation paper.

[Cited in Thatcher v. West River Nat. Bank, 19 Mich. 202.]

4. In such case, the amount recoverable on the note is prima facie the amount shown to have been due on the account at the time the note was taken by M., although no settlement or liquidation of the account is proved.

5. And, where M.'s agent, prior to the taking of the note, presented to T. an account current between T. and M., and the agent and T., after examining the account, concluded upon the amount then due to M.: *Held*, that the testimony of the agent to those facts, without the production of the account current, was competent and prima facie sufficient evidence, to show that the amount so concluded upon was due on the account at the time M. took the note.

Assumpsit, by endorsees against endorser, on two promissory notes, tried before Conkling, J., in 1836. The notes were both of them dated Rochester, June 10th, 1834, made by Thorn & Frink, payable at the United States Branch Bank, New-York, to the order of Jesse Hawley and endorsed by him, one for $2000, payable four months after date, and the other for $1500, payable three months after date. The notes were endorsed by Hawley for the accommodation and benefit of the makers, without restriction, and were passed by them into the hands of an agent of the plaintiffs [John Molson, Jr., and George Davies]. At the time the defendent endorsed the $2000 note, the plaintiffs held a note of a like amount made by Thorn & Frink and endorsed by the defendant, which was due and unpaid, and on which he had been duly charged as endorser. The plaintiffs took the last $2000 note in payment and satisfaction of the prior one. The $1500 note was taken by the plaintiffs' agent as security for the payment of a balance of account due from Thorn & Frink to the plaintiffs. The agent received the notes on the day of their date, and knew at the time that Hawley's endorsements were for the accommodation of Thorn & Frink. It appeared, on the trial, that there had been business transactions between the plaintiffs, who resided at Montreal, and Thorn & Frink, from 1831 to 1834, the latter shipping produce to the former for sale; and the plaintiffs gave evidence to show that a balance greater than the amount of the notes was due them from Thorn & Frink at the time their agent received the notes, although it did not appear that there had been any settlement or liquidation of the account, other than the one hereafter mentioned. The plaintiffs' agent testified that he went to Rochester in February, 1834, to obtain property or security from Thorn & Frink, and took with him an account current between the latter and the plaintiffs. The plaintiffs then proposed to give in evidence the declaration of Thorn & Frink as to the amount then due to the plaintiffs. This was objected to on the ground that Thorn & Frink were competent witnesses and should be produced. But the court decided that if the plaintiffs' agent went into an accounting with Thorn & Frink, and ascertained and settled any balance in that way, it was competent to prove the fact by the agent. He then testified that Thorn & Frink and himself examined the account and came to the conclusion that about the sum of $8400 was then due to the plaintiffs. The defendant objected to the reception of the testimony, on the grounds that the account current alluded to should be produced and that the evidence did not tend to prove any accounting.

At the conclusion of the evidence, the defendant's counsel requested the court to charge the jury, that if they believed from the testimony that the defendant was an accommodation endorser for Thorn & Frink of the notes in question, and that the plaintiffs took the notes from the makers either in payment of or as security for a pre-ex-

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

isting debt, the plaintiffs were not entitled to recover. The court refused so to charge and the defendant's counsel excepted. The defendant's counsel also requested the court to charge the jury, that if the defendant was an accommodation endorser of the notes for the benefit of the makers, and the plaintiffs received the notes from the makers as security for any balance that might be due them from the makers upon a settlement of their account, then the plaintiffs were not entitled to recover without showing a balance due upon a legal liquidation or settlement of such account. But the court instructed the jury that if they should be of opinion that there was any balance due from Thorn & Frink to the plaintiffs at the time the agent of the plaintiffs received the notes, the plaintiffs were entitled to recover such balance against the defendant upon the notes, although there had been no settlement or liquidation of the account between the plaintiffs and Thorn & Frink; but that it was incumbent on the plaintiffs to prove that such a balance was in fact due, and that their right of recovery was limited to the amount, not exceeding the amount of the notes, of the balance so proved. To this charge the defendant's counsel excepted. The jury found a verdict for the plaintiffs, and the defendant now moved for a new trial, on a bill of exceptions.

William Curtis Noyes, for plaintiffs.
Samuel Stevens, for defendant.

NELSON, Circuit Justice. Inasmuch as the $2000 note was endorsed by the defendant, without restriction, for the benefit of the makers, and was applied by them to the payment and satisfaction of a note of similar amount held by the plaintiffs against the makers, then due and unpaid, it was available in the plaintiffs' hands, notwithstanding it was accommodation paper and that fact was known to their agent at the time he thus received and applied it. Especially was that note available in the plaintiffs' hands, as it was applied to the payment and satisfaction of a like note of the makers endorsed by the defendant, and upon which he stood at the time charged as endorser. For aught that appears, the prior note was a valid security in the plaintiffs' hands, and the payment of it obligatory upon the defendant. Its application, therefore, was but the payment of the defendant's own note.

The $1500 note was available in the plaintiffs' hands, as it was endorsed without restriction, and applied to the payment or security for payment of a subsisting account due from the makers to the plaintiffs; and this, whether the plaintiffs or their agent knew or did not know that it was accommodation paper. The proof that the makers were indebted to the plaintiffs to the amount of the two notes, was competent and prima facie sufficient. New trial denied.

Case No. 9,703.

MOLYNEAUX v. MARSH.

[1 Woods, 452.] [1]

Circuit Court, S. D. Georgia. April Term, 1871.

PRACTICE IN EQUITY — DECREE — SATISFACTION — EXECUTION—HOW ARRESTED—SEVERAL DEFENDANTS—EFFECT OF COMPROMISE WITH SOME—BILL OF DISCOVERY—COSTS.

1. If a decree be satisfied, the execution should be arrested on motion, without a new bill.

2. When a decree is rendered against several defendants, a compromise by complainant, with some, as to their portion of the debt, does not release the other defendants.

3. If a creditor chooses to take fifty per cent. on the dollar from some of his debtors, no promise made to them will compel him to accept payment at a similar rate from others.

4. Where several persons are liable for the same debt, each one is entitled to know what amount of money the creditor has received; and for such purpose may cite the creditor to a discovery, by complying with the rules in such cases. Should the creditor refuse to make the disclosure, he will be liable to the costs of a bill of discovery.

In equity. Heard upon motion for injunction.

A. R. Lawton, for complainant.
Wm. Daugherty, for defendant.

BRADLEY, Circuit Justice. On the 20th day of May, 1871, the defendants obtained against the complainant and others, a decree in this court, declaring that they, the defendants, were judgment creditors of the Merchants' & Planters' Bank of Savannah to the amount in the aggregate of $435,000, and had exhausted their remedies at law, and that the now complainant and the other defendants in that case were stockholders of said bank and had in their hands, respectively, portions of the capital stock of the same unpaid, in the proportion and amounts named in the decree, amounting in the aggregate to $631,642, of which the estate of Edmund Molyneaux, represented by the complainant as administrator, held $96,480, and it was by said decree ordered, adjudged and decreed, that the complainants in said former suit (the defendants in this suit) should have and recover of the defendants in that suit, so much of the aforesaid several sums of money in their hands, respectively, as would pay off and discharge the demands of the complainants therein, and that execution should issue accordingly; and as to the estate of the said Molyneaux, it was ordered and decreed, that execution should issue, to be levied upon the goods and chattels, lands and tenements in the hands of the said administrator to be administered. The complainants in such former suit have sued out an execution against the Molyneaux estate as directed in the decree, and the marshal has levied on a house in Savannah belonging to the estate. The present bill is filed to obtain, and the applica-

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

tion is for an injunction to prevent the sale of the property levied on, to arrest further proceedings on said decree, and to administer all the affairs of the bank through the medium of the receiver heretofore appointed.

The question of referring the claims of the complainants in the former suit to the administration of the receiver was one of the issues fully discussed and determined in that suit, and it was held that the complainants were entitled to proceed in the manner which they had adopted, and that the fund against which they were proceeding, to wit, the unpaid stock, was not in the receiver's hands, but was liable to be subjected to the payment of the judgments obtained by those complainants. According to the views of the court and the terms of the decree, the complainants were entitled to issue executions against each and all of the defendants without any other restrictions than these, namely: that no greater sum should be levied on the property of any defendant than the amount of unpaid stock, which, by the decree, was found to be in his hands, and that no greater sum in the aggregate should be raised from the property of all the defendants than the amount due the complainants; such were the rights of the parties at the rendition of the decree. The question now is, whether, since the decree, the complainants in that case have done anything to curtail their rights, and subject themselves to the relief now prayed against them. If their claims have been paid and satisfied, the execution ought certainly to be arrested. But that could and should be done on motion without a new bill. It is not pretended, however, that the claims have been paid. The bill complains that the complainants in the former suit have taken an inequitable course, by receiving fifty per cent. of the amount of their stock from some of the defendants, and agreeing to demand no more from them until all the stockholders shall have paid a similar proportion, and by refusing to make a similar arrangement with the complainant in the present suit. However capricious and partial this conduct may appear, it is not a legal ground of defense to the execution. The complainant is only required to pay the amount found in his hands by the decree. The bill, however, alleges that the complainants in the former suit, by their agents, proposed and agreed to make a similar arrangement of fifty per cent. with all the defendants. But it does not allege that any such agreement was made with the complainant in this suit, nor that he parted with any consideration in consequence of any such proposition, and from the answer it is apparent that, at most, the agents and solicitors of the complainants in the former suit told some of the parties with whom they did make such arrangement, that they would do the same with others that might come into it. Surely such a declaration as this could not create a binding obligation to such other persons. It could, at most, only affect the validity of the arrangement made with those to whom the declaration was made. But I do not imagine that it could even have that effect. It is totally unlike the case of a debtor making a composition with his creditors. In that case, the consent of one creditor to the composition is a consideration for the consent of the others, so that all are bound thereby. But this is a case of a creditor dealing with his debtors. If he chooses to take fifty cents on a dollar from ninety and nine of them, no promise made to them will obligate him to take that proportion from the one hundredth, and for the plain reason that none of the ninety and nine give up any consideration which they were not legally bound to pay. The bill further alleges, and it is admitted by the answers, that the complainants in the former suit have also made similar arrangements with, and received money from, stockholders who were not parties to that suit. This, surely, cannot injure the complainant, but must, pro tanto, benefit him, for it tends to lighten the burden which the decree has cast upon his shoulders. As to the allegation, that these transactions have been privately made so that the complainant cannot know what amount of money the defendants have received; it is sufficient to say, that the case is not different from all other cases where several persons are liable for the same debt; each one is always entitled to know what money the creditor has received, and if he has any doubt on the subject, he may always cite the creditor to a discovery, by complying with the rules in such cases. In the present case the bill does not allege, and the answers do not disclose, that the claims or any considerable portion of them have been paid. The complainant is, undoubtedly, at all times entitled to a full and frank disclosure of the amounts which the defendants may have received, and if they refuse to make such disclosure they will be liable for the costs of a bill of discovery, but nothing of that kind, even, is alleged. In all these respects, therefore, the bill is without foundation, and this is the sum and substance of its allegations.

A fact is disclosed, however, by the answers, which has given me some embarrassment. It appears that the solicitors of the complainants in the former suit, in making the beforementioned arrangements or compromises with the defendants therein (as well as with other stockholders), have made them for the equal benefit of the said complainants, and of all other billholders whom they represent, of whom there appear to be several. These outside billholders have received $42,500 of the $113,500 which have been collected. I cannot precisely see where the said complainants get authority to do this. The decree of the court, subjecting the unpaid stock to the payment of the judgment creditors, at whose instance it was obtained, and making it a trust fund in the hands of the stockholders for that purpose was not made for the benefit of cred-

itors at large. Whether billholders or others, creditors at large cannot reach that fund, and the court will not reach it for them. The defendants, by suffering creditors at large to share with them the proceeds of this fund, which the court has enabled them to lay their hands on for their own benefit alone, must at least be accountable for the amount so appropriated. It seems to me they must account for the whole amount of $113,500, which has been collected from this source, and any other amount which they may hereafter collect in the same manner. But as this amount, when credited on the decree, does not relieve the complainant from any part of his burthen, the injunction must be denied, but without costs.

Case No. 9,704.

The MONADNOCK.

[5 Ben. 357;[1] 5 Am. Law T. Rep. 89; 15 Int. Rev. Rec. 33.]

District Court, E. D. New York. Nov., 1871.

SEAMAN'S WAGES—LIEN ON FREIGHT—ADVANCES BY MASTER—SEIZURE OF CARGO—PRACTICE—BILL OF LADING—ACT OF JULY 20, 1846.

1. Where cargo is arrested in admiralty in respect of the freight due for its transportation, the ordinary course is for the owner of the cargo to pay into the registry of the court any freight, acknowledged to be due, and thus obtain a release of his property from the custody of the marshal, and a discharge of his liability for the freight.

2. Freighters cannot be compelled to give bail for the value of cargo so arrested, and have no right, under ordinary circumstances, to give bail for freight which they acknowledge to be due.

3. Parties, claiming an interest in freight money, so paid into the registry, should file their claim and set up their rights by answer.

4. A canal-boat, being at Buffalo, her master and owner, A., employed a commission merchant, B., to find a freight for her, and B. made a contract with the firm of S. & B. for the transportation to New York, on the boat, of a cargo of lumber, which they had sold to S. & S. Thereupon B. signed a bill of lading, as master of the boat, for the cargo, which bill provided that the freight, when earned, was to be paid to J. & Co. in New York. The next day A., as master, signed another bill of lading, describing B. as agent of the shippers, and containing a memorandum signed by B. that $656 47 had been advanced to the captain, and directing J. & Co. to pay to the captain the balance of freight, and hold the advance subject to B.'s draft. The $656 47 had been advanced to A. by B. as a commission merchant, including his commissions, and for his security the freight was made payable to J. & Co. A. also drew a draft on J. & Co. for $25, which was also paid on the same security. The canal-boat having performed the voyage, a libel for wages was filed, on behalf of the crew of the canal-boat, against the freight money, and the cargo was arrested. S. & S., J. & Co., and B. claimed the cargo, and bonded it on the usual stipulation for value, and filed a joint answer, averring that S. & S. owned the cargo, and J. & Co. and B. the freight money, by reason of the advances made by them, and that any lien for the libellants' wages could only be enforced against the amount due to A. after deducting the advances. A. also filed a petition, as co-libellant, to recover advances made by him for navigating the boat. *Held*, that although the proper course of practice had not been pursued in the case, yet as no objection had been taken, the court would dispose of the questions raised, except that of jurisdiction, which would be held for further argument.

5. The bill of lading signed by B. must be held to be the contract under which the cargo was carried, and the lien of the crew on the freight money for their wages would not be affected by the assumption by B. of the character of master, with the assent of A.

6. The advance by B. to A. was not an advance payment of freight, nor was the advance by J. & Co. to him.

7. The pledge of the freight to J. & Co. by A. could not displace the lien with which the law charges freight money for the wages of the crew.

8. The act of congress of July 20, 1846 (9 Stat. 38), did not exempt freight money of a canal-boat from being arrested in a suit for wages.

9. A. could not claim a priority to J. & Co. either for his wages or for advances made by him.

[This was a libel for seaman's wages by Donald McDonald against the freight money of the canal-boat Monadnock.]

A. Nash, for libellants.

C. Van Santvoord, for respondents.

BENEDICT, District Judge. The question of jurisdiction which this case presents will be reserved, to be decided when the same shall have been fully argued by counsel, with reference to the effect of the recent decisions of the supreme court, and the other questions of the case will be now disposed of, upon the assumption that the case is within the jurisdiction of the admiralty. Before considering those questions, I notice a peculiarity in the mode of procedure adopted. The action is brought to enforce a lien for wages upon the freight money due the boat "Monadnock" for the transportation of a cargo of lumber. Upon the filing of the libel, process was issued requiring the marshal to arrest the lumber described in the libel. The lumber was accordingly seized, and was subsequently discharged from custody upon the usual stipulation for value given by the claimants.

The claim filed was a joint claim, made by the firm of Steinway & Sons, the firm of Geo. Jennison & Co., and B. F. Bruce; and these claimants filed a joint answer, which sets forth that Steinway & Sons are the owners and consignees of the lumber, and that it is subject to the payment of freight, according to a bill of lading annexed; that B. F. Bruce and Geo. Jennison & Co. are the owners of the freight money, by reason of advances made by them on, and in payment of, said freight, in advance, at Buffalo and in transit, which advances, and the mode of making the same, are particularly described. The answer then denies any knowledge respecting the earning of the wages set forth in the libel, and avers that, if the court has jurisdiction to enforce the claims of the libellants

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

against the freight, it can rightfully do so only to the amount which shall appear to be due the master or owner of the boat, after deducting the advances referred to.

The master and owner of the boat do not interpose any defence, and have made no claim to the freight money, and the case has been heard without objection upon the pleadings above mentioned. Upon this method of procedure, I remark, that when cargo is arrested in respect to the freight due for its transportation, the ordinary course is for the owner of the cargo to pay into the registry any freight acknowledged to be due, and thus obtain a release of his property from the custody of the marshal, and a discharge of his liability for the freight so paid. Freighters cannot be compelled to give bail for the value of a cargo seized only in respect to freight, nor forced to incur a liability for the cost of defending a suit in which they have no interest; and they have no right, under ordinary circumstances, to give bail for freight which they acknowledge to be due. Coote, Adm. pp. 14, 24; The Lady Durham, 3 Hagg. Adm. 200; The Riby Grove, 2 W. Rob. Adm. 59; The Victor, 1 Lush. 72.

The proper course here would have been for Steinway & Sons to have paid into the registry the freight which they admit they owe upon this cargo, and thus retire from the controversy; or if they desire first to dispute the jurisdiction of the court, they could do so by special plea to the jurisdiction, and apply for leave to receive the cargo upon a stipulation to hold the freight, subject to the decision of the court upon such plea.

As to the other claimants, upon the payment of the freight into the registry, they should have filed their respective claims, showing their interest therein, and set up their rights by answer. I am aware that there are cases in the books which allude to a different procedure from the one indicated, but I have thought proper to state what I conceive to be the better practice. I am not called on to interfere with the mode of procedure which has been adopted, because no objection has been taken to it; and the case has been tried upon pleadings, which both sides have treated as properly raising the points which have been discussed by the advocates.

Upon the evidence introduced as bearing upon the issues, no question has been made as to the services set forth in the libel. They are proved to have been rendered, as alleged. Nor has it been contended that a lien for such services does not attach to any freight, earned by means of those services, which remains due and payable to the master. But it is contended that certain payments of money, proved to have been made to the master and owner, were in legal effect payments of freight in advance, and that the balance only can be held subject to a lien for the wages in question. The circumstances attending the payments are as follows:

The boat being at Buffalo, and desiring a cargo, B. F. Bruce, who was a commission merchant, was employed by the master and owner to find a freight for her. Bruce, acting as agent for the boat, negotiated a contract with the firm of Scater & Belton, for the transportation to New York of a cargo of lumber, which they had sold to Steinway & Sons, deliverable in New York. That contract was set out in a bill of lading, which bears date August 9th, and which provides that the freight, when earned, is to be paid by Steinway & Sons to George Jennison & Co., in New York. The bill of lading untruly described Bruce as the master of the boat, and was signed by Bruce in that capacity, instead of by the real master, whose name was Arthur, under the supposition, doubtless, that the shippers thus obtained the additional guaranty of Bruce for the due transportation and delivery of the cargo. Such a misstatement of fact, in a bill of lading, is said to be usual in this trade. If so, it is not to be approved, and if effectual for any purpose, does not touch the rights of the libellants here. The assumption by the broker of the character of master, with the knowledge and assent of the master and owner of the boat, did not change the liability of the boat for the transportation of the cargo, or the liability of Steinway & Sons to the boat for the freight, as provided in the bill of lading, of August 9th, or affect the lien of the libellants upon that freight. This bill of lading I incline to consider as the contract under which this cargo was transported, and according to which alone the freight proceeded against is payable.

But the answer sets up, and the evidence shows that there was another bill of lading, dated the day after the one already referred to, which is similar to the first one, except that it describes B. F. Bruce as the agent of the shippers, and makes no allusion to Scater & Belton, the real shippers, and it is signed by Arthur, the master of the boat. This bill of lading also contains the following memorandum: "Advance to captain, $656 47. On delivery, Geo. Jennison & Co. will pay captain balance of freight, holding my advance subject to my draft. B. F. Bruce." If this bill of lading can be considered as the contract under which the freight in question was earned by the boat, still it can have no effect as against the crew to make Bruce the shipper, or to give to the advances made by him the legal character of advances of freight, for the fact remains clearly proven by the evidence, that Bruce was not the freighter or the agent of the freighters, and made no advances of his money on the security of the freight to be earned. According to the evidence, Bruce, as a commission merchant, and not otherwise, advanced $656 47, including his commissions, and for his security the whole freight money was made payable to his correspondent, Geo. Jennison & Co., in New York, on whom he drew for that amount, and by whom not only

his draft, but the subsequent draft of the master for $25, was paid upon the security of the provision, which was in both bills of lading, that the freight was to be collected by them alone. Jennison & Co. have no more advanced freight than Bruce, for they have never owed the freight, but expect to collect it of Steinway & Sons, the freighters, under the authority given by the bill of lading, and when collected to repay their advances out of it, and account to the master for the balance.

Under this view of the case, it is obvious that the question here is simply one of priority between Geo. Jennison & Co., and the crew; and the answer is clear. The pledge of the freight to Geo. Jennison & Co. may be entirely valid, so far as it was possible for the master and owner of the boat to pledge the freight; but the law charges freight money with a lien for the wages of the crew, which the master or owner cannot displace by any pledge made to secure advances to him. Freight, from the inception of the voyage, is charged with a hypothecatory interest in favor of the crew for their wages, and all assignments by the master or owners are subject thereto.

I should here remark, that I do not intend to say whether or not, in a navigation so peculiar as this, there may not be expenses, such as canal tolls for instance, which, from their nature, and the circumstances of the case, should be held to be a charge upon the freight in preference to the wages of the crew. If navigation of this description is to come within the jurisdiction of the admiralty, the principles of the law administered by courts of admiralty, will be found to be sufficient to protect that navigation, and enable it to be conducted as its exigencies and the interest of commerce shall require. Here no difficulty arises from the fact, that part of the sums advanced was applied to pay expenses peculiar to this navigation, inasmuch as the freight is sufficient to pay the wages of the crew after deducting those expenses.

The proposition of the answer therefore, that the demands of the libellants can be enforced only to the extent of the balance of freight, after deducting the amount of the advances made in Buffalo, is held untenable; and the libellants if they are entitled to maintain the action at all in this court, must be held entitled to be paid out of the freight, in preference to the claimants.

A second ground of defence, urged in behalf of the claimants, is that this freight is not liable to be proceeded against for wages, because exempted by the act of congress, of July 20th, 1846 (9 Stat. 38). The statute referred to is not set up in the answer as a bar to the action, nor alluded to therein; but its construction and effect having been argued by the advocates, I treat it as having been pleaded. This statute, if it could be construed so as to exempt canal-boats from seizure while being navigated, either during a voyage or during the season of navigation on the canals, would have no other than a beneficial effect. But treated as affording unlimited exemption to the boats described, its effect would be to cast adrift in the port of New York, at the close of navigation in each year, a very considerable number of needy men, defrauded of their wages for a longer or shorter period, by the irresponsible masters, who leave their boats here for the winter, and depart for their homes without paying the crew. The men thus oppressed, are of a class as much in need of the protection of a court of admiralty, as those seamen who follow the high seas; and I doubt not, that if the act could be so construed as to afford opportunity to apply the rules of the maritime law, in respect to the liens for wages, to boats of this class, much injustice would be prevented, and that an improvement in the character and responsibility of those who command these boats would follow, to the advantage of commerce and the state. I do not intend however to intimate at this time any opinion, as to the effect to be given to the statute in question, upon proceedings against the boats themselves, inasmuch as the present case relates solely to freight. If the act does not cover the freight, it is not material to this controversy, except in so far as it admits that navigation of this character is within the jurisdiction of the admiralty. In my opinion, the act in question does not include the freight within its exemption. The provision at the close of the first section, which is relied on, is of a character to warrant a court of admiralty, in refusing to extend it beyond the import of the words used; and there is no word in the act which covers freight money.

It is contended, that freight is appurtenant to the vessel, and therefore necessarily included with the vessel. But although freight money has been said to be appurtenant to the vessel, it is not an appurtenance in such sense that it always follows the condition of the vessel, or is always included when the vessel is named. Freight money is often proceeded against, when the vessel is not touched. It may be proceeded against when the vessel is lost. It is in some cases, as in that of masters' wages, subject to liens from which the vessel is exempt. It is the well known and natural fund for the payment of wages, and should not be held to be exempted from the charge by any other than an express provision of law. To limit the effect of the statute to the boats described in it, does not interfere with the accomplishment of the object of the provision in question, which relates to the remedy, and was intended to prevent the use of the summary process of the admiralty to stop, in the canal, boats there being drawn by horses. At least it is confined by its terms to boats so navigated, and the difficulties of navigation resulting from seizures of that class of boats would

seem to be the evil, which the provisions in the statute sought to obviate.

My conclusion, therefore, upon this branch of the case is, that the act of July, 1846, has no effect to exempt the freight in question from being proceeded against, in this action for the wages of the crew. There is besides the claim of the crew for their wages, a claim of the master, who has filed his petition to be made co-libellant, and who seeks to enforce a lien against this freight, for a balance due him for advances made by him towards navigating the boat. In regard to this claim, it is sufficient to say, that the master, by the memorandum upon the bill of lading signed by him, acknowledged the receipt of $656 47, upon security of the freight; and both bills of lading made the freight payable to Jennison & Co. to render the security effectual, with authority to them to deduct the advances made. He also afterwards drew from Jennison & Co. $25, on the same security. As against a claim, secured to be paid out of this fund, by the assignment of the master himself, the master can make no claim to preference, either for wages due him, or advances made by him.

The demand of the master will therefore be disallowed. Having thus disposed of all the defences, except that based on the want of jurisdiction, I direct that the cause be reargued upon that point.

Case No. 9,705.

MONCE et al. v. ADAMS.

[12 Blatchf. 1; 1 Ban. & A. 126; 7 O. G. 177.] [1]

Circuit Court, D. Connecticut. April Term, 1874.

PATENTS—TOOL FOR CUTTING GLASS—ANGLE OF CUT TO SURFACE—SPECIFICATION—AMBIGUITY.

1. The invention covered by the letters patent granted to Samuel G. Monce, June 8th, 1869, for an "improved tool for cutting glass," the claims of which are, "(1) The cutter, A, constructed substantially as shown and described, and for the purposes set forth; (2) the combination of the cutter, A, frame, B, and handle, C, substantially as and for the purposes described," consists, so far as the revolving steel cutter is concerned, in the fact that its sides are made parallel and then bevelled towards each other at an angle of about 45° to the axis of the cutter, so as to meet about midway between the same, in a cutting edge, and to be at right angles to each other.

2. The value of a diamond, for cutting glass, depends not merely on its hardness, but on the fact that its surfaces are curved, the meeting of any two of them presenting a curvilinear edge, and that the diamond is so placed that the line of the intended cut is a tangent to this edge, near to its extremity, and that the two surfaces of the diamond laterally adjacent are equally inclined to the surface of the glass, and the cutting edges are at right angles to each other.

3. The conditions necessary to form a glazier's diamond are found in the invention of the patent. The patent is valid.

4. The cutter of the patent was not anticipated by a cutter for cutting glass, made of hardened steel, which made a cut at an angle of 45° to the surface of the glass, the cutter of the patent making the cut at a right angle to such surface.

5. The cutter of the patent was the first successful substitute for the glazier's diamond.

6. The specification of the patent is not ambiguous, in saying, merely, that the cutter is to be "hardened," and in not saying what degree of hardness is to be given to it.

[This was a bill by Samuel G. Monce and Rollin J. Ives against Benjamin F. Adams for an injunction and an account. The plaintiffs pray that the defendant be restrained from further infringement of letters patent No. 91,150, granted to S. G. Monce, June 8, 1869.]

Charles E. Mitchell, for plaintiffs.

W. Edgar Simonds, for defendant.

SHIPMAN, District Judge. The complainants are the owners of a patent for an alleged new and useful "improved tool for cutting glass," and have brought their bill against the defendant, alleging an infringement by the latter, and praying for an injunction and an account. The patent was granted to Samuel G. Monce, one of the complainants, on the 8th of June, 1869. The defence contained in the answer, and chiefly relied upon, is a denial that said Monce was the first inventor of the patented article. It is also alleged, that the description of the invention set forth in the specification is incomplete and ambiguous.

The patented article was designed to be an economical and effective substitute for a glazier's diamond, in the cutting of glass. The alleged invention is thus described in the specification: "My invention consists in the use or employment of a revolving steel roller, the periphery of which roller is bevelled on both sides, so as to form a cutting edge, and is fitted to revolve in a suitable frame, and attached to a handle for operating the same. The cutter is made from steel, and is turned smooth and round, and afterwards hardened. The sides are parallel, or nearly so, for a short distance, and then bevelled towards each other, so as to meet about midway between the same, thus forming the point or cutting edge. The bevelled portion of the sides should be at an angle of about forty-five degrees to the axis of the cutter, and, consequently, will be at near right angles to each other. It is not necessary that the angles of the bevelled sides should be at exactly right angles to each other, but near that angle, or a very little more obtuse, the cutter is found to operate to the best advantage. The cutter can be fitted to revolve upon a pin, or on solid journals at each end, which latter mode I prefer, and show the same in drawings. The frame, near one end, is provided with bearings for the journals, which journals should be a little shorter than the thickness of the sides

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 126; and here republished by permission.]

of the frame, in order that, when the sides are placed against a straight edge or other gauge, the end of the journal shall not come in contact with such gauge. The handle, C, can be of any desired form, and secured to the frame in any proper manner. I construct said handle like the handle ordinarily used for a diamond tool. * * * By my invention I produce a tool for cutting glass, which is equally convenient in use as an ordinary diamond, and can be sold at a large profit, for one-tenth of the usual cost of a diamond." The claim is as follows: "I do not claim simply a revolving cutter, but what I claim as new, and desire to secure by letters patent, is: (1) The cutter, A, constructed substantially as shown and described, and for the purposes set forth. (2) The combination of the cutter, A, frame, B, and handle, C, substantially as and for the purposes described."

The drawings attached to the specification show that the instrument is a tiny steel revolving cutter or wheel, made as described in the specification, attached to a frame and handle, the whole resembling very much the glazier's diamond ordinarily in use. It is clearly proved that this instrument is exceedingly well adapted to the purpose for which it was designed; that very large quantities have been sold at a cheap rate; that it has superseded the use of all other steel glass-cutters; and that it is an efficient and useful tool, while previous inventions have been failures. A glazier's diamond is sold at from $3.50 to $5.00, while this article is sold at fifty cents or less. The use of a tool for glass-cutting is thus brought within the reach of every householder. It is admitted, that the invention does not consist of a revolving cutter; and it is obvious that it does not consist in a revolving cutter of a high degree or hardness, for, "hardened" steel cutters had been known previously to the date of the patent. The invention, then, so far as the cutter is concerned, must consist in its form—in the fact that the sides are made parallel, and then bevelled towards each other at an angle of about forty-five degrees to the axis of the cutter, so as to meet about midway between the same, in a cutting edge. The sides, at the cutting edge, will, consequently, if they are at an angle of forty-five degrees to the axis of rotation, be at right angles to each other. As has been said, the object of the patentee was to make an economical substitute for the glazier's diamond, which should, if possible, possess the requisites which experience had shown were best adapted to successful glass-cutting.

In order to determine whether the utility and success of this invention depends upon any peculiarities in the form of the cutter, it is desirable to ascertain upon what depends the efficiency of the diamond. While almost any diamond will scratch or tear the surface of glass, it is a fact that the value and efficiency of a diamond to be used for the cutting or severing of glass, depends not merely on the hardness, but upon the form, of the cutting surface. Other gems than the diamond will successfully cut glass, provided they can be shaped into forms similar to those of the diamonds used for this purpose. Dr. Wollaston, in the Philosophical Transactions for 1816, thus explains the peculiarities required for the glazier's diamond: "In the natural diamond, there is this peculiarity, in those modifications of the crystals that are chosen for this purpose, that the surfaces are, in general, all curved, and, consequently, the meeting of any two of them presents a curvilinear edge. If the diamond is so placed, that the line of the intended cut is a tangent to this edge, near to its extremity, and if the two surfaces of the diamond laterally adjacent be equally inclined to the surface of the glass, then the conditions necessary for effecting a cut are complied with. The curvature is not considerable, and, consequently, the limits of inclination are very confined. If the handle be too much or too little elevated, the one extremity of the curve will be made to bear irregularly upon the glass, and will plough a ragged groove, by pressure of its point. But, on the contrary, when the contact is duly formed, a simple fissure is effected, as if by lateral pressure of the adjacent surfaces of the diamond, diverted equally to each side. The effects of inequality in the lateral inclination of the faces of the diamond to the surface of the glass are different according to the degree of inequality. If the difference be very small, the cut may still be clean, but, as the fissure is then not at right angles to the surface, the subsequent fracture is found inclined accordingly. When an attempt is made to cut with an inclination that deviates still more from the perpendicular, the glass is found superficially flawed out on that side to which the greater pressure was diverted, and the cut completely fails."

Again, from the testimony given in this case it appears, that it is necessary, for practical use, as a glass-cutter, that the sides of the instrument should be bevelled towards each other at about a right angle, for two reasons: 1st. A more acute angle would not be sufficiently durable. 2d. Experience has shown that, in order to cut glass successfully, the cutting edges of the tool, whether of a diamond or of any other cutter, must be at a right angle to each other. This fact is also asserted by the authorities upon the subject. The reason why such an angle is necessary does not seem to be clearly explained. Hence, the requisites of the form of a tool best adapted to glass-cutting, are three-fold: 1st. The cutting edge should be curvilinear. 2d. The cutting edges should be at right angles to each other. 3d. The two surfaces of the diamond which are adjacent to the cutting edge should be

equally inclined to the surface of the glass. The cutter should also be so placed in its frame as most easily to bring the cut which is to be made at right angles with the surface of the glass.

Recurring, now, to the alleged invention, the sides of the cutter are made parallel and then bevelled towards each other at an angle of about forty-five degrees to the axis of the cutter, so as to meet about midway, in a cutting edge. The conditions necessary to form a glazier's diamond are thus complied with; for, by making the two sides of the cutter parallel for a short distance, and then bevelling them towards each other at an angle of forty-five degrees to the axis of rotation, till they meet, "the two surfaces" of the cutting instrument, "laterally adjacent, are equally inclined to the surface of the glass." The frame being attached to the cutter in the precise way in which the handle is attached to the diamond, the inclination of the cut will naturally be at right angles to the surface of the glass, and the lateral pressure of the adjacent surface of the cutter is "diverted equally to each side." Furthermore, the sides, at the cutting edge, being at or near an angle of forty-five degrees to the axis of rotation, will be at or near an angle of ninety degrees to each other.

Having thus ascertained wherein the peculiarity of the cutter consists, is this form a new invention of the patentee, or has it been anticipated by others? The respondent claims that this alleged invention is an instance of double use—the mere application of an old device to a new purpose. He introduces the patents of Charles Wilson, of March 13th, 1847, and April 10th, 1849, of Joseph E. Stanwood, of April 26th, 1859, and of A. H. Hook, of September 13th, 1864, to show, not only that the use of steel cutters for cutting hard substances was well known, but that the cutter in each of these patents was of a similar form with the one in the Monce patent.

The first patent to Charles Wilson was for a mode of cutting stone or other like material, by means of a revolving cutter, operating in a described manner, and was particularly designed for the smoothing and finishing of grindstones. Whether the knives in Wilson's machine are able to cut glass or not is unknown. In either event, the particular form or shape of the knives or cutters was not a part of Wilson's machine, and, whether they were or were not accidentally bevelled at an angle of forty-five degrees, was an unrecognized circumstance, of no value or importance to his discovery.

The second patent of Wilson is entirely immaterial to the present case.

The patent of Stanwood was for a revolving cutter, so operating upon gas or iron pipe, secured in place by a clamp or jaw, as to cut the pipe. Sometimes, one of the cutters, detached from the heavy frame in which it is placed, will cut or tear glass. Ordinarily, however, an instrument intended for cutting pipe cannot be successfully used upon glass. The requisites for successful pipe-cutting are very different from those for successful glass-cutting, and, consequently, it is only in exceptional cases that a gas-pipe cutter can be used upon glass. Such a cutter could never be made a practical substitute for a diamond. But, in this, as in the first Wilson patent, the invention which is the distinctive feature of the Monce patent is unknown and unrecognized. In the Stanwood device, the sides of the cutter may or may not be bevelled towards each other at a particular angle. The angles vary in different specimens of the article, sometimes exceeding, and sometimes being under, forty-five degrees.

The Hook patent is for a paper-cutter. It is sufficient to say, that one of its sides is at right angles to the axis of rotation.

The respondent also introduced the cutter attached to a book-binders' machine for cutting pasteboard, and claims that it has long been in use, and will cut glass. The pasteboard cutters exhibited upon the trial, did not cut glass readily or easily. The truth probably is, that such a cutter of unusual hardness will also sever glass, but those ordinarily and usually made will not answer this purpose. The sides of the pasteboard cutter are, apparently, but slightly inclined towards each other.

Thus far, the well known principle relied upon by the respondent is inapplicable to the present case, inasmuch as it is untrue, that the distinctive feature of the patented article was used as a part of the cutters previously existing. The alleged invention of Monce was neither a part of the invention of previous patentees, nor was it a part of their machines, unless by accident, and, lastly, the cutters in their machines will not practically perform the office of this cutter, to wit: the cutting of glass for glaziers' purposes. The peculiarity in the form of this cutter has accomplished an effect not before produced, that is, has made a successful glass-cutter.

The respondent also claims, that the alleged invention had been previously anticipated, in every particular, by the patent of O. M. Pike, of December 29th, 1868, and by the harness-leather cutter used and produced by the witness Septimus C. Stokes.

Pike's patent was for a glass-cutter. His cutter was a small rod of hardened steel, turning, near one end, upon two friction wheels, and, at the other end, in a hardened steel socket in a thumbscrew. The object of the thumbscrew, the friction wheels and the steel socket was to make the friction on the cutter as little as possible. When the instrument is used, the end of the cutter is placed upon the surface of the glass, and the side of the frame drawn along the straight edge or pattern. The instrument is so made that,

in order to bring the point of the cutter in contact with the surface of the glass, so as to cut, the cutter must be placed upon the glass at an angle of forty-five degrees. This article has not proved practically a success, and, by recurring to the quotation heretofore made from Dr. Wollaston, it is not difficult to understand the cause of the failure. The fissure should be made at right angles with the surface, otherwise, if the cut deviates much from the perpendicular, "the glass is found superficially flawed out on that side to which the greater pressure was diverted, and the cut completely fails." As the Pike tool must be held at an angle of forty-five degrees to the glass, the cut is made at an angle of forty-five degrees, instead of being at right angles, to the surface. The cut becomes a sidewise or slanting cut, and, the greater pressure being constantly directed upon one side, the instrument is unevenly worn, and, in a short time, loses its cutting power. The defect in the Pike instrument is remedied in the Monce patent, by making the cutter a wheel instead of a revolving rod. The wheel can then be placed upon the end of the handle, like the handle of an ordinary diamond, instead of at the side of a frame, and can be placed upon the glass so that the lateral pressure of the two sides of the cutter upon the surface will be equal, and, consequently, the cut will be at right angles, and not slanting, to the surface.

The Stokes cutter was originally for cutting leather. It was purchased in 1861 by the owner, who was then a saloon keeper, and used, at first, for cutting newspapers into cigar lighters. Stokes discovered that it would cut glass, and has occasionly used it for that purpose since, for his own convenience or amusement. The wheel was evidently, at one time, much larger than it is now, and has been worn to the present edge by use. The wheel is of great hardness, and will, when ground to a sharp edge, cut glass. That it can be uniformly used for a glass-cutter is not claimed. That such an instrument could not be made practically available in the market and by householders, as a glass-cutter, is obvious.

The result is, that the respondent has, in my judgment, failed to show that the alleged invention has been anticipated either by a prior patent or by prior use.

There is another fact in this case not unworthy of mention. The small and inexpensive tool which is the subject of controversy has proved to be of great utility, and has achieved success. The energy and research of the respondent and of his counsel has not discovered a successful substitute for the glaziers' diamond, other than the patented article. It has confessedly superseded all prior inventions. Under these circumstances, the language of the court in Stanley Works v. Sargent [Case No. 13,289], is not inappropriate: "Utility is not an infallible test of originality. To be new, in the sense of the act, it must be produced of original thought or inventive skill, and not a mere formal and mechanical change of what was old and well known. But, the effect produced by a change is often an appropriate, though not a controlling, consideration, in determining the character of the change itself."

The respondent also insists that the patent is void for ambiguity, both in the specification and in the claims: 1st. Because the specification does not state what degree of hardness is to be given to the cutter. It simply says "hardened." As has been before remarked, the patent was not for a hardened revolving cutter. That was a well known invention. As the term "hardened," among mechanics, implies that it shall be made as hard as can ordinarily be done, and not tempered, it was not necessary for the patentee to set forth in his specification more particularly the degree of hardness to be given to the cutting instrument.

2d. It is claimed that the specification is ambiguous, in that it does not point out what is old, and specify what is new, in the alleged invention. In the claim, the patentee expressly disclaims a revolving cutter, but does claim a cutter constructed substantially as shown and described, and for the purposes set forth. This claim has reference to the shape, form and angles of the cutter—to the particular construction and peculiar shape of his cutter, which adapted it to the purposes of a glass-cutter. He did not intend to claim, and did not, in my judgment, claim, a hardened roller, or a cutter brought to any particular degree of hardness.

I see no force in the other criticisms upon the ambiguity of the specification, which seems to me to be as exact and accurate as the nature of the subject will permit.

No question is made in regard to the fact of infringement by the respondent. He has made and sold an exact imitation of the plaintiffs' invention.

An injunction must, therefore, issue, and a reference be made to a master to take and state an account.

[For another case in which this patent was held invalid, see Monce v. Woodworth, Case No. 9,706.]

Case No. 9,706.

MONCE v. WOODWORTH.

[4 Ban. & A. 307;[1] 19 O. G. 998.]

Circuit Court, D. New Hampshire. May 8, 1879.

PATENTS—TOOL FOR CUTTING GLASS—NOVELTY—PUBLIC USE AND SALE.

Letters patent No. 91,150, granted to Samuel G. Monce, June 8th, 1869, for a "tool for cutting glass," *held* void for want of novelty, the invention having been in public use and on sale more than two years prior to his application for the patent.

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

[This was a bill by Samuel G. Monce against Frank R. Woodworth to restrain the infringement of certain letters patent.]

Barnard & Mitchell, for complainant.
Pike & Blodgett, for defendant.

CLARK, District Judge. Two questions are presented in this case by the pleadings and the proofs, for the consideration of the court: first, the question of novelty in the complainant's invention, and, second, the question of infringement by the defendant. I have considered only the first of these, because I am satisfied, upon the evidence offered, that it is decisive of the case.

The complainant alleges in his bill that he is "a true and original inventor or discoverer of a new and useful improved tool for cutting glass," which said invention was not known or used by others before his invention or discovery thereof, and that letters patent therefor were granted to him on the 8th day of June, 1869, and that the defendant has infringed this patent.

The defendant in his answer denies that the complainant "is the original or first inventor or discoverer of the alleged invention described in said letters patent, or that the said letters are valid," and alleges that said invention, and substantial and material parts thereof, either separately or combined together as in complainant's patent, were, long prior to the grant and date of said patent, known to and used by various persons named in the answer, and amendments thereto.

The invention of the complainant "consists in the use or employment of a revolving steel roller, the periphery of which roller is bevelled on both sides, so as to form a cutting edge, and is fitted to revolve in a suitable frame, and attached to a handle for operating the same. The cutter is made from steel, and is turned smooth and round, and afterwards hardened. The sides are parallel, or nearly so, for a short distance, and then bevelled towards each other so as to meet about midway between the same, thus forming the point or cutting edge. The bevelled portion of the sides should be at an angle of about forty-five degrees to the axis of the cutter, and, consequently, will be at near right angles to each other. It is not necessary that the angles of the bevelled sides should be at exactly right angles to each other, but, near that angle, or a very little more obtuse, the cutter is found to operate to the best advantage. The cutter can be fitted to revolve upon a pin, or on solid journals at each end. * * * The frame, near one end, is provided with bearings for the journals, which journals should be a little shorter than the thickness of the sides of the frame in order that, when the sides are placed against a straight edge or other gauge, the end of the journal shall not come in contact with such gauge. The handle, C, can be of any desired form, and secured to the frame in any proper manner. I construct said handle like the handle ordinarily used for a diamond tool. * * * By my invention I produce a tool for cutting glass, which is equally convenient in use as an ordinary diamond, and can be sold at a large profit, for one-tenth of the usual cost of a diamond." The claim made by the complainant is as follows: "I do not claim simply a revolving cutter, but what I claim as new, and desire to secure by letters patent, is, 1. The cutter, A, constructed substantially as shown and described, and for the purposes set forth; 2. The combination of the cutter A, frame B, and handle C, substantially as and for the purposes described." The drawings attached to the complainant's specification show very clearly the invention described.

This invention, thus described and claimed by the complainant, and patented to him by letters patent, June 8th, 1869, the defendant says was not the invention of the complainant, nor was it then new, but was known and used by various persons long before—that is, the complainant was not the first inventor, as he must have been to sustain his patent. Colt v. Massachusetts Arms Co. [Case No. 3,030].

To sustain his allegation, the defendant introduces a deposition of one Charles L. Morison, who says that in the winter of 1860 and 1861 he was in the business of a photographer at Warren, New Hampshire; that he went there soon after Thanksgiving in 1860, and remained there until after the breaking out of the Rebellion in April, 1861, when he enlisted in the Fourteenth Massachusetts, and afterward in the Tenth New Hampshire Volunteers, and was mustered out June 26th, 1865; that, while he was at Warren, in the winter of 1860 and 1861, he purchased a tool for cutting glass; that he used it at Warren, and, occasionally, after he came back from the army, in 1865, until he purchased a diamond.

This tool is produced, and is found to embody, substantially and fully, the complainant's invention, and to be adapted to and used for the same purpose. It has the rotary disk with bevelled sides and cutting-edge, the pin on which the disk revolves, the frame within which it is held, and the handle with which it is operated, all combined. This purchase and use was in 1860 or 1861, eight years before the date of the patent to the complainant. The time of the purchase is fixed by the place where the purchaser then was, and his enlistment in the Union army, which he would not be likely to misremember, and the character of the tool, by its production and admission, and he says that the person of whom he bought it had more of them. This evidence, if believed, is sufficient to make it quite probable that the complainant was not the original inventor of the tool claimed by him, and that it was not new at the time of his application for a patent, but

that it had been in public use years before.

But this witness further testifies, that, while he was at Warren, in the winter of 1860 and 1861, he went twice to Haverhill, to a photographer by the name of Herbert, to get glass for his business, cutting glass there with the same cutter, and that he distinctly remembers seeing a similar tool at Mr. Herbert's gallery. This Mr. Herbert was then out of health, and his wife assisted him in his work in the gallery. Mr. Herbert is now dead, but Mrs. Herbert is still living, and her deposition has been taken in this case by the defendant. She testifies that she was married to her husband in September, 1857; that he was then a photographer at Haverhill, New Hampshire, and that he continued his business there until September, 1865; that her husband was out of health, and that she went into his gallery in the spring of 1859, and was there until the business was closed in 1865, and that she learned the business as thoroughly as she could, to help her husband. She testifies further that she was acquainted with Mr. C. L. Morison, who was at Warren in the spring of 1861; that he came to the gallery of her husband to get some glass; that they had none of the size he wanted, and he cut it for himself, with a tool which he had with him. This tool she identifies, and says her husband then had a similar one, which they used in their gallery for cutting glass. The two tools were so similar that she marked that of her husband with the letters "H. F. H.," and the other with the letter "M.," she thinks. This last is annexed to her deposition, (defendant's Exhibit M,) and has upon it some marks which may have been put there by her, but they are not very legible. The tool which was used in their gallery, marked "H. F. H.," went with the sale of their gallery, and she has not seen it since. Here, then, are two of these tools for cutting glass, both seen by Mr. Morison and by Mrs. Herbert, one produced and identified by both, and the other similar, and the time of their use fixed as early as 1861. About this there would seem to be no room for mistake, unless the witnesses are wilfully false.

Again, Morison says, that after his discharge from the army, in 1865, he again commenced the business of a photographer, at Haverhill, New Hampshire, and occasionally used the tool, which he purchased in the winter of 1860 and 1861. Morris S. Lamprey, another witness, says that he knew Morison in the army, and that, after their discharge, he visited him at Haverhill, and that while there he was in his photograph-gallery and was shown a tool for cutting glass, and saw glass cut with it. He says it went with a wheel, and was similar to defendant's Exhibit M, (the tool which Morison purchased in 1860–'61), wheel set in wood similar to this. Should think this might be it, but could not swear to it; could not swear to the length of handle. Says he stood near, watching the process, and afterward the tool was held up near his eyes, and the cutter rolled with the finger. Now, this witness does not swear positively to the identity of the tool; but he does swear that it was similar to the one annexed to the deposition of Mrs. Herbert (Exhibit M), and as Morison swears that this is the only tool of the kind he ever had, it makes it quite certain this was the tool which he saw.

Warren S. Hill, an expert, called as a witness by defendant, says that the rotary cutter in Exhibit M is the same, in kind and form, as that described in letters patent to the plaintiff, No. 91,150. So says another expert, Edward H. Johnson. Indeed, there can be no doubt the tool described in the complainant's letters patent No. 91,150 and the one purchased by Morison in the winter of 1860 and 1861, are substantially similar in form, material, construction and use. This, I think, was conceded in the argument.

So far, there would seem to be very little, if any, doubt, that in the winter of 1860 and 1861, Charles L. Morison purchased a tool embodying the complainant's invention, constructed substantially in the same way, and used for the same purpose. It would also seem very probable that Henry F. Herbert had a similar tool, used for the same purpose, at the same time, and up to 1865. If so, the complainant's case must fail, because he was not the original inventor. Rich v. Lippincott [Case No. 11,758].

But the case does not rest solely upon this evidence. Milo Bailey, another witness called by the defendant, testifies that he is a trader at Haverhill, New Hampshire, at Haverhill Corner; that he traded at the Oliverian Village in that town from 1860 to 1867, and in 1867 removed to the Corner. He says that while trading at the Oliverian Village in 1865, latter part, or 1866, he purchased some rotary glass-cutters, either three or six of a peddler; that he has one of them now, which he annexes to his deposition, marked "O"; that he sold the others, one to Michael Carlton, Jr.; that these cutters were for cutting glass, and that he used the one retained by him for cutting glass, and that he so used it at the Oliverian Village before he moved thence, in 1867. This was two years or thereabouts before the granting of the patent to the plaintiff, in 1869. He says, he recollects the fact of having the tool before he moved from the Oliverian Village; that he kept it in the money-drawer, and used it to cut glass when he had not the size to suit a customer; that was what he bought and used it for.

Charles K. Carlton, being called as a witness, says that his father, Michael Carlton, Jr., purchased a rotary glass-cutter of Milo Bailey in the spring or summer of 1867; that he stood beside him when he purchased it; and it has since been in his father's or his own possession, and was bought to cut glass with, and has been so used, and for nothing else. He says it was purchased when Mr. Bailey first moved to Haverhill Corner, and

when the store was entirely new, newly repaired. He says this tool had upon it a label or paper, on which was printed "carbonized disk," which he removed at or about the time of the taking of his deposition. This tool is produced, marked "P," and is identical in appearance with the one marked "O," and the two are identical in construction with the one purchased and produced by Mr. Morison. Here, then, are three tools shown, which are claimed and proved to have been purchased and used prior to the granting of the complainant's patent, and one of them several years.

To overcome this testimony of the defendant, the complainant offers the testimony of George Henry, who says he has been engaged in the manufacture of the carbonized-disk glass-cutter; that he commenced in the latter part of 1869, and continued somewhat over two or three years. At first he disposed of them to persons "coming along," "happening in," but the greater part to one man, a Mr. Brooks; and that, in all, he manufactured some sixty or seventy thousand of them. Upon being shown the tools exhibited by the defendant, marked "M," "O," "P," he says he thinks or believes he made them at his shop, and gives his reason for such belief, that the brasses are driven in in the same way, and pinned in the same way, and that the general style is altogether the same. There was no mark upon them but the paper label.

Charles Brooks, another witness, called by the complainant, states that he had bought and sold the carbonized-disk cutter made by Mr. Henry for three or four years; that the amount of his trade was, in all, seven or eight thousand dollars. Upon being shown the tools marked "M," "O," "P," he says he should say they were similar to the tools made by Mr. Henry, and that they were a part of the tools made by him, in his belief.

Neither of these two witnesses, however, swear positively that Henry made these tools. There is no certain, sure mark upon them, beyond a general similarity, and the paper label, which seems to have been on one of them. Now, if they could identify them as made by Mr. Henry, would the testimony of those two witnesses overbear the testimony of the defendant's witnesses, fixing the time and reciting the circumstances with the particularity that they do?

There are other witnesses called, to whom I have not alluded, because I have found nothing in their testimony which could have changed the probabilities of the case, or the balance of testimony. The letters patent to the plaintiff are prima facie evidence of the novelty of the invention, and the burden of proof is upon the defendant to overcome this evidence, and in this case I think he has done it.

[For another case in which this patent was held valid, see Monce v. Adams, Case No. 9,705.]

Case No. 9,707.

MONCURE et al. v. DERMOTT.

[5 Cranch, C. C. 445.] [1]

Circuit Court, District of Columbia. March Term, 1838.[2]

USURY—SALE OF BOND—SURETY—BONA FIDES—CLOAK TO EVADE STATUTE—ESTOPPEL—ASSIGNOR OF BOND—WAIVER—TRIAL—RIGHT TO OPEN AND CLOSE.

1. A covenant absolutely to pay a usurious debt directly to the lender, is not a covenant simply to indemnify the surety, although delivered to the surety, but is a security for the usurious debt to the lender, especially if the instrument, upon its face, does not purport to be a covenant to the surety, but an undertaking to pay the debt directly to the lender of the money.

2. A covenant to pay an usurious debt to the creditor is void, under the statute of Virginia, although delivered to the surety, who was ignorant of the usury; it being a security for the usurious debt, and the surety who innocently pays the debt, cannot, upon that instrument, recover from the debtor money thus paid.

3. An assignor of a bond is not estopped to deny its validity in law.

4. Although the affirmative of the issue be upon the defendant in an action of covenant, yet as the plaintiffs must prove damages sustained by the breach of the covenant, they have the right to open and close the argument before the jury.

[Cited in brief in Murray v. Mason, Case No. 9,966.]

5. If the cause of action be usurious, no waiver of the objection by the defendant, in pais, will avail the plaintiff.

6. If a man in Virginia, bona fide, buy a bond at such a discount that the lawful interest upon the bond will produce him 12 per cent. per annum upon the purchase-money, it is not usury; but if he intended it only as a cloak under which to evade the statute, it is usury.

7. If there be no loan of money secured by the bond, and it be purchased bona fide, the transaction is not usurious, although purchased at such a discount as enables the purchaser to obtain an interest of 12 per cent. per annum upon the purchase-money, and although the bond was made to raise money upon, if the purchaser was ignorant of that fact.

8. If the instrument upon which the suit is brought, be a security for the usurious debt, it is void by the statute, and the plaintiffs cannot recover upon it the money which they, as executors of the surety, paid in satisfaction of such usurious debt; although, when they paid it, they were ignorant of the usury; and it was not necessary that the defendant should have informed them of the usury, and instructed them not to pay it, before they paid it.

9. What facts may be inferred from other facts, is a question of law. And from certain facts the jury may infer, that a certain transaction is substantially a loan, although it may appear to have been made in the form and name of a sale of a bond.

This was an action of covenant [by Richard C. L. Moncure and Walter T. Conway] upon the following instrument: "Whereas Mary James has executed her bond or note, dated the 28th of November, 1828, payable to me, on demand, for the sum of $2,620, which said bond or note was merely loaned to me for the purpose of raising money upon; and whereas I have, since the execution

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

[2] [Reversed in 13 Pet. (38 U. S.) 345.]

of the said bond or note, as aforesaid, assigned it to Philip Alexander, of Fredericksburg, for value received of him, I do, therefore, hereby bind myself, my heirs, executors, and administrators, to pay and discharge the said bond or note, with all interest that may accrue thereon, when the same shall become due and payable. Given under my hand and seal this 12th day of August, 1829. Anne R. Dermott. (L. S.)"

The "bond or note" mentioned in the above instrument was as follows: "$2,620. On demand I bind myself, my heirs, executors, and administrators, to pay to Anne R. Dermott, her executors, administrators, or assigns, the sum of two thousand six hundred and twenty dollars, for value received, with interest from the date hereof. Given under my hand and seal this 28th day of November, 1828. Mary James. (Seal.)"

Upon which was the following indorsement: "I assign the within to Philip Alexander for value received this 1st day of December, 1828. Anne R. Dermott."

It appeared in evidence that the following payments on account of this "note or bond" were made by Miss Dermott (the defendant) namely, 19th April, 1831, $180. December 27th, 1831, $200. February 7th, 1832, $225, and on May 8th, 1832, $395. And the following payments were made by the plaintiffs, namely, December 6th, 1833, $600. December 28th, 1833, $1,346.52; and December 31st, 1833, $435.55 in full. That this "bond or note" was made to raise money upon to pay a debt due by the defendant to Thomas Poultney & Son of Baltimore, upon the following obligation, namely: "We, Mary James, Anne R. Dermott, William C. Beale, and John Moncure, of the county of Stafford, and Thomas Sedden of the town of Fredericksburg, do hereby promise and bind ourselves, our heirs, executors, and administrators jointly and severally, to pay to Thomas Poultney & Son of Baltimore, their executors, administrators, or assigns, the just and full sum of three thousand six hundred and thirty-three dollars and sixty-one cents on or before the 23d day of November, 1828, as witness our hands and seals this 31st day of March, 1826. Mary James. (Seal.) Anne R. Dermott. (Seal.) Wm. C. Beale. (Seal.) John Moncure. (Seal.) Thomas Sedden. (Seal.) Attest: J. M. Conway; as to Mary James and Anne R. Dermott."

On that instrument was the following indorsement:

Paid by T. Sedden, on account of Robert James	$ 629 20
Check on United States Bank at Washington	628 33
Paid by P. Alexander	2,340 00
	$3,597 53
Balance due T. Sedden, for which he has a note of J. Moncure's	36 09
	$3,633 62

Thomas Poultney & Son, pay Thomas Sedden, Esq., cash, or order. Evan Poultney.

That on the same 31st of March, 1826, the said Mary James, (of the county of Stafford,) conveyed in trust to Arthur A. Morson, to secure and indemnify the three sureties Beale, Moncure, and Sedden, against their liability upon that note, about five hundred acres of land and thirteen slaves, in Stafford county, with power to sell the same if the debt should not be paid by Miss James or Miss Dermott. That as early as March 14th, 1828, Mr. John Moncure, in behalf of Miss Dermott, applied to Mr. Philip Alexander, of Fredericksburg, to obtain from him money to pay off this debt to Poultney & Son, and that Mr. Alexander finally determined that he would give $2,200 for a bond to be given by Miss James, payable in five years, for $3,400; but he would require a deed of trust from her (Miss James) of her land and slaves; and that the balance which would be due to Poultney & Son over and above the $2,200 to be placed in his (Alexander's) hands so that he might pay the debt to Poultney & Son and get a release of the deed of trust already given to Mr. Morson to secure the sureties Beale, Moncure, and Sedden, and take a new deed of trust for his security. That Miss James was the defendant's aunt, and the defendant either lived with her, or near her, at the time the negotiation was going on with Mr. Alexander about raising the money, and was in habits of intimacy with her. That Miss James and Mr. Alexander were well acquainted with each other. That the money to be raised was solely to pay off the debt to Poultney & Son, for which Miss James was bound as principal, and had given a deed of trust upon her land and slaves. That on the 8th of December, 1828, the said Mary James conveyed her land and slaves to John Moncure in trust to secure to Mr. Alexander the payment of her bond on the 1st of December, 1830. That on the 24th of November, 1828, (four days before the date of Miss James's bond) Mr. Alexander, in a letter to Mr. John Moncure, who was conducting the negotiation on the part of the defendant, says, "and as the profit on the transaction in which I am about to engage will be small, I will have nothing to do with it unless every thing is clear and perfectly indisputable." He then makes particular inquiry as to Miss James's title to the land and slaves; and says, "it is absolutely necessary that I should have all this information before I engage in the transaction. There is now but little time left to obtain it; perhaps too little. If I pay the $2,350 on Wednesday, it must be with the distinct understanding that, if the business be not arranged to my entire satisfaction, that Mr. Sedden, Mr. Beale, and yourself refund me the money I pay; which will leave you all precisely in the situation you would be placed if I had nothing to do with the business." "I cannot pay the money on Wednesday, without having a distinct understanding

with Mr. S., Mr. B., and yourself as to the repayment of the money I pay in case the business shall not be arranged to my satisfaction." And in the postscript he says, "you entirely misunderstood my views, if you supposed I was willing to purchase paper to produce me twelve per cent. on the money paid at the end of five years. My view was that it should, upon the money advanced, produce me annually twelve per cent. You will find, upon a calculation, that the sum I advanced, by compounding the interest at the end of each year, will not produce to me more than about eight per cent. Now it can hardly be expected that I would advance money and wait five years upon a security somewhat doubtful, and at last to receive only eight per cent., or a little over common bank interest paid each sixty days and compounded. I am willing to enter into the transaction if I can realize what were my views, twelve per cent. upon the money annually." The defendant also produced in evidence a letter dated November 25th, 1828, from Miss James to Mr. P. Alexander, in which she says, "my niece Miss Anne R. Dermott informs me she contemplates selling and assigning to you my bond for $2,880, dated the 22d of this month, and payable on demand. I am anxious to obtain time for the payment of the same; and propose, should you take the assignment, to place the debt upon a footing of perfect safety if you will grant the time I wish, say five years from the date of the bond, by conveying to a trustee of your own selection, land and slaves amply sufficient to secure both the principal and interest of the debt to be paid at the expiration of the five years from the date of the note. If you take an assignment of the note and accede to my proposition, I hereby bind myself, my heirs, executors and administrators, to execute a deed of trust when tendered to me, on the following property; namely, all my lands in the county of Stafford and my slaves," (naming them.) "The property is at present under a lien to secure Mr. Moncure, Mr. Beale, and Mr. Sedden as my securities to Mr. Poultney of Baltimore; but these gentlemen will release the property, or, if they think proper, give you the benefit of the lien."

And the following letter from Mr. Alexander to Miss James, dated, "Fredericksburg, 28th November, 1828": "Dear Madam—I received your letter this morning, and am willing to take the bond, provided you will agree to pay me five hundred dollars annually, and the balance at the expiration of the five years, and upon the debts being made perfectly secure. Yours, respectfully, P. Alexander."

It appeared in evidence that the negotiation for the money had been going on from the 14th of March to the 28th of November, between Mr. Alexander and Mr. John Moncure, as the friend and agent of Miss Dermott. That in every application of Mr. Moncure to Mr. Alexander to advance money, he avoided saying any thing to him in relation to the note or bond of Miss James being executed for the purpose of raising money upon it for the defendant, because he believed that if he did, Mr. A. would have declined making any arrangement whatever to advance the money required by the defendant. But in every application made to Mr. A. by Mr. M. on the occasion, he called on Mr. A. to know what he would give for Miss James's note to the defendant for a certain sum. That the objection to letting Mr. Alexander know that the bond sold to him was a loan to the defendant, was this: he (Mr. M.) believed, from his knowledge of Mr. A. and of his business transactions, that if he informed him that the note or bond was a loan, he would have declined making the advance for it which he did. That the bond of Miss James to the defendant, was made to raise money upon to pay off the debt to Poultney & Son, for which Miss James, and her lands and slaves, were bound; and was a loan to the defendant for that purpose, and was made to suit Mr. Alexander's views, and in pursuance of the agreement made with him by the defendant through her friend Mr. Moncure. There was also evidence tending to show that Miss James knew the purpose for which the bond was given, and the nature of the transaction with Mr. Alexander by which the money was raised. There was no evidence that the defendant informed the plaintiff of it, or warned them not to pay the money; nor that they gave notice to the defendant that they were about to pay it. That from the defendant's several payments on account of the bond, and her silence, the plaintiffs were justified in supposing that she had no objection to their paying it in full.

Mr. Jones and Mr. Swann, for defendants contended that the transaction with Mr. Alexander was usurious, and that the covenant of the defendant to pay that usurious debt directly to Mr. Alexander, was a security for the debt, and was void under the statute of Virginia, which enacts that all "covenants" "for the payment of money lent, on which a higher interest is reserved or taken than is allowed" by the statute, "shall be utterly void." It is not a covenant to indemnify Miss James; but a covenant to pay the debt due upon Miss James's bond, assigned by the defendant to Mr. Alexander. The pretence of its being a sale of the bond, is a mere cloak for the usury. Mr. Alexander insisted upon having twelve per cent. per annum for his money, and prescribed the security which should be given, namely, Miss James's bond and deed of trust. The bargain was made before the bond was drawn and executed; and the bond was made to conform to Mr. Alexander's "views."

Mr. Key and Mr. Dunlop, contra, contended that the covenant was in legal effect a covenant of indemnity only. Although Miss

James is not named as a party to the covenant, and nothing is said about indemnifying her, yet, as it was delivered to her, and as the payment of the money to Mr. Alexander would in effect be equivalent to indemnification, the legal construction of the instrument is that it is a contract of indemnity. Miss James was an innocent surety. There is no evidence she knew of the usury when she gave her bond. The statute of usury does not reach an indemnifying bond. Carter v. Cutting, 5 Munf. 237–239; Rice v. Mather, 3 Wend. 62; Robinson v. May, Cro. Eliz. 588; Button v. Downham, Id. 643. Noy, 73; Ford v. Keith, 1 Mass. 139. But the debt to Alexander was not usurious. He had a legal right to purchase the bond at any discount. Hansbrough v. Baylor, 2 Munf. 36; Taylor v. Bruce, Gilmer, 42; Whitworth v. Adams, 5 Rand. 377; Parker v. Rochester, 4 Johns. Ch. 329. The defendant is estopped to deny the validity of Miss James's bond. Rainsford v. Smith, Dyer, 196a, pl. 41; 5 Wheel. Abr. 106; 8 Cow. 102; Miller v. Stewart, 9 Wheat. [22 U. S.] 702–704; De Wolf v. Johns, 10 Wheat. [23 U. S.] 367.

Mr. Jones and Mr. Swann, in reply. Miss James was bound in the sealed note to Poultney & Son, and made her bond to raise money upon it to pay that note. She was an original party to the usury, and the money was raised for her benefit, as well as that of the defendant. She had given her obligation to indemnify three of the five obligors in that sealed note, all of whom were jointly and severally bound to Poultney & Son. In that note Miss James signs as principal and in her obligation to indemnify the three sureties she calls it her debt and makes herself the principal debtor. The defendant bound herself absolutely to pay the usurious debt directly to Alexander. In the cases cited from Cro. Eliz. the contract was to indemnify the surety from suits on account of the usurious bond; and the reason given for the judgment in those cases is, "for that the surety, by intendment, cannot know of the corrupt contract, to plead it in avoidance of the bond; wherefore the principal ought to take care thereof." But in the present case Miss James had knowledge of the usury. The money was raised as much for her use as for that of the defendant. The covenant of the defendant is not to indemnify, but to pay the original debt. The cases of indemnity, therefore, do not apply. In the case of Dowman v. Butter, Noy, 73, which was "on a counter bond to save harmless" Walmesly said, "the plaintiff shall recover. For that counter bond was made bona fide, and perhaps the surety was not conusant of the usurious contract, and then, he cannot, nor ought to plead that; as if error had been in the first suit; yet the surety shall recover upon the counter bond, although that he takes no advantage of the error. So if the surety had been an infant, and had not pleaded nonage. And that counter bonds mentioned in the statute 13 Eliz. are intended for payment of money to him that lent the money; and not between him that borrows and the surety." "Note, the saving harmless is the substance of the counter bond."

The covenant of the defendant to pay the debt to Mr. Alexander was an additional security to him for the usurious debt. The defendant, if liable at all, was liable, although Miss James or her executors had never paid a cent of the debt, and they might have recovered of her the whole amount for the benefit of Mr. Alexander. Miss James might have avoided her own bond by the plea of usury, and yet recovered the whole debt from the defendant. If the plaintiffs knew that it was a debt due by the defendant, they were bound to inquire of her whether it was due, or whether she had any defence; and if they paid it without such inquiry, they paid it in their own wrong, and are now lending themselves to Mr. Alexander to enable him to recover of the defendant a debt which they could not recover from Miss James. In the present case the breach of covenant assigned is, that the defendant did not pay the debt to Mr. Alexander; not that she did not indemnify Miss James. A bond to indemnify against an usurious contract may be good, but a bond to pay the usurious debt is void, whether the obligor knew that it was usurious or not. In the case from Mass. Rep. the plaintiff had no knowledge of the usury when he indorsed the note, and the notice given to him afterwards and before he paid the money, was only a notice that there was usury, but not of the particulars, so as to enable him to plead the usury and maintain his plea; and there was no instruction not to pay it. But here all the parties were concerned in the usurious contract, with full notice of all the circumstances. In Carter v. Cuting, Mr. Lee, the executor, was not warned not to pay the debt; he paid it; but the court refused to allow the payment in his administration account, and he had to repay it to the heirs of Carter. Ord, Usury, 123, 125; Potkins's Case, 3 Leon. 63; Dowman v. Butter, Noy, 73. The defendant is not estopped to deny the legal validity of the bond, or any other matter of law.

On the trial, the counsel for the plaintiffs prayed the court to instruct the jury, "that it is not competent for the defendant in this action to deny, by plea or otherwise, the validity of the note of 28th November, 1828, recited in the covenant on which this suit is brought; and that she is estopped from setting up, in this action, any alleged usury, as affecting the validity of said note."

Which instruction, THE COURT (THRUSTON, Circuit Judge, absent) refused to give.

The counsel of the plaintiffs then prayed the court to instruct the jury, "that the plaintiffs are entitled to recover in this action, the sums which the jury are satisfied, from the evidence, were paid by the plaintiffs to Philip Alexander, on the bond dated 28th

November, 1828, unless the defendant proves to the jury that before such payments, the plaintiffs were notified that the bond of 28th November, 1828, was tainted with usury, and instructed to dispute the same."

Which instructions, THE COURT also refused; principally because they were of opinion, that the contract of the defendant was not a contract for indemnity, but an absolute obligation to pay the bond assigned to Philip Alexander, and that if that bond was usurious, this bond of the defendant to pay it was also usurious and void. See Story, Confl. Laws, 206.

The plaintiff's counsel then prayed the court to instruct the jury, "that if they should believe, from the evidence, that the note of Mary James to the defendant, assigned by her to Alexander, dated 28th November, 1828, was made on an usurious agreement entered into between said defendant and said Alexander, but that the plaintiffs had no knowledge of such usury at the time they were called upon to pay the balance due on the note, nor at any time before, and paid the same under a belief that the same was bona fide due, and without any knowledge that there was any objection to the validity of said note, and without any notification or communication from the defendant, then the plaintiffs are entitled to recover."

Which instruction, THE COURT also refused.

Whereupon the plaintiff's counsel prayed the court to give the jury the same instruction, with this addition: "Unless the jury should be satisfied from the evidence, that the said Mary James knew of the said usurious agreement under which the said note was given and assigned as aforesaid."

But THE COURT still refused to give the said instruction, so amended.

Whereupon the counsel of the plaintiffs prayed the court to instruct the jury, as in the former prayer, to the words "communication from the defendant," inclusive, with the following addition, to wit: "And if the jury believe from the evidence, that the defendant waived and abandoned all objection to the validity of said note, and assented that the same should be considered as a valid and legal obligation, then the plaintiffs are entitled to recover; and it is competent for the jury to infer such waiver and assent, if they shall believe, from the evidence, that the defendant, after obtaining the said money, made payments of interest as the same became due, and expressed her desire and intention to pay the said note, and her anxiety to save her aunt's property from sale, under the said deed of trust."

But THE COURT still refused to give the instruction, as thus further amended.

The plaintiff's counsel then prayed the court to instruct the jury, "that if they believe from the evidence, that there was no loan of money from Alexander to the defendant, secured by the bond of the 28th of November, 1828, but that the said bond was bona fide purchased by said Alexander of the defendant, at a discount exceeding the legal rate of interest, the said Alexander not knowing, when he purchased the said bond, that the same was loaned by the said Mary James to the defendant solely to raise money on, the transaction is not usurious, and the plaintiffs are entitled to recover, in this action, the moneys paid by them to Alexander on said bond."

Which instruction, THE COURT gave, as prayed.

The plaintiff's counsel further prayed the court to instruct the jury, "that if, from the evidence, they should believe that Philip Alexander, when he paid the money, and took the note as aforesaid, intended to buy the said note for the amount given on it, not knowing that the note was made by Miss James to the defendant, in order to raise money on it, and did not mean, by disguising the advance under the form of a purchase, to evade the statute of usury; then such purchase was lawful."

Which instruction, also, THE COURT gave, as prayed.

Whereupon the defendant's counsel moved the court to instruct the jury, as follows, to wit: "That if the jury find and believe from the evidence aforesaid, that for several months before the execution and assignment of the bond or note mentioned and described in the covenant upon which this suit is brought, there were such negotiations and propositions pending between said John Moncure, (acting in behalf of defendant,) and Philip Alexander, as are mentioned and set forth in said affidavits of Moncure and Alexander, and in the papers and exhibits therein referred to; that the true and genuine nature and object of such negotiations and propositions, and of the successive arrangements and understandings resulting from them, as really contemplated by both parties, were, that said Alexander should make an advance of money to defendant, upon a future bond or note of said Mary James, payable to defendant, and by her to be assigned to said Alexander, under the name and form of a sale of such bond or note, at a discount above the legal rate of interest; that discount from the amount of such bond or note should be so adjusted as that the difference between the full amount of the bond or note, and the sum advanced on it, should be equivalent to an interest at the rate of 12 per cent. per annum on the sum actually advanced, for the time of forbearance to be given on such bond or note. That all the said preliminary negotiations, propositions, and arrangements, were just before the execution and assignment of the bond or note referred to in the covenant set forth in the plaintiff's declaration, (such bond or note being the same note under seal, or bill obligatory above given in evidence by plaintiffs with the said covenant, and annexed to the said original affidavit of said John Mon-

cure as aforesaid,) terminated in an arrangement so modifying the before-pending propositions and arrangements aforesaid, as that said Alexander should immediately advance the defendant two thousand three hundred and forty dollars, and that defendant should assign to him a note or bond thereafter to be drawn and executed by said Mary James, for such amount as should make the difference between the sum so advanced and the sum to be ultimately received by him for the principal and interest of such bond or note, equivalent to an interest of twelve per cent. per annum on the sum so advanced, according to the principal on which said Alexander, in his aforesaid letter (B 1,) to said Moncure, insisted that the profits of the transaction should be calculated and secured, and that the payment of such bond or note should be collaterally secured by a deed in trust of the land and slaves of said Mary James. That the said Alexander, in pursuance and execution of such arrangement and understanding, did advance the two thousand three hundred and forty dollars to defendant, or for her use. That the said Mary James, in the pursuance and execution of the same arrangement and understanding on her part, did, afterwards, on the 28th day of November, 1828, execute and deliver the said note under seal, or bill obligatory of that date, and, afterwards, on the 10th December, 1828, duly execute and deliver to said J. Moncure and P. Alexander the said deed in trust, bearing that date, as above given in evidence by defendant, and annexed to the said cross-examination of said Moncure, and marked (D 2); and that the defendant, in the pursuance and execution of said arrangement and understanding, did assign the said bill obligatory to said Alexander, immediately on the execution of the same by said Mary James. That the amount of said securities, and the time with which the said Mary James was indulged, by said deed in trust, for payment, were knowingly and designedly calculated and adjusted by and between said Alexander and said Moncure, in behalf of defendant, so as to produce, in the end, a yearly interest of twelve per cent. on the sum advanced, during such time of indulgence: and that the principal and interest secured by the said instruments, were intended and designed, by both said parties, to amount, and did, in fact, amount, to greatly more than the sum so advanced, with legal interest for such time of indulgence as aforesaid; and did, in fact, substantially secure to said Alexander a yearly interest of twelve per cent. on the sum so advanced by him. Then the jury, if they find such facts as aforesaid satisfactorily proved, and fairly deducible from the evidence aforesaid, may properly infer from such facts, and fairly presume, that the transaction was substantially a loan, within the meaning of the statute against usury; notwithstanding it may appear to have been made in the form and name of a sale of the said Mary James's bond or note; and then the jury may, from the same facts and circumstances, if proved and deduced as aforesaid, also properly infer, and will presume, that the sum of money deducted and retained by the said Alexander from the nominal amount of said bond or note, was substantially usurious interest under another name, for the forbearance of the money so lent or advanced."

Which instruction, THE COURT gave as prayed.

Mr. Jones, for defendant, contended for the right to open and close the argument to the jury, as the defendant held the affirmative of the issue; and cited Archbold's Civil Practice, 169, 170; Goodtitle v. Braham, 4 Term R. 497.

But inasmuch as the plaintiffs were to prove damages sustained by the breach of the covenant, THE COURT decided that they had a right to open and conclude the argument to the jury.

After the cause had been argued to the jury by Mr. Dunlop, for plaintiffs, and by Mr. Swann and Mr. Jones, for defendant, Mr. Jones moved the court to instruct the jury (in explanation of the fourth and fifth instructions prayed by the plaintiff's counsel, and given by the court) as follows: "That if the said note was both drawn and dated after a distinct understanding and agreement had been entered into with the said Alexander to take an assignment of such a note thereafter contingently to be drawn, at a discount exceeding the legal rate of interest, and the said Alexander knew, at the time he took the note, that it had been drawn and assigned for the specific purpose of carrying out the said previous understanding and agreement with him; or if it was understood and known by him, throughout all the preliminary negotiations which led to the final arrangement, that they had reference to a contingent note thereafter to be drawn and assigned for such specific purpose, and that such note was to be framed conformable to such final arrangement when it came to be concluded on between the parties; then it is to be presumed he had sufficient knowledge of the purpose for which said note was drawn by Mary James, within the meaning of the said fourth and fifth instructions, to affect him with the consequences of such knowledge; that is to say, that such knowledge of the specific purpose and object of the parties to the note, was sufficient notice that such were the only purpose and object, and that the bond or note was for no other consideration, if such be, in truth, the fact."

Which instruction THE COURT refused to give; saying that the matter was proper to be left to the jury, to draw such inferences as they should be satisfied ought to be drawn from the evidence in that respect.

Mr. Key, for plaintiffs, then prayed the court to instruct the jury, that if they should be satisfied, by all the evidence in the cause, that it was a loan at usurious interest, under cover of a sale, the contract was usurious and

void; but if they should be of opinion, from the evidence, that it was a sale and purchase of the bond of Mary James, then it was not usurious.

Mr. Jones, for defendant, agreed to the instruction, with an addition, saying, in effect, that if the jury found the facts to be as stated in his former prayer, it was a loan, and not a sale.

Mr. Key accepted and agreed to this modification of the instruction.

Verdict for the defendant.

Both parties took bills of exception. The plaintiffs carried the cause to the supreme court of the United States by writ of error, where the judgment of this court was reversed, and a venire de novo awarded, at January term, 1839. 13 Pet. [38 U. S.] 345.

MONCURE v. DUBUCLET. See Case No. 8,538.

MONELL (JOHNSON v.). See Case No. 7,399.

MONIRE v. The THOMAS MORGAN. See Case No. 6,694.

Case No. 9,708.

The MONITOR.

[9 Ben. 78.] [1]

District Court, E. D. New York. March, 1877.

COLLISION—ON INLAND CANAL—JURISDICTION.

The jurisdiction of the admiralty court over cases of collision upon inland canals upheld upon authority.

[Cited in Malony v. City of Milwaukee, 1 Fed. 612.]

A collision occurred on the Delaware and Raritan canal, in the state of New Jersey, between the steam barge Monitor and the canal boat Estelle, whereby the latter was sunk. She belonged in New York, and a libel was filed to recover for the damages. The answer of the owners of the Monitor sets up the want of jurisdiction of the admiralty courts over such cases occurring upon canals.

Beebe, Wilcox & Hobbs, for libellant.

Benedict, Taft & Benedict, for claimants.

BENEDICT, District Judge. This is an action to recover the damages caused by a collision that occurred between the steam barge Monitor and the canal barge Estelle, about twelve miles west of New Brunswick on the Delaware and Raritan canal. Upon the evidence I am of the opinion that the collision was caused by the negligence of the steam barge.

The main question of the case is one of jurisdiction. In behalf of the defence it is contended that the admiralty has no jurisdiction of a collision occurring on any canal, while the libellant insists that such a thoroughfare as the Delaware and Raritan canal can be no other than navigable water, and so within the jurisdiction. This precise question has never been decided by the supreme court of the United States, although it cannot be denied that general expressions have been used by that court which afford support to the claim of jurisdiction. It is conceded, however, that there are several adjudged cases in other courts, that if followed would support this libel. But it has been earnestly requested by both sides that in the absence of authority controlling this court, the question be examined and determined in this case upon principle, and to that end I have been furnished all the assistance that can be derived from an exhaustive argument of the whole question by the advocates. In view of this request the case has been held, in the hope that some intermission of pressing business might occur in which justice to these arguments could be attempted to be done in the opinion of the court. But it is manifest that the case can be no longer delayed from this purpose without injustice to the libellant, and I therefore feel impelled to follow the cases where a similar question has arisen, without attempting at this time to set forth my own views.

Decree for libellant, with an order of reference to ascertain the amount of damages.

[An application to the supreme court for a writ of prohibition was refused by a divided court.]

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

Case No. 9,709.

The MONITOR.

[10 Ben. 188.] [1]

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

MARITIME LIEN—SUPPLIES—VESSEL LEAVING PORT.

The departure of a steamboat, running between New York and Stuyvesant-on-the-Hudson, from New York on her daily trip is a "leaving of the port," within the language of the statute of New York of 1862, c. 482, in relation to liens on domestic vessels; and specifications of lien must be filed within twelve days from such departure, to make the lien valid.

In admiralty.

Henry Tompkins, for libellant.

Ten Broeck & Van Orden, for claimant.

CHOATE, District Judge. This is a libel for supplies furnished to the Monitor, in July and August, 1876. She made daily trips between New York and Stuyvesant, on the Hudson river, during the summer and until the 15th of November. Specifications of the claim were filed November 17th, 1876, in the office of the county clerk of the county of New York. The supplies were charged the

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vessel and owners, and in fact the libellant relied on the credit of the vessel. A lien is claimed, first, by the general maritime law, and secondly, by the New York statute of [April 24] 1862, c. 482, § 2 [Laws 1862, p. 956]. The case of The Lottawanna, 21 Wall. [88 U. S.] 558, is conclusive against the general maritime lien. The state statute provides that the lien shall cease "whenever such ship or vessel shall leave the port at which such debt was contracted, unless the person having such lien shall, within twelve days after such departure, cause to be drawn up and filed specifications, etc." It is argued that the proper construction of the statute as applied to a steamboat running between one place and another within the district, is that the "departure" intended is the final departure from the port, and not her departure on her daily trip. I think the language will not admit of this construction. The words "shall leave the port" are unambiguous. They do not mean "shall leave the jurisdiction" or "the district." The vessel undoubtedly left the port of New York every day after these supplies were furnished. The specifications were not filed within twelve days thereafter. Therefore, the lien ceased. This construction was put upon the similar provision of the Revised Statutes of New York in Veltman v. Thompson, 3 N. Y. 438. Libel dismissed with costs.

Case No. 9,710.

The MONITOR.

[4 Biss. 503.] [1]

District Court, N. D. Illinois. July, 1868.

COLLISION—VESSEL AT DOCK—TUG WITH TOW.

1. A canal-boat moored at a certain dock by the order of the harbor-master is lawfully there, even though it be at a narrow place in the river.

2. A tug with a tow must maneuver cautiously and prudently; and suction of the water from a passing vessel is one of those natural incidents which she must guard against.

In admiralty.

DRUMMOND, District Judge. The canal-boat Preston, which the libellant owned, was, at the time of the collision, at the dock below the tunnel passage, as it is called, in the Chicago river, at Washington street, or was in the act of getting to the dock. On the part of the libellant's witnesses it is asserted that the canal-boat was at the dock below the tunnel passage. On the part of the defense several of the witnesses state that the canal-boat was in the passage when the Monitor, having in tow the bark John Bell, came up the river, and the John Bell came in collision with the canal-boat.

Whichever hypothesis be true,—whether she was in or below the passage moored at the dock,—I think that the libellant is entitled to recover, because the canal-boat had a right to pass down through the tunnel passage, and it had a right to be moored at the dock, because the harbor-master had given express instructions for mooring the canal-boat at that place; therefore, the canal-boat was in a lawful position, or acting lawfully, and it was the duty of the Monitor to avoid coming in collision. If the canal-boat was in the passage they should have held up entirely, or should have gone so slowly as to have rendered the collision of no consequence; or if she was at the dock, of course it was the duty of the Monitor to avoid the collision.

Which is liable? I confess that I have not seen anything in the evidence to satisfy me that there was any fault on the part of the John Bell. Taking the proof as it is, she followed the Monitor in tow. The collision might have been the result, as it is claimed, of the suction of the water forced by the passage of the Bell; but that is one of those natural incidents which the tug was bound to guard against just as much as anything else in such a narrow passage, and it is a lesson which these tugs must learn if this court can teach it to them,—that they, in going through these dangerous, critical places, must use greater precautions than they do; and there is nothing that will teach them except compelling them to pay. It was clear to those who had charge of the tug that there was a canal-boat there. It was in open daylight. There was nothing to prevent them from seeing what was there, and instead of taking care to guard against it, they rushed headlong at an ordinary rate of speed, and let the weakest take care of herself. That is a rule that will not do in such a narrow thoroughfare as the Chicago river, and especially when they were tunnelling the river. The tugs must be more careful. It is not a question whether they will get through with a tow and be ready five, ten, or fifteen minutes sooner to take another, but when they are engaged in their business they must do it carefully, cautiously, and prudently, with regard to the rights of others. I have no doubt of the liability of the tug. Decree for libellant.

As to the caution required of a tug moving in a crowded harbor, see The Little Giant [Case No. 8,401] and The Alleghany [Id. 205].

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

Case No. 9,711.

The MONITOR and The HILL.

[3 Biss. 24; [1] 3 Chi. Leg. News, 353; 14 Int. Rev. Rec. 70.]

District Court, N. D. Illinois. June Term, 1871.

COLLISION—JOINT NEGLIGENCE OF TWO VESSELS—DIVISION OF DAMAGES—MEASURE OF DAMAGES.

1. Where a vessel was injured by the joint negligence of another vessel and a tug, the damage should be apportioned between them.

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

2. In estimating the damages, the expense of repairing the mast, and demurrage for the time lost, should be allowed.

3. The mast, as repaired, having stood the remainder of the season, and it not appearing but what it would have continued serviceable, the expense of putting in a new mast during the next winter cannot be recovered.

In admiralty. This was a libel filed by John Prindeville, as owner of the barque Major Anderson, against the tug Monitor and the brig Hill, for damages caused by a collision in Chicago harbor.

Waite & Clarke, for libellant.
Spafford & McDaid, for respondent.

BLODGETT, District Judge. The substantial facts in this case, as they appear from the pleadings and proofs, are, that on the morning of the 21st of April, 1869, the barque Major Anderson, belonging to the libellant, was lying in the Chicago river, moored outside of two other vessels which were moored to the dock. Immediately below the Anderson the brig Hill lay moored outside of another vessel which was also moored to the dock. The tug Monitor came alongside the Hill and made fast to her, for the purpose of towing the Hill to some other point up the stream. A strong current was running in the river at the time. In order to get into the open channel, it was necessary to work the Hill outside of the Anderson, and in attempting to do so, and while she was in tow of the tug, the bowsprit of the Hill became entangled in the mizzen-lift of the Anderson, and produced such a strain upon the rigging of the Anderson as to fracture the mizzen-mast near the deck. This result was unquestionably produced, as shown by the testimony, by the combined unskillful management of those in charge of the tug, and those in charge of the Hill. It seems there was a line run from the timber-heads of the Hill to the dock, which should have been rendered off, or allowed to run free as soon as the Hill was in control of the tug; but instead of doing so the men on the Hill held said line taut, whereby the Hill was drawn forward and upstream, instead of following the tug in a diagonal or direct line across or toward the center of the stream until she was outside the Anderson, as was manifestly intended. The evidence shows that those in charge of the tug were careless or negligent in not noticing the course the Hill was taking, and in keeping the force of the tug applied after the Hill's bowsprit became entangled in the rigging of the Anderson, although they were notified of the trouble, and ought to have slacked up.

I therefore find no difficulty in determining that the damage to the Anderson should be borne jointly by the Hill and the tug. The libellant claims as damages, first the cost of fishing the mast, which was $58; second, demurrage for one day while the mast was being repaired, $100; third, the cost of a new mast which was put in during the following winter, $385.

The only serious difficulty I have met with in the case is in fixing the amount of damages to which the libellant is justly entitled under the circumstances. The evidence shows that the mast was not broken off, but was cracked or strained to such an extent as to render it unsafe for service in the estimation of all who saw it, and it was properly fixed at the expense of $58 and one day's delay, so that it seems for all practical purposes to have been as useful as it was before the injury. It may not have been as symmetrical, but it evidently was as serviceable. It is claimed on the part of the libellants that they were entitled to a new mast in place of the old one thus broken by the carelessness of the respondents, and this might possibly be true if the old mast had been rendered entirely worthless, so that it was impossible to repair it and make it fit for service. But the proof shows that by fishing it did good service during the entire season, and there is no evidence but what it would have continued as serviceable for the remainder of the life of the vessel. There is also considerable evidence on the part of the respondents tending to show that this mast was weak and rotten at the time it received the injury. Some of the witnesses who examined it directly after the accident noticed rotten and decayed spots in it, and others who examined it the next winter, after it was taken out of the hull, testify to its showing a very considerable condition of decay.

The rule of compensation, where the damage can be repaired, is to make the injured part, as nearly as possible, as good as it was before the injury occurred; and applying that rule to this case, it seems to me the respondents ought not to be mulcted in the cost of the new mast. The old mast, when repaired, served all the purposes that it did before the injury. The vessel was eight or nine years old, and all her wood work must therefore have been somewhat impaired and weakened by service and decay; especially does the proof show that condition of things to have existed in reference to this injured mast, as it certainly broke or cracked on very slight provocation, and I do not think it would be equitable to give the libellant the cost of the new mast. If he has seen fit to take out the damaged or fished mast, and throw it away as a total loss, and replace it with a new one, he must do so at his own cost. There was no malice, or such gross carelessness shown in the case as entitles the libellant to exemplary or punitive damages. He is only entitled to be made good, and was substantially so by the fishing of the old mast.

This view of the case is fully sustained by the supreme court, in Smith v. Condry, 1 How. [42 U. S.] 35; Williamson v. Barrett, 13 How. [54 U. S.] 111; The Granite State, 3 Wall. [70 U. S.] 314.

A decree will therefore be entered finding

both the tug and brig at fault, and jointly and severally liable for the damages, and fixing the damages at one hundred and fifty-eight dollars, being the cost of repairing the injured mast and one day's demurrage. No interest is allowed, as the proof shows respondents to have been at all times willing to pay the actual damage. But as no tender was made, the libellant will have his decree for costs.

Case No. 9,712.

The MONONGAHELA.

[5 Biss. 131.] [1]

District Court, N. D. Illinois. June, 1870.

SEAMEN—WAGES—MASTER—MARITIME LIEN—ADVANCES FOR BOARD OF CREW AND SUPPLIES.

1. The contract of the captain of a vessel for his services is a personal contract, and he has no maritime lien for his compensation as such.

2. His claims for advances for board of crew and purchase of supplies may, however, be allowed out of proceeds in the registry.

In admiralty.

BLODGETT, District Judge. The hearing in this case came on for the purpose of determining what disposition should be made of a balance of proceeds remaining in the registry of the court. The steamer has been sold, the claims of the libellants and some others paid in full, and there is a remnant of some five or six hundred dollars left in the registry.

The captain of the steamer filed a claim amounting to $1,379 for wages as captain, and some small expenditures. There are also claims filed by material and supply men to the amount of about $900. It is objected by the material and supply men that their claims should be satisfied out of these proceeds before there is any satisfaction of the captain's claim. I am clear, on consulting the authorities, that such is the case. The objection to the payment of the captain, either pro rata, or as a first claim out of the proceeds of this steamer, I think is well taken.

The law clearly seems to contemplate the contract by the captain for his services as a personal contract with the owner of the vessel. He can file no libel; he has no lien upon the vessel for his wages or his services, although he has a lien, perhaps, for expenditures, or materials, or supplies, when in a foreign port, but for his wages as captain he has no lien, cannot libel the vessel, and cannot enforce it in rem. If there should be a sum left in the registry after payment of all liens, I am inclined to think that the captain, being a creditor of the owner, might intervene to be paid out of this fund, not because of his lien, but because he is a creditor and entitled by proper proceedings to his payment out of any funds belonging to the owner, his debtor; but certainly he has no lien as against material and supply men, who have at least a statutory lien.

I, however, find in the account filed by the captain, that he paid $53.50 board of crew and $23.85 for supplies of the boat. These items being proven, he will be entitled to the amount of those items, $79.35, or rather, to his pro rata, with the other claimants.

For a full discussion of the master's lien, and collection of authorities, see 2 Pars. Shipp. & Adm. 24, 25, and notes.

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

MONONGAHELA BRIDGE CO. (UNITED STATES v.). See Case No. 15,796.

Case No. 9,713.

MONROE v. BRADLEY.

[1 Cranch, C. C. 158.] [1]

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

INJUNCTION — VIOLATION — CONTEMPT — IMPRISONMENT.

The court of chancery will imprison for contempt in violating an injunction.

[This was a suit by Thomas Monroe, superintendent of the city, against William Bradley.] In this case, a similar attachment [as in the case against Samuel Harkness] was issued in the first instance. Both the defendants were ordered into close custody for the term of six days, the present day to be considered as one, and to stand further committed until the costs upon the attachment should be paid.

[See Case No. 9,715.]

Case No. 9,714.

MONROE v. DOVER STAMPING CO.

[1 Ban. & A. 401; Holmes, 413; 6 O. G. 685.] [2]

Circuit Court, D. Massachusetts. Sept. 3, 1874.

PATENTS—EGG-BEATERS—NOVELTY—INFRINGEMENT.

The second claim of the reissued patent granted to Edwin P. Monroe, October 16, 1860, for a new and improved egg-beater, is for "the beaters, I and J, revolved in opposite directions by suitable mechanism, substantially as set forth." The Monroe beaters revolve concentrically. The defendant made and sold beaters under the patent granted to Turner Williams and E. D. Goodrich, dated May 31, 1870, numbered 103,811. These latter consist of two beaters revolved in opposite directions, the axes being some distance apart. *Held*, that the manufacture and sale of the Williams & Goodrich beaters did not infringe complainant's patent.

[This was a bill by Edwin P. Monroe against the Dover Stamping Company to re-

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

[2] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq.; reprinted by Jabez S. Holmes, Esq.; and here republished by permission.]

strain the alleged infringement of letters patent No. 23,694, granted to the complainant April 19, 1859.]

James B. Robb, for complainant.

B. R. Curtis and T. W. Clarke, for defendant.

SHEPLEY, Circuit Judge. Complainant alleges that defendant infringes the invention secured to him by letters patent, reissue No. 1,062, dated October 16, 1860, for a new and improved egg-beater. Defendant, under license from the patentees, was making and selling egg-beaters, under and in conformity to letters patent of the United States, granted to Turner Williams and E. D. Goodrich, assignees of Turner Williams, dated May 31, 1870, and numbered 103,811.

The beater described in complainant's patent, consists of a frame, to be clamped to a table or other support, with two concentric beaters, which are, by suitable gearing, revolved in opposite directions. The vessel containing the eggs to be beaten, is held up to the beaters, which project downward from the frame, so that the beaters will be immersed in the matters to be beaten. By turning the crank, the beaters are revolved concentrically, in opposite directions. In the Monroe patent, the first claim, is for, in combination with a rotary egg-beater, an arm having at one end bearings for the journals to rotate in, and at the other a clamping device for the purpose of securing the beater to the table with its shaft or bearing in a vertical line, as set forth. It is not contended that defendant infringes this claim. The second claim is for "the beaters, I and J, revolved in opposite directions by suitable mechanism, substantially as set forth." The Monroe beaters revolve in opposite directions, and the beaters in the Turner Williams patent also revolve in opposite directions. Here their resemblance begins and ends. The Monroe beaters revolve concentrically. The axes of the beaters in the Williams machine are at some distance apart, and the orbits described by the revolution of the blades of the beaters intersect each other. The currents produced in the matter to be beaten, are entirely different. In the Monroe beater, the fluid material tends to arrange itself mainly in two concentric layers, which are carried around in opposite directions by the beaters, the centrifugal force tending to accumulate the material around the circumference of the vessel. In defendant's beater, this action does not take place, for the reason that the orbits of the blades intersect at two points in their circumference. After the blade of one beater has passed through the material, another beater, moving in an opposite direction, passes through the same material, obliterating the track made by the other, and so on alternately. There are other obvious and important differences, in the mode of operation of the beaters, which render it too clear to admit of any doubt, that the invention described in the Turner Williams patent is not an infringement of the patent to Monroe. Bill dismissed.

Case No. 9,715.

MONROE v. HARKNESS.

[1 Cranch, C. C. 157.] [1]

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

INJUNCTION—VIOLATION—ATTACHMENT FOR CONTEMPT.

[This was a suit by Thomas Monroe, superintendent of the city, against Samuel Harkness.] Attachment for violating an injunction. A rule granted yesterday, on complainant's affidavit, to show cause why an attachment of contempt should not issue, for violating the injunction in proceeding towards completing a two-story wooden house. Upon further testimony in support of the rule it was made absolute, and an attachment was issued returnable immediately.

[Cited in Wilcox Silver-Plate Co. v. Schimmel, 59 Mich. 528, 26 N. W. 694.

[A similar attachment was issued against William Bradley. See Case No. 9,713.]

MONSON SAV. BANK, Ex parte. See Case No. 9,555.

MONSON & B. MANUF'G CO. (ELY v.). See Case No. 4,431.

MONSON & B. MANUF'G CO. (POWELL v.). See Cases Nos. 11,356 and 11,357.

Case No. 9,716.

The MONSOON.

[1 Spr. 37; [2] 5 Law Rep. 416.]

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

MARITIME LIEN—PROVISIONS FURNISHED—VESSEL TAKEN BY MASTER ON SHARES—KNOWLEDGE OF LIBELLANT.

A person who furnishes provisions to a vessel not in her home port may have a lien therefor, although he knows the master has taken her on shares, and is to victual and man her.

[Cited in Hill v. The Golden Gate, Case No. 6,491; The Columbus, Id. 3,044; Harney v. The Sydney L. Wright, Id. 6,082a; The William Cook, 12 Fed. 920; Stephenson v. The Francis, 21 Fed. 723; The Stroma, 53 Fed. 283.]

In admiralty.

C. P. Curtis and B. R. Curtis, for libellant.

T. Parsons, for claimants.

SPRAGUE, District Judge. This is a libel in rem by Nickerson, a ship chandler, for necessary provisions furnished at New York to a vessel owned in Massachusetts. The

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

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

master, one Alleyne, had taken her on shares, that is, under a contract with the owner to divide the earnings. A part of the agreement was, that Alleyne should victual and man her. This agreement was known to the libellant when he furnished the provisions. It is admitted by the learned counsel for the claimants that a lien would have been created by these supplies, if the libellant had been ignorant of the contract between the general owner and the master. But it is contended, that with knowledge that the master was to victual and man the vessel, it would be a fraud on the general owners to create an incumbrance upon her for provisions, and that Nickerson was bound to look to the master alone. If credit had in fact been given exclusively to the master, then the right to a lien would have been waived, and none would have existed; but such was not the fact. There is no doubt that the provisions were furnished on the credit of the vessel also. In order to see whether a lien was created in this case, we must look to the general authority of the master, and the reasons on which it is founded. He has power to hypothecate the vessel in other than the home port for necessary supplies, or to create a lien upon her therefor; and this power is given in order that he may pursue the voyage. It is deemed for the benefit of the owners, that such a right should exist, that the certainty of holding the ship therefor, without the necessity of inquiring into the state of the title, or the ability of the owners, should give the greatest facility for obtaining these necessaries.

I am not aware of any case in which the state of the title has in any degree affected this right; and I think it would impair the usefulness of the rule, to introduce any such modification of it. It will be less plain and certain, and would not adequately accomplish the object of the law, in giving the best security, as the highest inducement to persons abroad, to furnish the necessary supplies. I should fear that owners themselves would be the sufferers from any diminution of the certainty of this security.

In the case now before the court, the general owners were directly interested in the success of the voyage. Their profits or compensation for the use of the vessel depended on its prosecution. I am satisfied, that it was competent for the master to obtain these supplies upon the credit of the vessel, and that a lien was created thereby. Decree for the libellant.

See also The Phebe [Case No. 11,064]; Freeman v. Buckingham, 18 How. [59 U. S.] 190; Thomas v. Osborn, 19 How. [60 U. S.] 22; Pratt v. Reed, Id. 361; Webb v. Peirce [Cases Nos. 17,320, 17,321]; The Sarah Starr [Case No. 12,354.]

MONTAGUE (JOBBINS v.). See Cases Nos. 7,329 and 7,330.

MONTAGUE, The G. H. See Case No. 5,377.

Case No. 9,717.

The MONTAUK.

[10 Ben. 455.] [1]

District Court, E. D. New York. May, 1879.

SEAMAN'S WAGES — VESSEL SAILED ON SHARES — KNOWLEDGE OF LIBELLANT.

1. The fact that the master of a vessel sails her "on shares" does not deprive a seaman hired by him of his lien on the vessel for his wages, unless it was also a part of the seaman's contract that his service was to be rendered on the personal credit of the master and not on the credit of the ship.

[Cited in The International, 30 Fed. 376.]

2. The fact that the seaman had knowledge of the master's agreement to sail the vessel on shares, does not raise any presumption that his own agreement was such as to destroy his lien.

[Cited in The L. L. Lamb, 31 Fed. 34.]

In admiralty.

S. B. Caldwell, for libellant.

H. H. Benjamin, for claimant.

BENEDICT, District Judge. This case comes before the court upon exceptions to the answer. The action is in rem to enforce a lien in behalf of a seaman for his wages. The answer admits that the libellant performed services as cook on board the vessel proceeded against, during the period charged in the libel, and that he was hired by the master of the vessel at the rate of wages stated in the libel.

The defence set up is, that during all the time the libellant served on board, the vessel was chartered by or let and hired to the master, and was entirely under the control and management of the master under a contract of charter or hiring made between the master and the owner of the vessel, whereby it was agreed that the vessel should be run, victualled and manned by the master on shares, all of which was known to the libellant.

It will be noticed that in this defence it is not averred that the libellant contracted to render the service in question upon the sole and personal credit of the master. The averment simply is that the vessel was sailed by the master on shares, and that the seaman knew that fact. These two facts do not constitute a defence to the action.

As I understand the law, an agreement between the master of a vessel and the owners thereof, whereby the vessel is to be sailed by the master on shares and be under the exclusive control and management of the master, although it may constitute the master owner, pro hac vice, and prevent him from binding the owner personally, does not deprive the master of the power to bind the vessel for the services of the crew, nor affect his contract with the seaman, unless it appears to be a part of such contract that the

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

service is to be rendered upon the personal credit of the master, and not upon the credit of the ship. In the absence of such an agreement by the seaman, the contract of the master for the service of the seaman on board the ship creates a lien thereon in favor of the seaman.

The fact that it is known to the seaman that the vessel is sailed by the master on shares by itself alone is not sufficient to raise a presumption that the seaman agreed for a personal credit. Hiring by the seaman upon the credit of the ship with knowledge of a contract between the master and the owner for the sailing of the vessel on shares, involves no inconsistency, because such a contract between the master and owner does not affect the master's power to bind the ship for the services of the crew. The master may undoubtedly so contract with a seaman as to deprive the seaman of a lien upon the ship, and the fact that the seaman knows that the vessel is to be run on shares is a material circumstance in an effort to show such to have been the contract; but the circumstance does not by itself prove the existence of such a contract nor warrant the conclusion that it was intended to waive a lien upon the ship.

This understanding of the law is supported by the following cases: Says Sprague, J.: "Supposing the libellants to be seamen employed in maritime service, they have a lien on the vessel whether she be sailed on shares or not. Their knowing that she was so sailed can make no difference." The Canton [Case No. 2,388].

Says McKeon, J.: "It is too well settled to admit of controversy that the lien of seamen for their wages is not affected by a contract between the master and owners in reference to the sailing of the vessel on shares." The Galloway C. Morris [Case No. 5,204].

Says Lowell, J.: "No case has ever yet decided that seamen hired by a charterer lose their lien." Flaherty v. Doane [Case No. 4,849]. See Skolfield v. Potter [Id. 12,925]; Webb v. Peirce [Id. 7,320].

The case of The Bambard [Case No. 831] proceeded upon this understanding of the law. In that case the libel was dismissed upon the ground that there were facts which showed that the agreement was to perform the service upon the personal credit of the master, and that the seaman had settled with the master upon that understanding of his agreement.

If it be the case, which I doubt, that a different understanding of the law from that indicated prevails in the Southern district of New York, the cases I have above referred to support the view which has hitherto prevailed in this district and show the weight of authority to be upon that side of the question.

This view of the case renders it unnecessary to consider the effect of section 4536 of the Revised Statutes of the United States. There must be a decree in favor of the libellant, for the amount claimed.

Case No. 9,718.

The MONTE CHRISTO.

[Cited in The Joseph Hall, Case No. 7,539. Nowhere reported; opinion not now accessible.]

Case No. 9,719.

The MONTE CHRISTO.

[6 Ben. 148.] [1]

District Court, N. D. New York. June, 1872.

SHIPPING — PUBLIC REGULATIONS — FRAUDULENT REGISTER—FORFEITURE—BONA FIDE PURCHASER.

1. An American register was obtained for a British vessel, under the act of December 23, 1852 (10 Stat. 149), on the statement that she had been wrecked off Cape May, which statement was false, and that repairs to an amount exceeding her previous value, had been put on her, a forged receipt for the payment of such repairs being exhibited. This American register was used by the person claiming to be owner, and he afterwards sold the vessel to a bona fide purchaser: *Held*, that the vessel was forfeited to the United States, by virtue of the 27th section of the act of December 31, 1792 (1 Stat. 298).

2. This forfeiture was not defeated by a sale to a bona fide purchaser.

In admiralty.

B. F. Tracy, for the United States.

Beebe, Donohue & Cooke and J. M. Guiteau, for claimant.

BENEDICT, District Judge. The evidence in this case establishes the following facts, to wit: That in the month of September, 1869, an American register was obtained for the British brig W. B. Forest, under the act of the 23d of December, 1852, by means of the false and fraudulent statement, that the brig had been wrecked off Cape May, within the waters of the United States, then brought to this port and sold for $975, and repaired to the amount of $3,825. These statements, upon which an American register was issued to her, under the name of the brig Monte Christo, have been proved to be pure fabrications without foundation in fact. The vessel was repaired to the amount stated during that season, by Messrs. C. & R. Poillon, whose bill was falsely stated to have been paid, and a forged receipt exhibited as evidence of the payment, but she was never wrecked as stated, and her repairs did not equal three fourths of the cost of the vessel when repaired. At the time of this fraud, the person claiming to be the owner of the vessel was one Jno. W. Currier; and the evidence discloses plainly, that the fraud was perpetrated with his knowledge, connivance, and procurement. In September, 1869, this American register, to the benefit of which the vessel was not entitled, was used by the vessel, with the knowledge of Currier, who took the oath of ownership and dispatched her on a voyage under

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

it. The vessel thereupon became forfeited to the government, by virtue of the statute of December 31, 1792, § 27, which declares, "that if any certificate of registry or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture." 1 Stat. 298.

The forfeiture created by this statute, as well as by the act of July 18, 1866 [14 Stat. 184], under which the evidence also brings this case, is absolute; and in such case it is well settled that the forfeiture, is not defeated by a sale to a bona fide purchaser. It is therefore unnecessary to consider the evidence offered to show that the claimant Franklin was a bona fide purchaser of the vessel, or to determine whether either he or the master, who has contracted to buy her, are chargeable with knowledge of the fraudulent character of the register under which the vessel has been sailed. There must therefore be a decree condemning the vessel.

[The case was subsequently heard upon the question of the distribution of the informer's share of the proceeds of forfeiture. Case No. 9,720.]

Case No. 9,720.

The MONTE CHRISTO.

[6 Ben. 327; 17 Int. Rev. Rec. 31.] [1]

District Court, E. D. New York. Jan., 1873.

SHIPPING—PUBLIC REGULATIONS—DISTRIBUTION OF INFORMER'S SHARE—FRAUDULENT REGISTER.

1. The act of July 18, 1866 (14 Stat. 184), is not an act relating to the customs, within the meaning of the act of March 2, 1867 (Id. 546).

2. The proceeds of a forfeiture under that act are to be paid directly by the court, one-half to the collector of the port, for the use of the United States, one-fourth to the informer, if any, and one-twelfth each to the collector, surveyor and naval officer.

In admiralty.

BENEDICT, District Judge. The question here presented by the district attorney does not appear to have ever arisen in any reported case, nor can I ascertain that it has ever been brought under consideration in the practice of any of the departments of the government.

It arises as follows: The brig Monte Christo has been condemned by this court as forfeited to the United States, under the 24th section of the act of July 18, 1866 (14 Stat. 184), which provides: "And be it further enacted, that if any certificate of registry, enrolment, or license, or other record or document granted in lieu thereof to any vessel, shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel and furniture, shall be liable to forfeiture." [Case No. 9,719.]

The proceeds of this forfeiture being in the registry of the court, an informer made claim to be entitled to the informer's share, namely, one-fourth of the proceeds. No question was made as to the right of an informer to this portion, and it has been determined that the person claiming is, in fact, the informer. Whereupon I am required to determine whether the various parties entitled to share in these proceeds can lawfully receive payment of their share directly from the registry of the court. Former decisions have left this question one of procedure merely. U. S. v. George [Id. 15,197]. By whomsoever the fund is distributed, the portions are to be the same, and the same parties are entitled thereto.

It is first to be considered whether the act of March 2, 1867 (14 Stat. 546), is applicable here; for if so, these proceeds, after deducting the charges and expenses, must be transferred to the treasury of the United States, to be thereafter distributed by the secretary of the treasury, in accordance with the order of distribution. The act of March 2, 1867, is confined, by its terms, to proceeds of forfeitures incurred under "the provisions of the laws relating to the customs," and it can have no application here, unless the 24th section of the act of July 18, 1866, be regarded as a provision of law relating to the customs. I do not see that the section should be so regarded. It relates solely to the use of fraudulent certificates of registry, enrolment, or license of ships and vessels, and would naturally be described as a provision of law relating to the registry or enrolment of ships and vessels, which is a well known class of statutes, in some instances certainly, treated as distinct from the laws relating to the customs. As, for instance, in the 11th section of the very act under which this forfeiture has been incurred, where the phraseology is, "acts relating to the customs, or the registry, enrolling or licensing of vessels." This distinction may well be supposed to have been in view in drafting the act of 1867; and, in the absence of any reason for including the 24th section of the act of July 18, 1866, within the description of laws to which the act of 1867 is applicable by its terms, I conclude that the proceeds of a forfeiture incurred under section 24 of the act of 1866 are not within the scope of that act. We turn then, and naturally, to the provisions in section 31 of the act of July 18, 1866, under which act this forfeiture was incurred, where it is provided that all forfeitures by virtue of that act shall be disposed of and applied "as provided in section 91 of the act of March 2, 1799 [1 Stat. 697]." This section 91 provides for the shares into which forfeitures are to be divided, and declares the parties entitled thereto, according to which one moiety is to be received by the collector, for the use of the United States, and the other half is to be divided between, and paid in equal portions to, the collector, naval officer and surveyor, unless there be an informer, in which case

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

one-half the latter moiety must be given to such informer. That the collector is to receive the moiety going to the United States, is indicated by the words of the section, and a payment to the collector, to the naval officer, and to the surveyor of their respective shares is mentioned; but no provision is made for any payment into the treasury, nor for any payment of the fund in gross to the collector.

The words of the section, taken apart from any other section, afford no authority for a payment of the fund to the collector or into the treasury; and, that such a payment was not contemplated by the act, is indicated by the fact that, while section 90 of the act of 1799 does provide for a payment of the fund in gross, less costs and charges, to the collector, all reference to that section is omitted in the 31st section of the act of 1866, and only section 91 mentioned; which section, while it fixes the shares, does not, as has been said, authorize any payment thereof to any but the parties entitled thereto, save only that one moiety is to be received by the collector for the use of the United States.

I arrive at the conclusion that the parties are entitled to payment directly from the registry of the court, the more readily, because no reason has been suggested for sending the fund through the hands of various officers, none of whom, under the law, have any discretion as to its application, or derive any advantage from its disbursement. No duties or other charges are to be deducted from it, and nothing whatever, that I can imagine, would be gained from a different construction of the law, while much unnecessary delay and labor would be caused thereby to all the parties entitled to the fund.

My determination, therefore, is that no statute authorizes a payment of this fund otherwise than to the parties entitled thereto by law, and that the only lawful disposition of the fund which can be made by the court is to pay one moiety to the collector of the port, for the use of the United States, one-fourth to the informer, and one-twelfth to the collector, for his own use, one-twelfth to the surveyor, and one-twelfth to the naval officer.

MONTE CHRISTO, The (UNITED STATES v.). See Case No. 9,720.

Case No. 9,721.

MONTEITH et al. v. KIRKPATRICK.

[3 Blatchf. 279.] [1]

Circuit Court, S. D. New York. May 22, 1855.

CARRIERS — BILL OF LADING — RESHIPMENT — LIABILITY OF INTERMEDIATE CARRIER — AFFREIGHTMENT — CHARGES — ADVANCES.

1. Where A., at Oswego, shipped flour to B. at New York, through the canal, subject to charges for freight through Lake Ontario, and chargeable with specified freight from Oswego to New York, and wrote on the bill of lading, "Pay charges to C. on safe delivery," and D., a canal forwarder at Oswego, receipted the bill of lading thus, "Received in good order for C.," and C., a forwarder from Albany to New York, receiver the flour at Albany in apparent good order, and paid the charges for freight through Lake Ontario, and the freight from Oswego to Albany, and carried the flour to New York, and delivered it to B., and it appeared that the flour had been damaged by wet before it arrived at Albany: *Held*, that, as C. had no interest in, or connection with either the lake or the canal navigation, and merely received the flour at Albany and transported it to New York, he was not answerable for either the carrier on the lake or on the canal, and was not responsible for the damage to the flour.

[Cited in The New Hampshire, 21 Fed. 927.]

2. C. was entitled to recover from B. the charges which he paid at Albany, when he received the flour, it appearing that the advance was made according to the established usage in shipping goods from Oswego to New York.

[Cited in Knight v. Providence & W. R. Co., 13 R. I. 576.]

3. Such advance became chargeable on the goods the same as the freight from Albany to New York, and the whole claim became an entirety, capable of being enforced by C., by a libel against B., in the district court.

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

This was a libel in personam, filed in the district court [by George Monteith and others against Charles Kirkpatrick], to recover freight and charges for the transportation of 850 barrels of flour from a port in Canada through Lake Ontario and the canal to Albany, and thence to New York. After a decree in the district court in favor of the libellants, the respondent appealed to this court.

Erastus C. Benedict, for libellants.
Ammiel J. Willard, for respondent.

NELSON, Circuit Justice. Perry & Van Dyck, of Oswego, shipped the flour in question in this case, to John Wilmot, in care of the defendant, at New York, subject to charges for freight through Lake Ontario, which were $132 13, and chargeable with 43 cents per barrel, freight from Oswego to New York. They wrote on the face of the bill of lading, "Pay charges to Albany Canal Line, on safe delivery." Franklin & Austin, of Oswego, forwarders on the canal, receipted the bill of lading, as follows: "Received the above in good order, for Albany Canal Line." The flour was received at Albany in apparently good order by the libellants, owners of "The Albany Canal Line," who paid the Oswego charges, $132 13, and the freight thence to Albany, (included in the 43 cents per barrel), transported the flour to New York, and delivered it to the defendant. "The Albany Canal Line" is a transportation line from Albany to New York. On an inspection of the

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

flour, after its arrival and delivery at New York, it was found to have been damaged by wetting, fifty cents per barrel. But this damage occurred previously to its arrival at Albany.

The respondent seeks to abate the amount of charges and freight claimed by the libellants, by deducting this damage to the flour. There could be no objection to this, if the libellants are responsible for the damage claimed. The difficulty is, that it does not appear, from any proofs in the case, that they are answerable for either the carrier on the lake or on the canal, under one or the other of whose charge the damage must have happened. The libellants had no interest in, or connection with, either the lake or the canal navigation. They simply received the flour at Albany, and transported it upon their line, from that place to New York. It is true that Franklin & Austin, the forwarders on the canal at Oswego, were in the habit of favoring the line of the libellants in the transportation of goods. But they do not appear to have been under any obligations to do so—certainly not from any partnership arrangements existing between the parties. The libellants, therefore, not being responsible for the damage, it was properly disallowed by the court below.

Another ground of defence is, that the libellants are not entitled to recover the charges paid by them at Albany, when they received the goods to be transported on their line. But the case shows that this advance was made according to the established usage of the shipping of goods from the port of Oswego to New York. The contract of shipment must, therefore, be construed with reference to, and in subordination to this usage. The right to recover the charges, stands upon the same footing as the right to the freight from Albany to New York.

It is also objected that the district court had no jurisdiction of the case, so far as related to these charges, as a portion of them were for the shipment of the flour on the canal. These charges were for freight on Lake Ontario, as well as upon the canal. As we have seen, according to the usage of the business, the contract of shipment with the respondent implied an undertaking to repay those charges, when advanced by the libellants; and they became thereby chargeable upon the goods shipped, the same as the freight from Albany to New York. The contract, therefore, as respected the whole amount claimed by the libellants, was, in judgment of law, an entirety, not severable, and contains all the essential elements of a maritime contract. The shipment of the goods to which it related, began and ended upon waters within the admiralty jurisdiction. I am inclined, therefore, to think that this ground of defence is not well taken, and that the decree below was right, and should be affirmed.

Case No. 9,722.

MONTEJO et al. v. OWEN et al.

[14 Blatchf. 324.] [1]

Circuit Court, S. D. New York. Sept. 15, 1877.

JUDGMENT—PRACTICE AT LAW—EQUITABLE DEFENCES.

1. M. brought an action at law, in this court, on a judgment recovered by him against O., in another court. O., by answer, set up a variety of matters which were not defences at common law against the judgment, but which were claimed to give O. an equitable right to prevent the enforcement of the judgment. On demurrer to the answer: *Held*, that the demurrer must be sustained.

[Cited in La Mothe Manuf'g Co. v. National Tube-Works Co., Case No. 8,033; Cortes Co. v. Thannhauser, 9 Fed. 227; Potts v. Accident Ins. Co. of North America, 35 Fed. 567.]

2. Section 914 of the Revised Statutes of the United States does not authorize such an answer to be put in, in an action at law.

[Cited in Doe v. Roe, 31 Fed. 99; Church v. Spiegelburg, Id. 602; Herklotz v. Chase, 32 Fed. 433; Wood v. Consolidated Electric Light Co., 36 Fed. 539.]

[This was an action by Francisco J. Montejo and others against Thomas J. Owen and others. The plaintiffs demur to answer of defendants.]

Granville P. Hawes, for plaintiffs.

Frederic R. Coudert, for defendants.

JOHNSON, Circuit Judge. This case comes up on a demurrer by the plaintiffs to the answer of the defendants. The action is upon a judgment rendered by the circuit court of the United States for the district of Louisiana, in favor of the present plaintiffs against the present defendants. The answer sets up a variety of matters which are not defences at common law against the judgment, but which are claimed to give the defendants an equitable right to prevent the enforcement of the judgment. These matters the defendants insist are available to them as a defence in this suit, by force of section 914 of the Revised Statutes of the United States. That section prescribes, that, "the practice, pleadings, and forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes, in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

It must be assumed, that, in a suit upon a judgment, brought in a court of the state of New York, the defence set up in the answer in this suit would be available by way of answer, if sufficient in substance to entitle the party to relief against the judgment. Such is the known and established law of pro-

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cedure in the state of New York, introduced by sections 69, 150 and 167 of its Code of Procedure. The first of these abolishes the distinction between actions at law and suits in equity, and the forms of all such actions and suits theretofore existing, and declares, that thereafter there shall be, in that state, but one form of action. The next section cited enacts, that the defendant may set forth, by answer, as many defences and counter-claims as he may have, whether they be such as had been theretofore legal or equitable, or both. The last section named enacts, that the plaintiff may unite in the same complaint several causes of action, whether they be such as had been theretofore denominated legal or equitable, or both, under certain specified conditions. These sections of the Code deal with claims legal and equitable, and defences legal and equitable, set up by answer, and counterclaims of both characters. In pursuance of the policy thus indicated, section 274 of such Code provides, that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. It is, of course, obvious, that this system, while it undertakes to provide for the means of administering indiscriminately legal and equitable remedies, in substance, founded upon legal and equitable rights, completely ignores all the former schemes of procedure founded on the recognition of their differences. Now, from the purview of section 914 of the United States Revised Statutes, which is already set forth, equity and admiralty causes are completely excluded, in terms. That section does not relate to them, except to effect such exclusion. The jurisprudence of the United States has recognized this distinction in numerous cases, as one of substance, as well as of form and procedure. Robinson v. Campbell, 3 Wheat. [16 U. S.] 212; Bennett v. Butterworth, 11 How. [52 U. S.] 669; McFaul v. Ramsey, 20 How. [61 U. S.] 523; Jones v. McMasters, Id. 8, 22; Fenn v. Holme, 21 How. [62 U. S.] 481; Thompson v. Railroad Co., 6 Wall. [73 U. S.] 134. In the last case cited, Mr. Justice Davis says, giving the opinion of the court: "The constitution of the United States and the acts of congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And, although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit." In the case of Bennett v. Butterworth, above cited, Chief Justice Taney said: "The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may, undoubtedly, proceed according to the forms of practice, in such cases, in the state court. But, if the claim is an equitable one, he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States."

That these discriminations between legal and equitable rights and suits are substantial, in the jurisprudence of the United States, is further apparent from provisions of the statute law, as well as from the decisions of the courts. Under section 721 of the Revised Statutes, the laws of the several states, with certain exceptions, must be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply; while, on the other hand, the law of equity, in the courts of the United States, is one and the same in every state, not dependent upon local law. "Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for the supreme court, in the last resort, to decide what those principles are, and to apply such of them to each particular case, as they may find justly applicable thereto." Neves v. Scott, 13 How. [54 U. S.] 268. Nor are the statutes silent as to the forms and modes of procedure in suits in equity. Section 913 of the Revised Statutes declares, that they shall be according to the principles, rules and usages which belong to courts of equity, except as modified by statute, or rules made in pursuance of statute, or by the supreme court. That court has, accordingly, prescribed a body of rules regulating, very largely and comprehensively, the practice in equity.

It is claimed, that, inasmuch as the present action is one to enforce a judgment, and, therefore, not an equity cause, the procedure is to be conformed to that of the state courts, upon such a cause of action; and that, as those courts allow an equitable right to set aside or restrain the execution of such a judgment, by way of answer, the courts of the United States must conform to that rule. But, this is a mere confusion of names. This so-called defence is an affirmative equitable right to the relief asked. It, under the cases and statutes cited, is to be administered under the equitable principles, and according to the equitable procedure, of the courts of the United States. In that respect, the procedure cannot be conformed to the state practice without overthrowing the whole scheme for the administration of equity in the courts of

the United States. The action is at common law. The defence is, substantially, an action in equity, and it cannot, because it assumes the guise of an answer or defence under the state law, escape from the control of the laws of the United States as to the modes of enforcing equitable rights. The demurrer must be sustained, and judgment given for the plaintiffs, with leave to the defendants to amend, on payment of costs, within twenty days.

Case No. 9,723.

MONTELL v. UNITED STATES.

[Taney, 24.] [1]

Circuit Court, D. Maryland. April Term, 1840.

SHIPPING—PUBLIC REGULATIONS—BOND TO RETURN CREW—VESSEL SOLD IN FOREIGN PORT.

1. The bond given to the United States, under the act of congress passed 28th February, 1803, § 1 [2 Stat. 203], by the master of a vessel bound to a foreign port, conditioned for the return of the crew to the United States, does not embrace the case of a vessel sold in a foreign port, and which does not return to the United States.

2. The bond does not extend to cases where the seaman is lawfully separated from the ship, or is separated from her without the fault of the master or owner. It applies to those cases only where the vessel returns to a port of the United States; to cases where the seamen continue subject to the lawful authority of the master, and where it was in his power to bring them home.

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

This suit was instituted by the United States in the district court, on the 4th of November 1839, against Francis T. Montell, the plaintiff in error, and John B. Corner, on the following bond: "Know all men by these presents, that we, John B. Corner, of Baltimore in the state of Maryland, master or commander of the schooner called the Elvira, now lying in the district of Baltimore, and F. T. Montell, in the city of Baltimore, in the state of Maryland, are held and firmly bound unto the United States of America, in the full and just sum of four hundred dollars, money of the United States; to which payment well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 10th day of May, one thousand eight hundred and thirty-nine. Whereas, the above bounden John B. Corner hath delivered to the collector of the customs of the district of Baltimore, in the state of Maryland, a verified list containing, as far as he can ascertain them, the names, places of birth, residence and description of the persons who compose the company of the said schooner called the Elvira, now lying in the said district, of which he is at present master or commander, of which list the said collector has delivered to the said J. B. Corner a certified copy. Now the condition of the above obligation is such, that if the said John B. Corner shall exhibit the aforesaid certified copy of the said list, to the first boarding officer at the first port in the United States at which he shall arrive on his return thereto, and then and there also produce the persons named therein to the said boarding officer, except any of the persons contained in the said list who may be discharged in a foreign country, with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing, signified in writing under his hand, may arrive as aforesaid, with other persons composing the crew as aforesaid, and who may have died or absconded, or may have been forcibly impressed into other services, of which satisfactory proof shall be then also exhibited to the said last-mentioned collector, then and in such case, the said obligation shall be void and of no effect, otherwise it shall abide and remain in full force and virtue. John B. Corner. (Seal.) Francis T. Montell. (Seal.) Sealed and delivered in the presence of H. Ring."

1st Exception. The plaintiffs to support the issues on their part, offered in evidence the following bond (being the same above set forth), the due execution of which was admitted, and likewise offered in evidence the certified list of the crew of the schooner Elvira, sworn to by the master of said schooner, on the 9th day of May, 1839 (and embodied in said exception), and further proved by Hamilton Ring, that he is an officer in the custom-house at Baltimore, and has charge of the marine papers, such as reports, returns of registers, certificates of foreign consuls and commercial agents, and that no report of the master of the Elvira, in regard to the seamen mentioned in the certified list inserted in the exception, has been made to said custom-house; he further proved, that since the clearing of the said schooner Elvira, he has seen at Baltimore, John B. Corner, the master of said schooner, but that the return of said schooner has never been reported at the custom-house at Baltimore, nor does he know that said schooner has returned to any other port in the United States; whereupon, defendant, by his counsel, prayed the court to instruct the jury: That the evidence offered by the United States in this case does not bring the defendant within the condition of the bond exhibited in evidence, and that the plaintiffs cannot, therefore, recover. Which prayer was rejected; the court (Heath, J.) believing a prima facie case was made out in proof; that the case was within the first section of the act of 1803; and that it was not necessary for the government to prove the negative, that the vessel was not sold. To this opinion, and the rejection of said prayer, the defendant, by his counsel, excepted.

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

2d Exception. After the evidence offered by the plaintiffs, detailed in the first bill of exceptions on the part of the defendant, and which is to be considered as incorporated in this, the defendant's second bill of exceptions, the defendant offered in evidence the following consular certificate: "Consulate of the United States of America: Havana. I, John A. Smith, vice-consul of the United States of America, do hereby certify that John B. Corner, master of the schooner Elvira, produced and discharged, according to law, the following persons, whose names are on the list of the crew, as citizens of the United States, to wit: Joel Pomeroy, Charles Smith, Oliver Greenleaf and James Mitchell. And the appearer having produced to me the contract with the seamen, it appeared that they had agreed to go the voyage from Baltimore, to receive, each, twenty-five dollars advance, and two dollars per month wages; on questioning them, they answered, it was their agreement. In testimony whereof I hereunto set my hand and affix my seal of office, at Havana, this 28th day of May A. D. 1839, and of the Independence of the United States the 63d. J. A. Smith. [Seal.]" Which was admitted to be signed and sealed by the vice-consul of the United States, at Havana, and was presented to the collector of the port of Baltimore. It was stated and admitted that the crew of the schooner Elvira were discharged at Havana. Whereupon the district attorney moved the court for its opinion and direction to the jury, that the said certificate affords no defence to this action. 1. Because Patrick Poinsen was not accounted for. 2. Because it does not appear thereby that Rossiter B. Wade, whose name appears first on the crew list, heretofore given in evidence by the plaintiffs, and who was discharged in Havana, was discharged in the Havana with the consent of the consul or vice-consul, nor that extra wages had been paid to him, or on his account. 3. Because the contract for wages, as set forth in the said certificate, is contrary to the policy of the act of congress. Which prayer the court granted, and instructed the jury, that Poinsen, being a foreigner, was not embraced by the law; that the name of the said Rossiter B. Wade, discharged in the Havana, ought to have been accounted for in the certificate of the discharge of the crew; that the first section of the act of congress covered him, as one of the crew; and that the failure to obtain the vice-consul's certificate of his discharge, was a failure to comply with the provisions of the law, and the defendant is liable on his bond. The court instructed the jury, upon the whole, that the evidence offered was no defence to this action. Whereupon the defendant, by his counsel, called William Frick, the collector, and asked him whether he had not seen the said Wade in the city of Baltimore, and at the custom-house in said port, after his sailing in said vessel. To the competency of which testimony the district attorney objected, and the court sustained the objection, and rejected the testimony; whereupon the defendant, by his counsel, prayed leave to except to said opinion, and directions of the court, and each of them. The verdict and judgment of the district court being against him, the defendant sued out this writ of error.

St. George W. Teackle and John Nelson, for plaintiff in error.

Nathaniel Williams, for defendant in error.

TANEY, Circuit Justice. This case is brought here by a writ of error to the district court. The suit was brought by the United States against Montell, upon a bond taken under the act of congress of February 28, 1803 (2 Stat. 203), for the return of the crew of the steamer Elvira, of Baltimore.

The first section of this act directs that before a clearance be granted to any vessel bound on a foreign voyage, the master shall deliver to the collector a list of the ship's company, and the collector shall deliver to him a certified copy of the said list; and that he shall enter into a bond that he shall exhibit the said certified copy to the first boarding officer, at the first port of the United States at which he shall arrive on his return thereto, and at the same time produce the persons named therein to the boarding officer; whose duty it is to examine the men, with such list, and report to the collector as mentioned in the said section.

The third section of the same act provides, that whenever a vessel belonging to an American citizen shall be sold in a foreign country, and her company discharged, or where a seaman is discharged, with his own consent, in a foreign country, the captain shall pay into the hands of the American consul, residing at the place of discharge, three months' wages, over and above the wages due such seaman, two-thirds of which shall be paid to the seaman, upon his engagement on board of any vessel, to return to the United States; the remaining third to be retained, to form a fund for the relief of destitute American seamen in foreign parts.

It is unnecessary to state in detail the contents of the different exceptions, which were taken in the district court. The judgment of that court was in favor of the United States for the penalty of the bond; and the point on which the case turned will be better understood, by stating the material facts, as they appear upon the whole record, without referring particularly to the different exceptions, in which they are inserted.

It appears from the record, that the schooner Elvira, an American vessel, owned in Baltimore, cleared from this port for Havana, in the island of Cuba, about the tenth of May 1839. Montell, a merchant of this city, was

the owner of the vessel, and John B. Corner, of the same place, the master for the voyage. On the day the schooner sailed, Corner delivered to the collector the crew-list, as directed by the act of congress above mentioned, and received the certified copy on the same day; and at the same time, he entered into the bond prescribed by the first section of the act of congress; in this bond, Montell, the owner, who is the plaintiff in error, was the security. The Elvira never returned to this country. The master returned in another vessel, some time before this suit was brought; and at the trial in the district court, the certificate of the American consul was produced, showing the discharge of all the crew at Havana, except Rossiter B. Wade, who went out as mate of the vessel.

It has been insisted on the part of the United States, that there is sufficient evidence on the record to show that the Elvira was sold at Havana, and that the crew were there discharged; and the district attorney contends that the bond of the master is forfeited: first, because he did not exhibit the crew-list to the first officer of the customs, who boarded the vessel, in which he returned to the United States, and account to him for the crew; secondly, because it does not appear that the three months' wages of the mate, Rossiter B. Wade, was paid to the consul.

I doubt very much whether it sufficiently appears, as contended for by the district attorney, that the Elvira was sold at Havana. But the chief point in controversy is, whether the bond embraces the case of a vessel sold in a foreign port, and which does not return to the United States; and as this point has been argued, I shall treat the case as if that fact appeared in the record, in order to decide the question upon which both parties wish for the opinion of the court.

Assuming then that the vessel was sold, the case presented, is precisely the one provided for in the 3d section of the law above referred to. The American owner may, if he thinks proper, always sell his ship in a foreign port; and if he does sell, he may discharge the crew; and in such a case, it does not require the assent of the consul to justify the discharge. The captain is bound to pay into the hands of the consul, the three months' wages as before mentioned, and the seaman is entitled to two-thirds of it, as soon as he has engaged a passage in another vessel, to return to the United States; but the captain has no power to compel him to return; he has no longer any authority over him, when he is lawfully discharged; indeed, he has nothing to do with him; for even the two months' wages are not to be paid to the seaman by the captain, but by the American consul; and it is at the option of the seaman to return or not. It would be most unreasonable, in such a case, to forfeit the captain's bond, if the seaman did not return; and it would require very plain words to satisfy the court that the legislature could have intended to make such a provision.

But it is very evident that the bond does not extend to cases where the seaman is lawfully separated from the ship; or separated from the ship without the fault of the master or owner. The bond applies to those cases only where the vessel returns to a port of the United States; to cases where the seamen continued subject to the lawful authority of the master, and where it was in his power to bring them home. The words of the first section apply only to cases of this description; they imply that the master is still in command of the vessel in which he returns, and that the seamen are on board, and subject to his authority. Thus, the provisions of this section imply, that the boarding officer will make known to him his official character, and will call on him to produce the crew-list, and to produce the men also; yet he cannot be called on to produce the crew, unless he is still in the exercise of authority over them, and exercises it in the vessel where he is himself found; for the boarding officer is required to examine the crew, with the crew-list produced; everything required to be done, presupposes the captain to have returned in command of the same vessel in which he sailed. And even if the vessel returns without the seaman, he is not liable to the penalty of the bond, under the provisions of the first section, provided the seaman was discharged with the consent of the consul; nor is he answerable, where he dies or absconds, or is forcibly impressed in another service. Now, if the bond is not forfeited, where the seaman is discharged, with the consent of the consul, how can it be considered as forfeited, where the seaman is lawfully discharged, upon the sale of the vessel, without the consul's consent? The two cases are in principle the same, and they are both expressly placed on the same footing in the third section, and the same provision is there made for each of these classes of cases.

But it seems to be supposed that the bond is forfeited, even where the seamen are lawfully discharged, unless the three months' wages are paid to the consul. The court think otherwise: the cases where seamen may be lawfully discharged, are provided for in the third section, and there is no reference in that section to the bond directed to be given by the master. The condition of the bond is prescribed in the first section, and it certainly can embrace no cases, beyond those enumerated in the law; and the payment of the three months' wages, where the vessel is sold, or where the seaman is discharged with the consul's consent, is not mentioned in the condition of the bond, as directed in the act of congress, and consequently is not intended to be secured by it.

The two sections of the law, before mentioned, apply to different cases; the first provides for the cases where the vessel returns

to the United States; the third provides for cases where she is sold abroad. They are both intended to guard the seamen, who are always friendless and unprotected, in foreign ports, from the injustice and despotism of the captain; and also to preserve them, as far as possible, for the service of our own marine. Therefore, when the vessel returns, the captain is compelled to bring home his crew with him, unless he can show that they were separated from the ship, in some one of the modes pointed out in the first section; and the bond is intended to accomplish this object; but it was not the policy of the United States to prevent our ship-owners from selling their vessels in foreign ports; and it would have been a virtual prohibition of sale, if they had been compelled, notwithstanding a sale, to bring home the crew. The third section, therefore, provided for the cases of sales in foreign ports, and instead of compelling the captain to bring home the crew, it compels him to furnish the consul with the means of sending them home, if they are willing to come, and tempts them to return by refusing them the money, until they have engaged a passage to the United States. But the bond prescribed in the first section, was not intended to cover the cases mentioned in the third; there is nothing, in any part of the law, from which such an intention can be inferred.

If, therefore, the vessel was sold abroad, the bond in question does not apply to the case; no suit can be maintained on it, unless the Elvira has returned to the United States. It is admitted that she has not returned. The United States, therefore, can have no cause of action on the bond; and it is unnecessary to inquire whether Rossiter B. Wade was or was not discharged, or was or was not paid his three months' wages; because there can be no breach of the condition of the bond, and, consequently, no cause of action upon it, if the Elvira has not returned to the United States.

Some other questions were argued at the bar; but it is unnecessary to express an opinion upon them, as the points, above decided, dispose of the case. The judgment of the district court is, therefore, reversed.

[NOTE. Suit was brought by the United States against the master, Francis T. Montell, and his sureties, upon another bond, given for the proper return of the ship's register. Judgment was had upon this bond in the district court, and the money, $1,200, was paid into court. The collector of customs thereupon filed his petition in the district court, praying that a moiety of the sum recovered be paid to him and to the naval officer and surveyor, under the act of congress relative to penalties and forfeitures. The district court dismissed the petition, but was reversed by the circuit court upon appeal by the petitioners. Case No. 15,798.]

MONTELL (UNITED STATES v.). See Case No. 15,798.

Case No. 9,724.

MONTELL v. The WILLIAM H. RUTAN.

[1 Int. Rev. Rec. 125.]

District Court, D. New York. 1865.

SHIPPING — JOINT OWNERSHIP — PARTNERSHIP — BILL OF LADING—MASTER'S FRAUD—LIABILITY OF VESSEL.

[1. On a libel against a vessel and her master, who was a part owner, by the assignee of a fraudulent bill of lading issued by him, where there is no allegation of joint ownership in the vessel and her business by the intervening part owners, there can be no recovery against them and their interest in the vessel.]

[2. Common ownership in a vessel does not create a common-law partnership; and an individual part owner has no power, because of such relation to the others, to bind them in relation to matters extra the necessary preservation of the property itself.]

[3. The master cannot subject a ship in rem, much less the co-owners, to a responsibility for safe carriage or delivery of cargo not actually laden on board for transportation in the lawful employment of the vessel.]

[4. A master, being a part owner in a vessel, who issues a fraudulent bill of lading, is liable in damages to an assignee thereof in good faith who made advances thereon, which damages may be recovered against the vessel to the extent of his interest therein.]

[This was a libel in rem by Francis T. Montell and others against the schooner William H. Rutan, and in personam against her master, Charles C. Rose, for damages for the nonperformance of a bill of lading.]

The bill of lading was executed by Rose, the master of the vessel, at Alexandria, Va., on September 30, 1857, by which he acknowledges the shipment on the vessel by Charles Howard, Jr., of 3,000 bushels of wheat and 1,000 bushels of corn, and which was to be delivered at New York to the shipper or his assigns. The libellants alleged that they advanced on this bill of lading the sum of $4,200, and it was assigned to them, and that on the arrival of the vessel at New York they demanded the wheat and corn, but the vessel failed to deliver more than 150 bushels of wheat and 1,000 bushels of corn, and they demanded judgment for the value of the cargo not delivered, against the vessel and the master, whom they alleged to be one of the owners thereof. Process was issued against the vessel, and also against Rose, with a clause of foreign attachment against his property, under which the vessel was seized, and personal service was made upon Rose. Rose never appeared in the action. But William Sprague and others, "intervening for their interest in the schooner," appeared and defended the action, denying that the master was part owner, and setting up that the bill of lading was false and fraudulent; that the wheat mentioned in it was never shipped on board her, except 150 bushels, which was duly delivered. And they proved on the trial the correctness of their allegation as to the bill of lading. The libellants claimed on the trial that the master, as part owner, was in law

the copartner of the other owners in this affreightment contract, and that they and the vessel were accordingly liable to them on it.

Beebe, Dean & Donohue, for libellants.
Benedict, Burr & Benedict, for claimant.

HELD BY THE COURT (BETTS, District Judge): That there is no allegation in the pleadings that the claimant's interest was that of a joint ownership in the vessel and her business, nor is the action brought against them individually, nor is any charge made against them of a common liability under the bill of lading. That the state of the pleadings, accordingly, does not authorize the description of relief sought for. That the law does not stamp upon a common ownership of vessels the character of a common-law partnership. Individual part owners have no power because of such connection with other owners to bind their fellows, aside of and beyond the necessary and regular uses of the vessels themselves. They do not acquire with their interest in that class of property an agency over it to implicate the responsibility of their co-owners, in relation to matters extra the necessary preservation of the property itself. Story, Ag. 42; Story, Partn. 650; Fland. Shipp. 378; Pars. Mar. Law, 334; 3 Kent, Comm. 151; Abb. Shipp. 137. That a cardinal restriction which applies to this case is that a master cannot subject a ship in rem, much less his co-owners, to a responsibility for safe carriage or delivery of cargo not actually laden on board of it for transportation in the lawful employment of the vessel. This principle is too firmly rooted in the doctrines of commercial jurisprudence to be now subject to question in this country or in England. The Freeman, 18 How. [59 U. S.] 182; Vandewater v. Mills, 19 How. [60 U. S.] 82; Story, Ag. § 456; Grant v. Norway, 2 Eng. Law & Eq. 337; Coleman v. Riches, 29 Eng. Law & Eq. 323. That as the libellants prove, by the testimony of the master himself, that he executed the bill of lading with knowledge that the wheat was not on board at the time, the bill of lading was nugatory and fraudulent, as to the vessel and all her co-owners, except the master himself. That, on the evidence, the master was interested in the vessel. That the interest of the claimants in the vessel is not so disclosed by the pleadings as to be affected by the result of the prosecution. That the decree can act on the vessel itself, in no way beyond the clear ownership of the master, and within the allegations of the libel of proofs. That the libellants are entitled to a decree against the master for their damages by reason of the breach of the bill of lading executed by him.

Ordered, therefore, that they recover that amount against him, and that it be referred to a commissioner to ascertain the amount; that the commissioner report also the value of the vessel and the time she was arrested in this suit, or the amount for which she was bonded and the value of the master's interest in her, and that, on the coming in of the report, the libellants have leave to claim the appropriation towards the damages of the value of such individual interest of the master in the vessel as may be decreed to be vested in him and legally allowable towards the satisfaction of the damages.

Case No. 9,725.

MONTFORD v. HUNT.

[3 Wash. C. C. 28.] [1]

Circuit Court, D. Pennsylvania. April Term, 1811.

RES JUDICATA—ESTOPPEL—BILL FOR RELIEF FROM JUDGMENT—EFFECT OF FORMER SUIT.

The plaintiff had filed a bill on the equity side of the circuit court of Georgia, against the defendant, in which he sought relief from a judgment obtained against him upon a promissory note drawn by him, claiming that the amount of the note had been paid by the endorser, against whom a suit had been instituted in a state court in Pennsylvania; and who, having been taken in execution under a capias ad satisfaciendum, gave the plaintiff certain securities, (afterwards found of no value,) and was then discharged from the execution. The bill was dismissed in Georgia; and the plaintiff having paid to the defendant the amount of the judgment, instituted this suit to recover the sum paid by him, on the ground, that the discharge of the endorser from execution, was a satisfaction of the debt. *Held*, that the decree of the circuit court of Georgia, was conclusive on the plaintiff; the same facts, as those now relied upon, having been before that court, or which might have been submitted by the plaintiff in the bill, to the consideration of the court, at the time of the proceeding.

[Cited in Draper v. Gorman, 8 Leigh, 646.]

The case was as follows: The defendant recovered a judgment against the plaintiff in the circuit court for the district of Georgia, upon a promissory note given by Gibson to Young, endorsed by Young to the plaintiff, and by the plaintiff to the defendant. At the same time, the defendant commenced an action in the state court of Pennsylvania against Young; recovered a judgment, and issued a capias ad satisfaciendum; upon which Young was taken, and afterwards discharged by the defendant from custody, upon giving to the defendant certain securities, which, however, produced no actual satisfaction of any part of the debt. The plaintiff filed a bill, on the equity side of the circuit court of Georgia, stating that the defendant had received satisfaction of his debt from Young, and obtained an injunction to the judgment at law. The discharge of Young, out of execution, was not known to the plaintiff, nor set forth in his bill; nor is it stated in the defendant's answer, but was fully

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

proved by the deposition of Mr. Duponceau, taken in the cause. The injunction was dissolved on motion, and the cause coming on to be heard, the court decreed that the judgment obtained by the defendant at law, against the plaintiff, had not been satisfied, and dismissed the bill. From this decree, Montford appealed to the supreme court of the United States, but not prosecuting the same, it was dismissed. Having paid to the defendant, the amount of the judgment obtained against him in the circuit court of Georgia, the plaintiff brought this action to recover it back, as money had and received; upon the ground, that the discharge of Young out of execution by the defendant, was a satisfaction of the debt, in like manner, as if Young had paid the money; and besides, that the securities assigned by Young to the defendant, should be considered as a satisfaction, though afterwards given up. It appears, that the whole subject, as urged by the plaintiff in this case, was in evidence before the circuit court of Georgia, in the equity suit.

Mr. Dallas and J. R. Ingersoll, for plaintiff, contended—1. That the discharge of Young, out of execution, was equivalent to satisfaction by a prior endorser, and consequently, that the payment by the plaintiff to the defendant, was so much money received to his use, which the defendant could not conscientiously retain. 2. That the decree on the equity side of the circuit court for the district of Georgia, was not conclusive, not being a case within the first section of the fourth article of the constitution; and if it is open to examination, it will appear that the court mistook the law. 3. If these points be established, then, upon the case of Moses v. M'Farlain [unreported], an action at law will lie, to recover money, erroneously paid under the judgment at law.

The court stopped Mr. Ingersoll, for defendant.

WASHINGTON, Circuit Justice. The case is too clear to admit of an argument. Even if an action for money had and received, would lie, to recover back money paid under a judgment unreversed and in full force, which the court by no means admits; still, the plaintiff has selected another remedy, and another jurisdiction to try his right; and the question now submitted to this jury, is in all its parts the very same which was brought before the equity side of the circuit court for the district of Georgia, where it received a final decision. If the plaintiff, from ignorance of facts, did not state his case properly in his bill, the deposition of Mr. Duponceau contained a full disclosure of all the facts necessary for him to know, and he might then have amended his bill, if he had thought it necessary. If the circuit court erred in the opinion on which the decree was founded, the plaintiff had his remedy by appeal, which he first took, and then abandoned. This decree, then, is conclusive between these parties; for it would be a strange anomaly in the jurisprudence of this country, if the judgment of a state court, should be conclusive in every other state, and yet, that the judgment of a circuit court, sitting in one state, should be considered as a foreign judgment in another state, and examinable before a circuit court sitting there, or before a court of that state. Plaintiff agreed to be called.—Nonsuit.

Case No. 9,726.

In re MONTGOMERY.

[3 Ben. 364;[1] 3 N. B. R. 137 (Quarto, 35).]

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

BANKRUPTCY—PAYMENT OF FEES OF BANKRUPT'S ATTORNEY BY ASSIGNEE.

Where, in involutary bankruptcy proceedings, the attorney for the bankrupt petitioned the court for the payment of his bill for services in the matter, out of the funds in the hands of the assignee, and the register certified that such services had saved the estate considerable expense, and recommended the payment of the bill: *Held*, that, if the assignee should, in writing, approve of the payment, on the grounds set forth, an order would be made allowing the payment.

In this case, which was a proceeding in involuntary bankruptcy, the attorney for the bankrupt [Henry B. Montgomery] presented to the court a petition for the payment of his bill for services renuered in the matter, setting forth that, by his advice, the bankrupt had not opposed the proceedings, whereby a long litigation was saved to the creditors; that he spent much time in preparing the schedules of the bankrupt's debts and property; that, by his advice, property which had been transferred by the bankrupt, had been surrendered to the assignee, to the amount of some $6,000; that the bankrupt had no property; and that the attorney would be unpaid for his services, unless his bill was paid out of the moneys in the hands of the assignee. He prayed for an order directing such payment. Accompanying the petition was a certificate of the register, as follows: "I think that the services and advice of Mr. Olney has saved the estate, in the above matter, considerable expense, and expedited the conversion of the estate into money; and, if consistent with the practice in like cases, I would recommend the payment of the above bill out of the funds in the hands of the assignee."

[To the Hon. Samuel Blatchford, District Judge of the District Court for the Southern District of New York: The petition of Jas. B. Olney, attorney and counselor at law, shows that a petition in bankruptcy was filed in this court against Henry B. Montgomery, claiming that said Montgomery, by a sale to Baldwin Griffin, violated provisions of the bankrupt act [of 1867 (14 Stat. 517)], and asked that he be adjudicated a bankrupt. Your petitioner further shows that Henry B. Montgomery and Sylvester B. Sage were co-partners, and in 1868. Sage sold out to Mont-

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

gomery, and the firm was dissolved; but the partnership was in fact insolvent on the last days of December, 1868. Sage was declared bankrupt. Montgomery sold his property, real and personal, to his father, Thomas Montgomery, and Baldwin Griffin, his brother-in-law, to secure them for moneys advanced to him by them. It was of this transfer that Montgomery's creditors complained, and a petition was filed in this court as aforesaid. Your petitioner further shows that by his counsel and advice all the property transferred by said Montgomery to his father and Griffin, both real and personal, was at once surrendered, given up, and transferred to the assignee without any trouble, expense, or hindrance on the part of the bankrupt or his friends, and the assignee has taken possession of the same and turned the same into money, and realized from the sale thereof some six thousand dollars, as your petitioner is informed and believes true, and the said amount is now in his hands awaiting distribution. Your petitioner further shows that said bankrupt has voluntarily surrendered all his property to the said assignee, and that he is to-day not worth one dollar, and has no means with which to pay the petitioner's fees and expenses as counsel, and which services are rendered necessary therein; and that by reason of the counsel, advice, services, fees, and expenses so made and incurred, and rendered by said petitioner to and for said Montgomery, as stated in the schedule hereto annexed, there has been actually saved to said estate and the creditors the sum of five hundred dollars, and your petitioner will go unpaid and unrewarded for his services and expenses, unless the same be paid out of the moneys in the hands of the assignee. Your petitioner further says that the services and expenses set forth in the annexed bill are true and correct, and the charges reasonable, and that your petitioner has had no pay therefor. Your petitioner, therefore, asks that an order may be granted allowing to him the amount of said bill from the moneys in the hands of the assignee. Jas. B. Olney.

[Estate of H. B. Montgomery,
To Jas. B. Olney, Dr.

February 20, 1869.—To services at New York two days from Catskill, on order to show cause why decree of bankruptcy should not be made, before the United States district court	$ 40 00
Expenses	18 60
Services making and copying inventory and schedules for Montgomery, two days	20 00
Cash paid for blanks	2 60
Services on first meeting in preparing papers bankrupt	10 00
Services at subsequent times, and attendance before register for Montgomery, and counsel	30 00
Services rendered otherwise in bankrupt proceedings	15 00
August 17.—Services before the register on behalf of Montgomery	20 00
	$156 20

[By THEODORE B. GATES, Register:

[I think that the services and advice of Mr. Olney has saved the estate in the above matter considerable expense, and expedited the conversion of the estate into money, and, if consistent with the practice in like cases, I would recommend the payment of the above bill out of funds in the hands of assignee.] [2]

BLATCHFORD, District Judge. If the assignee shall, in writing, approve of the payment of this bill out of the funds of the estate, on the grounds set forth in the petition of Mr. Olney, and in the certificate of the register, and of the amount of the charges, an order will be made allowing its payment.

[NOTE. This case was subsequently heard upon motion of assignee to strike out claim of Baldwin Griffin, a preferred creditor, who had voluntarily surrendered his preference. Case No. 9,728. Afterwards James B. Olney was allowed to file supplemental proof of debt. Id. 9,729. Upon motion of assignee, the proof of debt filed by Jonathan B. Cowles was stricken out. Id. 9,730. The case was then heard for a determination of the priorities of creditors (Id. 9,727), and finally upon the application of Thomas Montgomery, a creditor, to be allowed to amend proof of claim (Id. 9,731).]

Case No. 9,727.

In re MONTGOMERY.

[3 Ben. 567; [1] 3 N. B. R. 429 (Quarto, 109).]

District Court, S. D. New York. Dec. 23, 1869.

BANKRUPTCY—INDIVIDUAL AND PARTNERSHIP ASSETS.

One member of a firm bought out the other, taking the notes and books of the firm, and agreeing to pay the debts of the firm, and he continued the business for fourteen months, replenishing the stock, mingling old and new, and selling from either indifferently, so that it was impossible to tell which were the firm's goods. He was then adjudicated a bankrupt, and the stock was sold by the assignee as his goods: *Held*, that the proceeds in the hands of the assignee were to be held to be the individual estate of the bankrupt, and to be subject to the payment of his individual debts, before they could be applied to the payment of the debts of the firm.

[Cited in Re Rice, Case No. 11,750.]

[This case was formerly heard upon application of bankrupt's attorney to be paid counsel fees. Application allowed. Case No. 9,726. It was again heard upon motion of assignee to strike out claim of Baldwin Griffin, a preferred creditor, who had voluntarily surrendered his preference. Id. 9,728. It was then heard upon motion of James B. Olney, a creditor, to be allowed to file supplemental proof of debt. Id. 9,729. Upon motion of assignee, the proof of debt filed by Jonathan B. Cowles was stricken out. Id. 9,730.]

The register [Theodore B. Gates] certified to the court a question, as to the class of creditors who were first entitled to dividends.

[2] [From 3 N. B. R. 137 (Quarto 35).]

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

The question arose on the following facts: Up to November 23d, 1867, the bankrupt and Sylvester B. Sage were copartners in business, under the name and style of Montgomery & Sage, at Prattsville, in Greene county, as country merchants. On the day named, Sage sold out his interest in the store to Montgomery. The agreement contained this clause: "Also, that the said Henry B. Montgomery take the notes and books of the firm of Montgomery & Sage, and collect the same as far as can be, and, with the proceeds of the same, pay all the liabilities of the firm of Montgomery & Sage, which is this day dissolved, by mutual consent. But if there proves to be a deficiency, or not enough to pay the debts, the remainder is to be paid equally by both parties, and, in case there proves to be an overplus, or more than enough to pay the liabilities, then the balance is to be equally divided between both parties." On the 5th of January, 1869, Sage was adjudicated a bankrupt, on his own petition, and, about one month afterwards, Montgomery was adjudicated a bankrupt, upon the petition of certain of his creditors. Montgomery had continued the mercantile business as successor to Montgomery & Sage, and had, from time to time, replenished the stock of goods, mingling old and new together, and selling from either indifferently, so that it was impossible to tell which were the goods of Montgomery & Sage, and which were the goods of Montgomery alone. Moreover, the entire stock had been sold by the assignee of Montgomery as Montgomery's goods. The register gave his opinion, that the assets in the hands of the assignee should be regarded as belonging to Montgomery's individual estate, and liable, in the first instance, to the payment of Montgomery's individual debts in full, before any portion could be applied to the payment of the debts of Montgomery & Sage.

BLATCHFORD, District Judge. I concur with the register in his conclusion.

[NOTE. This case was again heard upon application of Thomas Montgomery to be allowed to file amended proof of debt. Case No. 9,731.]

Case No. 9,728.

In re MONTGOMERY.

[3 Ben. 565; [1] 3 N. B. R. 374 (Quarto, 97).]

District Court, S. D. New York. Dec. 11, 1869.

BANKRUPTCY — FRAUDULENT PREFERENCE — SURRENDER BY PREFERRED CREDITOR — RIGHT TO PROVE DEBT.

Where a creditor, who had received property from a bankrupt, in preference over other creditors, contrary to the 39th section of the bankruptcy act [of 1867 (14 Stat. 536)], had surrendered it to the assignee: *Held*, that, under the 23d section of the act, he could prove his debt against the estate.

[Cited in Re Reece, Case No. 11,633; Re Davidson, Id. 3,599; Re Tonkin, Id. 14,094; Re Scott, Id. 12,518; Re Hunt, Id. 6,882; Re Stephens, Id. 13,365; Re Dunkle, Id. 4,160; Re Baxter, 25 Fed. 701.]

[This case was formerly heard upon application of James B. Olney, attorney for the bankrupt, to be paid counsel fees. The application was allowed. Case No. 9,726.]

[2][This is a case of involuntary bankruptcy. Richard P. Burhaus, the assignee in this matter, applied for an order for the examination of Baldwin Griffin, a supposed creditor of the above-named bankrupt, who had proved and filed his claim against the above bankrupt. An order was duly issued on such application, and the said Griffin appeared before the undersigned and submitted to such examination. It appeared, on the examination, that the bankrupt had been a merchant at Prattsville, in Greene county, and that on the 9th day of January, 1869, he executed a bill of sale to Griffin of all the goods in the store and of the books of account of said Montgomery against his customers. The stipulated consideration was nine thousand dollars, from which was to be deducted two thousand one hundred and sixty-eight dollars and forty cents, alleged to be due from Montgomery to Griffin, and the residue was to be paid on various notes and other debts of Montgomery, some twenty-three in number, and which are set out in the bill of sale. Griffin is a brother-in-law of Montgomery, and had been a clerk in his store, and the evidence leaves no doubt upon my mind but that Griffin knew at the time he accepted the bill of sale and the property therein specified, that Montgomery was insolvent, and that this sale was designed to give him, Griffin, and the creditors mentioned in the bill of sale, a preference over the other creditors of said Montgomery. This transaction constituted one of the grounds upon which Montgomery was adjudicated a bankrupt. Griffin voluntarily surrendered to the assignee the property and accounts which he had received under the bill of sale.

[On this state of facts the solicitor for the assignee moved to strike out the claim proved by Baldwin Griffin, and that such claim be disallowed on the ground that Henry B. Montgomery, the bankrupt, being insolvent, or in contemplation of insolvency, on or about the 9th day of January, 1869, made a sale of his goods, chattels, property and estate to the said Baldwin Griffin, of great value, to wit: of the value of nine thousand dollars, with intent to give a preference to one or more of his creditors, or one or more persons who might become liable for him as indorsers or security, in fraud of the act of congress to establish a uniform system of bankruptcy throughout the United States, passed March 2, 1867 [14 Stat. 517]. That said Montgomery

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

[2] [From 3 N. B. R. 374 (Quarto, 97).]

was, by reason of said sale, among other things, afterwards, and on or about the 20th day of February, 1869, duly declared a bankrupt in and by the United States district court for the Southern district of New York, on the petition of one or more of his creditors, and that the said Baldwin Griffin, at the time of such transfer, had reasonable cause to believe that a fraud on said act was intended, or that said Montgomery was insolvent. Also that said Griffin, since said Montgomery was declared bankrupt as aforesaid, has surrendered to the assignee the property conveyed under said transfer, and accounted for the property sold by him and money collected by him, being part of said property and estate conveyed to him by said Montgomery, thereby acknowledging that said transfer was made to him, with knowledge on his part that a fraud was intended on said act, or with like knowledge that said Montgomery was, at the time of said transfer, insolvent, and that, for the causes aforesaid, said Griffin is not permitted to prove or have allowed his said claim.

[In answer to this motion, the solicitor for Mr. Griffin makes the following points: First. "There is no proof that Mr. Griffin had any reasonable cause to believe that, on taking such payment or conveyance, a fraud on the bankrupt law was intended. Nor is there any proof that he had reasonable cause to believe that Montgomery was insolvent." Second. "It appears from the evidence and from the motion now pending, that Griffin has surrendered to the assignee all property, money, benefit and advantage received by him under the preference or transfer before alluded to, and that he is, therefore, entitled to prove his claim in any view of the case, in accordance with the provisions of section 23 of the bankrupt law." Third. "The motion is too late after the claim has actually been proven."] [2]

By THEODORE B. GATES, Register:

[2] [I think the decision of this question depends upon the construction that shall be given to the latter clause of section 39 of the bankrupt act. Standing by itself, it seems to prohibit the proof of a debt in such a case as the one under consideration. But section 22 provides that if a person shall accept a preference, having reasonable cause, etc., he may nevertheless prove his claim, and receive dividends, if he surrenders to the assignee all property, etc., received by him under such preference. There have been a few decisions of questions involving a construction of these provisions of the bankrupt law, and they have proceeded upon different theories and have arrived at different conclusions upon almost identical facts. I have, therefore, sought to have the intention of the author of the law, and have received from the Honorable Thomas A. Jenckes, M. C., a letter, of which the following is a copy: "Washington, December 8, 1869. Theodore B. Gates, Esq. Dear Sir: —The last clause of the 39th section of the bankrupt act was intended to apply to cases in which the assignee was compelled to resort to legal process to recover the property, by defending which suit the creditor, who claimed to retain the property, would make himself party to the bankrupt's fraud, if any. I do not see that it is inconsistent with the provisions of the 23d section, by which a creditor, holding any of the bankrupt's property, can remove the stain of fraud by surrendering the property, and disclaiming all intent to become a party to the bankrupt's fraudulent proceedings. I think Judge Fox, of Maine, and Judge Field, of New Jersey, have given opinions to this effect upon these clauses. Respectfully yours, T. A. Jenckes." I adopt this construction, and recommend that an order be entered denying the motion of the assignee's solicitor.] [3]

BLATCHFORD, District Judge. The construction given by the register to the 23d and 39th sections of the act is the correct one, and the motion of the assignee should be denied.

[NOTE. This case was subsequently heard upon motion of James B. Olney to be allowed to file supplemental proof of debt. Case No. 9,729. Afterwards, upon motion of assignee, the proof of debt filed by Jonathan B. Cowles was stricken out. Id. 9,730. The priorities of creditors were determined in Id. 9,727, and finally Thomas Montgomery was not allowed to file amended proof of debt. Id. 9,731.]

Case No. 9,729.

In re MONTGOMERY.

[3 Ben. 566; [1] 3 N. B. R. 423 (Quarto, 108).]

District Court, S. D. New York. Dec. 11, 1869.

BANKRUPTCY — PROOF OF CLAIM — MOTION FOR LEAVE TO AMEND—CONTROL OF COURT THEREOVER.

Where a creditor filed a proof of debt on May 28th, 1869, and in the following October was examined by the assignee, and then applied to amend his proof of debt: *Held*, that his application should be granted.

[See In re Parkes, Case No. 10,754.]

[This case was formerly heard upon application of bankrupt's attorney to be paid counsel fees. Allowed. Case No. 9,726. It was afterwards heard upon motion of assignee to strike out claim of Baldwin Griffin, a preferred creditor, who had surrendered his preference. Motion allowed. Id. 9,728.]

[2][By THEODORE B. GATES, Register: James B. Olney, one of the creditors of the above-named bankrupt [Henry B. Montgomery], proved his debt against said bankrupt, individually, on the 28th day of May, 1869, at the sum of two hundred and twenty-five dol-

[2] [From 3 N. B. R. 374 (Quarto, 97).]

[3] [From 3 N. B. R. 374 (Quarto, 97).]

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

[2] [From 3 N. B. R. 423 (Quarto, 108).]

lars; and he also proved, at the same time, a debt of the same amount against said bankrupt, as a member of the late firm of Montgomery & Sage. On the application of the assignee in this matter, an order had been granted requiring the said James B. Olney to appear before the undersigned on or about the 6th day of October last past, and submit to an examination in regard to his said claim. Sundry other creditors were also ordered to appear at the same time and be examined as to their several claims. The said James B. Olney was in attendance as solicitor of one or more of such creditors, and the proceedings were, from time to time, adjourned until the day above-named, before the case of said James B. Olney was taken up. Said Olney was then examined by the solicitor for the assignee on his own claim, and moved upon his own evidence, and upon an affidavit, for leave to amend his proof of claim. This was objected to by the solicitor for the assignee upon the grounds: First. It is too late. The original proof of claim having been made on the 28th day of May, 1869, and no application for amendment having heretofore been made. Second. Also upon the ground that an order upon him to testify in regard to this claim having been made prior to the 6th day of October, 1869, and there having been two or more meetings since that time, and no application having been made prior to this time, it is now too late for the register to entertain the motion to amend, and especially after testimony has been given in the case. I respectfully submit the question thus presented for the decision of his honor the district judge.

[I think the amendments should be allowed if amendments of proofs of debts are permissible under the bankrupt law [of 1867 (14 Stat. 517)]. Section 22 regulates the mode of proving debts, and provides that the court may, on application of the assignee, or any creditor, or of the bankrupt, or on its own motion, examine the bankrupt upon oath, or any person tendering, or who has made proof of claims concerning the debt sought to be proved, and shall reject all claims not duly proved, etc. Under this section it has been held that the court has, at all times, full control of all proofs of debts and the right to entertain objections to the validity of the debts or the proofs thereof. In re Patterson [Case No. 10,815]; In re Jones [Id. 7,447]. It is the policy and purpose of the law to do equal and exact justice between the estate of the bankrupt and creditors, and this provision should be construed to confer upon the court ample power to investigate a claim at any stage of the proceedings, and to make any correction equity and justice demand; not only to reduce the amount if it is too large, but also to increase it if, through inadvertence, it is smaller than by right it should be. Questions of amendment address themselves to the equitable consideration of the court, and great discretion is exercised in disposing of them. In Re Brand [Id. 1,809], it was held that a creditor who had inadvertently prejudiced his rights by making proof in an improper form, should be allowed to withdraw it, and amend or resubmit it in proper form. See section 1, Bankrupt Act. When proof is defective, a party will not only be allowed, but will be required, to amend it. In re Lowere [Case No. 8,577]; In re Myrick [Id. 9,999]. I think, therefore, an order should be entered in this matter, allowing the creditor to file supplemental proof of claim corresponding with the facts set forth in his affidavit.] [3]

BLATCHFORD, District Judge. The decision of the register is correct.

[NOTE. This case was subsequently heard upon motion of assignee to strike out Jonathan B. Cowles' proof of debt. Case No. 9,730. The priorities of creditors were determined in Case No. 9,727. It was again heard upon application of Thomas Montgomery to be allowed to file amended proof of claim. Id. 9,731.]

Case No. 9,730.

In re MONTGOMERY.

[3 Ben. 567; [1] 3 N. B. R. 426 (Quarto, 108).]

District Court, S. D. New York. Dec. 11, 1869.

BANKRUPTCY—PROOF OF CLAIM—NOTE—NEW NOTE GIVEN AFTER ADJUDICATION — OLD DEBT EXTINGUISHED.

Where a creditor had proved a claim as endorser upon a note made by the bankrupt, but it appeared that, after the adjudication of bankruptcy, a new note had been given, and the first note taken up: *Held*, that the proof of debt must be disallowed.

[Cited in Re Parkes, Case No. 10,754; Re Broich, Id. 1,921; Re Merrill, 21 Fed. 121.]

[This case was formerly heard upon application of bankrupt's attorney to be paid counsel fees. Application allowed. Case No. 9,726. It was again heard upon motion of assignee to strike out claim of Baldwin Griffin, a preferred creditor, who had voluntarily surrendered his preference. Motion allowed. Id. 9,728. It was again heard upon motion of James B. Olney, a creditor, to be allowed to file supplemental proof. Id. 9,729.]

By THEODORE B. GATES, Register:

[2] [Jonathan B. Cowles, a supposed creditor of the above-named bankrupt, filed proof of a contingent claim against the said bankrupt on the 24th day of March, 1869. The claim is based upon a note made by [Henry B.] Montgomery on the 24th day of December, 1868, for five hundred dollars, indorsed by said Cowles, and at the time of the proof, held by the Farmers' National Bank of Catskill, where it had been discounted. The assignee in this matter obtained an order for the examination of said Cowles, and his evidence, on such examination, having been taken, the following facts seem to be established

[3] [From 3 N. B. R. 423 (Quarto, 108).]

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

[2] [From 3 N. B. R. 426 (Quarto, 108).]

by the evidence, namely: On January 8, 1869, Montgomery made his note for five hundred dollars, payable to his own order three months after date, at the Farmers' National Bank, Catskill; the note was indorsed by H. B. Montgomery, Baldwin Griffin, and J. B. Cowles, in the order stated. That note existed and was owned by the Farmers' National Bank of Catskill, where Montgomery was adjudicated a bankrupt, and where said Cowles proved his claim thereon. The note subsequently fell due, and was protested for non-payment. On the 19th day of July, 1869, five months after Montgomery was adjudicated a bankrupt, a new note was again, for the same amount, made by Montgomery, and payable three months after date to the order of Baldwin Griffin, at the Farmers' National Bank. This note was indorsed by Baldwin Griffin, J. B. Cowles, and A. C. Cowles, and was used to take up the first-named note. This second note was protested for non-payment, and on the 19th day of October, 1869, another note was made for four hundred and fifty dollars, signed by Baldwin Griffin, to the order of J. B. Cowles, and indorsed by J. B. Cowles and A. C. Cowles, Montgomery's name not appearing on the paper. This note, together with fifty dollars in money advanced by J. B. Cowles, was used to pay the second note. [Case No. 9,726.] This last note will fall due on the 20th of January, 1870. Upon the evidence in the case the solicitor for the assignee moved to strike out Cowles' proof of claim upon the ground, First. The claimant being second indorser, and only liable upon Griffin's failure to pay, is not entitled to prove the claim.

[I think that Mr. Cowles would have been entitled to prove his claim upon the original note under the 6th clause of section 19 of the bankrupt law [of 1867 (14 Stat. 525)], by way of security against the possible irresponsibility of any of the parties personally liable, and then his right to share in the dividends would depend upon his having paid any or all of the note. But the real difficulty in the way of Mr. Cowles proving a debt upon the note seems to me to grow out of transactions subsequent to the maturity of the first note, which is doubtless the one Mr. Cowles based his proof upon, although he makes a mistake as to the date of it. From the moment a debtor is adjudicated a bankrupt, he is effectually separated from his estate and his contracts. These pass to the assignee, who becomes the trustee of the estate for the benefit of the creditors. The bankrupt may, after his adjudication, make new contracts and acquire property which his former bankruptcy does not affect, and which his creditors (if he is finally discharged) cannot reach. See cases cited at note 6, p. 53, Bump, Bankr. (2d Ed.). If, then, a creditor of the bankrupt shall, after the adjudication, accept a new obligation from the bankrupt in substitution of the debt existing at the time of the filing of the petition, he relinquishes his claim upon the estate of the bankrupt, and must look to his debtor alone for payment of his demand. In this case, Montgomery's note for five hundred dollars, indorsed by Griffin and Cowles, would have been provable by either Griffin, or Cowles, or by the bank, against the estate, and was so proven by Cowles; but subsequently the bankrupt and all the parties to this note agree to make a new note, with which to pay the old and overdue note at the bank. The bank accepts the new note, and surrenders the old. The original debt was thereby extinguished, and the liability ceased to be a proper claim upon the estate of the bankrupt. The discharge of Montgomery will not release him from this debt, and whoever finally pays this note may maintain an action against Montgomery for it upon showing the facts herein recited. Section 19 of the bankrupt act provides "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing, but not payable until a future day, * * * may be proved against the estate of the bankrupt." But the debt must continue to exist in the exact condition in which it was when the debtor was adjudicated a bankrupt. If he and his creditor bargain about it, after that time, and give it any essential modification, they detach it from the beneficial operation of the law, and carry it over to the new estate in which the debtor has been placed by the adjudication of bankruptcy. In re Williams [Case No. 17,705] it was held that when a judgment is rendered after the proceedings in bankruptcy upon a debt which existed before that time, neither the debt nor the judgment is provable. The debt is merged in the judgment, and the judgment did not exist at the time of the adjudication of bankruptcy.

[I am of the opinion that the proof of debt filed by Jonathan B. Cowles should be stricken out, and that no dividends should be paid upon it.] [2]

BLATCHFORD, District Judge. The decision of the register is correct.

[NOTE. This case was subsequently heard upon the question of the priorities of creditors. Case No. 9,727. It was again heard upon application of Thomas Montgomery to be allowed to file amended proof of claim. Id. 9,731.]

Case No. 9,731.

In re MONTGOMERY.

[3 N. B. R. 430 (Quarto, 109).] [1]

District Court, S. D. New York. Dec. 24, 1869.

BANKRUPTCY—MOTION TO AMEND PROOF—NOTES—NEW NOTES GIVEN—PROOF BY MISTAKE.

Where a creditor proved claims on two old promissory notes, and then applied to amend proof so as to show that a new note had been given in a settlement, in which said two notes

[2] [From 3 N. B. R. 426 (Quarto, 108).]

[1] [Reprinted by permission.]

were part consideration, and they had been proved by mistake, *held*, application to amend must be denied. The creditor may prove a new claim on the new note, and an examination may be had on application of the assignee into the validity of the claims.

[This case was formerly heard upon application of bankrupt's attorney to be paid counsel fees. Case No. 9,726. It was again heard upon motion of assignee to strike out claim of Baldwin Griffin, a preferred creditor, who had voluntarily surrendered his preference. Id. 9,728. James B. Olney, a creditor, was allowed to file supplemental proof of debt. Id. 9,729. Upon motion of assignee, the proof of debt filed by Jonathan B. Cowles was stricken out. Id. 9,730. It was then heard upon the question of the priorities of creditors. Id. 9,727.]

James B. Olney, solicitor for Thomas Montgomery, a supposed creditor of the above-named bankrupt, moved on affidavit, for leave to amend the proof of the claim of said Thomas Montgomery. The solicitor for the assignee objected to granting such leave, and stated the following ground of objection: 1st. That the application comes too late; that the proof of claim was made on the 24th day of March, 1869, by J. B. Olney, attorney for Thomas Montgomery, on two notes set out in the proof, of seven hundred and eight dollars, each dated October 19, 1853, with indorsements thereon to July, 1864, amounting in the aggregate to nearly two thousand dollars. That by the affidavit of Henry B. Montgomery, he acted as the agent of his father, in bringing and placing in the hands of said J. B. Olney the notes in question, when by the facts as stated by him and his father, he must have known that these notes had been satisfied by the giving of a note of nine hundred and sixteen dollars in 1864; and that no claim has been made, that there was an error in the proof, until it was discovered that the notes of Montgomery and Griffin could not receive a dividend until the claims against H. B. Montgomery were satisfied; and the counsel for the assignee also objects to the amendment upon the ground that the matter above set forth in the last objection shows bad faith; also upon the ground that it appears by proof of claim of Amelia Griffin (wife of Baldwin Griffin, and daughter of Thomas Montgomery), that on the third of November, 1864, Henry B. Montgomery gave Thomas Montgomery his due bill for one hundred and sixty-two dollars and seventy-one cents on settlement. The solicitor for Thomas Montgomery objects to proof of claim of Amelia Griffin being used on this motion, on the ground that it has no bearing on the motion.

By THEODORE B. GATES, Register:

The facts in the case are as follows: Proof was made by James B. Olney, as attorney for Thomas Montgomery, on the 24th of March, 1869, upon three several notes, amounting in the aggregate to one thousand eight hundred and forty-five dollars and twenty-nine cents, which, with five hundred and fifty-four dollars and seventy-one cents interest, the creditor claims to be entitled to receive dividends upon. Two of these notes are for the sum of seven hundred and eight dollars each, and bear date October 19, 1853, and are made by Montgomery and Griffin. They are both payable to B. P. Cowles, or order, one nine months, and the other one year after date. The notes were not indorsed by the payee. The first note is dated April 1st, 1859, for four hundred and twenty-nine dollars and twenty-nine cents, payable one year after date, to Thomas Montgomery, or bearer, and is signed by Henry B. Montgomery. About this note there is no question. Indorsements for interest are made from time to time, on these several notes, down to the 1st of July, 1864, but no part of the principal of either appears to have been paid. The two notes, dated October 19, 1853, were given on account of the sale of certain merchandise (not for money lent, as stated by the proof), by said Cowles to Montgomery and Griffin, who were then copartners, but who dissolved in the fall of 1854. Montgomery purchased the stock, and assumed the debts. Thomas Montgomery is the father of the bankrupt, and Griffin and Cowles were sons-in-law of Thomas. Cowles died, leaving his property, including these notes, to his widow, as part of his personal estate. Soon after the widow died, and these notes went to Thomas Montgomery, the present owner. Henry B. Montgomery swears that he had a settlement with his father in the fall of 1864, of all matters between them except the note of four hundred and twenty-nine dollars and twenty-one cents, and found a balance of nine hundred and sixteen dollars due to his father, and gave him a new note therefor, signed by himself alone, and this he thinks was in November, 1864. That the old notes were not taken up, because his father desired to preserve them a short time, and hold them as memoranda of the settlement, and that deponent has neglected to take them and cancel the same. Henry B. Montgomery was his father's messenger to bring these notes with a power of attorney, to Catskill, and placed them in the hands of his father's lawyer, to be proved in this matter. Indeed, he selected these notes from among the papers of his father, and delivered them to the attorney. Montgomery says he supposed the nine hundred and sixteen dollars was among them. It is a little curious that he did not examine these papers sufficiently to know whether they were the seven hundred and eight dollar or nine hundred and sixteen dollar notes, and it can hardly be credited that he should have picked out not only notes wrong in amount, but also in number, and carried them thirty-seven miles, and placed them in the hands of his father's attorney for proof, and never have discovered his error. But further on in Montgomery's affidavit, he says: That deponent, in the haste and confusion at-

tendant upon the hearing (the first meeting of creditors), did not think of the note of nine hundred and sixteen dollars above referred to, and not until he had seen his father on his return home, did he remember the circumstances of the transaction. He then looked for the nine hundred and sixteen dollar note, but was not able to find it, nor has it been found. The affidavits of Griffin and Olney are not material to the real question involved, except to show that neither Thomas nor Henry B. Montgomery gave any intimation to either of them from March 24th, when the notes were proved, to October 18th, that there was any error in the proof. The claim proven by Amelia M. Griffin is properly in evidence in this matter, and should be considered in connection with this question. It may throw some light upon the subject, and, if so, the court should avail itself of it. That proof is upon a promissory note in the words and figures following: "$162.71. Prattsville, November 3, 1864. Due Thomas Montgomery, on settlement, one hundred and sixty-two dollars and seventy-one cents, with interest. H. B. Montgomery." The proof states that this note was given on a settlement between the parties to it. By reference to the indorsement on the first seven hundred and eight dollar note, I find the following: "Received, November 4, 1864, on the within, interest up to July 1, 1864," and on the other a like indorsement, but dated November 3d, 1864.

I cannot reconcile all these circumstances with the statement of Henry B. Montgomery, that he gave a new note for the balance due on the two old ones. If that had really taken place, why should his father have retained the old notes? The reason given by Henry B. Montgomery is entirely unsatisfactory to my mind. The new note was all the "memorandum" his father required or could have wanted. If he had really given a new note in November, 1864, why should the payment of interest up to July have been indorsed on the old notes on November 1, 1864? If there was a settlement and a new note given in November, 1864, as Henry swears, for nine hundred and sixteen dollars, why should the above note, dated on the 3d of that month, for one hundred and sixty-two dollars and seventy-one cents, "on settlement," have been given? and why should the old notes of Montgomery & Griffin have been proved, if there was a note of Henry B. Montgomery's substituted for them? I think Mr. Montgomery is confused in his recollection of these matters, and that he is entirely mistaken as to the nine hundred and sixteen dollar note. If such a note was given, there seems to have been no consideration for it. The original notes were not surrendered, but were kept until this application was made to amend the proof. Considering the evidence which has been submitted upon this application, with a view to do exact justice between Thomas Montgomery and the other creditor of his son, Henry B. Montgomery, I am constrained to recommend that the application for leave to amend the proof of claim of Thomas Montgomery be denied.

BLATCHFORD, District Judge. The proper course by which to obtain the relief sought by the alleged creditor is not by an amendment of the proof of debt. The amendment sought relates to a new and different claim from any one of those embraced in the existing proof of debt. The proper course is for the creditor to prove his newly-discovered debt independently. Then an investigation in regard to it can be had, on the application of the assignee, and also an investigation in regard to the two seven hundred and eight dollar notes, and the due bill for one hundred and sixty-two dollars and seventy-one cents, and the claims which ought to be rejected can be determined on the examination and cross-examination, as witnesses, of the alleged creditor himself and the bankrupt, and Mr. and Mrs. Griffin, and all others who know anything of the facts. For these reasons the leave to amend the proof of debt is denied. The clerk will certify this decision to the register, Theodore B. Gates, Esq.

Case No. 9,732.

In re MONTGOMERY.

[12 N. B. R. 321;[1] 2 Cent. Law J. 440.]

District Court, D. Indiana. May 4, 1875.

BANKRUPTCY—AMENDED ACT—PREFERENCES ATTACKED PRIOR TO DECEMBER 1, 1873 — MORTGAGE GIVEN BEFORE PASSAGE OF AMENDED ACT.

1. The amendatory act of June 22, 1874 [18 Stat. 178], does not apply to preferences and conveyances which are attacked in the course of proceedings in bankruptcy begun prior to December 1, A. D. 1873, and within two years after the commencement thereof.

2. The provision in section 11 of the amendment, which enacts that nothing contained in section 35 of the original act [of 1867 (14 Stat. 534)] shall be construed to invalidate any security taken in good faith at the time of making a loan, is only declaratory of what the law was before the passage of the amendment. Before the original act was amended, a mortgage given to secure a loan made at the time, in good faith, was valid, even though the mortgagor was insolvent at the time of executing the same, and the party making the loan had knowledge of the fact.

In 1871, Henry Monyhan loaned the bankrupt [Milton Montgomery] three hundred dollars, and took his note therefor. This debt was unpaid in March, 1873, when Monyhan loaned the bankrupt two hundred dollars more, for which the bankrupt executed another note, and promised to secure the whole debt by the execution of a mortgage on his real estate. He did not return with the mortgage at the appointed time, and Monyhan brought suit against him. Pending this suit, the bankrupt brought a mortgage to Monyhan at Lancaster, on April

[1] [Reprinted by permission.]

10, 1873, which was considered defective. Monyhan and the bankrupt then went together to Salem, where, at the office of Prow, who was Monyhan's attorney, on April 11, 1873, the bankrupt executed and delivered his note to Monyhan for one thousand dollars, and a mortgage, to secure the payment of this note, and another for five hundred dollars, which was executed at the same time, but was not delivered. This note for one thousand dollars was in lieu of the two notes for three hundred dollars, and two hundred dollars, which were then surrendered to the bankrupt. The difference between the aggregate amount of these notes and accrued interest, and one thousand dollars, was at this time loaned the bankrupt by Monyhan. The remainder of the fifteen hundred dollars was never loaned the bankrupt. The bankrupt was insolvent at the time, and had been so for some time previous. His property was encumbered by liens, suits were pending against him in the courts, he was not paying his debts, and in the community where he lived he was generally reputed to be in failing circumstances and insolvent. On July 24, 1873, a petition in bankruptcy was filed against him, and adjudication of bankruptcy was subsequently had thereon. On October 3, 1873, Monyhan proved his debt against the estate of the bankrupt, claiming the mortgage aforesaid as security therefor. Exceptions thereto were filed August 18, 1874, by James Reynolds and George H. Smith, who are creditors of said bankrupt, and whose debts have been duly proven against his estate in bankruptcy, and a re-examination of the claim of Monyhan was had, in the course of which the foregoing facts were elicited.

By Mr. Register BUTLER:

The bankrupt law provides that the transfer of property by an insolvent debtor, within a specified period of time before the filing of a petition in bankruptcy by or against him, and under other circumstances which are also specified in the law, is fraudulent and void. The transfer becomes absolutely void upon the filing of the petition in bankruptcy, and may be subsequently set aside as such at the instance of the assignee. The only limitation imposed by the law upon suits for this purpose, is that contained in section 2, which provides that they shall be brought within two years after the cause of action accrues. The cause of action accrues with the filing of the petition in bankruptcy. Sections 14 and 38. These provisions, which govern suits by assignees to set aside fraudulent conveyances, are substantially applicable to proceedings by an assignee or a creditor who has proved his debt under section 22 of the law, and rule 34 of the supreme court (United States), to have the court reject claims which are alleged to be "founded in fraud, illegality, or mistake," when the alleged fraud or illegality consists in the assertion of a security for a debt which has been obtained in violation of them. If then, the mortgage executed by the bankrupt in this case to Monyhan, on the 12th of April, A. D. 1873, and claimed by the latter in his proof of debt against the estate of the bankrupt as security therefor, was void under the law as it existed on the 24th of July, A. D. 1873, when the petition in bankruptcy was filed, these creditors, Reynolds and Smith, acquired then a right to have it set aside as such, which they are at liberty to assert at any time within two years afterwards, unless they are divested of it by the amendatory act of June 22, A. D. 1874. Section 10 of the amendatory act substitutes the period of two months where it was four months, and the period of three months where it was six months, in section 35 of the original act, as the time within which a conveyance, violated in other respects, may be rendered absolutely void by the filing of a petition in bankruptcy by or against the person who has made the same; and suspends the operation of the act in the one case for two months and in the other case for three months after its passage. It was evidently the intention of congress, as revealed by the context of the amendment and its relation to the amended law, that these provisions should apply only to conveyances which should be attacked in the course of proceedings in bankruptcy, begun after the expiration of these periods of time. They obviously do not refer to proceedings in bankruptcy begun previous to their expiration. Section 11 of the amendment supplies the word "knowing," where "reasonable cause to believe" was understood in section 35 of the original act, and prohibits such a construction of this section as would invalidate a bona fide security for a contemporaneous loan, besides making some additional verbal changes, which it is unimportant to consider here.

It is a well settled principle of law, that a statute is to be so construed as to give it a prospective operation only, unless the intention of the legislature to make it retroactive is clearly and unambiguously expressed, or necessarily implied [Harvey v. Tyler] 2 Wall. [69 U. S.] 347; [McEwen v. Den] 24 How. [65 U. S.] 244; [U. S. v. Heath] 3 Cranch [7 U. S.] 413. There is nothing in the terms of these sections of the amendment, which indicates an intention on the part of its framers, to have them apply to cases begun before its passage, or from which such an intention is necessarily inferred, and in the absence of any positive expression or necessary implication to this effect, they must be considered as prospective only. The language employed in other sections of the amendatory act, and especially in section 17, by which the provisions of that section are made expressly applicable to "cases of bankruptcy now pending, or to be hereafter pending," etc., seems to denote that the general provisions of the act were not intended to apply to cases pending

at the time of its passage. Confirmatory of this view is the clause in section 12, by which its provisions are made retroactive as to cases of involuntary bankruptcy begun since December 1, 1873. Here the intention of the legislature is clearly expressed, and it is reasonable to presume that had a like intention existed with reference to other sections, it would have been expressed with legal clearness. This section, as well as section 11, makes actual knowledge by the person to whom a conveyance is made, of an intended fraud on the bankrupt law, one of the essentials of a fraudulent conveyance, and extends the application of its provisions to all involuntary cases begun since December 1, 1873. It thus excludes any construction which would bring within its purview involuntary cases commenced before that time. Such was the opinion of Hopkins, J., in Hamlin v. Pettibone [Case No. 5,995]. This being an involuntary case, which was begun prior to December 1, 1873, section 12 is consequently inapplicable to it. The principles of construction which have been here applied to the interpretation of sections 10, 11, and 12 of the amendment, have been fully approved in the consideration of other sections thereof. Section 9, which modifies the conditions of discharge, as they existed in the original act, was held, in Re Perkins [Case No. 10,983], to apply only to cases begun after its passage. Such, also, was the opinion of Blatchford, J., in Re Francke [Id. 5,046]. Moreover, the construction which was given section 9 in Re Perkins, supra, has been already adopted by this court, and, for this reason, the question under present discussion may be regarded as virtually settled in this district; for the application to other sections of the amendment, of the principles on which that decision was based, must result in giving them the construction which is claimed for them.

The case of Singer v. Sloan [Case No. 12,899], which is cited by counsel for Monyhan, is not in point, as the petition in bankruptcy against Towle was filed since December 1, 1873. The court especially says that "it is not necessary, for the purposes of this demurrer, to decide whether cases brought, or acts done prior to said December, are to be controlled by the amendment. To avoid all doubt as to the views of the court, it is now held that said section 11 of the act of 1874 controls all cases brought since December 1, 1873." This case was decided by the district court for the Eastern district of Missouri. The circuit court for that district had already decided, in Re King [Case No. 7,781], that section 9 of the amendment applies to pending cases, and the district court in the case cited, says, "The same reasoning which produced those rulings (i. e., in Re King, supra), would exact the construction now given." The converse of this proposition is equally true, and where, as in this district, the court has held that section 9 does not apply to pending cases, it may be said that the precedent "exacts" a like construction of the sections affecting fraudulent conveyances. If these sections are held to apply to cases of the kind under consideration, vested rights are thereby destroyed, and contracts are made good which were absolutely void before their enactment. Proceedings in involuntary bankruptcy are very frequently instituted for the purpose of recovering property fraudulently conveyed, and compelling an equal division of it among all creditors. One of the acts of bankruptcy charged in the petition against the bankrupt in this case, is the mortgage to Monyhan, which is in controversy. In Steamship Co. v. Joliffe, 2 Wall. [69 U. S.] 450, Mr. Justice Field speaking for the court, it was held that when a right arises under, or is given by a statute, and "it has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute." This case being therefore governed by the law in existence when the petition in bankruptcy was filed, it remains to be ascertained whether, upon the facts adduced in evidence, the mortgage claimed by Monyhan as security for his debt, is in violation of it. It was executed within the four months preceding the filing of the petition in bankruptcy. It is conceded that the bankrupt was insolvent when it was executed. The legal effect of the mortgage was to give Monyhan a preference over other creditors as to part of his debt, and to prevent the distribution of the mortgaged property under the bankrupt law and defeat the operation thereof, and the bankrupt must, therefore, be presumed to have intended these results of his acts.

The only other point to be determined is whether or not Monyhan had reasonable cause to believe the bankrupt was insolvent, and that the mortgage was in fraud of the bankrupt law. The evidence shows that such a state of "facts and circumstances were known to Monyhan as clearly ought to have put him, as a prudent man, upon inquiry." Buchanan v. Smith, 16 Wall. [83 U. S.] 277. He might have ascertained the insolvency of the bankrupt by reasonable inquiry, and he must, therefore, be held to have had reasonable cause to believe that the bankrupt was insolvent. Id. These were matters of common notoriety and of public record, and there were proceedings in the courts which Monyhan personally, or by his attorney (with whose knowledge he is chargeable), must be presumed to have known, which were in fact sufficient of themselves to afford reasonable cause for this belief. The mortgage itself, under all the circumstances of its execution, was out of "the usual and ordinary course of business of the debtor," and, as such, was "prima facie evidence of fraud." Section 35. Commenting on this provision of the law, Hall, J., said, in Graham v. Stark [Case No.

5,676], "This prima facie evidence is present to any creditor who accepts a security in any case to which the provision is applicable; and unless the creditor has evidence sufficient to repeal this legal presumption, he has reasonable cause to believe that the security is fraudulent and void under the bankrupt act."

For the foregoing reasons, it is the opinion of the register that the mortgage in controversy is fraudulent and void under the provisions of the bankrupt law applicable thereto, and that the exceptions to the proof of debt of Monyhan ought to be sustained.

John H. Butler, for creditors Reynolds and Smith.

Francis Wilson, for Henry Monyhan.

GRESHAM, District Judge. In 1871 Monyhan loaned the bankrupt three hundred dollars. About the 1st of March, 1873, Monyhan let the bankrupt have two hundred dollars more, and took his note, the latter at the same time agreeing to give a mortgage on his real estate to secure the payment of this note and other loans to be made in the future. The bankrupt failing to return with a mortgage as soon after the loan of the two hundred dollars as he had agreed to, Monyhan placed the two notes, given for the two loans, in the hands of Prow, an attorney at Salem, and suit was brought on them. On the 10th of April, suit having already been brought on the two notes, the bankrupt returned to Monyhan with a mortgage, which the latter refused to take, because he believed the same was defective in form. On the next day, April 11, Monyhan and the bankrupt went to Prow's office, where the mortgage in controversy was executed and delivered, the notes for the two hundred and three hundred dollar loans destroyed, and Monyhan loaned the bankrupt an additional sum, viz.: the difference between the two notes destroyed and interest, and one thousand dollars. For the purposes of this opinion, no further statement of the facts is necessary. The agreement to give a mortgage at the time the two hundred dollars was loaned was binding, and Monyhan might have enforced the same against the bankrupt. In equity the case stands as if the mortgage had been executed at the time of the loan. That part of section 11 of the supplemental act of June 22, 1874, which provides that nothing contained in section 35 of the original act shall be construed to invalidate any security taken in good faith at the time of making a loan, was only declaratory of what the law was before the passage of the amendment. Before the original act was amended, a mortgage given to secure a loan made at the time in good faith, was valid, even though the mortgagor was insolvent at the time of executing the same, and the party making the loan had knowledge of the fact. It is clear that at the time the mortgage was executed and delivered at Prow's office, and the last money was advanced, and at the time the two hundred dollars was loaned, the bankrupt was insolvent, and from all the evidence, I am unable to escape the conclusion that Monyhan had knowledge of this fact, but I do not think Monyhan is shown to have acted in bad faith within the meaning of the statute, in taking the mortgage, so far as it covered the money advanced at the time of its execution, and the two hundred dollars loaned with a promise of security as stated. The exceptions are overruled and disallowed as to all of the claim, except the three hundred dollars loaned in 1871. In all other respects the opinion and finding of the register are approved.

Cas No. 9,733.

The MONTGOMERY.

[See Case No. 17,120.]

Case No. 9,734.

The MONTGOMERY v. The BETSEY.

[1 Gall. 416.] [1]

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

APPEAL—ABANDONMENT BY APPELLANT—AFFIRMATION—PRIZE CASE.

If, in a prize cause, the claimant appeal and desert his appeal, the circuit court may affirm the decree of the district court, with costs.

[Cited in U. S. v. Haynes, Case No. 15,335; U. S. v. Certain Hogsheads of Molasses, Id. 14,766; U. S. v. The Glamorgan, Id. 15,214; Folger v. The Robert G. Shaw, Id. 4,899.]

See The Elizabeth, 1 Hagg. Adm. 226; The San Juan Nepomuerno, 1 Hagg. Adm. 267.

[This was a libel by the privateer Montgomery (Holton J. Breed, commander) against the schooner Betsey (William Young, late master).]

On trial of this cause in the district court on a prize allegation, one George Moreton claimed $500, part of the cargo of the said schooner, as his property; and after a full hearing, the judge rejected the claim and decreed the same money good and lawful prize to the captors, from which decree the claimant interposed an appeal to this court, and, having failed to enter or prosecute his appeal, Pitman, Jun., for the captors, by petition, prayed the court to affirm the decree of the court below, with costs.

Cummings, Sprague, and Pitman, for captors.

STORY, Circuit Justice. As by the 21st section of the judiciary act of 24th September, 1789, c. 20 [1 Stat. 83], appeals from the district court must be prosecuted at the next circuit court held after pronouncing the decree, it is clear that this appeal must be pronounced to be deserted. The only question is whether the principal cause shall be remitted to the district court for final proceedings, or the de-

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

cree shall be affirmed in this court. On examination of the authorities and consideration of the peculiar organization of this court, I am satisfied that on a failure of the appellant to enter and prosecute his appeal, the appeal may be pronounced to be deserted, and the principal cause remitted to the court below for final proceedings; and in such case the taxation of the costs may be retained in the circuit court, or directed to be made in the court below; or the appellant may produce the record and have the principal cause retained here, and, upon a hearing ex parte, claim an affirmation of the original decree, with costs. The appellant may therefore elect to proceed as he may deem most for his interest. I understand that an affirmation of the decree, in cases like the present, has been an unquestionable practice of this court.

Decree affirmed, with costs.

Case No. 9,735.

MONTGOMERY v. BEVANS et al.

[1 Sawy. 653; 4 Am. Law T. Rep. U. S. Cts. 202.] [1]

Circuit Court, D. California. Aug. 26, 1871.

MEXICAN LAND GRANTS—VAN NESS ORDINANCE—GRANT BY ALCALDE — ATTEMPT TO REVOKE — GRANT TO ONE DECEASED—STATUTE OF LIMITATIONS—ABSENCE—PRESUMPTION OF DEATH.

1. An alcalde of the pueblo of San Francisco, in 1846, had no authority to revoke a grant once made by him and delivered, or to mutiliate its record. A mutilation of a record by him did not operate to divest a title already passed to the grantee.

2. When a party has been absent seven years without being heard of, the presumption of law then arises that he is dead. But when a party is once shown to be alive, the presumption of law is that he continues alive until his death is proved, or the rule of law applies by which such death is presumed to have occurred, that is, at the end of seven years. This presumption of life is received in the absence of any countervailing testimony, as conclusive of the fact establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails.

[Criticised in People v. Feilen, 58 Cal. 224.]

3. The presumption of the continuance of life rebutted in this case by evidence tending to show that the absent party met his death soon after his disappearance.

4. A grant of land in the pueblo of San Francisco, by an alcalde in 1846 to a person deceased, was void.

5. The city of San Francisco presented her claim for confirmation to the board of land commissioners created under the act of congress of March 3, 1851 [9 Stat. 631]; the board confirmed the claim to a portion of the land, and rejected it for the balance; an appeal was taken by the city from this decision to the district court of the United States; the case was then transferred to the circuit court of the United States for the district of California; and by that court a decree was rendered May 18, 1865, confirming the claim of the city to four square leagues of land, subject to certain reservations and exceptions therein mentioned. From this decree an appeal was taken to the supreme court of the United States, and whilst the case was pending there, congress passed the act of March 8, 1866 [13 Stat. 332], "to quiet the title to certain lands within the corporate limits of the city of San Francisco," by which act all the right and title of the United States, to the land situated within the corporate limits of the city, confirmed by the decree of the circuit court, were relinquished and granted to the city, and the claim of the city to the land was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon certain trusts as to the disposition of the land: *Held*, that by this act the government determined the conditions upon which the claim of the city should be recognized and confirmed, and that the title of the city, therefore, rests upon the decree of the circuit court, as modified by the act of congress—that is, her title is that which is recognized and established by the decree as thus modified. The decree must be read precisely as if the conditions prescribed in the act of congress had been inserted in the decree by the court.

[Cited in San Francisco v. U. S., Case No. 12,316.]

6. The claim of the city of San Francisco, as successor of the pueblo, to her municipal lands, was founded upon the general laws of Mexico, by which pueblos, or towns, once established and officially recognized, were entitled for their benefit, and the benefit of their inhabitants, to the use of lands embracing the site of such pueblos, or towns, and of adjoining lands within certain limits. No assignment of these lands having been made to the pueblo under the former government, the claim or right of the city was an imperfect one, requiring recognition and confirmation in the mode prescribed by congress, like other claims to property of an imperfect character derived from Spanish and Mexican authorities.

7. By the fifth section of the act of congress of July 1, 1864 [14 Stat. 4], "To expedite the settlement of titles to lands in the state of California," all the right and title of the United States to the lands within the limits of the city, as defined by its charter of 1851, were granted to the city for the uses and purposes specified in the Van Ness Ordinance, subject to certain exceptions designated. These exceptions consisted of all sites or other parcels of land which had been, or were then, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as might thereafter be designated by the president within one year after the rendition to the general land office by the surveyor-general of an approved plat of the exterior limits of the city, as recognized by the section, in connection with the lines of the public surveys: *Held*, that the exception from the grant of such parcels as might be subsequently designated by the president, did not defeat the entire grant; and that if the exception were not void for repugnancy, the title of the United States to the lands specified must be regarded as having passed by the act to the city with a right in the United States to resume the title to parcels upon the designation of the president within a specified period.

[Cited in Harris v. McGovern, 99 U. S. 166.]

8. The adverse interest of the government to the lands within the corporate limits of 1851 being released by the act of July 1, 1864, the titles conferred by the Van Ness Ordinance became perfect legal titles. The act operated upon such titles as effectually as a patent would have done, and the right reserved to the United States

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 4 Am. Law T. Rep. U. S. Cts. 202, contains only a partial report.]

did not affect the perfect character of those titles.

[Cited in Harris v. McGovern, Case No. 6,125; Whitney v. Morrow, 112 U. S. 696, 5 Sup. Ct. 334.]

[Cited in Ohm v. San Francisco, 92 Cal. 455, 28 Pac. 585.]

9. The sixth section of the state statute of limitations of 1863, providing in substance that parties claiming real property under title derived from the Spanish or Mexican governments, or the authorities thereof, which had not been finally confirmed by the United States, or its legally constituted authorities, shall be limited to five years after its passage, within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties shall be subject to the same limitations as though they derived their title from any other source, that is, shall have five years from such final confirmation, is invalid so far as it applies to actions for the recovery of real property founded upon titles derived from Mexican or Spanish authorities, perfected after its passage, either by act of congress or by judicial decree, survey and patent, and that, as to titles thus perfected, the ordinary period of limitation must be allowed from the date of their consummation, which exists with reference to actions on complete titles from other sources.

[Cited in Le Roy v. Carroll, Case No. 8,266; Henshaw v. Bissell, 18 Wall. (85 U. S.) 270.]

10. The act of congress of March 3, 1851, passed in execution of the obligation of the United States, under the stipulations of the treaty by which California was ceded, to protect the holders of titles derived from Mexican or Spanish authorities, is not subject to any constitutional objection, so far as it applies to titles of an imperfect character; that is, to titles which require further action of the political department of the government to render them perfect; and the action of the government under this act, and the rights of possession and enjoyment which the title perfected thereby gives, cannot be defeated or impaired by any state legislation.

This was an action for the possession of a fifty-vara lot situated within the limits of the city of San Francisco, as defined by its charter of 1851; and was tried by the court without the intervention of a jury, by stipulation of the parties. The plaintiff [John B. Montgomery] asserted title to the demanded premises, under an alleged grant to his son, John E. Montgomery, issued by Alcalde Washington A. Bartlett, bearing date on the first day of December, 1846. The defendants [Thomas P. Bevans and others] claimed under a grant issued to Andrew J. Grayson by Alcalde Edwin Bryant on the twenty-sixth day of February, 1847.

It was admitted by the parties, that San Francisco was, in 1846, a Mexican pueblo, claiming title to four square leagues of land, embracing the tract upon which the present city of San Francisco is situated; that in December of that year, the above named Washington A. Bartlett was alcalde or chief magistrate of that pueblo; and that in February, 1847, Edwin Bryant was his successor as such alcalde. It was also admitted, that the city of San Francisco, as successor of the pueblo, asserted a claim for the four square leagues of land, and presented her claim for the same for confirmation to the board of land commissioners, created under the act of congress of March 3, 1851; that such proceedings were had in the prosecution of that claim, that on the eighteenth day of May, 1865, it was confirmed by a decree of the circuit court of the United States for the district of California, to the extent of the four square leagues. From the decree of the circuit court an appeal was taken to the supreme court of the United States, and whilst the appeal was pending, congress passed the act of March 8, 1866, which is given below. The appeal was accordingly dismissed on stipulation of the attorney-general. Townsend v. Greeley, 5 Wall. [72 U. S.] 337; Grisar v. McDowell, 6 Wall. [73 U. S.] 379. The record of the proceedings in the case was presented in evidence and reference was made to it on the trial. No official survey of the tract confirmed by the decree of the circuit court has ever been approved by the commissioner of the general land office, or by the secretary of the interior. It was also admitted that the premises in controversy were within the limits of the city of San Francisco, as defined by its charter of 1851, and within the description of lands covered by the ordinance of the city called the "Van Ness Ordinance," adopted by the common council and ratified by the legislature of the state, March 11, 1858. Grayson, the grantee of the grant from Alcalde Bryant, went into immediate possession under his grant, and either he, or parties tracing title through him, have been in the uninterrupted possession of the premises, asserting ownership of the same under the grant ever since. The alleged grant to Montgomery was not produced, but the plaintiff, who is the father of the grantee, and whose deposition was taken under a commission in Pennsylvania, testified that a document of that character was delivered to him for his son in December, 1846. He was at the time a captain in the navy of the United States, in command of the sloop of war Portsmouth, lying in the harbor of San Francisco; and his statement was that the alleged grant was brought by a messenger from Alcalde Bartlett on board the Portsmouth, and delivered to him for his son, who had, about a fortnight before, sailed up the Sacramento; that the messenger brought, at the same time, three grants, one for himself, and one for each of his two sons, and delivered them all to him, the two latter to keep for his sons; and that afterwards, as he was leaving the port of San Francisco, he sent the grant for John E. Montgomery on shore to the alcalde to be kept for the grantee, as he did not expect to see him there again. It was admitted that this document could not be found among the papers of Alcalde Bartlett, or among the papers he left with his successor in office, although diligent search had been made for it.

In connection with the testimony the plaintiff offered a defaced record of the alleged grant, found in the book kept by Alcalde Bartlett, in which a record was made of

grants issued by him. The record was in the form of a certificate of the alcalde over his signature, that on the first day of December, 1846, he had, by virtue of the authority vested in him, granted the lot in question to John E. Montgomery, his heirs and assigns, and had put the grantee in full and quiet possession of the same. The signature of the alcalde is erased by lines drawn over it, but is plainly legible through the lines, and across the record the following words are written: "This title not given out in consequence of the loss of the petitioner before he could have done so. Feb. 1847. Wash. A. Bartlett, Chief Magistrate." The following is a copy of this document, the erasions and endorsement, being as above stated: "Lot No. one hundred thirteen (113), granted to John E. Montgomery. Chief Magistrate's Office, Yerba Buena. This is to certify that on the first (1st) day of December, A. D. 1846, I, Washn. A. Bartlett, alcalde or chief magistrate of San Francisco, by virtue of the authority of my office, granted, ceded, conveyed and confirmed unto John E. Montgomery, now resident in the district, the lot No. one hundred thirteen in the town of Yerba Buena, said lot being fifty Spanish varas square, and gave the said John E. Montgomery, his heirs and assigns, a full and valid title to said lot No. one hundred thirteen (113), under the form and conditions set forth in the title and recorded in this register, and that I put the said John E. Montgomery in full and quiet possession of said lot No. one hundred thirteen (113), and record the same for his security. Washn. A. Bartlett. Liber 'A' of Original Grants, page 201." The testimony of experts skilled in detecting resemblances and differences in handwriting was then taken, and from that testimony as well as from an inspection of the writings, it was clear that the lines over the signature and the writing across the record, were made by the same pen and with the same ink, and hence the court was of opinion that they were both made at the same time; that is, at the date of the latter, in February, 1847; and being also of opinion that there was no authority in the alcalde to revoke a grant once made, or to mutilate its record, admitted the record in evidence against the objection of the defendants.

It also appeared in evidence, that, besides the Portsmouth, the United States sloop of war, Warren, was, in November, 1846, lying in the harbor of San Francisco; and about the middle of that month, a launch from the Warren sailed from the harbor for Sutter's Fort, a place on the River Sacramento at a distance of about one hundred and twenty miles from San Francisco. The launch was manned by ten seamen, and was commanded by William H. Montgomery, a midshipman, and sailing-master on board the Warren. John E. Montgomery, brother of William, accompanied the launch. Both of the Montgomerys were sons of Captain Montgomery. It was generally understood at the time, on board the Warren, that the launch was sent with money to pay the troops of the United States stationed at Sutter's Fort. The voyage between San Francisco and Sutter's Fort was often made at that time in a single day. An ordinary voyage by sail from San Francisco to the fort and back did not occupy over four or five days. The launch was propelled by both sails and oars. From the time it sailed, no intelligence had ever been received of it, or of its officers, or of any of its men. About ten days after its departure, not hearing of it, Captain Montgomery became uneasy at its absence, and sent out several boats in search of it and of his sons and the men who sailed with them, and these boats were kept on the search for about two weeks. No trace was ever found of launch, officers or men, nor has any intelligence of its or their fate ever been received since. Captain Montgomery sailed with the Portsmouth from the port of San Francisco on the fifth or sixth of December, 1846. There was testimony taken as to the manner in which alcaldes in San Francisco, in 1846 and 1847, made grants of lots in the pueblo, but this is sufficiently shown in the opinion of the court. John E. Montgomery was never married, and never made any will, and by the law of California, the father takes the estate of a child dying intestate without issue.

The following is the fifth section of the act of congress of July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the state of California" (13 Stat. 332): "Sec. 5. And be it further enacted, that all the right and title of the United States to lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the state of California on the fifteenth of April, one thousand eighteen hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said state, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city,' there being excepted from this relinquishment and grant all sites or other parcels of lands which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the president of the United States, within one year after the rendition to the general land office, by the surveyor-general, of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys: And provided, that the relinquishment and grant by this act shall in no manner interfere with or prejudice any

bona fide claims of others, whether asserted adversely under rights derived from Spain, Mexico or laws of the United States, nor preclude a judicial examination and adjustment thereof." Under the clause of this act authorizing the president to designate other sites or parcels of land besides those previously or then occupied by the United States for military, naval or other public uses, he designated on the twelfth of October, 1866, the island of Yerba Buena, or Goat Island, for military uses. No other sites or parcels have ever been designated by him under the above act.

The following is the act of congress of March 8, 1866, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco" (14 Stat. 4): "Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the state of California, confirmed to the city of San Francisco by the decree of the circuit court of the United States for the Northern district of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are hereby, relinquished and granted to the said city of San Francisco and its successors; and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely, that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the state of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination and adjustment thereof."

Charles T. Botts and W. W. Chipman, for plaintiffs.

Edward J. Pringle and George & Loughborough, for defendants.

FIELD, Circuit Justice. There was no authority in the alcalde to revoke a grant once made and delivered, or to mutilate its record. Neither an attempted revocation nor a mutilation of a record could operate to divest a title already passed to the grantee. If the grantee were living at the date of the grant, and thus capable of taking the title, a question which I shall hereafter consider at length, the power of the alcalde over the property was exhausted when the grant was delivered; and the record of the fact was not subject to subsequent alteration by him.

It may be proper to observe here that I do not assent to the doctrine asserted by counsel, that the record in the book of the alcalde is the grant, and that the title to the premises passed to the grantee when the signature of that officer was affixed to it. The record does not purport to be a grant of itself; it contains no words of present transfer. It only purports to declare the fact that a grant had already been made. It is undoubtedly primary evidence of that fact, but it is manifest that the alcalde did not consider this entry as the operative instrument which passed the title, but only as record evidence of his official act. The book shows on its face, and it also appears from the testimony in the case as to the mode of procedure pursued by the alcalde in making grants, that another document than the record was deemed essential to the transfer of the title, in other words, that the document intended for the grantee was considered as the grant.

I am aware of the decision of the supreme court of this state, in Donner v. Palmer, 31 Cal. 500, and have read with much interest the very able and learned opinion of Mr. Justice Sanderson in that case; and I am not prepared to question the general soundness of the views there expressed, when applied to grants made by Mexican alcaldes acting under the laws of Mexico, and adopting the forms and modes of procedure prescribed by them. But it is a matter perfectly notorious that the alcaldes in the Pueblo of San Francisco, appointed shortly after the conquest by the military or naval authorities having command of the district, knew little of Mexican or Spanish law, and less of the modes of procedure prescribed by them for the alienation of lands. They were informed, and this information was the substance of their learning on the subject, that alcaldes under the Mexican law possessed authority to make grants of town lots upon petition; and they proceeded to exercise the authority without any knowledge of the limitations upon its exercise imposed by that law, and in utter disregard of its forms and modes of procedure. The power they asserted they claimed under the law of Mexico, but in its exercise they followed the mode which was in accordance with the system of conveyancing with which they were familiar. Whether the departure from the Mexican mode affected in any respect the validity of the exercise of the power, is a question which has no practical importance. The legislation of the state and of the United States has vested in the holders of these grants, within the charter limits of 1851, an indefeasible estate, whatever the imperfection which attended their previous title.

But it is important in many cases to in-

quire into the modes of procedure adopted by the alcaldes in order to give the effect they intended to the record of their official acts. In the present case there was a delivery of the grant and the mutilation of the record was subsequently made. The present case is, in this respect, distinguished from the cases which have come under consideration by the supreme court of this state.

The testimony of the plaintiff which proves the delivery of the grant, also proves the death of the grantee, or rather proves that he has not been heard from since the fifteenth of November, 1846, and the law presumes the death of a person who has not been heard from for the period of seven years. The plaintiff claims the premises as the heir of the grantee, and relies upon the presumption of law as to the grantee's death to establish his case. And, at the same time, he relies upon what he insists is a presumption of law of equal force, that the grantee having been shown to be alive on the fifteenth of November, 1846, continued alive until the lapse of seven years, when the presumption of death arose. The counsel for the defendants, on the other hand, contend that there is no presumption of the continuance of life during this period of seven years, and that the plaintiff, asserting that the grantee was alive on the first day of December, 1846, as he must do to give efficacy to the grant of the alcalde, is bound to prove the fact; and failing to do so, his claim of title falls to the ground. The argument upon which this position is based is substantially this: The presumption of death arises from the lapse of time since the party has been heard from; for it is considered extraordinary if he was alive that he should not be heard of during this period. Now, if he is to be presumed to be alive up to the last day but one of the seven years, there is nothing extraordinary in his not having been heard of on the last day, and the previous lapse of time during which he was not heard of becomes immaterial by reason of the assumption that he was living so lately. Language similar to this is found in the opinion of the exchequer chamber in the case of Nepean v. Knight, 2 Mees. & W. 895, and hence counsel argue that there is no presumption in favor of the continuance of life during the penumbra, or death period, of seven years, for if such presumption prevailed for one day after disappearance proved, it would necessarily prevail for six years and three hundred and sixty-four days, and the whole basis upon which the presumption of death rests would become absurd. The cases of Doe v. Nepean [5 Barn. & Adol. 86], decided by the court of king's bench, of Nepean v. Knight, mentioned above, decided by the exchequer chamber, and the case of In re Phene's Trusts, recently decided by the court of appeal in chancery, in England [5 Ch. App. 139], are cited in support of this position.

In Doe v. Nepean, 5 Barn. & Adol. 86, the lessor of the plaintiff claimed the premises in controversy by title accruing on the death of one Matthew Knight, who left England for America in 1806, and was not heard of after 1807. The action was brought in 1832, and the question at the trial was whether the action was barred by the statute which limited the entry of a person into lands to twenty years after title accrued. It was admitted that Knight must be presumed to have died, more than seven years having elapsed since he was heard of, and if that presumption were referable to the time when the last intelligence was received of him, 1807, the action was brought too late; but if it arose only when seven years had elapsed from the receipt of such intelligence the action was in time. The judge before whom the case was tried was of opinion that the presumption of death only arose at the expiration of the period of seven years, or in other words the presumption of life continued until that time, and directed a verdict for the plaintiff, with leave to the defendant to move for a nonsuit. After argument upon the motion, the court of the king's bench held that the lessor of the plaintiff who gave no other evidence of Knight's death than his absence, failed to establish that his death took place within twenty years before the action was brought. Mr. Chief Justice Denman, in giving the opinion of the court, observed that though absence of a person for seven years without being heard of naturally led the mind to believe he was dead at the end of that period, it raised no inference as to the exact time of his death, and still less that death took place at the end of seven years.

In the case of Nepean v. Knight, 2 Mees. & W. 895, which was another action of ejectment, for the same premises, the same question was considered by the exchequer chamber and after elaborate argument, the doctrine laid down in Doe v. Nepean was approved, the court observing, in its opinion, that when nothing is heard of a person for seven years, it is a matter of complete uncertainty at what point of time in those seven years he died, and that of all the points of time, the last day is the most improbable and inconsistent with the ground of presuming the fact of death. And yet, in the opinion both of the king's bench, in Doe v. Nepean, and of the exchequer chamber, in this case, it is stated that the law presumes that a person once shown to be alive continues so until the contrary be shown, and that for this reason the onus of establishing the death of Knight rested upon the lessor of the plaintiff. The presumption of the continuance of life, thus stated, is inconsistent with the conclusions reached in both cases. If the presumption of life exists until death is shown, it is difficult to perceive why it should not continue when death is not shown, until the period is reached at which the law has fixed as the commencement of a different pre-

sumption. Clearly there is no rule or principle which can limit its continuance at any period within the seven years, if it be admitted to exist at all.

In the case of In re Phene's Trusts, 5 Ch. App. 139, the court of appeal in chancery held, after elaborate consideration, that the time at which a person died within the seven years was not a matter of presumption, but of proof; also that there was no presumption in favor of the continuance of life after the disappearance of the party, and that the onus of proving the death of the party at any particular time within that period, lay upon the person who claimed a right resting upon the establishment of either of these facts.

In that case it appeared that one Francis Phene had died in January, 1861, having, by his will, bequeathed the residue of his estate to his nephews and nieces in equal shares. Nicholas Phene Mill was one of his nephews, and the share to which he would have been entitled, if living, was paid into court, because it was uncertain whether he survived the testator. In 1869, letters of administration were granted to his brother, who presented a petition for the payment of the fund to him. It appeared in evidence that he left his parents' home in England, and went to America in August, 1853, and was last heard of in June, 1860. Vice-Chancellor James, to whom the petition was presented, granted its prayer, holding in deference to three previous decisions of Vice-Chancellor Kindersly and one of Vice-Chancellor Malins, that the deceased must be presumed to have survived the testator, upon the general doctrine that continuance of life once shown to exist is presumed until death is proved, or at least for a reasonable period after disappearance; but as he dissented from the decisions, he directed the fund to be retained in court until the respondents had an opportunity to bring the matter before the court of appeal.

The decision of Vice-Chancellor Kindersly proceeded upon the presumption of the continuance of life for a reasonable period after the party is shown to have been in existence; but Vice-Chancellor Malins extended the presumption of the continuance of life to the expiration of the seven years. In Re Benham's Trust, L. R. 4 Eq. 416, the doctrine held by these judges was overruled, and if the opinion of the court of appeals contains a correct exposition of the law of England, and we are bound to presume that it does in the absence of any decision of the house of lords on the subject, that law supports the position of the counsel for the defendants in this case, that the onus rests on the plaintiff of showing that John E. Montgomery, who disappeared on the fifteenth of November, 1846, and of whom no intelligence has since been received, was alive on the first day of December, 1846, when the grant of the alcalde was made.

But the law as thus declared in England is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here, as in England, the law presumes that a person who has not been heard of for seven years is dead, but here the law, differing in this respect from the law of England, presumes that a party once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred, that is, at the end of seven years. And the presumption of life is received, in the absence of any countervailing testimony, as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails.

This rule is much more convenient in its application, and works greater justice than the doctrine which obtains in England, according to the decision in Re Phene's Trusts. that the existence of life at any particular time within the seven years, when the fact becomes material, must be affirmatively proved. In numerous cases such proof can never be made, and property must often remain undistributed, or be distributed among the contestants not according to any settled principle, but according as one or the other happens to be the moving party in court. Take this case by way of illustration: A man goes to sea on the first of January, 1860, and is never heard of again; his father makes his will and dies on the first of July of the same year, leaving him a portion of his property, and the residue to a distant relative. If persons claiming under the missing man apply for the legacy to him, they must fail, for they cannot prove that he survived the testator. On the other hand, if the residuary legatee applies for the property on the ground that the legacy to the missing man has lapsed, he must fail, for he cannot prove that the missing man died before the testator, and the proof of his death in such case would be essential to the establishment of the applicant's right.

Nor is this rule as to the presumption of the continuance of life up to the end of the seven years, justly subject to the criticism of counsel, that it renders absurd the whole basis on which the presumption of death rests. There must be some period when the presumption of the continuance of life ceases and the presumption of death supervenes; and as in all cases where the existence of a presumption arising from the lapse of time is limited by a fixed period, it is difficult to assign any valid reason why one presumption should cease at the particular time designated, rather than at some other period, and a different presumption arise, except that it is important that some time, when the change takes place should be permanently established.

It would be difficult to assign any other reason than this for the presumption which

obtains in some states, that a debt is paid, upon which no action has been brought, after the lapse of six years; and that it is unpaid up to the last hour of the sixth year. The presumption of payment arising from the lapse of time without action, it might be said with equal propriety, as in the present case with respect to the presumption of life to the end of the seventh year, that if the presumption of non-payment extends up to the end of the sixth year, it renders absurd the whole basis upon which the presumption of payment rests. So it would be difficult to give any sufficient reason for admitting in evidence a deed thirty years old without other proof of its execution than what is apparent on its face, and at the same time refusing admission to a deed except upon full proof of its execution, which has existed thirty years less one day—except that it is important that the period should be fixed at which the presumption arises which supersedes the necessity of direct proof.

But it is unnecessary to pursue the subject further. I am of opinion that the plaintiff could rely, in the first instance, upon the presumption of law as to the continuance of life to establish the fact that John E. Montgomery was alive on the first day of December, 1846, when the grant of the alcalde was issued. This leaves the plaintiff with a prima facie case of recovery.

We turn now to the consideration of the affirmative positions of the defendants. They contend that the evidence in the case rebuts the presumption of the continuance of life, and warrants the inference that the alleged grantee died previous to the first of December, 1846, and that the action is barred by the statute of limitations.

It appears from the evidence that about the middle of November, 1846, a launch from the United States sloop-of-war, Warren, a vessel then lying in the harbor of San Francisco, and, with the Portsmouth, under the command of Captain Montgomery, sailed from the harbor with ten seamen and two officers for Sutter's Fort on the Sacramento river. The two sons of Captain Montgomery were on the launch—William H. Montgomery, a midshipman and sailing-master on the sloop, Warren, had the command of it; John E. Montgomery, who was clerk of Captain Montgomery on board the Portsmouth, accompanied his brother. It was understood at the time on board the Warren that the launch was sent with money to pay troops of the United States. Sutter's Fort is distant from the harbor of San Francisco about one hundred and twenty miles, and the voyage between the two places is often made in a single day. An ordinary voyage from San Francisco to the fort and back would not occupy over four or five days. The launch in this case was propelled both by sail and by oars. From the time it sailed, no intelligence has ever been received of it, or of either of the officers, or of any of the men who accompanied it. About ten days after its departure, Captain Montgomery became uneasy at its absence, and sent out several boats in search of his sons and the men who sailed with them, and these boats were kept on the search for about two weeks, but no trace could be found of the launch or men. Of their fate absolute ignorance has existed to this day, now nearly a quarter of a century since their disappearance. Captain Montgomery himself left the port of San Francisco with the Portsmouth on the fifth or sixth of December following.

Now it appears to me that there are only two inferences which can be drawn from these facts, when considered with reference to the character and positions of the men and officers: One is, that they died during the period within which they should have returned to San Francisco; the other is, that they deserted from the service. The latter inference cannot be entertained for several reasons: First, desertion is the highest, and with cowardice, the basest of offences which can be committed by men in the naval service; it has never, it is believed, been charged upon a naval officer of the United States; it can never, therefore, be accepted as an explanation of any act of his, except upon the clearest proof. Second, if the case had been one only of desertion, and not of death, it is highly improbable that no intelligence should have been received of any of the men during the long period which has since elapsed. Besides, with respect to the sons of Captain Montgomery, the natural effect of relationship must have led them to break the silence of years, and to seek communication with their father.

The theory of desertion would require us to believe that officers and men conspired to commit the basest of crimes, beside larceny of the public funds in their custody, and that for nearly a quarter of a century they have not only kept to themselves the secret of their crime, but have so secluded themselves, twelve in number, from observation, that no intelligence respecting any of them has reached the public.

If desertion cannot be received as a reasonable explanation of their conduct, then death must be inferred. Death is the only fact which reconciles their conduct with the presumption of innocence, and with the ordinary conduct which officers and men of the navy pursue while in the public service. It is the sole fact which satisfactorily explains, according to the common experience and knowledge of men, which are proper grounds for judgment, the failure of the officers and men to return to San Francisco, and the absolute silence of the world since respecting them.

My mind is thus led irresistibly from the evidence to the conclusion, that the officers and crew on board the launch perished on the voyage to Sacramento, within a few days after their departure from San Fran-

cisco. They probably perished in the Bay of San Pablo, or the Bay of Suisun. If the accident which occasioned their death had occurred in the Sacramento river, it is probable that some of the men would have succeeded, from the narrowness of the stream, in reaching the shore; and probably some trace of the launch would have been discovered.

Finding, as I do, that John E. Montgomery died before the first of December, 1846, the conclusion follows, that the grant of Alcalde Bartlett, intended for him, was inoperative to pass the title.

A grant to a person deceased, is void. The instrument must be issued to a person in being, or it will be as invalid as if made to a fictitious party. The position of the plaintiff's counsel, that if the grantee were dead at the date of grant, his heir-at-law took the title, is not tenable. The case of Landes v. Brant, 10 How. [51 U. S.] 373, cited in support of this position, is an authority against it. In that case, Clamorgan, the patentee, had died in 1814, and the patent issued in 1845. The supreme court said that, according to the common law, the patent was void for want of a grantee, but that the defect was cured by the act of congress of May 20, 1836 [5 Stat. 31], declaring: "That in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who had died, or who shall hereafter die before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees and assigns of such deceased patentee, as if the patent had issued to the deceased person during life." This act, of course, had no application to grants issued by alcaldes in the pueblo of San Francisco, whose authority never extended to the alienation of any public lands, but only to lands belonging to the pueblo.

But, independently of the death of John E. Montgomery, before the first of December, 1846, the defendants have a perfect defense to the action, under the statute of limitations. The sixth section of that statute, as passed in 1850, provided that no action for the recovery of real property or its possession, should be maintained, unless the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises within five years before the commencement of the action. In April, 1855, this section was amended by the addition of a proviso, declaring that an action might be maintained by a party claiming real property or its possession under title derived from the Spanish or Mexican government, or the authorities thereof, if the action was commenced within five years from the time of the final confirmation of such title by the government of the United States, or its legally constituted authorities. In April, 1863, the section was restored to its original language, but a new section was enacted which, after providing that the time which had already run under the previous act, should be computed as a portion of the time prescribed as a limitation in the new act, declares "that any person claiming real property or the possession thereof, or any right or interest therein under title derived from the Spanish or Mexican governments, or the authorities thereof, which shall not have been finally confirmed by the government of the United States, or its legally constituted authorities, more than five years before the passage of this act, may have five years after the passage of this act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits out of the same, or to make his defense to an action founded upon the title thereto; and provided, further, that nothing in this act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate, or the possession thereof, under title derived from Spanish or Mexican governments, in a case where final confirmation has already been had, other than is now allowed under the act to which this act is amendatory."

By this last act, as I understand it, parties claiming real property under title derived from the Spanish or Mexican governments, or the authorities thereof, which had not been finally confirmed by the government of the United States, or its legally constituted authorities, were limited to five years after its passage within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties were subject to the same limitations as though they derived their title from any other source. This construction of the act is in accordance with a recent decision of the supreme court of this state in the case of Mayor, etc., of City of San Jose v. Trimble [41 Cal. 536].

Final confirmation as defined in the act, is deemed to be the patent of the United States, or the final determination of the official survey of the land under the act of congress of June 14, 1860 [12 Stat. 33]. The effect of this statute upon the action of the plaintiff is obvious. He claims the premises in controversy under title derived from the Mexican government, not directly by immediate grant, but indirectly through the action of the alcalde. That officer only had authority to alienate lands belonging to the pueblo; and the pueblo derived its claim and interest in its municipal lands under the general laws of Mexico. Its title was derived in the strictest sense of the terms, from the Mexican government. That title, although finally confirmed in fact by the decree of the circuit court of the United States, entered in the case of San Francisco v. U. S. [Case No. 12,316], on the eighteenth day of May, 1865, and the legislation of congress upon the claim of the city has not been finally confirmed within the

meaning of the act of 1863. No patent has been issued to the city upon the decree of confirmation, and the official survey has not been finally determined under the act of congress of June 14, 1860. The case of the plaintiff falls, therefore, directly within the provision which requires the action to be brought within five years after the passage of the act.[2]

Before leaving this subject it may be proper to say a few words further upon the source of title to the land within the limits of the pueblo of San Francisco, as described in the decree of the circuit court of the United States, as there is much difference of opinion on the subject between counsel.

The city of San Francisco, as successor of the pueblo, asserted title to four square leagues of land, embracing the site of the present city, and presented her claim for the same to the board of land commissioners, created under the act of March 3, 1851. The board confirmed the claim to a portion of the land, and rejected it for the balance. The city, not satisfied with this determination, prosecuted an appeal from the decision to the district court of the United States. From that court the case was transferred to the circuit court, and by this latter tribunal the claim of the city was confirmed to the extent of four square leagues, and on the eighteenth of May, 1865, the decree was entered. In the prosecution of the case it was not contended by the counsel of the city that any specific grant of land had ever been made or issued to her by Spain or Mexico. Her claim to the four square leagues was founded upon the general laws of Mexico, by which pueblos, or towns, once established and officially recognized, were entitled for their benefit, and the benefit of their inhabitants, to the use of lands embracing the site of such pueblos, or towns, and of adjoining lands within certain limits. "This right," as was said by the supreme court in Townsend v. Greeley, 5 Wall. [72 U. S.] 336, and repeated in Grisar v. McDowell, 6 Wall. [73 U. S.] 372, "appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. The same general system of laws for the establishment and government of pueblos and the assignment to them of lands, that prevailed in Spain, was continued in Mexico, with but little variation, after her separation from the mother country. These laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent four square leagues."

Upon these laws as already stated, the city rested her claim. As no assignment of lands was made to the pueblo under the former government, the claim or right of the city was an imperfect one, requiring recognition and confirmation in the mode prescribed by congress, like other claims to property of an imperfect character derived from Spanish or Mexican authorities.

From the decree of the circuit court of the United States an appeal was taken to the supreme court; and whilst the case was pending there, congress passed the act of March 8, 1866, "To quiet the title to certain lands within the corporate limits of the city of San Francisco." By this act, all the right and title of the United States, to the land situated within the corporate limits of the city, confirmed by the decree of the circuit court, were relinquished and granted to the city, and the claim of the city to the land was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon certain trusts as to the disposition of the land. "By this act," said the supreme court in Grisar v. McDowell [supra] "the government has expressed its precise will with respect to the claim of the city of San Francisco to her lands, as it was then recognized by the circuit court of the United States. In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act directly by legislation upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation, it may annex any conditions to the confirmation of a claim resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of the board or courts at any stage."

"The act of March 3, 1851, is a general law applying to all cases, but the act of March 8, 1866, referring specially to the confirmation of the claim to land in San Francisco, withdrew that claim, as it then stood, from further consideration of the courts under the provisions of the general act. It disposed of the city claim and determined the conditions upon which it should be recognized and confirmed. The title of the city, therefore, rests upon the decree of the circuit court, as modified by the act of congress."

By the statement that the title of the city rests upon the decree of the court, is meant that her title is that which is recognized and established by the decree. The decree must

[2] This view of the effect of the statute of limitations upon the right of action of the plaintiffs, is modified in the opinion filed on denying the motion for a new trial. It is there held that the statute commenced running against the action of the plaintiff, from the first of July, 1864, the date of the passage of the "Act to expedite the settlement of titles to lands in the state of California. [13 Stat. 332.] That period expired in April, 1868, and the present action was not commenced until May, 1870.

be read precisely as if the conditions prescribed in the act of congress had been inserted in the decree by the court. No one would have doubted, if that had been done, that the title was Mexican in its origin, and to be treated like other imperfect Mexican titles when confirmed by authority of the United States.

It only remains to add that judgment must be entered for the defendants. If special findings are desired, the counsel for the plaintiff will prepare them and present them to me upon notice to the counsel of the adverse parties, for settlement; otherwise a general finding will be filed.

Motion for New Trial.

The plaintiff's attorney moved for a new trial, before Mr. Justice Field, on the ground of newly discovered evidence, and alleged error in the finding of the court, and in its ruling upon the statute of limitations. The court denied the motion immediately after the argument, but stated that perhaps its opinion on the statute of limitations might require some explanation or modification; and if satisfied upon further consideration that such was the case, it would file a supplemental opinion on that point, but that its finding as to the death of the grantee at the time the grant was issued remaining, the judgment must stand as rendered, whatever qualification might be made in the opinion upon the statute of limitations.

Subsequently the following opinion was filed:

FIELD, Circuit Justice. When the motion for a new trial was argued, the views expressed in the opinion of the court upon the effect of the state statute of limitations of 1863, and particularly as to the time it began to run against the right of action of the plaintiff, were earnestly combatted by counsel. It was contended by them, that the statute only began to run from the passage of the act of congress of March 8, 1866, and that the legal title to the premises until then was in the United States. Whilst unable to agree with counsel in this position, I was so much impressed with their argument that I was induced to reconsider the opinion, and must now qualify in some particulars its conclusions.

The sixth section of the statute of limitations of 1863, as stated, provided, in substance, that parties claiming real property under title derived from the Spanish or Mexican governments, or the authorities thereof, which had not been finally confirmed by the United States, or its legally constituted authorities, should be limited to five years after its passage, within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties should be subject to the same limitations as though they derived their title from any other source, that is, they should have five years from such final confirmation. The statute, in another section, declared that by final confirmation was meant the patent of the United States, or the final determination of the official survey of the land under the act of congress of June 14, 1860. As no final confirmation, within the meaning of the statute, that is, as no patent had been issued to the city and no official survey had been made, the attention of the court was drawn only to the provision of the statute for the commencement of actions within five years after its passage. It did not then occur to the court, and was not suggested by counsel, that in consequence of the legislation of congress by the acts of July 1, 1864, and of March 8, 1866, no patent would ever issue to the city under the decree of confirmation, and that the act of June 14, 1860, had been repealed. But such is undoubtedly the case. The act of June 14, 1860, was repealed on the first of July, 1864; and it is not the practice of the land department of the United States, and there is no occasion for such practice, to issue patents for land granted by direct act of congress. A patent necessarily rests for its validity upon the legislation of congress, and if the provisions of such legislation are complied with—and it is itself presumptive evidence of the fact—it passes all the title of the United States to the premises designated. A grant by direct act of congress differs only from a patent, in that it passes the title without any intermediate steps from the sovereign proprietor, whereas the patent is only issued through the action of subordinate officers. If any difference could exist in the grade of the two conveyances, the preference would fall to the legislative grant, as proceeding more immediately than the patent from the original source of title. But in truth, there is no such difference; both pass the title of the grantor to the extent designated.

Now, by the fifth section of the act of congress of July 1, 1864, "to expedite the settlement of titles to lands in the state of California" (13 Stat. 332), all the right and title of the United States to the lands within the limits of the city, as defined by its charter of 1851, were granted to the city for the uses and purposes specified in the Van Ness Ordinance, subject to certain exceptions. These exceptions consisted of all sites or other parcels of land which had been or were then occupied by the United States for military, naval, or other public uses, or such other sites or parcels as might thereafter be designated by the president within one year after the rendition to the general land office by the surveyor-general of an approved plat of the exterior limits of the city, as recognized by the section, that is, as defined by the charter of 1851, in connection with the lines of the public surveys.

It is contended by counsel that the exception from the grant of such parcels as might be subsequently designated by the president,

defeated the entire grant. Their position is that the act is void for repugnancy, because, to use their own language, it begins by granting all, and ends by reserving all to the grantor. But this position is clearly untenable. The grant is general, of all the lands within the limits of the charter of 1851, and the exception is of such sites or parcels of these lands as are or have been occupied by the United States, or may be designated by the president for particular uses. The power of future designation does not in terms extend so as to cover the whole grant, but only to parcels of the same. If the language of the exception would authorize, as supposed by counsel, the designation of one parcel after another until all the land granted was taken, it would not follow that the grant itself would fail, but only that the exception would be void for repugnancy. If the grant were between private parties it is possible that the exception would be regarded as void, either for uncertainty or repugnancy. The grant in such case would be taken most strongly against the grantor. But the grant here being a legislative grant, it is the duty of the court to give effect so far as possible to the intent of the legislature, if that can be ascertained, without reference to the technical rules which would control the construction of a private grant. I am, therefore, of opinion that the right of the government to designate through the president, within a limited time, parcels of land for public uses, could be maintained. It is not to be presumed that the president would exercise the right so as to defeat the general purpose of the grant, which was to quiet the title of possessors of lots in the city under the Van Ness Ordinance. In this view the title of the United States to all the lands within the charter limits of 1851, should be regarded as having passed by the act to the city with a right in the United States to resume the title to parcels of these lands, upon the designation of the president within a specified period. But, if I am mistaken in this view, the exception should be regarded as void, and the titles as having passed at once without any right in the United States subsequently to resume the title to any parcels. It is of no practical consequence in this case which construction is adopted, for no parcel within the limits of the city, lying on the peninsula west of the bay, was ever designated by the president, and the power of designation on the peninsula was released by the act of March 8, 1866, in pursuance of which the claim of the city was finally confirmed. The only designation ever made was that of the island of Yerba Buena, which is situated in the bay.

Now, though the title of the city, as stated in the previous opinion, is Mexican in its origin and was recognized and established by the decree of the circuit court of the United States, as modified by the act of congress of March 8, 1866, yet all adverse interest of the government to the lands within the corporate limits of 1851 being released by the act of July 1, 1864, the titles conferred by the Van Ness Ordinance became perfect legal titles. The act operated upon such titles as effectually as a patent would have done. The contingent right reserved to the United States did not affect the perfect character of those titles, any more than a like right of the United States to take property for public uses upon compensation affects the title of such property. There is good reason, therefore, for the position of counsel of the defendants, that the statute of limitations of 1863 began to run against the right of action of the plaintiff on the first of July, 1864, if it be held that the statute did not run from its passage.

The statute allows, as already stated, five years after its passage for the commencement of an action, provided the title has not been previously perfected by final confirmation; if thus perfected, then five years from such confirmation. It does not contemplate the case of a final confirmation subsequently made, or, rather, it gives no force to such subsequent confirmation, and herein lies the defect of the statute. It is not competent for state legislation to impair the rights of the claimant flowing from subsequent confirmation.

Upon the acquisition of California the obligation devolved upon the United States to protect the inhabitants of the territory in their property. This obligation was recognized by express stipulations of the treaty. The obligation being political in its character could be discharged, as I have often had occasion to observe in this court, and when a member of the supreme court of the state, in such manner and on such terms as the government might deem appropriate. By the act of March 3, 1851, the government determined the conditions upon which it would discharge this obligation to holders of titles from Mexican or Spanish authorities. It there established a tribunal for the consideration of all claims to land by virtue of such titles, and required their presentation before it for investigation within a prescribed period, with such evidence, documentary or otherwise, as the holders might possess; appointed law officers to appear and contest their validity; allowed appeals from the decisions of the tribunal to the courts of the United States, and provided officers to survey and measure off the lands when the claims to them were finally adjudged to be valid.

On the one hand the claimant was compelled by this act, on pain of forfeiting his land, to present his claim to it before the tribunal thus created, and was subjected to numerous and expensive proceedings to establish its justice and validity. On the other hand the government promised the claimant that if on the prescribed investigation and consideration by that tribunal, and the courts of the United States on appeal, his claim was found to be valid, it would take such ac-

tion as would render his title perfect, and give to him such evidence of ownership as would assure to him its possession and enjoyment. This legislation was not subject to any constitutional objection, so far as it applied to titles of an imperfect character; that is, to titles which required further action of the political department of the government to render them perfect. The precise point was adjudged by the supreme court of the United States, in the case of Beard v. Federey, 3 Wall. [70 U. S.] 478–490, where language respecting claims to land in California, derived from Spanish or Mexican authorities, the obligation with reference to such claims devolved upon the United States upon the cession of the country, and the character and effect of the act of congress of March 3, 1851, is used, similar to that which is expressed and repeated, so often as to become almost trite, in numerous decisions of the supreme court of this state.

The act of March 3, 1851, being constitutional, it is not within the legislative competency of the state to interfere with and defeat its operation. This follows necessarily from the sovereign and supreme authority of the United States over all matters connected with the treaty and the enforcement of obligations incurred thereby.

The statute of limitations of 1863, so far as it fixes a period after its passage within which actions must be brought for the recovery of real property claimed under titles of Mexican or Spanish origin, may not perhaps be open to any just objection where the titles are imperfect in their character and are unconfirmed. But to give effect to the statute so as to cut off or limit to the period designated after its passage, the right of action upon those titles, when subsequently confirmed and perfected, would be to defeat in many instances the legislation of congress, and render it subordinate to the action of the state.

Many of the grants, as is well known, from Mexican and Spanish authorities, were for specific quantities of land lying within exterior boundaries embracing a greater quantity. They usually contained a clause providing for official segregation of the quantity designated, with a reservation of the surplus for the benefit of the nation. They were, notwithstanding this, accompanied with conditions of cultivation and occupancy, either expressed in the grants or annexed by force of law, and a compliance with them was essential to avoid a possible denouncement and forfeiture of the land. The grantees were therefore obliged to take possession, and their right of possession necessarily extended to the entire tract. They could not set apart for themselves any particular portion of the general tract equal, in their judgment, or according to their measurement, to the quantity specified. The authority to make a segregation, remained before the cession of the country with the former government, and since the cession has remained with the new government. The grantees were, therefore, interested to protect from injury and waste the entire tract, and to improve it, and, until official segregation, third persons could not interfere with this right to the possession of the whole. Until then, as was said in Cornwall v. Culver, 16 Cal. 429, no individual could complain, much less could he be permitted to determine in advance that any particular locality would fall within the supposed surplus, and therefore justify its forcible seizure and detention by himself. "If one person," to use the language of the court in that case, "could in this way appropriate a particular parcel to himself, all persons could do so; and thus the grantee, who is the donee of the government, would be stripped of its bounty for the benefit of those who were not in its contemplation, and were never intended to be the recipients of its favors."

Such being the rights of grantees until official segregation, the courts of this state have with strict justice given effect to them by sustaining actions of ejectment, until such segregation for the entire tract within the exterior boundaries. Much hardship has, in numerous cases, been the result of actions of this character. Many grantees throughout the country, probably the majority of them, have, therefore, from this consideration or to avoid the expenses of litigation, refrained from enforcing their rights in this respect. Now, if the statute of 1863 could be upheld when applied to actions upon titles confirmed subsequently to its passage, this absurd result would follow, if the confirmation were had more than five years afterwards, namely, that grantees would be barred from recovering the limited quantity to which they were ultimately found entitled after confirmation and survey, because they had not previously sued for and recovered a greater quantity. The grantees in that case would be required to sue, before confirmation, for more than they would be ultimately entitled to have set apart to them, and more than the former government intended to grant to them, or be barred of all right of action for the quantity actually intended and finally assigned to them.

It is evident that the state courts are incompetent to determine finally upon the rights of parties claiming by imperfect titles of Mexican or Spanish origin before their confirmation. A suit founded upon such title might be defeated by a ruling of a state court, that the grant was invalid because issued without authority, or was forged, or abandoned, or because its conditions were not complied with, and yet if the grant should be adjudged valid in the proceedings before the board of commissioners created under the act of March 3, 1851, and the tribunals of the United States on appeal from its decision, and a patent be issued, the judgment of the state court would not be a bar to a new action upon the patent. And the reason is obvious; until the government has dischar-

ged its obligations under the treaty with respect to such titles, the state court can only look into the evidence respecting them for the purpose of determining the right of their holder to present possession. It can pass no judgment which will impair the ultimate determination of the appropriate federal tribunals respecting their validity.

If an adverse judgment by a state court upon the unconfirmed title would not bar an action upon the confirmed title, it must necessarily follow that the absence of any action upon the title before confirmation cannot be effectual as a bar to an action after confirmation.

It would seem from the argument of counsel, that the difficulty experienced by them upon the subject under consideration, has arisen from the idea that its determination depends upon the character of the title derived from Mexican or Spanish authorities as equitable or legal. But its determination does not depend upon this distinction. Equitable titles, so called, are strictly mere claims upon the government for titles, and are founded upon some service rendered or other consideration given to the government, or promise by it. They constitute no estate in the land, and, unless accompanied with the right of possession, do not authorize any action for the recovery of the land. Grants in California from Mexican or Spanish authorities conferred something more than mere equitable titles, as thus understood; they passed to the grantees a present and immediate interest in the premises designated; they conferred a legal title, though generally, for want either of departmental approval or official segregation, one which was imperfect in its character. The question in all cases of this kind, is not whether the title is equitable or legal, but whether it is perfect or imperfect. If imperfect, it is under the control of the government of the United States, and any regulations which that government may prescribe for the purpose of protecting and perfecting it. The action of that government, and the right of possession and enjoyment which perfected title gives, cannot be defeated or in any respect impaired by state legislation. As against the perfected title, the state statute of limitations can only begin to run from the date of the consummation of the title.

In the present case the act of July 1, 1864, as already stated, operated upon the premises designated in perfecting the title as effectually as a patent of the United States. It is no objection to the efficacy of the act that it was passed in advance of the period when a patent would ordinarily have been issued, and thus rendered a patent unnecessary.

It follows from the views expressed that the sixth section of the state statute of 1863 is invalid so far as it applies to actions for the recovery of real property founded upon titles derived from Mexican or Spanish authorities, perfected after its passage, either by act of congress or by judicial decree, survey and patent, and that, as to titles thus perfected, the ordinary period of limitation must be allowed from the date of their consummation which exists with reference to actions on complete title from other sources.

It follows, also, that the statute in the present case began to run against the right of action of the plaintiff on the first of July, 1864, and not on the eighteenth of May, 1863. The former opinion must, therefore, be modified in accordance with these views.

MONTGOMERY (BOUDEREAU v.). See Case No. 1,694.

MONTGOMERY (CHISHOLM v.). See Case No. 2,686.

MONTGOMERY (FAY v.). See Case No. 4,709.

MONTGOMERY (GRESHAM v.). See Case No. 5,805.

MONTGOMERY (RICE v.). See Case No. 11,753.

Case No. 9,736.

MONTGOMERY et al. v. The T. P. LEATHERS.

[Newb. 421.] [1]

District Court, E. D. Louisiana. Nov., 1852.

SALVAGE—ACTUAL SAVING NECESSARY—SURRENDER BY MASTER—RIGHT OF PILOT TO PARTICIPATE—DERELICT—RATE OF SALVAGE—BY WHAT GOVERNED.

1. To constitute a derelict in the sense of maritime law, it is necessary that the thing be found deserted or abandoned upon the seas, whether it arose from accident, or necessity, or voluntary dereliction.

[Cited in Williams v. The Jenny Lind, Case No. 17,723.]

2. The abandonment of a steamboat by the master, to the care and protection of the master and crew of another steamboat for the purpose of procuring assistance and safety, is not a case of derelict.

3. In questions of salvage, no distinction can be made between the boat and cargo, both being subject to the same rule of law.

[Cited in The Queen of the Pacific, 18 Fed. 701.]

4. A salvage compensation can be awarded only to persons by whose agency and assistance the vessel or cargo may be saved from impending peril, or recovered after actual loss; and salvage will not be allowed unless the property be saved in fact by the parties who make the claim. Intentions, however good, and exertions even though they be perilous and heroic, are not sufficient to sustain a claim for salvage.

[Cited in The Williams, Case No. 17,710.]

5. The drawing a boat off when aground, is a common act of courtesy among steamboats, for which no claim for salvage is ever asserted.

6. The surrender of the imperiled boat by its master, to the care and protection of the master and crew of the steamer Robb, virtually dissolved the contract between the surrendered boat and its pilot, and the pilot by important services subsequently rendered beyond the line of his duty, as such, is entitled to claim as one of the salvors.

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

7. The rate of salvage is not governed by the mere extent of labor. The value of the property saved, the degree of hazard in which it is placed, the enterprise, intrepidity and danger of the service, and the policy of a liberal allowance for timely interposition of maritime assistance, all conspire to increase the amount of the salvage. When the value of the property is small and the hazard great, the allowance is in greater proportion; on the other hand, when the value is large and the services highly meritorious, the proportion is diminished.

[This was a libel by Edward Montgomery and others against the steamboat T. P. Leathers and cargo, for salvage.]

Mr. Benjamin, for salvors.
Mr. Durant, for respondent.

McCALEB, District Judge. The libelants in this case claim a salvage compensation for services rendered in saving from loss by fire, the steamboat T. P. Leathers. It appears from the evidence, that the steamboat James Robb, while prosecuting her voyage from this port to that of Louisville, Kentucky, on the 13th of June last, discovered the Leathers on fire, at College Point, about sixty miles above this city. The discovery was made about two o'clock in the morning. The Robb, upon being hailed by the Leathers, went to her assistance, and found her in a very dangerous situation; the fire was in her hold, and all efforts to extinguish the flames had proved ineffectual; she had been run hard ashore on a sand bank, with a view to save the lives of those on board; she had been scuttled by boring into her a number of large auger holes, for the purpose of extinguishing the fire. All the steam and water from her boilers had been exhausted by being discharged into her hold; by this means the flames were at first partially subdued, but again broke out as fiercely as before; she had already obtained the assistance of the steamboat St. Charles, which had vainly endeavored to pull her off the sand bank and extinguish the fire. When the Robb arrived, the flames had made such progress as to render inevitable the destruction of the Leathers and that portion of the cargo which had not been removed by the St. Charles. The Leathers was commanded by Captain J. F. Leathers, but when the fire broke out, he requested his older and more experienced brother, who was on board as a passenger, to take command. This request was complied with, and the latter had the control of the burning boat when the Robb arrived. With the assistance of his brother, he was engaged in doing all that skill, experience and energy could accomplish, with the means at his disposal, in rescuing the boat and cargo from impending peril. At his request, the Robb, aided by the St. Charles, hauled the Leathers off the sand bank. She took on board the passengers, and a large portion of the cargo from the deck of the Leathers, which had not been previously taken off by the St. Charles. She pumped the boilers of the Leathers, which were empty, full of water, and after giving all the assistance she could for about four hours, was on the eve of leaving the Leathers and prosecuting her voyage to Louisville, when the captain of the Leathers requested Captain Montgomery not to leave, as it was perfectly apparent the boat must inevitably be destroyed without the superior equipments of the Robb, to aid in putting out the fire. The testimony of Captain Leathers shows that he had no hopes whatever of being able to save the boat without that aid which the Robb only could render. He therefore came to the conclusion to abandon the burning boat to Captain Montgomery, of the Robb, that he might do with her whatever he might deem expedient, with a view to her final safety.

Captain Montgomery thereupon took possession of the Leathers, and with all the means and machinery of the Robb, resorted to every device which skill and ingenuity could suggest to save her. It may be proper here to remark, that the Robb is the only boat on the Mississippi provided with an extra steam engine to furnish steam and water for extinguishing fires. This engine, with its boiler, the main engine and its boilers, and the small engine called the doctor, on the Robb, were all fitted up with extra pipes leading into the hold of the Leathers. The two main engines of the Leathers and her doctor, were also fitted up with similar pipes, which were made to lead into her hold. Steam was then raised in the boilers on both boats, and an unremitted discharge of steam and water kept up. By this means, the flames were in a great measure subdued, but not entirely extinguished. The heat in the hold was so intense, and the smoke so suffocating, as to render it impossible for any one to go below. It was deemed advisable, therefore, to fill the hold with water as the only means of entirely putting out the fire. The Leathers was then towed by the Robb from College Point, where she had been stranded, to Valcour Aime's plantation, six miles lower down the river, to a sand bank where there was about six feet of water. While the boat, however, was proceeding down the river to the point here designated, it was found that the current of air created by her motion had the effect of driving back from the hatches the steam and smoke; and Captain Montgomery determined, though at considerable hazard of his life, to take a hose and descend into the hold, that he might thus be enabled more effectually to direct a stream of water upon the burning cargo. He was urgently warned not to do so by the officers of the Leathers, who informed him that there were barrels of turpentine in the hold; and notwithstanding the peril he incurred, he called for volunteers to aid him in the accomplishment of his purpose, and followed by James Dean, the pilot of the Robb, James F. Smith, her first clerk, James K. Moody, second clerk, Marshall Johnson, her first engineer, and Chas. Pierce, pilot of the Leathers, descended into the hold with a

hose in his hand, while Dean was provided with another. They were thus enabled, with the assistance of the other men, Smith and Johnson, Moody and Pierce, to direct a perpetual stream of water upon those articles of merchandise which were actually blazing. They were thus enabled by constant exertions for several hours, to extinguish the flames entirely, and save the boat and that portion of the cargo not already taken on board the Robb. The gallantry and intrepidity displayed by Captain Montgomery and his associates, will be fully appreciated by a reference to the fact disclosed by the evidence, that some of the barrels containing turpentine were on fire, and had their hoops burnt off. The water in the hold of the Leathers was then pumped out, the freight which had been taken from her on board the Robb was returned to her, and after about thirteen hours of unremitted labor, the Robb continued her voyage to Louisville, in charge of her mate, while Captain Montgomery took command of the Leathers, and brought her down in safety to this port.

The facts here detailed, and the testimony of the witnesses not particularly referred to, are such as to justify the court in regarding the services of the salvors as in the highest degree meritorious. It cannot be denied that almost all those ingredients of a salvage service, which in the opinion of a court of admiralty, enhance the claim for compensation, were strongly presented on the trial of this cause. The danger to the property rescued was imminent. The testimony of Captain Leathers shows clearly that it would inevitably have been destroyed but for the timely assistance of the salvors. In the conduct of Captain Montgomery were displayed all those qualities of skill, energy, intrepidity and gallantry, which ever have and ever will, appeal most strongly to the equitable consideration of courts in awarding a salvage compensation. The same qualities were exhibited, though not to the same extent, by those who promptly responded to his call for volunteers, and faithfully executed his orders. The proctors for the respondents have with commendable liberality, admitted that the services performed by the salvors were of a highly meritorious character, and that a liberal remuneration should be awarded. They have, however, very properly contended, that this is not a case of a derelict, as that term is understood in the maritime law, and however much I may feel inclined to regard with favor the services of these salvors, it is my duty to adhere as closely as possible to the well established principles of law. I cannot give to the case any other character than that which the law has given it. If it could be considered as a case of derelict, I should perhaps have little hesitation in decreeing the usual proportion of a moiety. But a glance at the law will show, that it would be a deviation from all precedent thus to regard it.

To constitute a derelict in the sense of the maritime law, it is necessary that the thing be found deserted or abandoned upon the seas, whether it arose from accident or necessity, or voluntary dereliction. Sir William Scott, in the case of The Aquila, 1 C. Rob. Adm. 37, declared that a legal derelict is, properly, where there has been an abandonment at sea by the master or crew, without hope of recovery. With the view, for which the words "without hope of recovery," are introduced, viz: to distinguish a temporary absence from a permanent abandonment, it might, perhaps, have been more proper to have said, an abandonment without the intention of returning, since the spes recuperandi might exist even though the abandonment were without such intention. In another case, that of The Jonge Johannes, 4 C. Rob. Adm. 263, the same learned judge seems to have entertained an opinion, that if a vessel be captured, and afterwards abandoned by her captor, it is not properly a case of derelict; because neither the owner nor those who were in possession as his agents, have committed any act of dereliction. So that in this view, to constitute a derelict, there must be a voluntary abandonment by the master and crew. But this opinion, as appears from later cases (The Lord Nelson, Edw. 79, and The Blenden-Hall, 1 Dod. 414), has been silently retracted; and certainly it is not the recognized doctrine in this country. Sir Leoline Jenkins has given a true definition in its most broad and accurate sense, when he says "derelicts are boats or other vessels forsaken or found on the seas without any person in them." Works of Sir L. Jenkins, vol. 1, p. 89. It is true that the civil law attached a very different sense to the term; for a thing was not a derelict in that law unless the owner voluntarily abandoned it without any further claim of property in it. "Pro derelicto antem habetur quod dominus ea mente abjecerit, al id in numero rerum suarum esse nolit." Just. Inst. lib. 2, p. 681, § 46. And, therefore, a thing cast overboard in a storm to lighten a vessel, was not esteemed a derelict. Rowe v. The Brig [Case No. 12,093].

In the case now under consideration, the boat on fire was found in possession of her captain and crew, who never left her at any moment from the commencement of the danger until the final extinguishment of the flames. It is true that Captain Leathers abandoned her to the possession of Captain Montgomery, under the conviction that nothing could be effectually done for her safety, without the admirable equipments of the Robb. But such an abandonment can, in no just or legal sense, be considered as sufficient to satisfy us in regarding the boat as a derelict—that is deserted by her captain and crew sine animo revertendi. A case of the total abandonment of a vessel upon the Mississippi must very rarely occur, especially where, as in this instance, she is stranded near the shore. The inducements to seek safety by the desertion of a ship in flames on the high

seas, or driven about in a helpless condition by storms, or wrecked on the coast of the sea, can never exist on our public navigable rivers. Being satisfied that this is not a case of derelict, I shall, instead of a moiety, award one-third of the proceeds of the property saved to the salvors, to be distributed as hereafter directed.

The position assumed by the proctors of the claimants of a portion of the cargo, that a distinction should be drawn by the court between the boat and cargo, cannot be recognized as the correct rule, in cases of this nature. I know no precedent for the establishment of such a rule, and the learned proctors have referred to no authority in support of their position. The reason advanced for the distinction, which it is contended should be drawn, is the fact that less exertion and risk were necessary in saving that portion of the cargo which was placed upon the deck of the Leathers. There is scarcely a case of salvage that ever came before a court of admiralty, in which this distinction would not have been applicable; and yet, we find the uniform rule to be, to consider the service performed in rescuing the vessel and cargo, as one general salvage service, to be compensated by awarding a certain quantum of the proceeds of the whole property. I have searched with diligence for authorities upon this point, and the only case I have discovered, is that of The Vesta, decided by Sir Christopher Robinson. 2 Hagg. Adm. 195. The decision was given upon an appeal from the commissioners, and although the learned judge confirms the action of these commissioners for satisfactory reasons, he is clear in the expression of an opinion adverse to the principle contended for by the proctors in this case. He maintains, that it is not a correct principle in determining the amount of salvage, to give specific proportions of different parts of the property saved as of the ship and cargo, and the different parts of the cargo. Such a rule is inconvenient in itself, and must lead to error, unless checked by proper attention to the adequacy of the remuneration so assigned, according to the circumstances of the particular case. The more usual and better rule is, to make a valuation on the whole property. "Suppose," says the judge, in illustration of his views on this point, "a casket of jewels on board, and which might be saved with great facility; it could not, in such case, be contended that the salvors would only be entitled to a small gratuity for carrying it on shore. To uphold such a notion would lead to preferences in saving one part of a cargo before another." I shall, therefore, adhere to the usual rule, and decree compensation out of the whole proceeds of boat and cargo; and shall do so with greater satisfaction, because it appears from the testimony of Captain Leathers, that there existed the strongest apprehensions that the deck of the burning boat would fall in, and the cargo on the deck could only be saved by directing a constant stream of water into the hold, by the operations of the engine and hose of the Robb.

I come now to consider the claim of the St. Charles to be considered as a salvor; and I shall proceed to state as briefly as possible, the reasons why, in my judgment, the claim cannot be admitted. A salvage compensation can be awarded only to persons by whose agency and assistance the vessel or cargo may be saved from impending peril, or recovered after actual loss, as in cases of shipwreck, derelict or recapture. It is well settled, that unless the property be saved in fact, by those who claim as salvors, salvage will not be allowed, be their intentions however good, and their exertions however heroic and perilous. Clarke v. The Dodge Healy [Case No. 2,849]. The evidence shows that a large portion of the cargo on deck, was taken on board of the St. Charles. But by an agreement between Captain Leathers and Captain Applegate, commanding the St. Charles, that portion of the cargo was transported by her to its place of destination, and her captain and owners were to be compensated by receiving the freight which was chargeable thereon. This freight was doubtless received. Whether it has been or not, it is certain that no claim for salvage has or could now be asserted against that portion of her cargo. It can hardly be contended that the Leathers and the balance of the cargo were saved when the St. Charles left her. The testimony of Captain Leathers on this point, is too explicit to admit of a doubt. The St. Charles aided the Robb in drawing the Leathers off the sand bar; but we are told by the pilot of the Leathers, that the power of the Robb was sufficient without her. Besides, the drawing a boat off when aground, is a common act of courtesy among steamboats, for which no claim for salvage is ever asserted. If the services of the Robb had extended no farther than this simple and usual act of courtesy, it is hardly probable that she would have asserted any claim for salvage compensation. But she persevered unto the end. She not only rendered the services alluded to by the witnesses, but it was by those services that the property against which she has filed her libel was actually saved from impending peril. I am of opinion that the St. Charles has already been amply compensated by the amount of freight she has received upon that portion of the cargo which by agreement with Captain Leathers—an agreement which seems at the time to have been perfectly satisfactory to both parties—she was to carry to its point of destination.

The proctors for the claimants of a portion of the cargo, have urged upon the court the propriety of decreeing salvage to the crew of the Robb. I cannot perceive upon what ground their clients are interested in securing to the crew their customary proportion of the compensation awarded, except upon the supposition that as that proportion has not been claimed, it will enure to the benefit

of the claimants. But if by the evidence the crew were placed before the court as salvors, I should feel it my duty to have their proportion retained in the registry, subject to their orders, and in no event would I feel myself authorized to order it into the hands of the claimants. The evidence, however, does not justify the court, in this instance, in considering the crew as salvors. They have asserted no claim as such, and the fair presumption is, that, not having performed any service beyond the ordinary line of their duty, they have no demand to make beyond their ordinary wages. If, indeed, the court could feel itself called upon to award to them a compensation, the amount would necessarily be about the proportion of stipulated wages, which, for about thirteen hours, would be too insignificant to be taken into account in a case like this. I have felt it to be a sacred duty to guard the rights of the crew in all cases in which they could at all be regarded as salvors. And in the case to which the proctor has referred, I refused to award to the owners of the tow-boat the amount of salvage compensation which was justly demanded by the crew, under the belief that they would eventually claim as salvors, and because I was convinced their claims had not been properly presented by those whose duty it was to protect their rights. The only persons who now appear before the court as salvors, are Captain Montgomery, the men whose names have already been mentioned, and Hamilton Smith and Isaac Darrimore, the mate and carpenter. These two last did not descend into the hold of the Leathers, but rendered prompt and efficient assistance in executing orders above, and especially in cutting holes in the deck. They incurred no real danger, but were active and useful in their appropriate sphere. Charles Pierce, although a pilot on the burning boat, is clearly entitled to be regarded as a salvor. His original contract with the boat, on which he was employed, was virtually dissolved by the surrender of the boat into the possession of Captain Montgomery; and there seems to be no doubt that he performed important services beyond the line of his ordinary duty. I shall, therefore, place him upon an equality with James S. Smith, Marshall Johnson and James K. Moody. After Captain Montgomery, the real dux facti—the strong prevailing mind that led throughout the enterprise—I consider the pilot of the Robb, James Dean, as first entitled to the favorable consideration of the court. He was the first to respond to the call of Captain Montgomery for volunteers, and to follow him into the hold. He also had charge of a hose, and amid the intense heat and suffocating smoke, continued, with great fortitude and energy, to discharge his duty until the flames were finally extinguished.

Since the decision of Lord Stowell in the case of The Raikes [1 Hagg. Adm. 246] it has become customary with courts of admiralty to award a liberal compensation to the owners of steam vessels to induce them to embark in a salvage enterprise and thus enlist their powerful and efficient aid in rescuing life and property from impending peril. The case now under consideration is one in which a higher proportion than one-third should be awarded to the owners of the salving boat. The superior engine of the Robb and her other excellent and extensive equipments, all so admirably adapted to the service in which she was employed, will, I think, justify me in deviating from the ordinary rule of one-third, and giving to her owners one-half of the salvage compensation awarded. It should also be remembered, in further justification of this rule, that her exertions to save the property in this instance worked a forfeiture of her insurance. As already intimated, I shall decree one-third of the proceeds of the boat and cargo saved free of all expenses and charges, as the aggregate of salvage compensation; and of this one-half having been decreed to the owners of the Robb, I shall divide the other half into thirty shares, of $250 each. I give—

To Captain Montgomery	12	shares
James Dean, pilot	4	"
James S. Smith	3	"
Marshall Johnson	3	"
James K. Moody	3	"
Charles Pierce	3	"
Hamilton Smith	1	"
Isaac Darrimore	1	"
	30	shares

Thirty shares of $250 each, are equal to $7,500. The whole value of the property saved has been estimated at $45,000. The owners of the Robb will receive the other half of the third allowed, viz: $7,500.

In making this decree, I have endeavored to give what I consider, under all the circumstances of the case, a liberal reward to the salvors, and at the same time protect the rights of the unfortunate owners. It is well established that the amount of salvage rests in the sound discretion of the court. The rate is not governed by the mere extent of labor, but is a result from the combination of various considerations. The value of the property saved, the degree of hazard in which it is placed, the enterprise, intrepidity and danger of the service, and the policy of a liberal allowance for the timely interposition of marine assistance, all conspire to heighten the amount. Where the value of the property is small, and the hazard is great, the allowance is always in greater proportion. On the other hand, where the value is large, and services are highly meritorious, the proportion is diminished.

MONTGOMERY v. TYSON. See Case No. 484.

MONTGOMERY (UNITED STATES v.). See Cases Nos. 15,799 and 15,800.

MONTGOMERY, The (WALTER v.). See Case No. 17,120.

Case No. 9,737.

MONTGOMERY v. WHARTON et al.

[Bee, 388;[1] 2 Pet. Adm. 397.]

Admiralty Court, Pennsylvania. 1780.[2]

SHIPPING—VESSEL CHARTERED—RIGHT OF OWNERS TO DISCHARGE MASTER—MASTER'S REMEDY.

1. Owners of a vessel which they have chartered to others, may dismiss the master they have appointed before the completion of the voyage, (although he has signed bills of lading for the cargo, and shipped his mariners,) without the owners shewing sufficient cause for such dismission.

[Cited in Parsons v. Terry, Case No. 10,782; Clayton v. The Eliza B. Emory, 4 Fed. 344.]

[Quoted in Ward v. Ruckman, 36 N. Y. 37.]

2. In cases of real injury the master must apply to the laws of his country for redress.

[Cited in Parsons v. Terry, Case No. 10,782.]

[Quoted in Ward v. Ruckman, 36 N. Y. 37.]

Wharton, and others, owners of the ship General Greene, had chartered her to certain merchants for a particular voyage, and appointed Montgomery master for that voyage. The ship had cleared out at the naval office, and was on the point of sailing, when a sudden frost filled the Delaware with ice, and fixed her in the port of Philadelphia. During the winter some differences arose between the owners and master. The consequence of which was, that the owners, by a letter of dismission, discharged Montgomery from their service, and put another master on board. Whereupon Montgomery libelled against the owners in the admiralty to compel them to fulfil their contract with him. The question was, whether owners could dismiss the master they had appointed before the completion of the voyage, after he had signed bills of lading for the cargo, and shipped his mariners, without the owners shewing sufficient cause for such dismission. And it was contended, that the master, from the time of his appointment, has the sole command of the ship vested in him, and cannot be displaced without committing some offence sufficient to forfeit his rights and justify a dismission. That after signing bills of lading, he becomes answerable to the freighters for the delivery of the cargo, and that the owners cannot by their act exonerate him from this charge, whilst the bills of lading signed with his hand, remain in the possession of the freighters: that the libellant, considering himself as engaged for this voyage, had neglected to seek for any other appointment; and that the owners discharging him at this time, was an injury which the court ought in justice to redress by compelling them to reinstate him in his office.

In behalf of the respondents it was urged, that the owners of a ship have, and ought to have, a right to remove the master at pleasure; because their interests are so deeply concerned in the appointment, that they are answerable not only for his imprudent conduct, but are bound by contracts he may legally make on account of the concern: that if, after their choice of a master, his appointment should be deemed irrevocable for the voyage, unless some gross offence can be proved, the owners will be at the mercy of the master, who, by his weak or wicked conduct, may bring them to ruin. That if when the owners have dismissed the master, the court should undertake to reinstate him, contrary to their judgment and inclination, and so force him upon them, the court and not the owners, ought to be answerable to the freighters for any consequences that may ensue: that neither the charter-party, shipping articles, or bills of lading, prohibit a change of the master, as the contracts made with him are made in his official and not in his personal capacity: that the master is in fact the representative of the owners, and not himself personally bound, neither is he answerable for the conduct of his successor: that in case an action should be brought against him for a breach of contract on the bills of lading, he might plead his dismission by the owners, and it would be good in law: that the subordinate officers are appointed by the master of a ship, and if they should misbehave, or prove insufficient or unsafe, the owners have no remedy but by the removal of the master: that if owners are bound by the appointment of a master to continue him for the voyage, the master ought also to be bound to perform the voyage, even against his interest or inclination; but if, in case of the master's refusal, the owners should libel against him in the admiralty, the court could give no redress, because the court cannot award damages, neither can it compel the master to a specific performance of his contract, from the nature of the service: that the master's appointment is, and ought to be during pleasure only: that the same power which appoints can remove: that if a master suffers injury by an unreasonable dismission, he may have his remedy at common law where ample recompense in damages will be made to him: and finally, that whatever inconveniences may arise to masters being subjected to the caprice of owners of vessels, much greater would arise to the owners, should they be compelled to retain in their service masters once appointed, however contrary to their judgment or interest; and that no instance can be produced of a master being thus forced upon the owners of a ship by any court whatever.

To which, counsel for the libellant replied: That this cause came properly before the court of admiralty: that where a court hath

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

[2] [Affirmed in 1 Dall. (1 U. S.) 49.]

the right to take cognizance of an injury, it follows necessarily that it can give redress: that if the court cannot award damages, it can order a specific performance of the contract: that the court can compel the master to such performance; and if he refuses, can attach his person, and oblige him to give security for the completion of his contract; and, therefore, the jurisdiction is competent: that it would be unjust to send the master to common law for redress, on the owner's breach of contract, as the owners may fail and be unable to pay damages, and therefore the ship ought to be his certain and proper security: that all contracts ought to be sacred and mutual, being founded on reciprocity; and it would be absurd to allege, that the master is bound on his part, and the owners not bound on theirs: that a master engaged for a voyage, is like a servant indented for a certain time; and that the engagement or indenture cannot be dissolved, during the terms, but by mutual consent: that, this vessel was chartered to the freighter, who acquired by the charter-party a temporary property in her, and the owners had nothing to do with her for the time, the ship being under the same circumstances with a house leased for a term: that after the charter-party is signed, and the goods laden on board, the owners cannot discharge the master at their pleasure; as his good character and abilities might have been the inducement which led the freighter to make choice of that ship in preference: and, lastly, that if no instance can be found of a master's being forced upon the owners of a ship, neither can any authority be produced, giving the owners the arbitrary power of dismissing the master at pleasure, and without assigning sufficient cause.

HOPKINSON, J. After having carefully considered the arguments advanced, and the authorities cited in this cause, it appears to me unnecessary to pursue the whole tract of argument that hath been taken on this occasion. The decision of the cause rests solely on the nature of the contract between the owners of a ship and the captain they employ. And the terms or substance of such a contract is, in my opinion this, viz. If the master well and faithfully performs the duties of his station, the owners, on their part, are bound to pay the stipulated wages, and allow him all the customary privileges of his office. But it does not seem to be any part of the contract, that a master once engaged, shall be master for the voyage at all events. This might be extremely injurious to owners, on account of the very extensive powers a master hath over their property. And however hard it may appear that the master should be subject to the caprice of his owners in this respect, he must consider it as one of the unavoidable inconveniences of his occupation, and in cases of real injury apply to the laws of his country for redress. Much greater would the danger be to owners of vessels, and indeed to commerce in general, if the appointment of a master should be irrevocable for the voyage. Whatever good opinion an owner may have of the master, at the time of his appointment, he may find sufficient reason afterwards to change his mind, and yet not be able to produce legal proof of his defection or inability. Fidelity or infidelity before a service performed, is a matter of opinion only, and it would be an unreasonable hardship to compel an owner to continue what was originally a voluntary trust in the hands of a person of whom he may have found subsequent reasons to believe that he may prove either unfaithful or unskilful, although he may not be able to charge him with any positive offence: but I cannot see how this court can interfere to any effect. If the court should decree that the owners shall receive the libellant on board, as master for the voyage contracted for; have not the owners a power to sell their ship, to lay her up, or totally change the voyage, and so evade the decree? Or, if a master should refuse to go the voyage for which he engaged, can this court compel a specific performance of the duties of his office? The remedy in both cases must be in damages for a breach of contract, to which the common law is most competent. Let the bill be dismissed.

The libellant appealed from this judgment, and the cause was again fully argued before the judges of the high court of errors and appeals; but the libel was finally dismissed. [1 Dall. (1 U. S.) 49.]

MONTGOMERY & E. R. CO. (OTIS v.). See Case No. 10,612.

MONTGOMERY & E. R. CO. (STRANG v.). See Case No. 13,523.

MONTGOMERY & E. R. CO. (YOUNG v.). See Case No. 18,166.

MONTGOMERY COUNTY (THAYER v.). See Case No. 13,870.

Case No. 9,738.

The MONTICELLO.

[See Case No. 3,971.]

Case No. 9,739.

The MONTICELLO.

[1 Lowell, 184.] [1]

District Court, D. Massachusetts. Dec., 1867.[2]

COLLISION—FOG—BOTH VESSELS IN FAULT—WITNESSES.

1. There is a fog at night, within the meaning of the act of 29th April, 1864 [13 Stat. 60], re-

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

[2] [Affirmed in Case No. 3,971.]

quiring a horn to be sounded by sailing vessels, whenever the weather is so thick that the horn would be heard farther than the ordinary signal lights of the vessel could be clearly distinguished.

2. Where a steamer was running at least eight knots an hour on a calm foggy night and came suddenly on a schooner a little on the starboard bow, *held*, on the opinion of experts, that the steamer should have starboarded her helm, and having had time to do so was in fault for porting, and the damages were decreed to be divided, though the schooner was in fault for not sounding a fog-horn.

3. There is no objection to one party in a collision cause calling as witnesses persons who were on board the vessel of the other party.

Libel for damage caused the schooner Phoebe by the steamer Monticello, on the night of March 11, 1867, about twenty-six miles to the southward and eastward of Cape Lookout. The witnesses for the libellants deposed that they saw the mast-head and starboard side-lights of the steamer at a few minutes after ten o'clock, at a distance which they estimated at a mile, and about two points forward of their port beam. The crew of the schooner hailed the steamer, but she kept her course until close to the schooner, when an order was heard to port the helm, but they observed no change of course, and the claimants' steamer struck the schooner near the port fore-rigging and cut her down. The crew were saved by the steamer. It appeared that the schooner was close-hauled on the port tack, with a wind that barely gave her steerage way. The steamer was bound down the coast in a south-westerly direction, and was running at least eight knots, with one lookout near the bows. The lookout saw the red light of the schooner very near him and a little on his starboard bow, and reported to the mate on the bridge, who gave the order to port, which was obeyed, and the schooner had swung off to starboard one and a half or two points before she struck the Phoebe. Concerning the amount of haze or fog the evidence was conflicting.

C. T. & T. H. Russell, for libellants.

The steamer was going too fast. The place was a thoroughfare for ships and vessels of all kinds, and eight miles an hour was excessive speed: The Bay State, 18 How. [59 U. S.] 89; The St. Charles, 19 How. [60 U. S.] 108. There should have been a lookout on each bow on a vessel of this size. When the schooner was discovered the wrong order was given.

J. C. Dodge, for claimants.

The fault lies entirely with the schooner for not sounding a fog-horn. When we came suddenly upon her we did right, or if not, it was so late that we should be excused, the first fault having been on the other side.

LOWELL, District Judge. I am fully satisfied that whatever may be the truth in relation to the other matters, the steamer was in fault in porting her helm. The experts on both sides agree that the order should have been to starboard. It is said to be a general rule of navigation that when the vessel which is bound to give way sees a light close at hand on the port bow or directly ahead the helm should be put to port, but if on the starboard bow, the helm should be starboarded. Whether this be a general rule or not, it is manifestly a true rule for a case like this, where the red light of a sailing vessel is seen in a calm by a steamer going at least eight knots, because to clear her bows the steamer will require but a slight change, comparatively of only one point, as the experts say, to clear the steamer on that side, while it required three points on the other, the speed of the schooner counting for very little under the circumstances. I am fully satisfied, from all the evidence, that the steamer would have avoided the hull and probably even the head-gear of the Phoebe, if the mate had not unfortunately given the order to port, and insisted upon it, when some one, who, for aught he knew, he says, was the master, cried out to starboard. Nor can I find that the emergency was so sudden and extreme as to excuse such a mistake. The order to port which was heard on board the schooner was evidently the second order, which the mate says he gave very peremptorily when he heard some one crying to starboard, and it did not even then appear to the master of the schooner too late, if only the proper command had been given. From a consideration of what passed on board both vessels, and of the change of course which actually took place, I am convinced that there was ample time for this steamer, which was a quick steering vessel, to get out of the way, after seeing the schooner's signal.

It is said on behalf of the steamer, as showing fault on the other side, that the night was very thick and foggy, so that the lights of the schooner could be seen for only a few hundred feet, and that the schooner should have sounded a fog-horn, as required by the statute of April 29, 1864 (13 Stat. 60), c. 69, art. 10, which enacts that whenever there is a fog, the fog signals shall be carried and used.

The libellants contend that there was no such fog as is here referred to. They admit a haze, mist, or smoke, as it is variously termed by their witnesses, but say that the ordinary lights of a vessel could be seen a mile off. The claimants' witnesses represent a very much denser fog than this, and think a few hundred feet are the extent of the range of such lights at that time.

What is a fog such as the statute intends? Is it every haze, by day or night, of whatever density? To give the statute a reasonable interpretation we must suppose that its intent is to give to approaching vessels a warning which the fog would otherwise deprive them of. By day there must be fog

enough to shut out the view of the sails or hull, or by night of the lights, within the range of the horn, whistle, or bell. It means that a safeguard of practical utility under the circumstances, should be provided. If it be entirely plain, upon the evidence, that the ordinary signals are sufficient and more efficacious than the horn could be, the horn will not be required. But a serious doubt upon this point must weigh against the vessel failing to comply with the statute. I do not consider it to be enough to aver and prove that the lights might be seen in time to avoid serious danger; but where it is evident that the fog signal could not have been so useful as the ordinary signal, it need not be used. Thus if the lights could be plainly and easily made out at a mile, and the fog-horn could not be heard at a third or a quarter of that distance, I cannot suppose that such a state of the atmosphere would amount to a fog in the sense of the law. It is to guard against some danger which the fog would or might cause, and from which the horn might possibly guard, that it is to be blown.

Before considering the state of the weather, I may dispose of one defence set up by the schooner, that her hail was equivalent to the horn. The evidence does not satisfy me that the fact is so, and it would require very strong evidence to outweigh the expressed legislative opinion that the other signal is the better.

Coming to the question of fact, it is found that the schooner's men, with a rather suspicious unanimity, give it as their opinion that a vessel's lights could be seen a mile off; and that they did see the steamer's lights at that distance. The estimates which sailors make of time and distance on such occasions are notoriously untrustworthy, not so much from any wilful misstatement, as from the great difficulty of arriving at satisfactory conclusions in their own minds, as well as an inability to express their precise meaning. The same witness will often give these measurements differently in different parts of his evidence. Looking carefully at what they did on board the schooner, I am unable to account for the six or seven minutes which would elapse before the steamer could make a mile. They began to shout very soon after they saw the other vessel, and yet two of the men who were roused by the shouts had not reached the deck when the vessels came together. They think they shouted for a considerable time, but they were not heard on board the steamer until about the time the light was seen, and then they were heard without difficulty on that calm night, and the steamer's second order to port was heard by them. On a clear night the steamer's mast-head light ought to be visible at a distance of at least five miles, if she had the regulation lights, as it is proved she had; but it appears to have broken upon the schooner's crew suddenly, three of them seeing it at once, and one likening it to a star, at the distance which they now estimate at a mile. I think that estimate may probably be influenced by the suspense and anxiety which made the time seem very long before their hail was observed. It is a very delicate and difficult task to decide such a question as this upon written testimony; and I have endeavored to bring it to the test of the various circumstances given in evidence. One of these, appealed to on both sides, is the distance at which the lights of the steamer were actually seen, after the collision, by the men on the wreck; but I have not been able to satisfy myself what that distance was. I can only say that I do not think it is proved to have been any thing like a mile.

There are three witnesses who stand in a peculiar relation to the case. They are steamer's men, called and examined on behalf of the schooner. The fact that they are used on that side has been severely commented upon, and some remarks of Dr. Lushington were read, in which that learned judge disparages affidavits taken from the hostile camp, as he expresses it. Any thing like tampering with witnesses would deserve and would receive the sternest reprehension of the court, but the case shows nothing of that sort; and it is to be remembered that we are not presented with ex parte affidavits, as in the case cited, but with full examination and cross-examination which develop the history of their engagement as witnesses and show nothing improper. These three witnesses give their evidence with moderation and with no obvious bias, and I am disposed to rely a good deal upon their statement of the weather. They all say that it was foggy. In their estimates of how far the running lights of a vessel could be seen they differ, and had evidently not concerted their answers; one says two hundred and fifty yards; one, twice the steamer's length, which would be some thing over two hundred yards; the third gives two estimates, the largest of which is a quarter of a mile. The best judgment I have been able to form upon all the evidence is, that there was a fog, which, though not as dense as many others, was enough so to render the sounding of the fog-horn a proper precaution. Upon the evidence, such a signal might probably, on a calm night like this, have been heard on board the steamer at the distance of half a mile, and I am not satisfied that with ordinary vigilance the schooner's lights would have been clearly distinguishable at that distance. This opinion is founded upon the direct statements of the steamer's crew, but especially of those three whom the libellants called; and upon the facts that the lights of neither vessel were seen at any considerable distance from the other, that the fog was a sea fog from the north-east, and the other circumstances above referred to.

Both parties were in fault, and it is impos-

sible to say that either fault was the sole cause of the collision. Damages to be divided.

This decree was affirmed on appeal, October term, 1870; and upon the question of fault in the steamer, the court added to the reasons given in the district court, that she had no right to go so fast in a fog as to be unable to stop or reverse, if necessary, within the time shown to have been at her command in this case. [Case No. 3,971.]

MONTICELLO, The (DOLNER v.). See Case No. 3,971.

MONTREAL OCEAN STEAMSHIP CO. (CRERAR v.). See Case No. 3,387.

Case No. 9,740.

The MONTSERAT.

GEIGER et al. v. The MONTSERAT.

[6 Adm. Rec. 83.]

District Court, S. D. Florida. May 10, 1858.

SHIPPING—MASTER—REFUSAL OF COURT TO RETURN VESSEL AFTER DECREE.

[A court of admiralty, after decreeing salvage, may refuse to restore the ship and cargo to the master if the interests of the owners and consignees seem to call for such refusal.]

[This was a libel for salvage by John H. Geiger and others against the brig Montserat and cargo.]

Miner Bethel, for libellants.

S. I. Douglas, for respondent.

MARVIN, District Judge. The libel, answer and proofs, in the case show that this brig laden with a cargo of tobacco, flour and staves, was aground on a rocky bottom, at the northwestern end of the Marquis Keys, in a dangerous situation, lying in 9 feet of water, drawing 11 feet; that the libellants, 23 in number, in three vessels, hearing, at this place, through the master, who arrived here in his boat, of the brig's disaster, proceeded to her, and found her in the situation described. They were employed by the master to assist in relieving her. The libellants carried out a heavy anchor astern, lightened the brig of between 50 and 60 tons weight of the cargo, and heaved her off the bottom, and brought her to this port. They were employed in this service three days. The brig has been appraised at $700, and the cargo at $18,000, making the total value of vessel and cargo $18,700. Under the circumstances, I think that one sixth of the value, or $3,116, is a reasonable salvage, $3,000 of which is to be paid by the cargo, and $116 by the vessel. This sum will make the men's shares a little less than $50.

There are other features in the history of this case to which it is necessary to advert. It appears from the bills of lading, that the cargo consists of 102 hhds. of tobacco, shipped at New Orleans by Messrs. Castillo and Harispe, and consigned to Don Jose Ayarza, in Bilboa, Spain; 200 bbls. flour, shipped by the same, consigned to B. Beguirie & Co., Bordeaux, France; 13,200 staves, shipped by Paul Inge Fils & Co., consigned to order; and one corn-sheller, shipped by J. M. Basnaldo & Co. consigned to Don Pablo De Epulza in Bilbca. From the testimony of the mate, corroborated by that of the master, it further appears that the brig sailed on her voyage from New Orleans, on the 23rd of last March; that the second day out, the vessel began to leak (the master says during a heavy S. E. gale), which induced the master, on the remonstrance of the crew to make for the nearest port. It further appears from the testimony of the mate, fully corroborated by that of the master, that when within 18 miles of this port, in good weather, in the day time, with land in plain sight, and with a fair wind to keep off the shore and to come to this place, the brig was pointed towards the land, and run aground, in the place where the libellants found her. She was run aground, the master says, to save the cargo. It does not appear that the vessel leaked much while ashore, and probably not much injured while aground, as the weather was good; nor does it appear that she leaked much, if any, while being brought into this port, in charge of the libellants. The libellants do not allege that she leaked, or that they had occasion to pump her, which they would have been likely to aver had the fact been so in order to enhance the value of their services; nor does it appear, that she has leaked since her arrival in port more than vessels usually do. The cargo has been unladen, and the bottom tier of the hhds. of tobacco is found to have been slightly wetted, on the under side. Surveyors appointed by the court to examine and report the condition and value of the vessel report that they find the forward ends of her deck plank under the quick work decayed; quick work in many places decayed; quick work at break of deck, the ends of the plank, decayed; her top throughout chafed, and seams open; deck worn out, and from appearance leaks badly. On boring her, on both sides, near the floor heads, they found the timbers somewhat decayed, but generally good for a vessel of her age; her tree-nails throughout much decayed; and her fastenings rusted out; chain bolts very much worn and rusted. They report, that they do not consider her seaworthy, or in condition to carry a cargo to any port, coastwise or foreign, without large repairs; that her present value is $700; and that it would cost $3,000 to put her in a condition to carry a cargo to a foreign port; and that she would not sell, when repaired, for the cost of repairs. The surveyors did not see the bottom of the vessel, and do not appear to have made any report upon any injuries she may have sustained while aground.

Upon this statement of facts, it seems impossible to conceive that this master did not know that, at the time he took this cargo in

and sailed from New Orleans, the vessel was in an unfit and unseaworthy condition to carry her cargo to its port of destination; but, however unseaworthy the vessel was, it does not appear to have leaked so badly as to have made it necessary to run the vessel aground, within 18 miles of this port, in good weather, and with a fair wind into port, in order to save the cargo. According to the master's account he must have sailed some four or five hundred miles after the leak commenced before she was run ashore, during all which time he kept the leak down.

The question arises, what disposition ought the court to make of the brig and cargo? They have both been attached by the marshal, and are in custody of the court, on libel for salvage. The master claims them virtuti officii for and on account of whom it may concern, and there is no person before the court to controvert his claim. He is competent in law, as the agent of whoever may be concerned, to make the claim. In ordinary cases, the property or its proceeds, upon satisfaction of the demand for which it was arrested, is restored to the claimants by order of the court, granted as a matter of course. But it is not restored without such order, unless by the marshal, under the act of the 3rd of March 1847 [9 Stat. 181]. To say nothing touching the restoration of the vessel, the owner of which appointed the master, and resides in this country, and has an opportunity to take any measures he may think proper to protect his own interests, is it the duty of the court, in the present case, and under the facts stated, and at the present time, to make an order to restore the cargo to the master, without imposing such conditions as will afford some assurance that the owners or underwriters will, in the end, probably receive it? I think it is not its duty to make such order. On the contrary, I think it is its duty, in the exercise of a sound discretion for the furtherance of justice, to postpone making any order for the delivery of this cargo to the master, until the owners in Spain and France have had full time allowed them to intervene in the cause in person, or by a special agent, and present their bills of lading, and claim their goods, unless the master shall choose to charter another vessel, and reship the goods direct to the original port of destination, which I think it is his duty to do, if he can procure a vessel in this port or in Narana on reasonable terms.

Upon payment of the salvage and expenses, which can be raised upon a respondentia bond, and upon a reshipment of the goods, and bills of lading being signed by the new master to deliver them, in Bilboa and Bordeaux, to the consignees, the order of restitution may be made and the custody of the marshal be withdrawn. Otherwise, I think the cargo should remain in store, and the owners advised of the facts; or if it is likely to deteriorate much in value on account of its being detained in store several months, in this climate, I think it should be sold, and the proceeds retained in the registry of the court to await the orders of the consignees or owners upon the production of their bills of lading. [U. S. v. 422 Casks of Wine] 1 Pet. [26 U. S.] 550; The Eliza [Case No. 4,346].

The MONYUKA. See Case No. 1,175.

Case No. 9,741.

MOODIE v. The AMITY.

[Bee, 89.] [1]

District Court, D. South Carolina. 1796.

ADMIRALTY — PRIZE CAPTURE — SALE BY CAPTOR ON LAND.

Sale on land in the ports of the United States cannot be prevented by their courts of admiralty, in cases of lawful capture on the high seas, by French privateers duly commissioned.

[This was a libel by Benjamin Moodie, British consul, against the ship Amity and Isaac Hammond.]

BEE, District Judge. This case is one of a new impression. The libel admits the capture of the Amity on the high seas, by a vessel under the flag of the French republic. There is no allegation that this vessel has been fitted, or her force increased within the United States, contrary to the laws of neutrality. It is not alleged that the prize was captured within the jurisdictional limits of the United States. Upon these grounds alone has this court assumed jurisdiction, in cases of capture by French privateers, where the prizes have been brought infra praesidia of this country. In all other cases the 17th article of the treaty with France is conclusive upon the subject of their prizes brought into our ports; and the point has been fully settled by several appeals to the supreme court of this country. The only allegation in the libel, on which to found a claim for the interference of the court, is a sale of the prize on land, as being contrary to the 24th article of the treaty with Great Britain. In support of this it is contended that by the 9th section of the judiciary act [1 Stat. 76], this court has jurisdiction in all cases arising on the high seas, of admiralty and maritime jurisdiction. That the original capture having been on the high seas, the court has cognizance of the original question, and, therefore of all its consequences; of which this intended sale is one. That the third article of the constitution of the United States extends the judicial power to all cases arising under treaties made, or to be made. This court has cognizance of all such points of admiralty and maritime nature, provided they may be judged of by any court of the United States.

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

But the treaty with France excludes all jurisdiction on our part, in cases like the present. The commission under which this prize was made, has been exhibited in court, as that treaty provides. It is unobjectionable; and the two grounds before mentioned have not, nor can be, taken. I have, therefore, no authority over the original question in this cause, and none over any of its consequences. As to the cases from Dougl. 582, 583, they do not apply here. I am clearly of opinion that this court has no jurisdiction in this instance; and I dismiss the libel with costs.

Case No. 9,742.

MOODIE v. The BETTY CARTHCART.

[Bee, 292;[1] 3 Dall. 288, note.]

District Court, D. South Carolina. April 27, 1795.

NEUTRALITY LAWS—EQUIPMENT—WHAT EVIDENCE TO BE FIRST TAKEN.

1. What equipments in our ports amount to a breach of neutrality.

[Criticised in Stoughton v. Taylor, Case No. 13,502.]

2. Evidence to acquit or condemn must in the first instance come from the vessel taken, the persons on board, and the examination on oath of the master and other officers.

In admiralty.

BEE, District Judge. The cause before the court, and in which I am now about to pronounce my decree, is a cause of considerable importance, as well with respect to the circumstances of the case, as the value of the property. It will not be necessary for me to recite at length the whole of the pleadings, and arguments that have been adduced. The facts stated in the libel, are partly admitted, and partly denied. The capture of the Betty Carthcart, on the high seas, out of the jurisdictional limits of the United States, and the property of the vessel and cargo as belonging to British subjects, are admitted on all hands. It is admitted also, that at the time of the arrival of the Citizen of Marseilles, in Philadelphia, she was an armed ship, and had a commission to cruize against the enemies of France. An exception was taken to the commission on two grounds: 1. That all the commissions issued by Santhonax and Polverel, had been recalled. 2. That the certificate from Mr. Petry, the consul at Philadelphia, was only conditional. The only points, then, which it is necessary for me to investigate, are: 1. Whether the force of this vessel was increased and augmented within the limits of the United States. 2. Whether such increase is a breach of the laws of neutrality and nations: and 3. What is required by the laws of neutrality in such cases, or whether the 17th article of the treaty is a suspension thereof as to the United States.

On the first part, viz. whether the force of the Citizen of Marseilles was increased and augmented within the United States. A number of witnesses have been examined, and a variety of other evidences adduced. The proofs in this cause have been very properly divided by one of the counsel, into four classes or sets. I will, therefore, consider them in that order also: The proofs which relate to the vessel at Cape François, before she sailed for Philadelphia. 2. Those which relate to her whilst at Philadelphia. 3. Those after she left the city, and previous to her going to sea. 4. Those immediately after she got to sea.

To the first point, Mr. Boisseau only speaks of her as an armed vessel generally, to the month of June 1793, but does not specify any particulars. W. Charrie, who was on board two days, about this period, speaks of her as an armed vessel, with ten ports on each side, and guns in them, and also as having guns in her hold—but no particular number. These are the only witnesses to this point.

If we proceed now to her appearance at Philadelphia, we find a contrariety of evidence. General Stewart, in his letter to the collector, 3d of September, 1794, mentions her as having at her arrival sixteen nine, and ten six pounders; but he does not say whether they were mounted or not. He says she will only mount twelve guns at going out, and carry the others in her hold. In his letter to the secretary at war, dated the 14th October, 1794, he refers to the above, and also states the different reports of Mr. Milnor, one of the deputy inspectors of the port, to him. The first, on the 30th of September, 1793. He adds, that the ship arrived last autumn, with sixteen nine, and ten six pounders, but will only mount twelve guns, which she brought in that situation—the others she is to carry in her hold. On the 14th of October, General Stewart visited her again, and says he finds no addition to the armament, she was reported, and had, on her arrival, viz. ten six pounders on her main deck, and two on her quarter deck, and the rest of the guns in the hold. No new ports had been opened since her arrival. General Stewart does not say who reported her thus on her arrival. It could not be Mr. Milnor, for he, on the 14th of October, in his report, says, "Having examined the ship called the Citizen of Marseilles, on her arrival in port, I again examined her this day, and find no addition to her armament, &c." The same number of guns are mentioned, that she had on her arrival. His other certificate which appears from General Stewart's letter to be dated on the 30th of September, 1793, and made to him, of the then actual armament of the ship that day, the day of her arrival—says—"boarded the privateer ship the Citizen of Marseilles, commanded by Planche, twelve six pounders mounted and three not

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

mounted, with other warlike apparatus—forty-six men." By comparing the dates and extracts in this exhibit, it plainly appears there is some mistake amongst the officers at that port. Mr. Milnor, on the 30th of September, 1793, the day she arrived, boarded her, and says she had twelve six pounders mounted, and three not mounted: he also visited her on the 14th of October 1794, and found no addition to her armament, the same number of guns being mounted. This evidence from the report of the officers of the port, clearly proves, that the ship, on her arrival, had only twelve guns mounted—how many others there were on board not mounted, must be left to the officers to settle, as I cannot do it from the evidence adduced. Mr. Harrison also fixed to ten on her main deck, and two or four on her quarter deck. Michael Williams says, she had but five of a side on her main deck, and two on her quarter deck. John Grenion, who sailed in the vessel from the Cape to Philadelphia, says she had only five of a side on the main deck, and one on each side on the quarter deck, and that there were no more port holes open than guns. Captain Montgomery, of the revenue cutter, who saw her at a distance at her first arrival, supposed her to have ten ports of a side, but whether all real, or some painted, he could not say. From the whole of this evidence, then, it clearly appears to me, that the ship, at her arrival, had only twelve guns mounted, and none in her hold. If we now advert to the number of ports which were open either at her arrival, or at her leaving the port of Philadelphia; we find she had the same number as of guns mounted. All the evidences who were near her, swear positively, that there were none abaft the main chains—though several say the ports were framed within, but planked over on the outside. Harrison's evidence is conclusive—because he mentions his application to the governor for permission to open more ports, which was refused; and Captain Chabert's reply that he did not wish to go contrary to the laws of the country, and that as he had carpenters of his own, he could open them elsewhere, and at another place, is fully sufficient to fix this point.

The third class of evidence, is such as relates to the vessel after her leaving the city, and previous to her proceeding to sea. And from a careful revision of this it does appear, that a number of ports were opened, and guns mounted in the river Delaware. Quin swears positively to fourteen. Powel says there were three carpenters at work to cut the ports through, and fit them—himself, Stevenson and another; and that each took one for a day's work. It could not therefore take more than five days to effect this, and from the latter end of October to the 4th of November, there was sufficient time to complete it. The evidence of these two witnesses has been impeached in several particulars, but it really appears to me, that there are so many proofs and circumstances stated, that corroborate their testimony to most of the points they speak of, that there is not sufficient ground for me to repel the evidence they have given in toto. The witnesses who prove the increase of force in the river, are Quin, who says she mounted twenty-eight guns—Captain Montgomery says twenty-six or twenty-eight. Mr. Kevan says, a whole tier fore and aft. All then speak of the vessel down the river, and before she went to sea.

The fourth and last class is that relative to her, immediately after her going to sea. One of the counsel for the claimant objected to the testimony of all the witnesses on board the prize, as being interested, and of course incompetent, but he could not be serious in this, because the constant uniform practice of the civil law courts has been to admit such evidence to certain points. In Collectanea Juridica (page 135), is the famous case so often resorted to as fixing the law. In this case, it is expressly laid down, that the evidence to acquit or condemn, must, in the first instance, come from the vessel taken, the persons on board, and the examination on oath of the master and other officers. The evidence they all give is reducible to two points. 1st. The appearance and force of the ship both as to guns and men. 2d. The intelligence obtained from the crew. As to the last, I think little attention should be paid to the chit chat on board one of these privateers; and very frequently the witnesses do not understand the language they hear spoken, and report from second hand: but they certainly are competent witnesses as to the number of guns and crew that were on board at the time of the capture; and in this they all agree, that she mounted twenty-eight guns, when she took the Den Onzekeren, out of which she took two guns to make thirty, and several of them say, she could mount thirty-four guns, having ports cut for that number. Captain Raymon Sanchez, captain of the brig Dichoso, taken on the 6th of November, two days after the vessel left the Delaware, says she mounted twenty-eight. Lemuel Janson, of the Den Onzekeren, says she mounted twenty-eight guns. Jacob Vix, a sailor on board the Dutch ship, says the same. John Hallrick, seaman on board the Betty Carthcart, says the same. Charles M'Donald, mate of this ship, says she had twenty-eight guns on the 11th of November, when they took him. Hans Evertson, mate of the Den Onzekeren, taken the 16th of November, says she had then twenty-eight guns mounted. Adrianus Pappagaay, the doctor of the Dutch ship, says she had twenty-eight guns. Here then is such concurrent testimony of the increased force of this vessel, that it is impossible not to admit it; and if admitted, it carries with it the most unequivocal proof that the ship the Citizen of Marseilles, did increase her force of guns

mounted, and prepared for use within the territory of the United States:—There was no positive proof as to the new gun carriages being actually carried on board; neither was there any of their being on board when she first arrived. Mr. Harrison mentions the repairing of some, and where old ones were rotten the replacing them. If this was solely for those guns that were actually mounted at her arrival, I see nothing against it. It could not be called an augmentation of her force—neither is there any evidence sufficient to convince my mind that the crew of the Citizen of Marseilles, at her going out was increased, or if increased, in any way that could be said to infringe our neutrality. Though some of the evidences say they were not all native Frenchmen from their language, yet they all agree that the strength of the crew were so, the others were a mixture, there is no proof of any one American citizen being on board, unless Quin was; as to other nations, I know of no right we have to control their seamen. The 27th article of our treaty with Holland [8 Stat. 48], which, by the 3d article of the treaty with France [Id. 14], in my opinion is confirmed to them also, admits the carrying away seamen or other natives or inhabitants of the respective nations on board of any of their vessels, whether of merchandise or war.

From a careful review of the evidence produced in this cause, it appears clearly to me that the ship Citizen of Marseilles, at her arrival in Philadelphia, mounted only twelve guns, and had others, but the precise number is not ascertained, in her hold: that at the time of her leaving the river, she had twenty-six or twenty-eight mounted: that Captain Chabert having been refused permission to open new ports in Philadelphia, and declaring he did not wish to infringe the laws, and having afterwards done so within the territories of the United States, could not and does not plead ignorance as an excuse. Whatever he did was with his eyes open, and being forewarned, he must abide the consequences.

It remains now for me to inquire into the law arising from the foregoing facts, and the power and duty of this court thereupon. There cannot be a doubt that if a prosecution was instituted against Captain Chabert, or any of the persons concerned in increasing, augmenting, or procuring to be increased or augmented, the force of the vessel, under the act of June 5, 1794 [1 Stat. 383], but that a conviction must follow. There a penalty of fine and imprisonment is declared, as a punishment for a breach of the sovereignty and neutrality of the United States, and this by a municipal law of our own: but what does the law of nations require further? I have in the course of the last summer, delivered my opinion on this question so fully in this court, that I need only now repeat some part of the law then laid down. In the case of Janson v. Talbot [unreported], I stated that this court, by the law of nations, has jurisdiction over captures made by foreign vessels of war, of the vessels of any other nation, with whom they are at war, provided such vessels were equipped here, in breach of our sovereignty and neutrality, and the prizes are brought infra praesidia of this country. By the law of nations, no foreign power, its subjects or citizens, has any right to erect castles, enlist troops, or equip vessels of war in the territory or ports of another. Such acts are breaches of neutrality, and may be punished by seizing the persons and property of the offenders. Vessels of war so equipped, are illegal ab origine, and no prizes they make will be legal as to the offended power, if brought infra praesidia. The seizure and restoration of such prizes are what the laws of neutrality justly claim. You must either permit both parties to equip in your ports, or neither. Should either equip without your consent, the least you can do, is to divest them of the prizes they may have thus illegally taken, and restore them to the other party, or else permit them to equip also. This cause and this decree were submitted to the circuit court in October last, and there affirmed. An appeal to the supreme court is still undetermined,[2] but until this opinion is overruled by that tribunal, I hold myself bound to consider it as a law. I gave a like decision lately, in the case of British Consul v. The Nancy [Case No. 1,898], from a full conviction that the principles I laid down formerly, were founded on the rules of propriety and the law of nations.

Case No. 9,743.

MOODIE v. The BROTHERS.

[Bee, 76.] [1]

District Court, D. South Carolina. March, 1795.

NEUTRALITY LAWS—EQUIPMENT OF WAR VESSEL—REPAIRING.

Equipment for war in a neutral port does not take place merely by alteration of two ports in repairing the waist of a vessel previously armed.

In admiralty.

BEE, District Judge. The cause now before the court is briefly this. The schooner Port-de-Paix, duly commissioned by General Laveaux, and owned altogether by Frenchmen, captured on the 27th of January last (1795) on the high seas, without the jurisdictional limits of the United States, the ship Brothers, belonging to a subject of his Britannic majesty. The prize, upon her arrival in this port, was, with her cargo, libelled by the British consul, Mr. [Benjamin] Moodie; who, among other causes, alleges that the privateer was originally fitted out in the port of Charleston, or augmented in her warlike

2 [Since reported in 3 Dall. (3 U. S.) 133.]

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

force, contrary to the act of congress and law of neutrality and nations. He, therefore, claims restitution of the captured vessel. The claimants on oath deny that the privateer was originally fitted, armed, or manned within any of the ports of the United States; or that she received therein any augmentation or addition, solely applicable to purposes of war. They produce a copy of their commission from General Laveaux, and plead the 17th article of the treaty with France in bar to the interference of this court in this cause. Several exhibits have been filed to shew that the captured vessel and cargo are British property; and one exhibit proves that the privateer was formerly an armed vessel in the service of the king of Spain, and then mounted eighteen guns. That she was captured by the Montagne French privateer and brought as prize into this port, from whence she afterwards departed with fewer guns than she had on her coming in. After which she was commissioned and manned at Port-de-Paix. It was agreed between the parties, the pleadings being completed, that the evidence taken by me in this court in November last, in the case of The Courier [Case No. 3,283] captured by the same privateer and libelled here, should be received as evidence in this cause also. I have already, by my decree in the case of The Courier, declared my opinion of this privateer; but have reconsidered the evidence with great care. Messrs. Wallace, Libby, Williams, Carpenter, Weyman, and the collector, all agree that she was a complete privateer when she first arrived here. She had then fourteen guns on her main deck, two cohorns forward, and swivels on her quarter deck. They also agree that she received no augmentation of force here. She had been much injured in her engagement with La Montagne, and was compelled to take off her quarter deck. She then went to sea, returned dismasted, and took a new mast. But none of the witnesses saw any additional equipments. Ingram, who worked on her says, she had her quarter deck taken down, her waist repaired, and two ports cut therein. That she was an armed vessel when she arrived, and was repaired as a privateer. The question then is wholly as to the cutting of two new ports, when her waist was repaired. This arises out of Ingram's testimony, which is at variance with that of Williams, Libby, and Carpenter, and positively contradicted by the oath of the claimants, who swear that the repairs she received in this port were necessary to her safety and sailing, but not at all applicable to war. They say that she actually went to sea with fewer guns than she had when she arrived as prize. Admitting then, for the sake of reconciling Ingram's testimony with that of all the other witnesses, and with this oath of the claimants, that two of her ports in the waist were altered, this will not amount to any additional equipments; nor can it be considered as a breach of neutrality. If a prosecution had been instituted under the act of the 5th of June, 1794 [1 Stat. 383], no forfeiture could have been adjudged for so trifling an alteration. Upon the whole, I retain my former opinion, and that upon mature deliberation. I therefore admit the relevancy of the plea in bar, and decree that the libel be dismissed with costs.

Case No. 9,744.

MOODIE v. The HARRIET.

[Bee, 128.] [1]

District Court, D. South Carolina. 1798.

SALVAGE—RECAPTURE—RANSOMED SHIP—PORT OF DESTINATION.

Salvage allowed upon recapture of a ransomed ship; the ransom bill declaring that the sum agreed upon therein should only be payable upon the arrival of the vessel at her port of destination, where she never arrived.

This is a suit instituted [by Benjamin Moodie] for salvage in recapturing the brig Harriet on the high seas on the 26th of October, 1798. It appears, from the pleadings and proofs before the court, that this brig belonged to Tunno and Cox, and Miller and Robertson, merchants of this city. That she sailed on the 8th day of October last from a Spanish port on the south side of the island of Cuba, bound to the Havanna. That, two days after, she was taken, in sight of the island, by a French privateer called the Betsey; another privateer being in company. That these privateers, finding the brig had no cargo on board, were preparing to set her on fire; whereupon the captain (Lightbourne) proposed to ransom her. This being agreed to, he drew an order, on a house in the Havanna, for two thousand dollars, the sum fixed; which order was payable upon the arrival of the brig at the Havanna, and was in nature of a ransom bill. Upon signature of this paper, the vessel was suffered to proceed on her voyage, Captain Lightbourne being detained on board one of the privateers as a hostage. A Frenchman, as prizemaster, and two American seamen were sent on board from the capturing vessels; but they did not interfere in the management of the vessel, leaving this wholly to the mate, who took the command, and made the usual entries in the logbook. Some days after this they fell in with an American armed brig, who, finding that the Harriet had been taken and ransomed, left her. Sixteen days after her first capture (26th of October) she was met with by a British privateer, of New-Providence, who took possession of her as a recaptured vessel, put on board a prizemaster and crew, and ordered her to the port of Nassau. They endeavoured to reach that place, but, being prevented by bad weather and contrary winds, proceeded to Charleston, and arrived here on the 19th November last.

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

BEE, District Judge. The only question for the court to decide is, whether, under the circumstances of this case, the actors are entitled to any, and what, salvage. It is contended on the part of the owners, that, if the vessels had been carried into a British port, no salvage would have been allowed, because she had been previously ransomed, and the ransom bill not recovered. The argument appeared, at first, to have weight; but, upon looking into cases partly resembling this, and considering the nature of the ransom bill produced in the cause, I think the inference will not hold. The ransom bill in this case expresses that two thousand dollars shall be paid upon the arrival of the brig at the Havanna. But the recapture prevented her arrival there; of course, the obligation became void: and, though they had the captain as a hostage, yet no suit could have been maintained on that bill, in any civilized country; because the event in which alone the payment was expressed to be due, never took place. What prevented it? The recapture by the British privateer. This saved the ransom to the owners. And the French captor seems to have been of that opinion, for the hostage was discharged, and the ransom bill with him.

It was contended that, if the brig had arrived at the Havanna, she would have been restored, on the ground of having been taken within the jurisdictional limits of the island. This might have been the case; but the consideration, I believe, would not have availed, if she had been carried into a British port. They would have in that event, considered nothing more than the original capture by their enemy, and subsequent recapture by their subjects. And if this court should go into an investigation of the point relied on, it would involve the question of prize, or no prize. But it is laid down in Doug. 627, that though the contract of ransom happen to be connected, in point of time, with the capture as prize, it does not necessarily arise out of it, but is, in truth, a mere simple contract of sale between individuals, who at the time, and for the purpose, of contract are not considered as being the subjects of hostile nations: on which principle was decided the case, in 3 Burrows, of Record and Bettingham. There, though war still subsisted, and though the hostage had died in captivity, the action was maintained by an alien enemy against a subject of Great Britain; and this decree, Lord Mansfield says, was notorious over all Europe. But though this be law where the ransom bill is not recaptured, yet the case in Douglas, resting chiefly upon the authority of Valin, and other foreign writers, proves clearly that the recapture of the ransom bill puts an end to the claim of the first captor. In the case before me, the vessel, on the safe arrival of which at the Havanna, the ransom bill was due, has been recaptured. This is certainly equivalent to a recapture of the bill itself, and clearly extinguishes the claim of the original captors. So far the recaptors are entitled to salvage.

The remaining part of the question is what the amount of that salvage shall be. From several decrees of British admiralty courts during the present contest, I find that one eighth has been a usual allowance to captors. In the case of the money taken out of the Grand Sachem, the admiralty court at Antigua decreed restitution to the original owners, upon proof of property; and reserved an eighth for salvage to the recaptors. This proportion is also observed by the court of admiralty in England, as appears from Doug. 624.

Upon the strength of these authorities, which seem to me fully applicable to the case before me, I decree to the recaptors one eighth, amounting to two hundred and fifty dollars, with costs of suit.

Case No. 9,745.

MOODY v. FISKE et al.

[2 Mason, 112; [1] 1 Robb. Pat. Cas. 312.]

Circuit Court, D. Massachusetts. Oct. Term, 1820.

PATENTS—SEVERAL IMPROVEMENTS IN ONE PATENT—SUMMARY—INFRINGEMENT OF PART.

1. Where a patent is for several improvements in a machine, and each improvement is summed up in the patent as the invention of the patentee, he is bound by his summary, and if any one of the improvements is found not to be new, his patent is void.

[Cited in Whitney v. Emmett, Case No. 17,585; Wyeth v. Stone, Id. 18,107; Davoll v. Brown, Id. 3,662; Hovey v. Stevens, Id. 6,746; Hogg v. Emerson, 6 How. (47 U. S.) 483, 485; Re Boughton, Case No. 1,696; Re Halsey, Id. 5,963; Blake v. Stafford, Id. 1,504.]

[Cited in Davis v. Bell, 8 N. H. 503.]

2. Where several improvements in a machine are distinctly claimed in a patent, an action lies for the piracy of any of the improvements, although the defendants have not used the whole of the improvements.

[Cited in Wyeth v. Stone, Case No. 18,107; Blake v. Smith, Id. 1,502; Wilson v. Rousseau, Id. 17,832; Root v. Ball, Id. 12,035; Olcott v. Hawkins, Id. 10,480; Foss v. Herbert, Id. 4,957; Sessions v. Romadka, 21 Fed. 131.]

[Cited in Holliday v. Rheem, 18 Pa. St. 469. Cited in brief in Tillotson v. Ramsay, 51 Vt. 312.]

Case [against Jonathan Fiske and others] for an infringement of certain patent rights, granted to the plaintiff [Paul Moody]. There were two counts on two distinct patents in the declaration, but the first was the only one relied on at the trial, being on a patent for "an improvement on the double speeder for roping cotton," &c. The cause was tried on the general issue. The patent was dated the 3d of April, 1819, and the specification annexed to it, contained a very minute description of the double speeder as improved by the plaintiff, under distinct articles. In

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

the first article the plaintiff states, "The first part of my invention is a new position of the rollers," which he then proceeds to describe. In the sixteenth article the plaintiff sums up his improvements in the following terms: "The above description exhibits all my improvements in the roping machine for roping cotton, whether called a double speeder or by any other name. The parts which I claim as new, and as my invention, are the following: 1st. The position of the rollers. 2d. The two upper cones with all the mechanism, and motions connected with or dependent on them. 3d. The method of moving the belt on the lower cones, and that of communicating motion from the lower driven cone to the spindles, and all the mechanism and method of communicating motion from the upper driven cone to the arbors or axes of the perpetual or endless screws and perpendicular racks, which raise and lower the spindle rail; but I do not claim the said racks and screws, as these as well as the common heart wheels have each before been, or may be used, for the same purpose, and either may be applied to my improvement. 5th. The method and machinery by which the said motion of the spindle rail is changed from an ascending to a descending movement, and the manner of connecting the same with the wagon carriage. 6th. The said wagon, wagon carriage, gallows frame, catch wheels, the cycloid or cycloidal cam, slides, lever, and pully shaft, which raise the belts on the upper cones, and all the similar parts which raise the belts on the lower cones (except the cycloid or cycloidal cam) with all the parts, movements and mechanism connected with the same. 7th. The flier tubes and methods of applying and using the same. 8th. The rotary motion of the cams, and the intermediate gear work and machinery which produces it." The seventeenth article then proceeds: "The machine referred to, and from which the description of my improved double speeder is made, as above set forth, has twenty spindles, and produces roping of a convenient size and twist, for being afterwards spun into a certain kind of thread or yarn, but I also contemplate the nature and principles of my said invention, as applicable to any machine for the like purpose, whether it has more or less spindles, or made to give a greater or less degree of twist. And I do not consider my said invention as confined to any particular form, position, kind of material, degree of velocity, shape, magnitude, or position of the several parts, but the same may be applied to any machine made of iron, brass, copper, or other suitable metal or material; and all the parts above described and set forth, may be extremely varied to obtain the object for which similar machines have been, are, or may be, used or employed. The position of the rollers, which I consider as an important improvement, may be applied to any machine for spinning as well as for roping. and I have applied it to an improved spinning and filling frame, a description and drawing of which I have prepared for procuring a patent."

The defence at the trial turned mainly on two points: 1st. That the machines used by the defendants were not identical with those of the plaintiff. 2d. That part of the improvements claimed by the plaintiff were known before, and so the patent was broader than the invention, and void. The counsel for the defendants contended on these points, following the enumeration of the improvements in the 16th article of the patent: 1st. That the position of the rollers was not new. 2d. That the plaintiff had no right to the two upper cones, they not being his invention. And as to the machinery connected with them, it was not used by the defendants. 3d. That the method of moving the belt of the lower cones, and the mechanism connected with it, were not used by the defendants. 4th. That the method of communicating motion from the upper driven cone to the arbors or axes, of the perpetual or endless screws, and perpendicular racks, &c. were not used by the defendants. The same answer was given to the 5th, 6th, and 7th improvement, specified in the 16th article. 8th. That the rotary motion of the cones and the intermediate gear work and machinery, were not new. The proof in the cause being very strong, that the position of the rollers was not new, two questions arose: 1st. Whether the plaintiff was concluded by the summing up in his patent, from contending, that the position of the rollers was not a substantial part of his invention, or was not per se patentable. 2d. If not so precluded, and if the patent was not void, whether the defendants were not liable in this action, if they used any one of the plaintiff's improvements, although the proof should be satisfactory that they did not use all the improvements.

Gordon & Webster, for plaintiff.
G. Sullivan, for defendants.

STORY, Circuit Justice. Upon the last point there has hitherto been considerable difficulty in my mind. But after a good deal of reflection on it, I have come to the result, that where the plaintiff claims, as in this case, several distinct and independent improvements in the same machine, and procures a patent for them in the aggregate, he is entitled to recover against any person who shall use any one of the improvements so patented, notwithstanding there has been no violation of the other improvements. In such a case, the patent goes for the whole of the improvements, and if each be new, and be claimed distinctly in the patent, as such, there does not seem any good reason why the party who pirates any part of the invention, should not be liable in damages. Take the case of a copy right. It has never been supposed, that in order to maintain an action,

the whole book should be pirated. It has been adjudged sufficient, if a considerable part of the book be pirated, so that such part be that of which the plaintiff is truly and substantially the author. Cary v. Longman, 1 East, 358, and cases there cited. To be sure, a mere extract would not be piracy; but if the substance of the work be taken, or so large a portion of it as makes it a substitute for the original, and materially injures the literary property of the author, it has been thought to be actionable. Roworth v. Wilkes, 1 Camp. 94. There is no doubt, that by the law of England, a party who pirates any part of the invention of the patentee, is liable in damages, notwithstanding he has not violated the whole. I say pirates any part of the invention, for any person may lawfully use any machinery, combined with the patentee's invention, which he does not claim as new, or which, if so claimed, has been previously known and used. This is the doctrine in Bovill v. Moore, 2 Marsh. 211; Davies, Pat. Cas. 361, which was an action for the violation of a patent "for a machine for the manufactury of bobbin lace or twist net, similar to, and resembling the Buckinghamshire lace net, and French lace net, as made by the hand with bobbins on pillows." Lord Chief Justice Gibbs there said, "We must consider what the patent proposes to give to the patentee, and what privileges he would possess under the patent. Now the patentee is entitled to the sole use of this machine, and whoever imitates it, either in whole or in part, is subject to an action at the suit of the patentee." The defendants had used the invention in part, but obtained a verdict upon the ground that the plaintiff had not invented the whole machine, but had only made improvements in it, the combination having existed up to a certain point before, and therefore his patent was void as covering more than his invention. It may be, that the decisions have turned upon the peculiar language of the English patents, for in all the precedents which I have seen, the patent gives the exclusive right of the whole invention, and prohibits all other persons, "directly and indirectly, to make, use, or put in practice, the said invention, or any part of the same, &c. or in any wise to counterfeit, imitate, or resemble the same, or make or cause to be made, any addition thereto, or subtraction from the same." See forms in Coll. Pat. 54, 57; Davies, Pat. Cas. 27, 30. But as no such intimation is given in the reports, I incline to believe that the doctrine stands upon the general principles of law, that he who has the exclusive right to the whole of a thing, has the same right to all the parts which the general right legally includes, that is, (in cases like the present) to all the parts which he has invented.

The principal difficulty that arises, is in the application of the doctrine; and that may in most cases be removed, by considering the nature and extent of the patent, or rather of the thing invented and patented. Where the patent goes for the whole of a machine as a new invention, and the machine is in its structure substantially new, any person who pirates a part of the machine, substantially new in its structure, deprives the inventor so far of his exclusive right in his invention, and may in a great measure destroy the value of the patent. Where the patent is for several distinct improvements in an existing machine, or for an improved machine, incorporating several distinct improvements, which are clearly specified, then if a person pirates one of the improvements, he violates the exclusive right of the patentee, for the patent is as broad as the invention, and the invention covers all the improvements; and it is a wrong done to the patentee to deprive him of his exclusive right in any of his improvements. Where a patent is for a new combination of existing machinery, or machines, and does not specify or claim any improvements or invention, except the combination, unless that combination is substantially violated, the patentee is not entitled to any remedy, although parts of the machinery are used by another, because the patent, by its terms, stands upon the combination only. In such a case, proof that the machines, or any part of their structure existed before, forms no objection to the patent, unless the combination has existed before, for the reason, that the invention is limited to the combination. And yet if the combination itself be not wholly new, but up to a certain point has existed before, and the patentee claims the whole combination as new, instead of his own improvements only, as by taking out a patent for the whole machine, doubtless his patent is void, for it exceeds his invention. Bovill v. Moore, 2 Marsh. 211; Davies, Pat. Cas. 361, 398, 404, 411. But if there be different and distinct improvements constituting parts of the combination, which are specified as such in the patent and specification, and any one of them be pirated, the same rule seems to apply as in other cases where part of an invention is pirated, for the patent then shows that the invention is not limited to the mere combination, but includes the particular improvements specified. It is often a serious difficulty from the obscure language of the specification, to ascertain what is the nature and extent of the invention claimed by the patentee. Whether his patent be valid or not, must materially depend upon the accuracy and distinctness with which the invention is stated. But in all cases where the patentee claims any thing as his own invention, in his specification, courts of law cannot reject the claim; and if included in the patent, and found not to be new, the patent is void, however small or unimportant such asserted invention may be. This leads me to the first point made at the bar; as to which, it appears to me clear, both upon

principle and authority, that where a patentee in his specification states and sums up the particulars of his invention, and his patent covers them, he is confined to such summary; and he cannot afterwards be permitted to sustain his patent by showing that some part which he claims in his summing up as his invention, though not in fact his invention, is of slight value or importance in his patent. Rex v. Cutler, 1 Starkie, 354; Davies, Pat. Cas. 398, 404; Bovill v. Moore, 2 Marsh. 211. His patent covers it, and if it be not new, the patent must be void. Here the plaintiff claims a particular position of machinery as his invention, and it clearly appears in evidence that the position is not new. It has existed before, not in machines exactly like the present, but in machines applied to analogous purposes, viz. in machines for roping cotton; and applied for the same purpose as the plaintiff applies them. Without doubt he supposed that he was the first inventor, but that was his mistake, and will not help the case. The objection therefore is fatal.

I wish it to be understood in this opinion, that though several distinct improvements in one machine may be united in one patent, it does not follow that several improvements in two different machines, having distinct and independent operations, can be so included. Much less that the same patent may be for a combination of different machines, and for distinct improvements in each.

The plaintiff upon this intimation agreed to take a verdict against him, declaring his patent void, that he might obtain a new patent. Verdict for defendants.

[For another case involving this patent, see Boston Manuf'g Co. v. Fiske, Case No. 1,681.]

Case No. 9,746.

MOODY v. FULLER.

[5 Cranch, C. C. 303.] [1]

Circuit Court, District of Columbia. March Term. 1837.

SLAVERY—REMOVAL INTO DISTRICT OF COLUMBIA—SALE WITHIN THREE YEARS—SUIT FOR FREEDOM.

An officer of the United States, being the bona fide owner of a slave in Fortress Munroe, a place within the United States, but not within the jurisdiction of any one of the states, and removing thence with his family to the city of Washington in the District of Columbia, to reside therein, and bringing his slave with him, cannot lawfully sell such slave within three years after such removal and importation; and such slave, by such importation and sale, becomes free.

Petition for freedom.

Mr. Bradley, for defendant [Azariah Fuller] prayed the court to instruct the jury that if, from the evidence, they shall be of opinion that Andrew B. McLean was the bona fide owner of the petitioner [the negress Sally Moody] and, while such bona fide owner, resided as an officer of, and in the employment of the United States, for a series of years, at Fortress Munroe, within the territory of the United States, and not within the limits of any state of this Union, and brought her from the said territory into the District of Columbia, with his family, when he removed here to reside; then, although the jury shall further find that the petitioner was sold within three years after such removal into the said district, she is not entitled to her freedom under such removal and sale, unless they shall further find that such residence at said Fortress Munroe was intended to defeat or avoid the law prohibiting the importation of slaves.

Mr. Dermott, for petitioner.

But THE COURT (nem. con.) refused to give the instruction.

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

Case No. 9,747.

MOODY v. TABER.

[1 Ban. & A. 41; [1] Holmes, 325; 5 O. G. 273.]

Circuit Court, D. Massachusetts. Feb., 1874.

PATENTS — ABDOMINAL SUPPORTERS — LICENSE—REPUDIATION BY LICENSEE—PURCHASE WITH NOTICE.

1. A patent for abdominal supporters, intended to sustain the viscera of well formed persons, will not be held void for want of novelty, upon the testimony of a physician, that, prior to the complainant's invention, he had made several supporters, of which no specimens are produced, "of the same general character," for deformed patients; each being peculiar and special in its construction, and made with a view to the particular deformity of the patient for whom it was intended.

2. A licensee who has elected to put an end to his license, and denies the validity of the patent, and refuses to recognize any title in the patentee, will not afterwards, when the validity of the patent has been sustained, be permitted to set up the license from the patentee as a defense to the action.

[Cited in Cohn v. National Rubber Co., Case No. 2,968; White v. Lee, 3 Fed. 224.]

3. One who purchases patented articles from a licensee, with knowledge of his having repudiated his contract with the patentee, will be liable for the sale of such articles, as well as for the sale of those he makes afterwards.

[Bill in equity [by Sarah A. Moody against George R. Taber] to restrain alleged infringement of reissued letters patent [No. 42,591] for improvements in corsets and abdominal supporters, granted to the complainant [May 3, 1864; reissued, No. 2,165] Jan. 30, 1866; and for an account.] [2]

T. S. Wakefield and J. B. Robb, for complainant.

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

[2] [From Holmes, 325.]

Chauncey Smith and W. W. Swan, for defendant.

SHEPLEY, Circuit Judge. Defendant is charged with the infringement of letters patent reissue numbered 2,165, granted to Sarah A. Moody, for improvements in corsets and abdominal supporters. The invention consists in certain improvements, and changes in the form and construction of corsets, to fit them to perform the function of supporting the abdomen in cases in which an artificial support is required. When adjusted according to the specifications in the patent, the operation of the improved supporters is to lift and support the abdominal viscera, transferring the strain from the abdominal muscles to the base of the spinal column and hips, and relieving the pelvic viscera from abnormal pressure. The utility of the invention is proved by the testimony of eminent surgeons, and of distinguished physicians of both sexes. The exhibits introduced to establish the fact of an anticipation of the complainant's invention fail to support the defence of want of novelty set up in the answer. The one most nearly resembling the invention of the complainant is exhibit No. 6, produced by Dr. Charles H. Spring. This, he testifies, was made for and worn by a patient of his "about five or six years since." This was after the date of complainant's invention. He says this was "of the same general character" as those made by him for the past ten or eleven years. But when we consider the fact that the witness had given special attention to diseases and deformities of the spine, and that each corset made under his direction was peculiar and special in its construction, and made with a view to the particular deformity of the patient in each case, it would not be safe to treat a patent as invalid upon testimony no more definite than that which speaks of those contrivances of an earlier date, of which no specimens are exhibited, as being of the same general character as exhibit No. 6. Some of the witnesses consider the invention described in the specification of the patent to be of the same general character as that described in the specifications of the patent to Elizabeth Adams. Yet a careful reading of the two will show that there is no similarity, much less identity, in what is claimed as invention in the two patents. Exhibit No. 6 itself is also proved to be applicable only to deformities, and, if applied to a fully developed or well-formed person, would not extend low enough to have any elevating or supporting force to counteract the pressure of the abdominal viscera. This exhibit, like all the contrivances made under Dr. Spring's direction, had for its primary function the support of an enfeebled, diseased, and deformed spine. The support given in any case to the abdominal viscera was merely auxiliary and secondary. The other exhibits offered in evidence fail to sustain this branch of the defence, for reasons clearly and fully stated in the testimony of the expert witnesses, especially in that of Dr. Newton.

Exhibits A and B, representing the corsets sold by the defendant, are clearly within the description in the complainant's patent. Without going over in detail the relations between the complainant and the defendant Taber, and also the Boston Corset Skirt Company, which was originally, and prior to the failure of the company, a licensee of the complainant, it is sufficient in this case to say, that, although the company could have availed itself of the right to sell the supporters on hand at the expiration of the contract, by paying the license fee according to the terms of the contract, the company elected to repudiate any rights or liabilities under the contract, and to determine the contract relations absolutely. This it did by its letter of October 19th, 1869, in which the company say to the complainant: "In order that there may be no misunderstanding in the future, we hereby give you notice that we understand the contract to be at an end, and we shall not therefore account to you for any profits we may derive from the manufacture and sale of abdominal supporters after October 10th, 1869."

The company could not be permitted thus to put an end to the contract, and deny the validity of the patent, and refuse to recognize any title in the patentee, and, afterwards, when the validity of the patent is sustained, to set up a license from the patentee to vend those on hand after October 19th, the date of the letter. The defendant bought the balance on hand, at the time of the failure of the company, of the corsets manufactured under the patent, with full knowledge of complainant's rights; and for the sale of these, and all made and sold by him like exhibits A and B, he must be held to have infringed, and be liable to account for the profits.

Decree for injunction and account.

MOON (NELSON v.). See Case No. 10,111.

MOON (PIPER v.). See Case No. 11,182.

MOONACHIE, The. See Case No. 4,091.

Case No. 9,748.

In re MOONEY et al.

[14 Blatchf. 204;[1] 15 N. B. R. 456.]

Circuit Court, S. D. New York. April 20, 1877.

BANKRUPTCY—REVIEW OF ORDER OF DISTRICT COURT—OF WHAT MUST SATISFY COURT.

1. The district court, on the petition of the assignee of a bankrupt, praying that the bank-

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

rupt might be ordered to pay over certain moneys alleged to be in his hands, and might be punished for contempt if he did not obey such order, took proofs on the question. The bankrupt testified that the money was, all of it, expended before the petition for an adjudication of bankruptcy was filed, and gave an account of the way in which it was expended. The district court made an order denying the prayer of the petition. On review: *Held*, that the application to this court, on review, to reverse said order, must be denied.

2. The petitioner for review must satisfy this court that a wrong decision was arrived at by the district court, if such decision was one on a question of fact.

3. In this case he must satisfy this court that a reasonable man would not be able to give credit to the relation given by the bankrupt, but would be satisfied of its substantial untruth.

4. The district court having decided that it did not satisfactorily appear that the bankrupt had not made a full disclosure, this court will sustain such decision, unless satisfied that the district court ought clearly to have decided the other way.

[In review of the action of the district court of the United States for the Southern district of New York.]

In bankruptcy.

Alexander Blumenstiel, for assignee.

Richard S. Newcombe, for bankrupts.

JOHNSON, Circuit Judge. This is a petition by the assignee of the bankrupts to review and reverse an order of the district court, made November 25th, 1876, denying the prayer of the petition of the same petitioner, presented to the district court on the 8th of December, 1875. This petition asked that the bankrupts might be ordered to pay over certain moneys alleged to be in their hands, and might be attached and punished for contempt, if they did not obey such order. An order was made upon this petition, to which the bankrupts had filed an answer, referring it to one of the registers to take proofs upon the issues raised by the answer of the bankrupts, in respect to the moneys alleged to be in their hands. Upon this order voluminous proofs were taken, and reported to the district court. Upon those proofs the parties were heard, and, on the 10th of June, 1876, an order was made, reciting that the bankrupts had received, between the 1st of January, 1874, and the 16th of July, 1874, the day of their failure, from the assets of their firm, Joseph Mooney, $7,147 05, and Isaac Mooney, $8,421, that neither of them had accounted for such sum received by him, and requiring each of them to show, on oath, what he did with the money, and fully account for the same; and it was referred to the same register to take the proofs and report the testimony, with his opinion. A voluminous examination was reported by the register, with his opinion, that each of the bankrupts had in his hands, at the time of the filing of the creditors' petition for the adjudication of bankruptcy, the sum of $3.300, and advising their commitment as for contempt, in not paying the same to the assignee. Upon the presentation of this report to the district court, the order was made which is now under review.

I have carefully examined this mass of testimony, and I do not see any ground for fixing any particular sum of money as being unaccounted for by the bankrupts. According to their testimony it was all expended before the filing of the petition against them. The account which they have given of the way in which the money was spent was undoubtedly subject to criticism, and was not calculated fully to satisfy the judgment, but did leave suspicions behind it as to its entire truthfulness. It has, however, been passed upon by the district judge, who has not felt himself able to pronounce that the bankrupts have not complied with the order of the court, by making all the disclosure which is in their power. It certainly may be true, that they have told all they are able to tell; and it is not claimed that any further examination is likely to yield any further results. The bankrupts have answered all the questions put to them. If their answers are true, they have obeyed the order of the court. The district court has not felt it to be its judicial duty to declare them untrue, and to proceed to punish the bankrupts on that basis. In reviewing a decision of the district court, on a question of fact, and, especially, upon one of this nature, it is for the petitioner to satisfy the court that a wrong decision has been arrived at. Coggeshall v. Potter [Case No. 2,955]. The proposition to be made out must be, that a reasonable man would not be able to give credit to the relation given by the bankrupts, but would be satisfied of its substantial untruth. It would require a very clear case to make that out, in the face of a decision of the district judge sustaining the bankrupts' story, or, putting it at the lowest, not discrediting their story, so as to feel it right to act judicially on the basis of its wilful falsity. As the question is stated by Judge Drummond in Re Salkey [Id. 12,254],—did it or did it not satisfactorily appear, that the bankrupts had not made a full disclosure?—and to this question the district court has answered in the negative. With this decision it seems to me my duty to concur, unless I am satisfied that the district judge ought clearly to have decided the other way. The case of In re Salkey [Cases Nos. 12,253 and 12,254] was much stronger than this before the court. The district judge, in that case, held the bankrupts not to have made a full disclosure and committed them. Eight months before their failure, they had bought goods to the amount of $35,000, had not paid for them, and had left only $6,000 worth, at their own valuation. They gave no account whatever, as to what had become of them. Yet, Judge Drummond, when the bankrupts were brought before him on habeas corpus, thought it proper, while holding that the power of the district court was complete, and that there was no relief to be given on habeas corpus, to send the parties back before the

register who had charge of the case, in order that, upon their further examination, he might report whether the bankrupts had made a full disclosure of what they knew. The English cases which were cited (In re Bradbury, 14 C. B. 15; Ex parte Nowlan, 6 Term R. 118; Rex v. Perrot, 2 Burrows, 1122, 1215; and Ex parte Lord, 16 Mees. & W. 462) are founded upon statutes conferring expressly the power upon the commissioners, if, in their opinion, the examination of the bankrupt is unsatisfactory, to commit him. I do not think our statute is as broad as the English statutes, and, therefore, the decisions founded upon them are not entirely safe guides as to the powers to be exercised under our statute. The application to this court, upon review, to reverse the order of the district court in this matter, made and entered November 25th, 1876, is, therefore, denied, and the clerk will certify this order to the district court.

MOORE, Ex parte. See Case No. 8,981.

Case No. 9,749.

In re MOORE.

[2 Ben. 325.] [1]

District Court, E. D. New York. March, 1868.

BANKRUPTCY—SPECIFICATIONS OF OBJECTIONS TO DISCHARGE—FRAUD.

1. Where specifications of objection to a bankrupt's discharge had been filed, and the creditors then moved for leave to take testimony, which motion was opposed, on the ground that the ground of objection alleged was an assignment made by the firm, of which the bankrupt was then a member, before the passage of the bankruptcy act [of 1867 (14 Stat. 517)], and consequently not within the meaning of the twenty-ninth section of the act: *Held*, that the specifications not only alleged such assignment, and that it was fraudulent, but also alleged that the property had remained in the possession of some of the assignors ever since the assignment, and that this was done with the knowledge and assent of the bankrupt.

2. The court would not, on such a motion, pass upon the question whether such a state of facts, if proved, would amount to a fraud under the twenty-ninth section of the act.

3. Leave to take evidence would be granted.

This was a voluntary proceeding in bankruptcy instituted by Chauncey W. Moore, who was a member of the firm of C. W. & J. T. Moore & Co. Certain creditors, opposing the discharge of this bankrupt, filed specifications of the grounds of their opposition, and thereupon, on notice to the bankrupt, moved for a trial and for leave to take testimony. The motion was opposed, on the part of the bankrupt, upon the ground that the grounds of opposition set forth in the specifications consisted of an alleged fraudulent assignment, by the firm of C. W. & J. T. Moore & Co., in 1861, long before the passage of the bankruptcy act, and, consequently, not within the meaning of the twenty-ninth section, which, it was contended, was limited to transactions since the passage of the act.

BENEDICT, District Judge. It is unnecessary now to express any opinion upon the bare proposition, whether the words "fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property," in the twenty-ninth section, are to be construed as if limited by the words, "contrary to the provisions of this act," or "since the passage of this act," elsewhere used in the section, inasmuch as the specifications in this case appear to me to raise a somewhat different question.

These specifications not only aver a fraudulent assignment, made in 1861, with the intent to enable the assignors to retain the control and disposition of a large amount of property pretended to be assigned, but they go further, and aver that this property has ever since been in the charge and custody, or under the control of the assignors, or some of them; that no dividend or other distribution of this property has ever been made to the creditors under the assignment; that one of the members of the firm now has in his hands, or under his control, a large amount of property and assets, pretended to have been included in that assignment, and that this disposition, detention, and custody of the property is with the knowledge, consent, and connivance of the petitioner now before the court.

Whether such a state of facts, if proved, would not amount to a fraud within the meaning of the twenty-ninth section, which should defeat a discharge, is a question which I am not inclined to pass on finally by denying a motion like the present. Leave will accordingly be given to take proofs in support of these averments.

The present motion also includes an application to amend the sixth specification, which, it is conceded, is not sufficiently specific. The permission will be given, as the opposition, in this case, is manifestly made in good faith, and the rules governing the specifications could not be considered as settled. The motion is accordingly granted.

Case No. 9,750.

In re MOORE et al.

[5 Biss. 79.] [1]

District Court, N. D. Illinois. May, 1869.

BANKRUPTCY—PARTNERSHIP—PETITION BY PART OF FIRM—NOTICE.

1. One or more partners may file their petition in bankruptcy without making the others parties, but notice of the pendency of the proceedings must be given to the other partners.

2. The petition must pray that the firm be declared bankrupt.

By LINCOLN CLARK, Register: On the 29th day of December, 1868, Rufus E. Moore

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

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

and James T. Kelly filed their petition in this court, praying for the benefit of the act of March 2, 1867 [14 Stat. 517]. A certified copy of their petition and schedules have been sent down to me as register, and also an order of the court to proceed in the matter. The petition sets forth that the petitioners were co-partners with one Mrs. Hatch. It states that the members of said co-partnership owe debts, etc., and are unable to pay all their debts in full; that they are willing to surrender, etc., in the usual form. The petitioners then pray that this petition may be taken as the separate and individual petition of each of them respectively, if in the judgment of the court they are not entitled to make application for their discharge under the bankrupt act jointly. What kind of application is this? Is it an application to have the firm declared bankrupt, or is it to have the petitioners declared bankrupt? My understanding is that the firm cannot be declared bankrupt unless all the members of it join in the application, or unless the petition is so framed as to give the outstanding party an opportunity to deny the fact of bankruptcy. In the present case the petition is in form neither the one nor the other. Section 36 of the act. Also, see rule 18 of the supreme court. In view of this rule it may be well to ask, how can a third party be said to refuse to join when, as yet, it may be that he has no knowledge of the proceeding? And is it competent to give a notice of the proceeding when it is not shaped for that purpose; in other words, where the petitioners do not ask to have the firm declared bankrupt? In re Winkens [Case No. 17,875]. The debts of the firm are very considerable. So far as the schedule shows, there are no firm assets, except what may be found in a deed of assignment made by the co-partners in May, 1868. Should the property named in that assignment come to the hands of the assignee in bankruptcy, there would be assets. But I cannot regard this as a proceeding to have the firm declared bankrupt. If it were such, the outstanding partner might be able to show that it was not bankrupt. I think the petition might be so amended as to make it an application to have the firm declared bankrupt, but I cannot see how a third party can be brought in for that purpose when the petition is not properly framed to that end. If it is not a proceeding to have the firm declared bankrupt, can it be declared competent to have the petitioners individually so adjudged? I cannot see how it can be so regarded. Individuals can join only on the fact of joint interest and according to form prescribed. In other cases the proceeding should be individual. I am of opinion that the petition should be so amended as to make it a proceeding to have the firm declared bankrupt, or that it should be dismissed. My views in the matter differing from those of Messrs. Wilson & Storrs, counsel for petitioners, and it being one of importance in practice, I send it up to the court for determination.

Isaac G. Wilson, for petitioners.

DRUMMOND, District Judge. I think it would be proper for the petition to state that an application has been made to the other co-partner to join in the petition, and if this were done, then the consequence might follow which is implied by rule 18. But there is nothing, as I see, in the bankrupt law, to prevent one partner from making his application for a discharge under the law from his individual debts, and from his debts as a co-partner of the firm. It seems to be desirable that the non-joining partner should know that the application is made, leaving it optional with him to come in if he pleases, or take any action he may choose. This petition does not state any thing about a refusal.

It seems to me that all has been done that the law requires when you have given notice to the other partner, and now it is optional with her whether she will come in or not. If she does not choose to come in, the court will go on and make its decree, and discharge these men both as members of the firm and individually. Of course the result would be that the firm would have to be declared bankrupt. The law does not require, nor does the rule—and in fact, the law seems to be otherwise—that before a member of a firm can be discharged under the bankrupt law, he must request the other members of the firm also to apply. The rule seems to give the option to that member of the firm who does not apply, to join in the application, and declares what the consequences shall be of a non-joinder.

I think you have brought yourself within this rule. It seems to me the only thing is that the other co-partner ought to be brought in as I stated. I think she ought to be notified in order that she may take such steps as she may be advised. That can be done certainly as well by a supplemental or subsequent act, as in the original petition. In stating that these are members of a firm of which she as a partner is one, it seems to me the petition does all that is required to be done. I think the proper course would be for an entry to be made of the fact that she has been notified of the pendency of the proceeding. Of course the petition must be amended and ask that the firm be declared bankrupt.

NOTE. Notice of the filing of the petition must be given to the non-joining partners before adjudication of bankruptcy can be made. In re Lewis [Case No. 8,311]; In re Prankard [Id. 11,366]. Where one partner has asked for the benefit of the bankrupt act, the firm must, of necessity, be declared bankrupt. In re Grady [Id. 5,654]; In re Greenfield [Id. 5,772]. Unless the firm is declared bankrupt no member can be discharged from his firm debts. In re Little [Id. 8,390]; In re Bidwell [Id. 1,392]; In re Grady [Id. 5,654]. But if there are no firm assets the rule is otherwise. In re Winkens [Id. 17,875]; In re Abbe [Id. 4].

MOORE, In re. See Case No. 10,041.

Case No. 9,751.

In re MOORE.

[1 Hask. 134.] [1]

District Court, D. Maine. Feb., 1868.

BANKRUPTCY—DISCHARGE—FRAUD—CONCEALMENT OF PROPERTY—EVIDENCE.

1. The discharge of a bankrupt is not prevented by transactions prior to the bankrupt act [of 1867 (14 Stat. 517)].

2. A specification in bar of a bankrupt's discharge, stating that he concealed the title to land, is not sustained by proof of his omitting an equity of redemption from his schedule of assets.

3. Such specification, charging that the bankrupt willfully and knowingly swore falsely in his examinations, to be effectual, must be proved beyond a reasonable doubt.

4. Evidence of verbal admissions is both unreliable and dangerous.

[Cited in Re Goold, Case No. 5,604.]

In bankruptcy. Petition by bankrupt [Luther S. Moore,] for his discharge. Creditors specified objections thereto: I. That he fraudulently conveyed his property for the purpose of concealing it, and to prevent its attachment. II. That he concealed his title to land. III. That he concealed his promissory note. IV. That he concealed the "Laconia property." V. That in his examination before the register, he willfully and knowingly swore falsly in regard to the keeping of books of account.

Josiah H. Drummond and Woodbury Davis, for petitioner.

Almon A. Strout and George F. Shepley, for objecting creditors.

FOX, District Judge. A very protracted examination has been had of the bankrupt by the assignee before Mr. Register Fessenden. It appears that the bankrupt failed on the 31st day of August, A. D. 1863, and filed his petition in this court to be adjudged a bankrupt on the day the bankrupt act took effect. At the time of his failure he was owing about $60,000, more than $40,000 of which was due to the banks in this city and the county of York, for loans made to him on his paper, purporting to be indorsed by Jeremiah M. Mason.

The bankrupt has for many years been in the practice of the law at Limerick, in the county of York, and also extensively engaged in the purchase and sale of real estate. His homestead farm, upon which he had made very costly expenditures and improvements, was mortgaged by him, on the 28th day of August, 1863, to his brother-in-law, H. P. Storer of Portland, to secure the payment to him, in eight years, of Moore's note for $10,000.

The first specification charges that this mortgage was fraudulently given for the purpose of concealing the property, and to prevent its attachment, and that the bankrupt, at the time of filing his petition, was the owner of this estate. The evidence, in my opinion, not only fails to prove such to have been the condition of this estate, but rather establishes beyond question, that at the time this mortgage was executed, Moore was indebted to Storer to the amount of $2,000, which debt was then cancelled, and $8,000 was paid in cash to Moore by Storer at the time, or within a few days afterwards, and the note and mortgage for this sum were then given by Moore to Storer, the whole amount of which still remains unpaid.

It must be remembered that this transaction took place in 1863, prior to the passage of the bankrupt act, and although I am well satisfied that the bankrupt at the time of his giving this mortgage was well aware of his insolvency, and intended to secure and prefer the debt to Storer, and place his estate beyond the reach of his creditors, acts which are now prohibited by the bankrupt act, and which would deprive him of his discharge if committed subsequently to the passage of this act, yet, it is quite clear, the bankrupt law cannot be made to have a retroactive effect, and punish a party, by refusing him a discharge for acts committed by him prior to the passage of the law. A fraudulent preference or transfer of a debtor's property, by the act, is made an offence, for which the punishment prescribed by the act is, a failure to obtain his discharge. To thus punish a party, the offence for which the punishment is inflicted must have been committed since the passage of, and in violation of a law then in force. Such was the decision in this district in Clark's Case [Case No. 2,795a], in July last, and it has been repeatedly so decided in other districts, and with much force by Field, J., in Rosenfield's Case [Id. 12,058], where he held, that neither a fraudulent conveyance made, nor a fraudulent preference given before the passage of the bankrupt act, is good ground upon which to oppose a discharge; and a specification, alleging such a conveyance or preference, should be stricken out on motion.

The second specification charges the bankrupt with a concealment of his interest in the Gilpatrick lot by a conveyance, made by Gilpatrick to Lorenzo Moore, the brother of the bankrupt, for the use and benefit of the bankrupt. The bankrupt conveyed this lot in the spring of 1863 to Gilpatrick by an absolute deed, which was intended as security for the payment of $1,760, due from Moore to Gilpatrick. A bond of defeasance was at the time executed by Gilpatrick to Moore, as appears from the examination of the bankrupt. Gilpatrick also received from Moore his notes for the amount due, one of which was paid from the proceeds of a sale of a portion of the property, and the other two were paid before their maturity, in May, 1865, by the bankrupt, with money, as he swears, belonging to his brother Lorenzo, and Gilpatrick thereupon released the bond to Lorenzo.

The deposition of Lorenzo Moore was read

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

by the orators at the hearing; he testifies that after studying law with his brother, he went to Independence, Iowa, there practiced his profession, and was also engaged in speculations in real estate, occasionally remitted to his brother money for investment, and finally in 1864, returned back, having accumulated about $12,000; that in 1865 he was at his father's house in Newfield, saw his brother quite frequently, his brother was then indebted to him in the sum of $1,500 or $1,600 for borrowed money for which he held Luther's note, and for which he afterwards took some property of Gilpatrick in payment; that Luther held Gilpatrick's bond for the conveyance of this property, and he gave up to Luther his note and received from Gilpatrick his deed in payment, authorized Luther to make this arrangement a few days before it was made; that the deed is dated May 1, 1865, and has been in his own possession ever since the 3d or 4th of the month; that the consideration of this conveyance was the surrender of the note for $1,500, he held against Luther; that he gave the note to Luther, and Luther paid him the balance in cash beyond the $1,500 allowed Gilpatrick, and that he has received rent of the Gilpatrick lot since.

There is nothing cotradictory of this testimony presented by the creditors. It fully corroborates the bankrupt's statement, and establishes the fact that Lorenzo paid for the transfer from Gilpatrick. This transfer was however in its legal effect, an assignment of a mortgage; for by the laws of Maine, the conveyance to Gilpatrick with a bond of defeasance executed at the same time by him constituted a mortgage security for the amount of Moore's liability to him, so that, at the time of the filing of the petition by the bankrupt, he held an equity of redemption of the estate, and was entitled to redeem it from his brother on payment of the balance due; this equity nowhere appears upon the schedules annexed to his petition in bankruptcy.

The specification does not accuse the bankrupt of concealing an equity of redemption in the estate, but it charges the concealment of a parcel of land, being the same premises conveyed to Jacob Gilpatrick of the value of $2,000, by causing a conveyance of the same land to be made to the brother of the bankrupt, "he the said bankrupt falsely pretending, that said Lorenzo advanced the money to purchase said land, and that said Lorenzo was and is the true owner thereof, when in truth and in fact the said bankrupt is the true owner of said land, and ever has been the true owner of the same since said conveyance to Lorenzo Moore, and advanced the money to pay the incumbrance on the same, and to obtain the title to the same, and the said Lorenzo Moore, holds said real estate for said Luther S. Moore, whereby the said Luther S. Moore concealed the same, and still conceals the same and the money paid therefor, with the intent to defraud his creditors, and to prevent the attachment and seizure on execution of said real estate, and to prevent its coming into the hands of the assignee in bankruptcy, and has omitted the same from his schedules annexed to his petition in bankruptcy, although he was the owner of the same, contrary to the said bankrupt act."

This is the entire specification touching this estate, and it will be observed, it is based upon the ground that the bankrupt was the owner of the entire estate, and had paid his own money to relieve the incumbrances upon it, and was fraudulently using the name of Lorenzo to conceal the bankrupt's interest in this property, which belonged to him absolutely. This was the charge the bankrupt was called upon to meet, by the specification, a fraudulent concealment of an entire, an absolute title to the Gilpatrick lot, and not an equity of redemption; and this charge is disproved entirely by the evidence produced by the opposing creditors.

It was claimed at the argument that the bankrupt had concealed his interest in this equity, and for this cause should be refused a discharge. It is a sufficient reply to this, that a concealment of the equity, as I have shown, is not set forth in any of the specifications as a reason for opposing his discharge, and of course should not be thus first presented at the hearing, without an opportunity for the bankrupt to defend against it. The equity is not mentioned on the schedules of assets, but it was clearly and fully disclosed by the bankrupt in his examination, as he states, he received the bond from Gilpatrick. Whether this right to redeem is of any real value is quite uncertain; the amount secured to Gilpatrick at the time of the conveyance in 1863 was $1,760; $500 of the principal with interest was paid by a sale of a portion of the estate, and the balance remains unpaid. The only testimony, as to the value of the property, is from the bankrupt, who estimated it to be worth at the time of the conveyance about $1,800, and from Gilpatrick who thought its then fair cash value was $2,200; it is doubtful whether the property is now worth the amount of the incumbrance.

To preclude a bankrupt's discharge by a concealment of his property, it must have been willful concealment, designedly done by him, and not merely an accidental omission to set forth his interest in the property. In the present case, all the facts were disclosed by the bankrupt himself, and upon all the evidence in the case, it is not at all clear to me, that there was any real value or interest in the estate to be concealed by him; but I think the schedule is defective, and should be amended, setting forth the equity in the Gilpatrick lot, that the same may be disposed of by the assignee, if anything can be realized therefrom.

The third specification charges the concealment of a note, signed by one I. G. Harmon, payable to Calvin Moore, the note being the property of the bankrupt. I do not think

this charge is sustained by the evidence. The bankrupt does not appear to have had any right or interest in the Harmon note. The fourth specification relates to the Laconia Stand, and charges the bankrupt with concealing this estate, by causing a conveyance of the same to be made to, and remain in, Lorenzo Moore, the bankrupt falsely pretending that Lorenzo paid for the property, when in fact, the bankrupt was the owner of it, and purchased and paid for the same with his own money, and caused a conveyance to be made to Lorenzo for the sole purpose of concealing the same.

The facts respecting this estate are somewhat complicated; but I understand that Leander Boothby was once the owner of the estate, encumbered by mortgages which were about becoming foreclosed; that in 1860 he applied to Wm. Bean to lend him money to redeem the estate, and an arrangement was made by which the title was conveyed by Leander Boothby to his wife, who received $700 from Bean, she giving him a warranty deed of the estate, and he at the same time giving to her a bond to reconvey the estate to her within three years, on payment of the loan with heavy interest. This loan was applied to the discharge of the incumbrance. The business was done at the bankrupt's office. In June, 1863, a claim was made by the bankrupt, in behalf of Flanders & Co., on this estate by virtue of an alleged prior attachment. Bean was notified of this claim, and becoming somewhat alarmed, proposed to Moore to convey to him the interest he had in the property, on payment of the amount he had loaned, $700, losing his interest for three years, which he says was to be nearly $200. Moore accepted the proposal, and received from Bean, in the fall of 1863, a bond running to Lorenzo Moore, binding Bean to convey the estate if it was not redeemed, and if redeemed to pay over the amount received. Moore paid Bean $400 in cash, and offered him a draft or something or other for $300, as Bean says, "which he considered as good as cash when he could get to a bank with it," but upon which he claimed of Moore a discount of nine per cent. to make it cash. Moore declined to pay the nine per cent. and went out of his office with it, and soon returned with $300, which he paid to Bean. At the time the bond was made, Bean testifies that Moore said, "You know why I take this in Lorenzo's name." The title had never passed from Bean to Lorenzo Moore, and the estate was not redeemed by the Boothbys, they denying the validity of Bean's claim on the ground, as I understand, that the conveyance made by Mrs. Boothby to Bean was not valid under the laws of Maine at that time, the property having originally been the estate of her husband, and he not having joined in the conveyance to Bean. The title to the estate is now in litigation before the supreme court of this state, in an action brought in Bean's name for benefit of Lorenzo Moore against Mrs. Boothby for possession of the premises.

Boothby and his wife were produced as witnesses by the creditors; he testified that "In the spring of 1867, the bankrupt was at our house and then stated, that he had paid out $700, and he wanted that amount out of the property, but would give in the interest, that he was making a loss at that rate; my wife said, she did not see how he was the loser, if Lorenzo Moore owned the property; he replied, the money was his, the money he paid for that stand was his own property, and he could not afford to lose it and that he never thought we would cheat him out of that amount of money, he said we should be much better off than he would, as he had lost the interest of his money, whilst we had received the rents; he said, he had paid Bean $700 for his title to the property."

Mrs. Boothby's version of this conversation is, that "Moore said he wanted us to pay $700 he had paid to Bean, he said the money was his and he was poor and was not able to lose it, said we should be doing better than he did, as we were receiving the rents, and he was getting nothing, besides losing the interest of his money, do not remember about Lorenzo's title being mentioned."

The bankrupt in his examination states that he paid Bean $700 for his interest in the estate, and took a bond for the conveyance of the same to Lorenzo Moore, the money which he used being Lorenzo's, and the draft of $300 testified to by Bean, being a draft for that sum which he had received from Lorenzo, drawn by a banker at Independence, Iowa, in favor of Lorenzo Moore, on a bank in Boston or New York, the money from which draft he paid over to Bean. He admits having a conversation with Boothby and wife, and in that conversation may have said, "I had paid Bean the $700 and could not afford to lose it," or words to that effect, but that in the entire conversation he was speaking and acting in behalf of his brother; that Bean's testimony was correct, excepting that he had no recollection of using the words "You know why I take this bond in Lorenzo's name."

Lorenzo Moore testified that "In 1863 I sent home to Luther $700, or $800, in three drafts from Independence, Iowa, the money being sent to him to invest for me; that in 1863 Luther did invest for me $700 in the Laconia property, whilst I was in Iowa; I instructed him to invest it for me if he saw a chance to make money, and I would share the profits with him. When I came back he told me, he had invested it in the Laconia property; has invested other monies for me, and we had divided the profits, about $300 on Chas. Boothby's place, and something over $100 on the Mill's lot.

The bankrupt's statement as to the Laconia stand is in all respects sustained by that of his brother, and I think also derives some support from Bean's testimony, as to

the $300 draft offered to him by Luther, at the time of giving the bond. On the other hand, there is the testimony of Boothby and wife as to the alleged admissions of the bankrupt claiming an interest in the property, and that the $700 paid to Bean was his own money.

In my opinion, verbal admissions are the most dangerous and unreliable testimony which can be produced to a court of justice, and but very little reliance should be put upon them, when presented from interested witnesses, under circumstances similar to these in the present case. They consist of a mere repetition of statements made long since, and depend entirely upon the honesty, intelligence, and recollection of the witnesses, and in all cases, after a considerable lapse of time, when a witness undertakes to rehearse, from his recollection alone, the exact language and expressions of a party, I am but little inclined to yield a ready credence to its entire correctness; an unintentional change of a few words may give a meaning to the statement entirely different from what the party actually did say.

In the present case, these two witnesses do not entirely agree in their recollection of the conversation. Boothby states that his wife said she did not see how he, Luther, was a loser, if Lorenzo Moore owned the property; whilst the wife says she does not recollect about Lorenzo's title being mentioned. If the wife had made such a remark, it seems to me she would have been more likely to remember it than any other part of the conversation, as it was her idea, and the most important, in my view, of anything testified to by either witness.

The position, assumed by these witnesses in their defence of the suit, brought against them in Bean's name for the recovery of the estate, I admit, is not without its effect on my mind, and has greatly diminished the respect and confidence which I might otherwise entertain for them, and the credence which I might have given their testimony. They stand before me in hostility to the Moores, are defendants in a suit for the recovery of this estate, putting a defence upon the strict law, that the husband did not join in the conveyance with his wife, notwithstanding he was a party to the agreement, present when it was made, acted throughout as agent for his wife, and received from Bean his money, all parties implicitly believing that Bean by the deed acquired a valid security on the estate for his loan. Instead of paying back the money without interest, the use of which they had enjoyed for more than three years, and which amount they admit Moore was willing to accept, they see fit to defend on this strict technicality, the non-joinder of the husband in the deed.

It may be, that under the laws of Maine, this defence will prevail; but it does not commend to my consideration very favorably those who are endeavoring to profit by it; and they should not expect any tribunal to place any great reliance on their statements as to the admissions of their opponents touching the title to the estate in question.

I should fear that parties entertaining such loose notions of what is right, honest and honorable, could not always be depended upon when called to testify as witnesses, and I should feel great reluctance in deciding this matter against the bankrupt upon their evidence, even if entirely uncontradicted; but as the case now stands, upon all the testimony in relation to the Laconia land, I have no question that the money advanced to Bean was Lorenzo Moore's property, and the bond for the conveyance from him was properly taken in the name of Lorenzo Moore, and that the bankrupt acquired thereby no interest in this estate. The money advanced to Bean having been the property of Lorenzo Moore, the most satisfactory reason is shown for taking the bond in his name, and we have no occasion for indulging in loose conjectures for other reasons, if the bankrupt did make the remarks testified to by Bean.

I have never entertained any question as to the judgment which should be rendered upon the specifications already adverted to, but there is one still remaining for my decision, upon which there is a very considerable conflict of evidence. I have repeatedly read all the testimony applicable to this objection, but have been unable to reconcile the statements of all the witnesses, or to feel such absolute confidence and trust in the conclusion arrived at by me, as I could have desired.

The fifth specification charges the bankrupt with having on his examination before the register willfully and knowingly sworn falsely, viz: "that since Feb. 22, 1858, he kept no cash book, and no written account in any shape of any receipts or expenditures from that date, except receipts on the files of said bankrupt, and loose memoranda of money borrowed or had for the time being, when in truth and in fact, he had kept a cash book and cash account since that date." Such is the statement, repeatedly given by the bankrupt in his written examination, and its materiality is not denied by his counsel.

The charge therefore is that of willful falsehood, and is a question of fact submitted to me, for my decision, involving a trial of the bankrupt for the crime of perjury. The consequences being of such extreme importance, in determining the question, I must be governed by the rules of law regulating the trial of an indictment for perjury. The creditors should satisfy my mind beyond a reasonable doubt, that this bankrupt has intentionally and willfully given false testimony in relation to this matter.

It is undisputed, that prior to Feb. 22, 1858, the bankrupt did keep what he terms cash books, showing, in part, his receipts and payments of money from January 1, 1848. Four of these books have been produced and carefully examined by me. The bankrupt states that he abandoned his practice of keeping such books in February, 1858, on account of manifold errors and omissions. Some of the testimony on the part of the creditors is in my opinion easily explained, whilst other portions must depend on the intelligence, character and memory of the witnesses, and their relations to the bankrupt, as it is direct, positive and unqualified, as to the fact that the bankrupt did, subsequently to Feb., 1858, keep such books.

The evidence on the part of the bankrupt, and especially that gathered from his books, does certainly throw great doubt and uncertainty over the proof offered by the opposing creditors, and leads me to the conclusion that there may have been some mistakes, or failure of memory, on the part of their witnesses. I am not convinced that the bankrupt did keep a cash book, or cash accounts, during the time charged in the specifications. I am left in doubt from all the testimony, but am the rather inclined to believe that the statements of the bankrupts in relation to this matter are correct. Discharge granted.

Case No. 9,752.

In re MOORE.

[36 Leg. Int. 38; [1] 7 Reporter, 199; 26 Pittsb. Leg. J. 81.]

Circuit Court, W. D. Pennsylvania. Dec. 28, 1878.

INTEREST, BEGINS WHEN—BONDS TRANSFERRED LONG AFTER DATE OF EXECUTION—BANKRUPTCY—USURY—WITNESSES.

[1. While interest on bonds does not ordinarily begin to run until the relation of debtor and creditor is created by the transfer and delivery thereof, yet it is competent for the maker, upon transferring the bonds as collateral security, to agree that interest should be computed from their date according to their tenor, and that such interest should stand as security for a loan made expressly on the faith of it.]

[2. No objection can be made to such a pledge of the interest by persons who received other bonds of the same class several years after their date, for they must be presumed, in the absence of proof to the contrary, to have acted upon the assumption that the rest of the bonds of that series were outstanding for interest as well as principal, according to their face and tenor.]

[3. An assignee in bankruptcy *held* to have the right to set up the defense of usury as against a creditor of the estate; and *held*, further, that the bankrupt was a competent witness, notwithstanding the death of such creditor, whose claim was presented by his executors.]

On the first day of December, 1870, the bankrupt [Thomas Moore] executed a mortgage in favor of William Floyd, trustee, to secure the payment of twenty bonds, bearing interest, each for the sum of $5,500. These bonds were used by the bankrupt in lieu of an endorser, each being pledged as collateral for a promissory note of the same amount, which note was renewed every four months, and the discount paid with each renewal. At the time of the bankruptcy, all of the notes were outstanding, and all of the bonds held as collateral thereto. John I. House held four of the bonds as security for four notes. He also held a draft for $5,485.50, for which the bankrupt was liable, and to secure the payment of which the bankrupt gave him a paper, dated March 22d, 1877, pledging the accrued interest to the amount of $5 000. House contended that he was entitled in respect of this claim to participate in the distribution of the fund. The fund was less than the face value of the mortgage. The register held that each bond was entitled to one-twentieth of the fund, and as the four bonds held by Mr. House did not draw sufficient of the fund to pay in full the notes for which they were held as collateral, there was nothing to which the special interest pledged could apply. The fund must first go to pay the notes for which the mortgage bonds were pledged, and if any surplus were left, arising out of the four bonds held by House after paying his four notes, it would be applied to the draft held by him. In 1867 the bankrupt conveyed the same property to Moore and Pollock, receiving from them a mortgage, securing the payment of fifteen notes, each for $10,000. One of these was assigned by the bankrupt, August 10th, 1867, to Henry McCullough, as collateral security for a note for $10,000, made by the bankrupt. This assignment was not recorded until after the bankruptcy, July 3, 1877. Moore and Pollock reconveyed to the bankrupt, February 28th, 1868, and other assignments of parts of their mortgage were either re-assigned or satisfied, and on the 11th of May, 1875, the bankrupt entered a formal satisfaction in full. McCullough having died, his executors claimed to have priority over the creditors under the later mortgage of the bankrupt. The assignee set up the defence of usury, and the bankrupt was examined as a witness. The register held that the McCullough claim is good against the bankrupt, but must be postponed until the creditors under the later mortgage of the bankrupt have been paid in full; that the assignee has a right to set up the defence of usury, and that the bankrupt is a competent witness, notwithstanding the death of McCullough. To the several findings and rulings of the register, exceptions were filed, and after argument, were overruled in the district court.

Sterrett, Kennedy & Doty, for appellants.
Thos. M. Marshall, for Floyd et al.
Robert Woods, for McCullough's executors.

McKENNAN, Circuit Judge. I think the basis of computation of the value of the bonds chargeable upon the fund for distribu-

[1] [Reprinted from 36 Leg. Int. 38, by permission.]

tion, which was adopted by the register and approved by the court below, was erroneous. It is undoubtedly true, as a general rule, that no interest accrues upon a note or bond until the relation of debtor and creditor is created by the transfer and delivery of such note or bond by the maker to another, for a sufficient consideration; and this is so for the reason that such is the constructive import of the contract between the maker and holder of such instrument. But it is none the less certain that the maker of a note may make himself liable for interest apparently accrued upon it, where he expressly stipulates to become so for a lawful consideration. It was altogether competent then for the bankrupt and John I. House to agree that the interest upon the bonds transferred to the latter as collateral security should be computed from their date according to their tenor, and that the whole or a part of such interest should stand as a security for a loan made expressly upon the faith of it. Nor have the holders of the other bonds of the same class any equity to gainsay such an arrangement, because, as such bonds were hypothecated to them several years after date, they must be presumed, in the absence of proof to the contrary, to have acted upon the assumption that the bonds not held by them were outstanding for interest as well as principal, according to their face tenor.

The proper method, then, of determining the value of the collateral securities, is to compute the interest upon all of them from the date of their last hypothecation to the time of distribution, and to add to the amount of the securities held by John I. House the interest which had accrued upon them before the date of their hypothecation, and, as the fund for distribution is insufficient to pay in full the debts for which the collaterals were pledged, to apportion it among the creditors upon the basis of the value, thus ascertained, of the securities hypothecated to them respectively.

In regard to the exceptions filed in behalf of the estate of McCullough, I deem it necessary to say that they were properly overruled by the court below.

The order of the district court confirming the report of the register is, therefore, reversed, and the cause is remanded to that court with directions to cause distribution to be made of the fund in the hands of the assignee among the creditors entitled to it in conformity with the method herein indicated.

MOORE (ALEXANDRIA v.). See Case No. 185.

MOORE (BANK OF COLUMBIA v.). See Cases Nos. 875 and 876.

MOORE (BANK OF METROPOLIS v.). See Case No. 901.

MOORE (BANK OF UNITED STATES v.). See Case No. 930.

MOORE (BEBEE v.). See Case No. 1,202.

Case No. 9,753.

MOORE v. BROWN et al.

[4 McLean, 211.] [1]

Circuit Court, D. Illinois. June Term, 1847.

TAXATION—TAX TITLES—REQUIREMENTS OF STATUTE—NOTICE OF SALE—STATUTE OF LIMITATIONS.

1. In selling lands for taxes, the requirement of the statute must be complied with. And this especially applies to the giving of notice of sale.

[Cited in Cahoon v. Coe, 57 N. H. 596; Thurston v. Miller, 10 R. I. 360.]

2. A deed for land sold for taxes, which, upon its face, shows that legal notice of the sale was not given, is void. Such a deed can not avail a person who sets up a defense under the statute of limitations.

[Cited in Shoat v. Walker, 6 Kan. 68.]

[This was an action of ejectment by Joshua J. Moore against James Brown, Alfred Brown, Harmon Hogan, and Joseph Froward.]

Williams & Butterfield, for plaintiff.

Logan & Lincoln, for defendants.

OPINION OF THE COURT. This is an ejectment for the south half of section 35, town 12, range 1, in Warren county, of this state. Patent to Amos Davenport for the land. Deed from him to Dewy. This deed was objected to, because the acknowledgment is defective. The person taking the acknowledgment does not certify that the person making it was known to him. Rev. St. Ill. 1845, p. 106, it is provided that a deed for land in Illinois, executed in any other state, "in conformity with the laws of such state," shall be good to convey real estate in Illinois. The deed objected to was executed in Vermont, and the law of that state, it is believed, does not require, as in New York, and in some other states, the person taking the acknowledgment to certify that the one who makes it is known to him. Dewy conveyed to Cole, and he to the plaintiff.

The defendants admit themselves to be in possession, and they set up in defense a sale of the premises for the taxes of 1821 and 1822, on the 9th of December, 1823. The act of the state requires the taxes to be paid on or before the 1st of October, annually, and if not so paid, the auditor is required to have the lands published three weeks, the last publication to be sixty days before the sale. The act of 1835 limits a suit to seven years after adverse possession. It is not denied, but admitted, that the land was sold for taxes before the expiration of the time required by the law, before it should be sold, and the question arises, whether under such a title, the occupant can set up the statute of limitations. It must be admitted, that to entitle an occupant to plead the statute, he need not have an effective deed. This would dispense with the statute, for it is only beneficial to

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

the tenant when his title is not paramount to that of the plaintiff. But here the question is, whether a deed void upon its face, can enable an individual to avail himself of the statute.

A strict construction has uniformly been given to tax titles. It is necessary that, at least the requisites of the law, through which an individual is divested of his title, should be substantially complied with. We see the necessity of this rule, in the case under consideration. Three hundred and twenty acres of land have been sold for less than twenty dollars. If such sacrifices can be made, where there is a departure from the requirements of the law, there is no safety to the owners of real estate in Illinois, especially if they be non-residents. But this rule should not be so technical as to render a sale for taxes of no value. It is the duty of the land holder, resident or non-resident, to contribute his proportion to the revenues of the state, by which public improvements are made, and the value of the property of the people is greatly enhanced. And every non-resident who fails to pay his taxes should be made to suffer for a disregard of his own interest, as well as the interest of the state. But there is often difficulty in procuring faithful agents. If sales for taxes were made with more care, and a stricter observance of the law, it would give a higher value to those sales, and fewer sacrifices would be made.

We suppose that the deed before us is void upon its face. The law requires a notice to be given, before the sale, which the face of this deed shows has not been given; it is therefore void, and can afford no protection, under the act of limitations. Verdict for plaintiff. On suggestion of the counsel, the above question was certified to the supreme court, as to the validity of the deed.

[This case went to the supreme court on a certificate of division in opinion between the judges of this court. It was decided in the supreme court that the deed was void, and therefore inadmissible as evidence; Mr. Chief Justice Taney, Mr. Justice Catron, and Mr. Justice Grier dissented. 11 How. (52 U. S.) 414.]

Case No. 9,753a.

MOORE et al. v. The CARIBON.[1]

District Court, S. D. Florida. Dec., 1880.

SALVAGE—NATURE OF SERVICES—COMPENSATION.

[Two of the libellants boarded a bark flying a signal of distress off Tortugas light, and found that the master and part of the crew had died of the fever, and the rest were sick, but one man being fit for duty. They piloted her to a comparatively safe anchorage, where food and assistance could be obtained, though not such as the condition of the sick required. Four days later, two pilot boats arrived, put a crew of six men on board, and brought her into port. *Held*, that the services of the first two libellants were salvage services, requiring liberal compensation, and that the services of the others was a continuing salvage service, of less merit, but entitled to a reasonable reward.]

[This was a libel by Moore and Keys and C. P. Williams and others against the bark Caribon to recover compensation for salvage services.]

W. C. Maloney, Jr., and G. B. Patterson, for libellants.

L. W. Bethel, for respondent.

LOCKE, District Judge. This vessel was discovered by two of the libellants, one light keeper at Tortugas, some eight or ten miles from that place, with a signal of distress flying. The master and two men had died during the voyage, and the rest of the crew, with one exception, were sick with the Chagres fever. The mate, who was in command, although partially recovered, was still suffering; and there was but one person on board fit for duty. The two original libellants, Moore and Keys, went on board, assisted what they could, and the next day piloted the bark into a channel, where she came to anchor in a comparatively protected place, but not a part of the harbor or one of complete security; yet it was where they could lie at anchor, and obtain assistance and nourishment from parties at Fort Jefferson. Four days after being brought in, two pilot boats, with the second libellants, arrived from Key West, their entire crews consisting of thirteen men, who all assisted in getting under way, put a crew of six on board, and brought her to that port. She had neither been pumped, nor had her decks washed down, for twenty-five days; and this the salvor crew attended to.

When first discovered and boarded by libellant Moore, this vessel was in distress, and required assistance. She was in the vicinity of dangerous navigation, a season of the year when severe weather might at any time be expected, with a disabled crew; yet the danger was not imminent, nor the services such as would justify a large compensation. Had she not been boarded by Moore, she might have continued her course, and made Key West or reached the pilot grounds of that port with no more disaster than had been encountered for the twenty-five days previous; yet the risk was continuous, and the crew so utterly unable to render such service as any hour might require that she could not be considered in a seaworthy or safe condition. When brought to anchor by Moore, although temporarily in a place of comparative safety, it cannot be said that a salvage service had been completed. The vessel was not where medical assistance or such nourishment and attendance as was required by the sick could be procured; nor could hospital accommodations be provided and a new crew obtained. She may have been temporarily safe, but she was not put into a position where she could continue her voyage or earn money for her owners. Further aid was necessary, and this

[1] [Not previously reported.]

was provided by the second libellants from the pilot boats. This being a continuing service, on account of these facts, and that at no time between the boarding of the first libellants and the final anchoring in Key West could the vessel be said to be in a state of safety and in such a place as her needs required, the compensation should be considered as joint.

The number of salvors interested in the second libel is no measure of the necessities of the case, nor can it be used to increase a compensation. It was stated by one of the witnesses that, although five or six men could very well work the vessel, it took the entire fourteen employed to get up the anchor. I do not doubt but what the entire number were employed at that service, but that the condition of the windlass or weight of the anchor was such that it required nearly twice as many to weigh it as comprised the original crew I cannot accept. The locality where the vessel was discovered, in immediate proximity to a harbor, which she had reached without assistance, goes far to show she might have gone on and ultimately found safety without assistance. The fact that the mate had not been able to take a sight so as to calculate his whereabouts for over three weeks shows plainly past dangers; but having made land, and therefore ascertained his locality, it cannot be considered as showing present or future ones, so as to enhance an award.

Of the individual salvors, the first libellant Moore rendered the most valuable service, and should be most liberally compensated. There is no evidence as to what part was taken by Keys, but he went on board, and it is presumed rendered what assistance was required of him, although he may be, as alleged, but a boy.

Taking all the facts into consideration, I think five hundred dollars will be a fair compensation for the entire service, of which libellant Moore will receive seventy-five and Keys twenty-five dollars, and the remaining four hundred be divided between the pilot boats and crews according to the rules for dividing pilotage in ordinary cases.

The decree will follow accordingly.

Case No. 9,754.

MOORE v. The CHARLES MORGAN.

[3 Cin. Law Bul. 42.]

District Court, S. D. Ohio. 1878.

SALE—WARRANTY—MACHINE MADE FOR PARTICULAR PURPOSE—WELL KNOWN AND ASCERTAINED MACHINE.

Where a machine ordered and sold is a known and ascertained article, the purchaser is liable whether it answers the purpose for which it was intended or not. But where it is not a known and ascertained article, but it is a specific chattel ordered and made to perform a certain purpose, the law implies a warranty that it shall be fit for the purpose for which it was intended. The mechanic making the machine may, however, relieve himself from such warranty by a specific contract not to be responsible for the adaptability of the machine for the intended purpose.

In admiralty.

Henry Hooper and F. W. Moore, for libellant.

Coppock & Caldwell, for defendant.

SWING, District Judge. The libellant, [Arthur G.] Moore, sues the steamboat, Charles Morgan, for machinery, viz.: a steam condenser, supplied at the request of the master, and upon the credit of the boat, and claims the sum of $2,333. Captain Stein, the master and owner, sets up as a defense, that Moore induced him to purchase a certain apparatus, called a "steam condenser;" that he held himself out as a skillful mechanic and that the condenser would answer the purpose for which it was made; that the machine was a new mechanical contrivance, called "the condenser," to be connected with the engines and boilers, and would cause a great saving of fuel, and enable the boat to run with lower pressure of steam; that relying upon these representations, he entered into an agreement with the libellant for the construction of said "condenser," for which he was to pay what the labor and materials would fairly be worth; that Moore constructed the machine, and represented that the same was built in a workmanlike manner, and would accomplish the purpose for which it was made; that on trial it was found to be constructed in such an unworkmanlike manner, that it would not, and did not, answer the purpose for which it was constructed, and was utterly worthless; that it was constantly giving way, breaking, causing detentions, and endangering the other machinery of the boat; and that he was finally compelled to remove it, on account of the inferior materials, defects, and want of skill in its construction. The condenser was an utter failure and of no value. The libellant had concealed the fact that he was not using proper skill and materials, and thereby perpetrated a fraud upon him, and induced him (the claimant) to pay a thousand dollars, for which he asks judgment. This is the state of the pleadings between the two parties. The proof shows that the condenser and apparatus was furnished the boat, and that the materials and labor in it were reasonably worth $3,333.60; that libellant had been paid upon the same the sum of $1,000, and that the balance is still due thereon. Of course, if the proof sustains the allegations of the claimant, he is still entitled to a decree. The general facts are these: Jones, Leathers & Pauley, patentees of a condensing engine, which they represent as a machine of great merit, were very anxious to introduce it upon the boats of the Western waters. For this purpose they prevailed upon Capt. Stein, an old steamboatman, whose reputation as a navigator was very high, to adopt the machine and place it upon his new

boat. Moore, the libellant, was a machinist, manufacturing machinery for steamboats, having no connection with the patentees, or interest in the patent.

This is the position of the three parties when they undertook to make the arrangement, out of which this difficulty originated. The original and incipient steps were as follows: Witness Thorp says, that Leathers, one of the patentees, solicited him to use his influence with Capt. Stein to have him put a condenser on his boat, and that if it failed, it should cost him nothing. Leathers himself says, that he induced Stein to put it on, and that he made the arrangements for that purpose with Stein. The letters in the case also show an effort upon the part of the patentees to induce Capt. Stein to enter into this contract. The letter of Pauley, which Leathers says was written under his direction, states: "Captain Stein and myself had a talk Saturday, and we have come to the conclusion that it would be best for you to go down with Stein, if you possibly can make the trip, that is to Vicksburg. He wants the condensers, and he wants you (Moore) to build them. Capt. Leathers and myself will guarantee them." Now as to the agreement, Moore says that he told Capt. Stein, in the presence of McFarland, the engineer, that he took no responsibility whatever in regard to the working of the machine, and he gives the following as the understanding between the parties: First—He was to build the machine. Second—That Capt. Stein was to pay him for it. Third—That Capt Leathers was to assist Stein in payment, either by negotiating his paper, or giving time. McFarland corroborates Moore in assuming no responsibility whatever in regard to the working of the machine, the conversation having taken place in his presence. Nor does Capt. Stein contradict this in terms. He insists from time to time that Leathers should be responsible to Moore for the balance of this money. He goes so far as to cause Moore to draw a check upon Leathers. And when suit is about to be brought, he urges, "Wait until I can see Leathers. Leathers ought to be responsible for this." According to the view which I take of the testimony, Captain Stein evidently had that idea, that these patentees, who had more interest in the thing than anybody else, who had everything at stake in its success, who selected the most prudent captain upon the entire river to introduce this wonderful invention of theirs, by placing it upon his new boat which he was then constructing, were responsible for its success. What duty does the law impose upon each? It will not be denied that when a mechanic undertakes to perform any work, or to furnish any materials, he is required to do it in a skillful and workmanlike manner; that the materials must be proper and suitable for the purpose. If he undertake to make an article for a specific purpose, it must be reasonably fit and suited for that purpose. Was the mechanical labor performed in a skillful and workmanlike manner?

Testimony clearly shows that the workmanship was good, and that the materials furnished were up to the standard. He is a machinist of good reputation, and was on that very account selected by the patentees. Ross, McFarland and Goode, the engineer of the boat, all testify to the good character of the work. It is true, Jones and Stein both claim that the workmanship was inferior; but then Stein is no machinist, and Jones in a previous letter made no specific objections to the machinery. The law, however, requires, that he who undertakes to make a particular article, for a specific purpose, shall make that particular article fit for the uses and purposes for which it was constructed; but it is also a well known proposition in law that the machinist may by a specific contract release himself from this responsibility. This Moore claims he had done, by refusing to guarantee it. It appears that the machine was simply an experiment. Out of the hundreds of boats navigating the Western waters only three have adopted it. No wonder that Moore, who had never manufactured the machine, refused to take the responsibility. The patentees claimed that the machine was so valuable that there "was millions in it." The machine was an utter failure; it failed to answer the purpose required of it. But as Moore made it at Captain Stein's instance, and as Moore refused to guarantee it, the law imposes the duty of paying for it upon Captain Stein. The patentees are the only men who guaranteed it. They said that Stein should not lose anything if it was a failure; that if it did not perform its office, Stein should pay nothing for it. And how, in the face of all these letters of theirs, they can say that they have nothing to do with it, is very strange to me. Now what is the law upon this state of facts? Broom, Leg. Max. 776, 777, states: "Accordingly, where an agreement is for a specific chattel, in its then state, there is no implied warranty of its fitness or merchantable quality; but if a person is employed to make a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used." Such, I said, would be the law in this case, if the party who made it was not protected by a specific contract which he made, that he would assume no such responsibility. But this doctrine is laid down by Broom, and is recognized in Benj. Sales, 479; Chit. Cont. 391; and Strong, Sales, 371, as modified in Broom, Leg. Max. 661, where he says: "A marked distinction will at once be noticed between the cases falling within the class just noticed" (which is the class I have alluded to) "and those in which it has been held that, where a warranty or contract of sale has reference to a certain specific chattel the purchaser will be liable for the price agreed upon, on proof that the particular chattel specified has been duly sent according

to the order, and will not be permitted to engraft any additional terms upon the contract. If, for instance a two-color printing machine, being a known and ascertained article, has been ordered by the defendant, he cannot excuse himself from liability to pay for it by saying that the article in question does not answer his purpose, because the sole undertaking, in this case, on the part of the vendor, was to supply the particular article ordered, and that undertaking has been performed by him. If, on the other hand, the article ordered by the defendant were not a known and ascertained article, as if he had merely ordered, and plaintiff had agreed to supply, a machine for printing two colors, the defendant would not be liable, unless the instrument were reasonably fit for the purpose for which it was ordered. In Benjamin on Sales (section 56) he says: "A mistake by the buyer in supposing that the article bought by him will answer a certain purpose for which it turns out to be unavailable, is not a mistake as to the subject-matter of the contract, but is a collateral fact, and affords no ground for pretending that he did not assent to the bargain, whatever may be his right afterward to rescind it if the vendor warranted its adaptability to the intended purpose." And in Story on Sales (section 372): "Thus, where the plaintiff was the patentee and manufacturer of a patent machine for printing two colors, and the defendant, having seen one of the machines on the plaintiff's premises, ordered one, the plaintiff in a written memorandum undertaking to make 'a two-color printing machine on my patent principle' —and in an action for the price, defendant excuses himself from liability on the ground that the machine had been found useless for printing in two colors. It was held that if the machine described was a known and ascertained article, ordered by the defendant, he was liable whether it answered the purpose or not; but that if it were not a known and ascertained article, and the plaintiff merely agreed to supply a machine for printing in two colors, the defendant was not liable unless the instrument was reasonably fit for such a purpose." This doctrine is very clearly laid down in Ollivant v. Bayley, 5 Q. B. 288; Chanter v. Hopkins, 4 Mees. & W. 399; Prideaux v. Bunnett, 1 C. B. (N. S.) 613, where the authorities are cited on this question.

Here, in this case, a known patentable article is purchased, and the machinist undertakes to supply it in accordance with the plans furnished to him. If it operates, all well and good. The law requires him to construct it according to the well-recognized plan. If he fail to do this, and the machine does not operate on that account, he loses his money. It appears that at the request of the patentees and Captain Stein, he, Moore, goes to New Orleans and Memphis to inspect the working of a similar machine on board the Natchez. The patentees furnish the plans, and one of them testifies that these plans were correct drawings of the condenser upon the Natchez. Moore says, that the machine he built was in exact accordance with the plans furnished to him except as to the position of the condenser. There is no proof that this change caused the failure of the machine. If he undertook to make any changes, and these changes were the cause of the failure, he would have to stand the loss. In such a case Captain Stein could rely upon the judgment of the mechanic, and if the proof showed that the attempted improvement led to the failure, the mechanic was responsible. But there is no proof that the breaking of the valves, or failure of this machine, was owing to any change made by Moore in the plans.

There is, however, one significant fact in the case, which has an important bearing on the conclusion to which we have come. There is a letter of Jones, one of the patentees, written after the failure of the steam condenser, in which he says: "It is true that the drawings were handed to you (Moore) by Pauley, and I presume that he mentioned to you that the valves must be balanced, and that the drawings in this respect must be modified." And then goes on to say that they intend making improvements in the plans until they are perfect. Here is an admission that these plans furnished to Moore are incorrect, and now when the machine fails, they attempt to shield themselves upon the pretense that it was not properly constructed. What were the defects of the plans, or the cause of the failure of the machine, does not appear. Moore and Goode, the engineer of the boat, are positive that the result was produced by a too great pressure of steam. The great fact, however, remains, that Moore made the machine according to the plans furnished by the patentees, and that these plans were wrong. In the construction of a defined machine he has fully complied with what the law requires. It is hard upon Capt. Stein. Had the patentees been before the court, Capt. Stein could have called upon them to fulfill their guarantee. As it is, a decree must be rendered for the libellant for the balance due upon his account, $2,333.

Case No. 9,755.

MOORE v. CONNECTICUT MUT. LIFE INS. CO.

[1 Flip. 363; 1 Am. Law T. Rep. (N. S.) 319; 3 Ins. Law J. 444; 4 Bigelow, Ins. Cas. 138.] [1]

Circuit Court, E. D. Michigan. April, 7–12, 1874.

LIFE INSURANCE—SUICIDE PROVIDED AGAINST—THE LAW ON THAT SUBJECT.

1. The policy had this clause in it: "If the assured shall die by his own hand," etc., "this policy shall be void and of no effect." *Held*, that

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 1 Am. Law T. Rep. (N. S.) 319, contains only a partial report.]

"suicide" and "die by his own hand," mean, in general terms, the same thing.

2. In a suicide sanity is always presumed, and insanity must be proven, by one claiming exemption on that account. Nor is suicide evidence of insanity in itself alone.

[Wolff v. Connecticut Mut. Life Ins. Co., Case No 17,929.]

3. The presumption of fact, in such case, is that the person "died by his or her own hand," in the sense of the policy. The plaintiff must show the contrary.

4. Every degree of insanity will not exempt a person from the consequences of an act. There must be more than error of judgment. There must be mental disorder.

5. In order to render the defendant liable the mind of the party assured must have been so far deranged as to be incapable of rational judgment in regard to the act of self destruction. The plaintiff must prove that the assured was moved by an insane impulse which he could not resist, or that his powers of reason were so far overthrown as that he could not exercise them in reference to the act of self destruction.

6. "General nature, consequence and effect of the act," are words not restricted to the act of taking his life, but to the result of it. They refer to the accomplished act of suicide.

At law.

C. I. Walker and A. Pond, for plaintiff.

A. B. Maynard and G. V. N. Lothrop, for defendant.

LONGYEAR, District Judge (charging jury). This suit is brought by Lottie A. Moore, the wife of Everett W. Moore, to recover the amount of a policy issued by defendant to her on the life of her late husband, for $5,000. The contract itself is not disputed, but there is a clause in it that raises the whole question in this case, and that clause is as follows: "If the assured shall die by his own hand," etc., "this policy shall be void and of no effect."

That the assured took his own life there is no dispute. The simple question is whether the circumstances under which he took his own life are such as to bring the case within that provision of the policy, that is, was it within the sense of the words "die by his own hand," as these words were used in the policy?

These words, "die by his own hand," mean the same as suicide, in general terms. That was decided in the case of Life Ins. Co. v. Terry, 15 Wall. [82 U. S.] 591, which has been laid before you here, and it has been seen all the way through in the argument of this case, and from the books which have been read, that the discussion of this very clause, and the words similar to it, proceed upon the same principles and upon the same general considerations as suicide; and, consequently, I call your attention in the first place to the definition of suicide as bearing upon the question here under consideration, and I will read that from 4 Bl. Comm. 189. Suicide was placed so long ago as the time when Blackstone wrote, and still stands there by the English law, and also so far recognized and provided for or against in this country, as felonious homicide. It is placed in the same category as murder. I read from Blackstone as follows:

"Felonious homicide is an act of a very different nature from the former," (that is, of excusable homicide,) "being the killing of a human creature of any age or sex without justification or excuse. This must be done either by killing one's self or another man."

"Self murder—the pretended heroism, but real cowardice of the stoic philosophers, who destroyed themselves to avoid the ills which they had not the fortitude to endure—though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law with the cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers that no man hath a power to destroy life but by commission from God, the author of it; and, as the suicide is guilty of a double offense, one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has, therefore, ranked this among the highest crimes, making it a peculiar species of felony—a felony committed on one's self; and this admits of accessories before the fact, as well as other felonies, for if one persuades another to kill himself, and he does so, the adviser is guilty of murder."

Now comes the definition of suicide, which I desire to call your particular attention to: "A felo de se, therefore, is he who deliberately puts an end to his own existence, or commits any unlawful, malicious act, the consequence of which is his own death, as if attempting to kill another he runs upon his antagonist's sword, or shooting at another the gun bursts and kills himself. The party must be of years of discretion and in his senses, else it is no crime."

That this party was of years of discretion there is no dispute. The only dispute in this case is as to his being in his senses when he committed the act. In regard to this, sanity is presumed. All persons are presumed to be sane until the contrary is proven. Insanity must always be proven by the party claiming an exemption on account of it. The fact of suicide is not of itself evidence of insanity. That, however, is not disputed, and I need not stop to discuss it to any length whatever.

This covers the first and second of defendant's requests to charge, which I will here read for the purpose of disposing of them.

The defendant requests the court to charge the jury: 1st—"It being admitted that the assured, Everett W. Moore, destroyed his own life, it is a presumption in fact that he "died by his own hand," and in the sense of the policy, and the burden of proof is upon the plaintiff to show that he came to his death under such circumstances as makes

the defendant liable upon the policy." This is correct, and I so charge you. 2d—"There is no presumption arising from the act of self destruction that it was the result of insanity, and the burden of proof is upon the plaintiff to prove that at the time of the death of the said Everett W. Moore, he was insane to such a degree that the defendant is liable upon the policy."

This is simply the proposition that I have already stated, with, however, perhaps a very little qualification. The charge, as I give it to you is, that suicide is not of itself evidence of insanity, standing alone by itself; and the burden is upon the plaintiff in this case to show that insanity existed, and that it was of such a nature and degree as to make the company liable. I will, therefore, next call your attention to the degree of insanity that will not or that will excuse or exempt the party from the provision in the policy.

First, it is not every degree of insanity that will exempt the party taking his own life from the consequences of the act. A person may from anger, jealousy, shame, pride, dread of exposure, fear of coming to poverty, or the desire to escape from the ills of life be considered in a certain sense insane; but these alone are not enough to exempt him from the consequences of self destruction, where he committed the act deliberately and intelligently.

In regard to this it is sufficient to explain that an error of judgment as to the commission of the act is not sufficient to exempt the party—a mere error of judgment, for we may say that all men, perhaps, who decide to take their own lives, when they do it deliberately and intelligently, commit an error of judgment. That is not sufficient to exempt them.

Mental disorder, amounting to insanity, must appear in order to exempt the party. But while these causes, which I have named, are not sufficient alone (such as anger, dread of exposure, a desire to escape from the ills of life, etc.), to exempt the party from the consequences of suicide, there undoubtedly may be circumstances under which these operating together with other circumstances upon the mind, may produce a disorder of the mind. And that is for the jury to determine in every case. Where they have produced a disorder of the mind, then it is that which you are to consider, and not the mere peculiar causes which produced it. And in this connection, I will notice the third, fourth, and fifth of the defendant's requests, and the plaintiff's first request.

The plaintiff requests the court to charge the jury: "That if the death of the deceased was not his voluntary, intelligent act, he did not die by his own hand within the meaning of the policy." That is correct as a general principle, and I so charge you.

The defendant's third request is as follows: "If the assured, being in possession of his reasoning faculties, and from shame, pride, a dread of exposure, or a desire to escape from the ills of life, intentionally took his own life, there can be no recovery." This I have already explained to you.

The fourth request is: "If the assured was embarrassed in his business, or had drawn checks without having any funds upon which to draw, or had committed forgeries and exposure was imminent, or was in a distressed state of mind from this or some other cause, and for any or all of these reasons he formed a determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable." This is undoubtedly correct, and I so charge you. If for these reasons he took his own life in the exercise of his usual reasoning faculties, then the company is not liable.

5th—"It is not every kind or degree of insanity that will so far excuse the act of self-destruction as to make the company liable." I have already covered this in my charge. I merely read these now for the purpose of disposing of them.

Thus far there is no great difficulty in applying the law to any given case, or to this case. You will next proceed to the question of the degree of insanity that will excuse. Here the difficulty, in cases of this kind, begins, and your real burdens in this case commence. The court can aid you but little in this respect, further than to lay down the general principles by which you are to be governed. These have been well defined by the highest court of adjudicature in this country, by whose decision this court and the jury must be governed. They are well set forth in the requests of the respective counsel.

I will now read the sixth and seventh requests of defendant's counsel, which are as follows: 6th—"To have this effect—that is, that insanity shall have the effect to excuse the act—the mind must be so far deranged as to have made the deceased incapable of using a rational judgment in regard to the act of self-destruction." This is correct, and I so charge you.

7th—"To make the defendant liable, the plaintiff must prove either, first, that the assured was impelled by an insane impulse which the reason that was left him did not enable him to resist; or, secondly, that his reasoning powers were so far overthrown that he could not exercise them on the act which he was about to do." This request is correct law, and I so charge you.

The plaintiff's second request virtually covers the same ground, and I will simply read it for the purpose of showing that fact, and for the purpose of disposing of it: "If the deceased was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was

about to do, the company is liable." This is correct, and I so charge you.

I will now dispose of plaintiff's third request, as to which there is some dispute between counsel. The request is as follows: "If the death was caused by the voluntary act of the deceased, he knowing and intending that his death would be the result of his act, and when his reasoning faculties were so far impaired that he was not able to understand the moral character, general nature, consequences and effects, of the act he was about to commit; or, if he was impelled thereto by an insane impulse which he had not the power to resist, such death was not within the contemplation of the parties to the contract, and the insurer is liable."

The last part of the request is included in the second request, and it can be just as well stricken out, and I will leave it out for the purpose of perspicuity in considering this particular request. I will read it again, leaving out that last clause: "If the death was caused," etc., "when his reasoning faculties were so impaired that he was not able to understand the moral character, the general nature, consequence and effect of the act he was about to commit, the company is liable."

That is the request which the court has been asked to give. The criticism upon this request by defendant's counsel is, in the first place, that, although so declared by the supreme court of the United States in the case of Life Ins. Co. v. Terry [15 Wall. (82 U. S.) 580], it was merely dictum—that it was not included in the points presented to the court for decision, and consequently is not binding upon this court, and that it is not good law. If that declaration of the supreme court was within the question presented, it is absolutely binding upon this court and upon you. We will, therefore, first consider that question.

I think the learned court of appeals of New York, which has made the same criticism on the decision of the supreme court (Van Zandt v. Mutual Ben. Life Ins. Co., 55 N. Y. 169), and the learned counsel in this case have overlooked one peculiar feature of the case of Life Ins. Co. v. Terry [supra], and that is the refusal of the court below to charge as requested. This precise question was presented in the request to charge, which the court refused to give, and the charge which was given by the court below must be read in connection with and in the light of the requests which had been made and refused, and that request presenting this exact question of the moral character of the act, and of moral insanity, in my opinion was clearly and fully before the supreme court. For the purpose of sustaining that position, I will read the request which was refused, and in response to which the charge was given which was given.

The second request on the part of the defendant was: "That if the jury believe, from the evidence, that the said self-destruction of said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act he was about to commit, and the consequence which would result from it, then in that case it was wholly immaterial that he was impelled thereto by insane impulse which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his action," thus presenting the exact question upon which the supreme court passed, and which is embodied in the plaintiff's third request.

It is true, the court below did not include in express terms in the charge given this moral responsibility or of moral insanity, but the terms used in the charge which was given are broad enough to include that; and in view of the fact that the court had been requested to charge otherwise, and then using expressions which are broad enough to include that, it is fair to presume that it was so included, and that the jury so understood.

The language of the charge as given was as follows: "If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was about to do, the company is liable." This charge must be read in the light of the request which had been refused, and which expressly included the question of moral insanity.

I therefore hold that the question was disposed of finally by the supreme court in a manner absolutely binding upon this court. I therefore give the plaintiff's third request as stated. These words, "general nature, consequence and effect of the act," have been somewhat criticised, and I deem it my duty to make a few remarks in regard to them, as they are used in that decision. They do not refer to the act, in my opinion, by which the deceased took his life. They are broader than that; they refer to the entire act—not only the act by which he took his life, but the result of it; that is, they cover the "suicide," the accomplished fact, and that is what is referred to as the "general nature, consequence and effect of the act"—that is, the general nature of the suicide, of the murder committed upon one's self, the enormity and effect of it, otherwise it would be inconsistent with what precedes; because, if it was his voluntary act, he knowing and intending that his death would be the result, then it would be a simple absurdity to put the question to you, whether, under these circumstances, if he did not understand the general nature and consequences of the act, the company would be liable. That would be, I say, absurd. These words then, have a broader meaning, and cover the entire accomplished fact—the act of suicide.

In this view of the case, gentlemen of the jury, it is entirely unnecessary for me to detain you with any remarks or considerations, growing out of my own views or opinions as

to the correctness of the law as established by the supreme court, and which has just been given you as contained in the plaintiff's third request. I will, therefore, pass it with a single remark, that a considerable time ago, after that case of Life Ins. Co. v. Terry had been decided in the court below, but before it was decided by the supreme court, I had occasion to pass upon the same question in the case of Wolff v. Connecticut Mut. Life Ins. Co. [see Case No. 17,929], and then decided as I now find myself enabled to decide, and my views have not changed upon that subject since that time.

Although I find it nowhere distinctly so stated, yet from the discussions upon the subject, I gather that these defenses, as they may be called, to the crime of suicide, are placed upon the same ground so far as this question of the moral character of the act is concerned, as defenses for murder. It has always been held that a person killing another when so insane as not to be capable of judging between right and wrong, should not be convicted of murder. What I mean is, the principle is the same, although the standard or degree may be different. This is virtually so stated in Life Ins. Co. v. Terry, 15 Wall. [82 U. S.] 591. This ability to judge between right and wrong, refers to a principle of the human mind. It does not depend at all upon what a man's religious belief may be, or whether he has any or has not. It does not depend upon whether he believes in a God and a future state, or the contrary. It refers to that principle which is planted in every human breast—that sense of right and wrong which exists in the mind of the disciples of Buddha or of Confucius, or of the followers of Mahomet or of Christ, and in the mind of him who believes in none of them. It is that sense of right and wrong that we all feel and realize and understand. It is true that sense is stronger in some persons than in others, but it is that to which reference is had in this connection.

The defendant's eighth request I will now consider.

Counsel for Defendant.—That is virtually passed upon by your honor; it is simply refused, as I understand it.

The Court.—Very well, that is all that need be said on that subject. Defendant's eighth request was as follows: "That the evidence in this case does not tend to show that degree of insanity on the part of the assured which excuses the act of self-destruction, and justifies the jury in rendering a verdict for the plaintiff; therefore the verdict must be for the defendant."

Gentlemen of the jury, I have done about all that I can do in this case, and have made these questions as clear as they can be made with the ability I have; and if it is not clear in your minds what your duty is, it rests in the difficulty of making it so more than in the efforts which have been made by the counsel on both sides, and by the court. The propositions of law that have been stated to you are such as there is no dispute about between counsel, with the exception of the last, and that has been determined by the supreme court, and we must obey. This case, gentlemen of the jury, rests upon presumptions entirely; that is to say, it rests upon the conclusions which you are to draw as to the existence of a certain fact from the proof of the existence of other facts. For insanity and the degree of it are not susceptible of positive proof in a case like this. There are instances in which it may be proven with a great degree of certainty by positive proof, such as in the case of a raving maniac; but here it rests upon presumptions entirely, and your decision of the case depends upon the conclusions which you shall draw as to the fact of sanity or insanity from the facts proven. You start out with the presumption of sanity. The burden of proof is upon the plaintiff to prove the contrary. If the plaintiff has sustained that burden, and has so proven to your satisfaction, then she may be entitled to recover at your hands. If she has not, then the defendant is entitled to your verdict.

The first question for you to determine is, Do the presumptions arising from the facts proven overcome the presumption of sanity? The truest test is whether the facts proven, from which you are asked to find insanity, are inconsistent with sanity. If they are so inconsistent with the exercise of sound mind that you cannot reasonably attribute such facts thereto, then they are evidence of insanity, but not otherwise.

Now there is a great range of indications as to soundness or unsoundness of mind, all the way from the ravings of the maniac, which are patent to the eye and the ear, down to the retiring melancholic, who seeks to conceal the worm which is gnawing at his mental vitality. These indications, I say, range all the way between these; and here is where the difficulty exists in coming to a correct conclusion as to what facts do indicate; but it is peculiarly and entirely and exclusively within your province, and I leave it to you without even rehearsing the facts or in any manner deciding them.

Evidence is that which carries conviction to the mind. You are to look at all the facts which have been proven, and to bring to bear upon them your best judgment aided by your experience and observations in life, and considerations to which you have access, without, however, going outside of the proofs in the case, and decide for yourselves whether, in the first place, Everett W. Moore, at the time he took his own life, was sane or insane. Secondly, if you shall find that he was insane, then whether under the charge that has been already given, he was so insane as to excuse or exempt him and this plaintiff from the consequences of the prohibition or disability in the policy. I recommend to you in your consideration to adopt

that order: First, the question of insanity in general terms—was he insane? If you decide that he was not insane, then, of course, that is the end of it, and your verdict must be for the defendant. If you shall decide that he was insane, you must go then a step further, and inquire whether his insanity was of that degree and kind that you are satisfied that he was driven by an irresistible impulse to commit the act, or that he was incapable of exercising his reasoning powers as to the moral character, general effect and consequences of taking his own life. If, after finding that he was insane, you shall come to the conclusion that he was thus insane, the plaintiff is entitled to recover at your hands; otherwise not. If your verdict shall be for the plaintiff it will be for $5,000, and interest from the 30th day of December, 1873, to and including the present date.

Counsel for Defendant.—I desire, growing out of what your honor has said, to make another request: "That the mere fact that the assured did not fully understand and appreciate the moral character of the act of self-destruction, does not so far excuse the act as to make the defendant liable."

The Court.—I cannot see how this varies in any manner the charge as already given, and I therefore refuse this request, with the simple addition that the jury are to take this refusal into consideration, in connection with the charge which has already been given upon this subject.

The jury, after consideration, returned a verdict for plaintiff.

Defendant excepted to refusal of the court to charge as requested in eighth request, and the last request made above. Exception was also taken to the court ruling out the testimony offered by defendant of certain witnesses who had testified as to conduct of deceased prior to his death, and on which they had formed no opinion as to his sanity or insanity, but had, since his death formed an opinion. They were asked to state what this last opinion was, which was objected to as being incompetent and irrelevant and the objection was sustained by the court.

NOTE. "If he shall die by suicide" or "by his own hand," the self-destruction is voluntary, and the meaning is the same. See 7 Heisk. 567; 21 Pa. St. 466; 4 Hill, 74; 44 E. C. L. 336; 4 Allen, 96; [Life Ins. Co. v. Terry]; 15 Wall. [82 U. S.] 591; 54 Me. 224. Mental insanity has been defined to be, where a person has not mind of sufficient strength to understand the physical act about to be committed, and moral insanity is where he cannot distinguish between right and wrong. Should the insanity be of either kind, the policy is not protected against by the words "suicide" or "dying by hand." See Terry v. Life Ins. Co. [Case No. 13,839], and 6 Bush, 268. For a further discussion as to the law bearing upon the questions raised in this case, see Equitable Life Assur. Soc. v. Patterson, 41 Ga. 338; Cooper v. Mutual Ins. Co., 102 Mass. 227; Minick v. Mutual Ben. Life Ins. Co., 3 Brewst. 502; Stormont v. Waterloo Life & Casualty Assur. Co., 1 Fost. & F. 22; Borradaile v. Hunter, 5 Man. & G. 639; and Schwabe v. Clift, 2 Car. & K. 134. As to suicide, see. further, 4 Hill, 73; 4 Lans. 202; 8 N. Y. 299; 37 N. Y. 580; 47 N. Y. 52; 55 N. Y. 651; 59 N. Y. 557; 65 N. Y. 232.

NOTE [from 4 Bigelow, Ins. Cas. 138]. See note to Borradaile v. Hunter, 2 Bigelow, Ins. Cas. 303.

Case No. 9,756.

MOORE v. The C. P. MOREY.

[8 Reporter, 583;[1] 25 Int. Rev. Rec. 359.]

Circuit Court, N. D. New York. August 21, 1879.

ADMIRALTY — NEGLIGENCE — DUTY OF VESSEL IN TOW TO FURNISH PROPER LINE.

Where a tug took in tow a schooner, and the tow line was frozen and stiff, and the tug asked for a better line, but no other was furnished by the schooner: *Held*, that the tug was not liable for any damages resulting to the schooner from the line slipping off the tow post.

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

In admiralty.

Wm. A. Moore and George B. Hibbard, for libellant.

J. A. Hathaway and Albertus Perry, for claimant.

BLATCHFORD, Circuit Judge. The only negligence charged in the libel against the tug is, that the master and crew of the tug either recklessly threw off the line of the schooner from the tow post of the tug or carelessly permitted it to slip off while the schooner was in peril and danger of loss should her line be permitted to slip off the tow post of the tug. It is set up in the answer in defence that the captain and crew of the schooner undertook to furnish the tug with a sufficient tow line to tow the vessel into the harbor; that while the schooner was disabled and the current running out of the river and harbor and a heavy sea was rolling and a strong wind was blowing, all of which was well known to the crew of the schooner, her captain and crew neglected and refused to furnish to the tug a dry and suitable line for such purposes; but, on the contrary, furnished the tug with an improper and insufficient line for such purpose, for the reason that the line so furnished was wet and frozen and was covered with ice and was stiff and unyielding, and it was impossible for the captain and crew of the tug to make it fast or keep it from slipping on the post used for the purpose of fastening said tow line to; and that the crew made every effort that lay in their power to fasten and secure said line and prevent it from slipping and getting loose from said post, but were unable to prevent it from slipping and getting detached from said post. The district judge, in his decision, found that the slipping of the line was not

[1] [Reprinted from 8 Reporter, 583, by permission.]

owing to any negligence on the part of the tug, but arose from the fact that the line was frozen to such an extent that it could not be securely fastened; that notice of this fact was given by the crew of the tug to the crew of the schooner before the service was undertaken; that the crew of the tug gave their best efforts to the service, and that the tug fulfilled every requirement incumbent upon it for the safe performance of its duty. The same conclusions are arrived at in the findings made by this court. Under the circumstances of this case, the contract between the parties was only that the tug should do her best with the frozen line. She was tendered a frozen line; she asked for a better one; she was told that that was the only one there was, and she was substantially told to do the best she could with it; she did the best she could with it, and there her duty terminated. It was not her duty to have a better line, or an unfrozen line, or to see that the line was in a different condition from its actual condition. Any duty incumbent upon her in that regard was discharged by her objections distinctly made to the frozen line, out of which arose the contract that the tug should do the best that could be done with the use of the frozen line. Libel dismissed.

MOORE (DEVIGNY v.). See Case No. 3,838.

Case No. 9,757.

MOORE v. DOVE.

[1 Hayw. & H. 161.] [1]

Circuit Court, District of Columbia. Dec. 7, 1843.

LANDLORD AND TENANT—PROPERTY RENTED FOR ANOTHER—LIABILITY.

Where a party agreed to rent certain premises and pay the rent for another, he will be liable for the rent without occupying the premises.

[This was an action by James Moore, Sr., against William T. Dove.]

J. Hellen, for plaintiff.

Jos. H. Bradley, for defendant.

This suit was brought for a year's rent of premises owned by the plaintiff. The declaration contained two counts. The first count alleged that the defendant occupied, possessed and enjoyed the said premises, and promised to pay the said rent. The second count that he, the defendant, promised to pay to the plaintiff for the premises, as much as the premises were worth, for the use and occupation and possession of said premises; and that he, the defendant, has not paid any part of the rent due. The plea of the defendant was non-assumpsit. Issue was joined, and the jury brought in a verdict for the plaintiff for $92.12. The defendant, by his attorney, moved for a new trial: Because the action was brought for the use and occupation of a tenement, and the only proof offered was that the defendant agreed to rent the same and pay the said rent for another person, and not for his own use, and that he never did occupy the same himself. The defendant, through his attorney, objected to the admissibility of said evidence in this action, but THE COURT overruled the objection, and instructed the jury if they believe the evidence the plaintiff was entitled to recover.

Motion for new trial overruled and judgment entered on the verdict.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

MOORE (DRIGGS v.). See Case No. 4,083.

Case No. 9,758.

MOORE v. DULANY.

[1 Cranch, C. C. 341.] [1]

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

TRIAL — PRODUCTION OF DEPOSITIONS — PRIVATE AGREEMENT BETWEEN COUNSEL.

The court will not compel the opposite party to produce depositions taken by consent, nor enforce the private agreements of counsel, but will see that parties are not entrapped by such agreements.

Assault and battery.

Mr. Youngs, for defendant, stated to the court that the plaintiff had, by consent of defendant's counsel, taken the deposition of Mrs. Hodge and Mrs. May, and he now called upon the plaintiff to produce them, and prayed the court to compel the plaintiff to produce them. But THE COURT refused, there being no consent entered on record, and the court cannot undertake to enforce the private agreements of counsel, they must depend upon the honor of each other. The court will not suffer a party to be entrapped by such agreements. Verdict for the plaintiff, one cent.

Case No. 9,759.

MOORE v. DUNLOP.

[1 Cranch, C. C. 180.] [1]

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

JUDGMENT—WRIT OF ERROR—WHEN ACTSAS SUPERSEDEAS.

A writ of error is not a supersedeas unless a copy of the writ be filed in the clerk's office for the adverse party, according to the 23d section of the judiciary act of 1789 [1 Stat. 85].

[This was a suit by Thomas Moore, use of W. Oxley, against Henry Dunlop.]. Motion to quash the execution, it having issued before mandate, and after writ of error filed and citation issued. The judgment was rendered on the 6th of January, 1804. The writ of error was filed on the 13th of Janu-

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

ary. The bond and citation were filed in supreme court office on the 14th of January. The execution issued on the 2d of July, 1804, and the mandate was filed on the 7th of August, 1804. See Acts Sept. 24, 1789 (1 Stat. 73), § 22, and Feb. 27, 1801, § 8 (2 Stat. 106). No copy of the writ of error was filed in the clerk's office for the adverse party, according to the 23d section of the judiciary act of 1789 (1 Stat. 85), and on that ground THE COURT refused to quash the execution.

KILTY, Chief Judge, absent.

MOORE v. The FASHION. See Case No. 9,772.

Case No. 9,760.

MOORE et al. v. FOSTER et al.

[Chase, 222.] [1]

Circuit Court, D. Virginia. May Term, 1868.

REBELLION—NOTE DRAWN WITHIN CONFEDERATE STATES—ACCEPTED IN SATISFACTION OF DEBT.

1. Any draft, bill, or note drawn in the Confederate States, or in any state, under the proclamation of the president declared in insurrection, or in any part of them (except such part as was permanently and absolutely under the control of the forces of the United States), upon any person or persons in the Federal lines, was absolutely void as to the maker and all other parties thereto, and was not to be received in payment or satisfaction of any debt due to a citizen of a state adhering to the government.

2. When such a draft has been received, the jury must be satisfied upon good evidence that it was accepted in satisfaction of the debt.

In 1860, Foster & Moore of Norfolk, owed Moore & Brother of Baltimore, nine hundred and twenty dollars, due by negotiable notes, which fell due during the occupation of Norfolk by the Confederate army. After the evacuation of that city, Moore & Brother came to Norfolk, and Foster & Moore agreed to pay the amount of their liabilities to them in Virginia money, i. e., the bills of Virginia banks. Foster & Moore then bought a draft for one thousand dollars, drawn by the Bank of Windsor, N. C., on the Bank of Portsmouth, Va. This draft was endorsed by Maury & Co., Smith of Norfolk, and other responsible parties, and made payable to the order of Moore & Brother, to whom it was sent. They neglected to have the draft presented, and some two months afterward the Bank of Portsmouth ran its assets into the Confederate lines. They held the draft until 1867, and it was never paid. Under these circumstances, Moore & Brother brought suit upon the original notes, and tendered the draft back to Foster & Moore, who refused to receive it.

Gilmer & Son, for plaintiffs.

Mr. Guigon and John Howard, for defendants.

CHASE, Circuit Justice, instructed the jury as follows: 1st. That any draft, bill, or note drawn in the Confederate States, or in any state under the proclamation of the president declared in insurrection, or in any part of them (except such part as was permanently and absolutely under the control of the forces of the United States), upon any person or persons in the Federal lines, was void as to the maker and all other parties thereto, and was not to be received in payment of any debt when due to a citizen of any state adhering to the government; but there being a question as to whether the Bank of Windsor was, at the time this draft was drawn, in the Federal or Confederate lines, that question was for the jury to determine. 2nd. That the jury must be satisfied that the plaintiffs accepted this draft in satisfaction of the debt due them, upon good evidence.

The jury failed to agree.

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

MOORE (FOSTER v.). See Case No. 4,978.

Case No. 9,761.

MOORE v. FOWLER et al.

[Hempst. 536.] [1]

Circuit Court, D. Arkansas. May, 1847.

CONSTITUTIONAL LAW—SALE UNDER EXECUTION—APPRAISING PROPERTY—CONTRACTS MADE BEFORE PASSAGE OF LAW.

1. A state law, providing that a sale shall not be made of property under execution unless it will bring two thirds of the valuation affixed to it by three householders, is unconstitutional and void, as to contracts made before its passage. McCracken v. Hayward, 2 How. [43 U. S.] 608.

2. But such a law is valid as to contracts made after its passage, because the laws in existence at the time are necessarily referred to, and form a part of the contract, as effectually as if incorporated in it.

3. Motion to quash appraisement, overruled.

[Action by Alexander D. Moore against Absalom Fowler, Felix G. Secrest, Lewis Snapp, and William Brown, Jr.] Motion to quash appraisement, and the return of the marshal on execution.

George C. Watkins and J. M. Curran, for plaintiff.

A. Fowler, for himself and other defendants.

JOHNSON, District Judge. In the case of McCracken v. Hayward, 2 How. [43 U. S.] 608, the supreme court of the United States have established the doctrine, that a state law, providing that a sale shall not be made of property levied on under an execution, unless it will bring two thirds of its valuation, according to the opinion of three householders, is unconstitutional and void. My opinion was different. U. S. v. Conway [Case No. 14,849]. But the rule established by the supreme court is the law of this court, and to which I shall always cheerfully conform, whatever may be my own views. But

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

the court expressly limit and restrict the operation of this principle to contracts made before the passage of the law, and declare it inapplicable to contracts made after its passage, upon the ground that the laws in existence when the contract is made are necessarily referred to and form a part of the contract, as the measure of the obligation to perform it by the one party, and the rights acquired by the other. Was the contract in the present case made prior, or posterior to the appraisement act of 1840? The writing obligatory, upon which the action is founded, bears date on the 16th of August, 1844, and consequently was made subsequent to the passage of the act, and is subject to its provisions. Acts 1840, pp. 58, 59. It is contended, however, that this latter contract grew out of a prior one made by the defendant Fowler, before the passage of the act of 1840, and that the date of the original contract is to be considered as the time of making the contract upon which the judgment is based in this suit. I cannot accede to this position. The original contract, on which the first judgment rests, was entered into jointly by Robert Crittenden and Absalom Fowler. The contract upon which the judgment rests in this case was entered into and made jointly by Absalom Fowler, Felix Secrest, Lewis Snapp, and John Brown. The three latter persons were not parties to the original contract, and, as far as they are concerned, it is undoubtedly a new contract; and if it is a new contract as to them, it is equally so as to Fowler; it being an entirety, and not in its nature divisible. Motion overruled.

Case No. 9,762.

MOORE v. GADSBY.

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

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

EVIDENCE—NOTE—INTERNAL REVENUE—STAMP.

Same point as in Neale v. Hill [Case No. 10,068.]

Assumpsit [by John Moore against John Gadsby] for hay sold and delivered. Non assumpsit, and issue.

THE COURT refused to permit the note offered by the plaintiff to go in evidence to the jury, because it was "a note for the security of money," and not stamped agreeably to Act Cong. July 6, 1797, §§ 1, 13 (1 Stat. 527). The note was in these words, viz.: "Received of Jno. Moore twenty-three hundred and twenty wt. of hay, at seven pounds ten shillings per tunn, to be paid in sixty days from this date. 2,320 wt. at 7s. 6d. per C. Dollars, 29.00. Jno. Gadsby. May 23, 1800."

MOORE (GIRARDEY v.). See Case No. 5,462.

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

Case No. 9,763.

MOORE v. GREENE et al.

[2 Curt. 202.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1854.[2]

REAL PROPERTY—FRAUDULENT TRANSFERS—BILL TO SET ASIDE—STATUTE OF LIMITATION—TIME WHEN FRAUD DISCOVERED—WILL—EVIDENCE.

1. Under the laws of Rhode Island, a will of lands cannot be admitted as evidence of a devise, until it has been duly probated by the decree of a court having jurisdiction to admit it to probate.

2. To avoid the bar of the statute of limitations, set up in the answer, upon the ground of a concealed fraud, the bill must allege that the fraud was discovered within twenty years, and must show when and how it was discovered; and the evidence must satisfactorily support these averments.

[Cited in Martin v. Smith, Case No. 9,164; Baldwin v. Raplee, Id. 801; Re Dole, Id. 3,965.]

3. The statute of limitations bars equitable relief founded on a good legal title fraudulently suppressed or destroyed, in twenty years after the discovery of the fraud, in analogy to the statute bar operating in courts of law; for a court of equity will not relieve against fraud, after the lapse of such a time since its discovery, as would have barred the title at law, if no fraud had existed.

[Cited in Badger v. Badger, Case No. 718; Sullivan v. Portland & K. R. Co., Id. 13,596; Godden v. Kimmell, 99 U. S. 210.]

[Cited in brief in Butler v. Lawson, 72 Mo. 244; Kansas Pac. Ry. Co. v. McCormick, 20 Kan. 111.]

[This was a bill by Elizabeth Moore against Ray Greene and Benjamin W. Hawkins to set aside certain titles on the ground of fraud.]

Mr. Randall, for complainant.

Tillinghast & Bradley, contra.

CURTIS, Circuit Justice. This is a suit in equity. The bill states that John Manton, of Johnston, in the state of Rhode Island, died in the year 1767, leaving a will duly executed, to pass his lands, whereby he devised them to his two granddaughters, Lydia and Betsy Waterman, children of his then deceased daughter Anna, wife of Benjamin Waterman; that Betsy Waterman intermarried with Daniel Carpenter, and the complainant is her daughter and sole surviving heir. The bill further states, that at the time of his decease, John Manton left two other daughters, one the wife of Joshua Greene, and the other, the wife of Ephraim Pearce; and that the testator's three sons-in-law, conspiring together to defraud the two grandchildren of the lands devised to them, procured, by fraud, the town council, which then had jurisdiction over the probate of wills, to refuse probate of Manton's will, and thereupon to appoint an administrator. That, in further pursuance of their fraudu-

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

[2] [Affirmed in 19 How. (60 U. S.) 69.]

lent design, they proceeded to, and did make partition by deed among themselves, in severalty, of all Manton's lands, and then procured the administrator of Manton, under a license from the general assembly of the province, to sell the lands to pay fictitious debts of Manton, which they pretended were due to some of them, and so obtained colorable titles to the lands in severalty, under which it is alleged the defendants now claim some of those lands which the bill seeks to recover. The defendant, Ray Greene, answers, that he holds by descent from his father, and purchase from other heirs of his father, certain lands, formerly belonging to Manton, purchased by his grandfather of the administrator of Manton, and devised by his grandfather to his father. He denies all knowledge or information of the fraud charged in the bill; avers, upon information and belief, that his grandfather's purchase was legal and fair; and sets up the possession of his grandfather, of his father, and of himself, for a period of upwards of eighty years, and the statute of Rhode Island for quieting possessions, in bar of the bill. The other defendant, Hawkins, while he does not admit that the lands held by him were ever lands of Manton, sets forth his title thereto by purchase, and also relies on the possession of himself and of those under whom he claims, and upon the same statute for quieting possessions, as a bar. He also denies all knowledge or information of the fraud alleged in the bill.

The complainant presents two titles. The first by devise to her mother, whose heir she is by the alleged will of John Manton, of one moiety of his lands. The second by descent to her mother from John Manton, one of whose heirs she was, being one of the two children of his deceased daughter.

The first of these titles it is not possible to sustain. This court can give no effect to a will of lands in Rhode Island, until it has been duly proved by the competent authority empowered to allow wills, and admit them to probate. Tompkins v. Tompkins [Case No. 14,091]; Mathewson v. Sprague [Id. 9,278]. See Gaines v. Chew, 2 How. [43 U. S.] 646, and cases there cited. But if it were otherwise, there is no competent evidence in this case to show what the will of Manton was. The will itself is not produced, nor is there one witness examined in the cause who ever saw it, or can speak to any part of its contents. All there is upon the record on this subject, are certain traditions existing in the neighborhood, that Manton's will gave his lands to these two grandchildren. Manifestly, this is wholly insufficient, and the title by devise must be at once laid aside.

The other title by descent seems to be made out in proof, so far as respects the pedigree; and the first question is, assuming that the lands held by the defendants belonged to Manton at his decease, whether the bar of the statute of limitations can be got over. Before considering this question, it is proper to state, that it has not been insisted, nor could it be, consistently with what appears on the face of the bill, that the complainant is not within the statute, because the alleged frauds had been kept concealed, so that the complainant, or those under whom she claims, had only discovered them within twenty years. For the bill alleges, that as early as 1797, these alleged frauds were fully investigated in the course of a trial of an action brought by other heirs of Manton, and that that suit was brought in consequence of inquiries made by the complainant and the plaintiffs in that suit. And the bill also avers, that from the death of John Manton, in 1767, up to the year 1824, renewed and continual claims have been made by the heirs of Lydia and Betsy Waterman, of whom the plaintiff is one, for their portions of Manton's lands, as his rightful heirs at law, upon all persons in possession. It does not say, in terms, that those continual claims were founded on the frauds charged in this bill; but as no other ground of claim is therein suggested, the fair conclusion is, that during all this period, the frauds alleged have been known and insisted on. It is true, the bill alleges that the complainant was ignorant, until some time not specified, that Manton died seized of part of these lands, being those situate in the town of Gloucester; but as the public records of the town showed the fact, and as she did become apprised of it as soon as she caused them to be examined, and as the fact of his dying so seized, did not affect her title to relief, but only introduced another tract of land to which the same relief might be extended, it does not seem to be material, if she has recently made this discovery. But there is no proof that it is a recent discovery; and after a litigation which, according to the bill, has lasted since 1767, concerning the title of Manton's lands, there is no presumption that the complainant had not notice of what appeared on the public registry of titles of the town, where Manton was known to her, at one time, to have had extensive possessions. The bill does contain an averment, that ten years have not elapsed, since the discovery of the frauds of the sons-in-law and administrator of Manton; but it not only fails to show when and how it was discovered,—Stearns v. Page, 7 How. [48 U. S.] 829; Fisher v. Boody [Case No. 4,814],—but the averment is inconsistent with the other statements in the bill already detailed. I am of opinion therefore, that this case stands nakedly, upon the statute of limitations, the bill not averring such concealment and ignorance of the alleged fraud, as to avoid the bar, if one exists upon the facts. For it is settled that the statute of limitations is applied by a court of equity to a case of fraud, after the expiration of twenty years from

its discovery by the party defrauded. And it is equally clear, that if the complainant would avoid the bar of the statute of limitations, he must show by his bill the grounds of such avoidance. In Stearns v. Page, 7 How. [48 U. S.] 829, Mr. Justice Grier, in delivering the opinion of the court, speaking of charges of fraud where much time had elapsed, says, "And especially must there be distinct averments as to the time when the fraud was discovered, and what the discovery is, so that the court may see, whether by the exercise of ordinary diligence, the discovery might not have been before made." In Carr v. Hilton [Case No. 2,437], this court held, that to avoid the bar of the statute of limitations, the complainant must not only allege his ignorance of the fraud, but must show when and how it was discovered, and offer satisfactory evidence of the truth of these averments. These positions are deducible from settled rules of pleading. If a bill contains no sufficient matter to avoid the bar of the statute of limitations, the defendant may plead what is called a pure plea of that statute; and unless the complainant amends his bill, and inserts what he relies on as a reply to the statute, his suit is at an end. But if he does so amend, and avers infancy, coverture, or ignorance of fraud, he must support these averments, if they are denied, or he still fails to remove the bar. And as this bill does not contain any satisfactory statement, as to when or how the alleged fraud was discovered, and the case is entirely bare of evidence to show these facts, and the fraud is denied by the answers, the court cannot treat this as a case of secret fraud, discovered by the complainant within twenty years.

That those under whom the defendants claim, acquired an actual and open seizin in 1767, under deeds purporting to convey the fee-simple of the land, is shown by the bill. It details, with particularity, the different partition deeds, and deeds from Manton's administrator, charges them to be tainted with fraud, and avers, "whereby the said Lydia and Betsy Waterman, while infants, and their heirs were and have been wrongfully and unjustly defrauded, and ever since fraudulently kept out of possession of their rightful shares, proportions, and inheritances of, in, and to the large real estates of their maternal grandparent." Taking the averments of the bill together, they amount to this; that the three sons-in-law of Manton, entered, in 1767, under deeds conveying the lands in fee, and have ever since claimed by themselves or their heirs or grantees, to own the lands, and have kept out of possession the complainant, and all others claiming under the two granddaughters. It cannot be questioned therefore, that there is a bar from lapse of time, unless there is some mode of avoiding it. The complainant's counsel has urged several modes; the first is, that the statute of limitations of Rhode Island requires twenty years "uninterrupted quiet, peaceable, and actual seizin and possession," and it is urged, that inasmuch as suits were from time to time brought by persons who claimed under the same title as the complainant, against persons under whom these respondents claim, those suits stopped the running of the statute, though they were not for the same tracts of land sued for in this action, and though all of them finally terminated, against the title relied on by the complainant, and in favor of the title under which the respondents claim. Perhaps it is a sufficient answer to this position to say, that the earliest of these proceedings alleged in the bill was not commenced until December, 1795, twenty-eight years after the adverse possession was begun. But in addition to this, the institution of a suit to recover lands, in which the plaintiff fails, does not interrupt the quiet, peaceable, and actual possession and seizin of the defendant, even where that suit is between the same parties, and for the same land afterwards in contestation; nor does it tend to show that the title or possession of the party seized is defective. On the contrary the more his right is questioned, and the oftener he maintains it successfully, the stronger is the presumption that he is lawfully in possession, and the more clearly and notoriously is his possession adverse and effectual. It would be singular indeed, if the complainant could be assisted to set aside the bar of the statute, by showing that third persons had made repeated attempts to set up the title on which she relies, and had failed in those attempts. It is true, the bill charges that they did recover some verdicts, which were set aside, or appealed from, or reviewed, so that no final judgment was rendered thereon; and it attributes these failures to causes, which being disrespectful to the courts and judges of the state of Rhode Island, should hardly have been stated, without some evidence to support them; and I find no such evidence on the record.

My opinion is, that there was the necessary seizin and possession to constitute a bar, unless the complainant can bring the case within the proviso of the statute, by showing some disability. The facts upon this point are, that the seizin of those under whom the respondents claim, began in 1767. In 1777, Betsy Waterman, the complainant's mother, became of age, and her title would become barred in 1787. Why was not her title then barred? The complainant's counsel makes several answers.

That she was then under coverture. But it is settled that cumulative disabilities cannot be allowed. A party can avail himself only of the disability which existed when the title was acquired. There are many decisions that if an infant marry, her right of action is barred when the time allowed to her, as an infant, has expired, although she may then be under coverture. But it is enough to refer to the decision of the supreme

court in Mercer's Lessee v. Selden, 1 How. [42 U. S.] 37.

It is also argued that her right was suspended because her husband had an estate by the courtesy in the land. This is not so; for an actual seizin is necessary to create such an estate, and it does not appear that her husband ever entered. Mercer's Lessee v. Selden, supra. Another ground is that Betsy Waterman died before the expiration of ten years, allowed to her, after she became of age. This fact is not averred in the bill, and it has already been stated, that if the complainant desired to avoid the bar of the statute, by bringing her case within any saving in the proviso, it was necessary to plead the facts upon which such exemption is claimed. But if this defect did not exist, the proof fails to show that she died as early as 1787. The only evidence exhibited to the court, on this point, is the testimony of Thaddeus Spencer, who says he never knew the complainant's mother, she must have died many years ago; and Benjamin Thornton, who says he cannot tell when she died,—he don't know how old the complainant was when her mother died, but always understood it was in her infancy, when she was quite young. Now the proof is, that the complainant was about twenty years of age when she was married, in 1804; if so she was born in 1784. Certainly this is not sufficient to show that her mother in fact died as early as 1787. If she died in 1788, the complainant was then only in the fourth year of her age, which might be called in her infancy, when she was quite young, as Thornton heard she was. From whom he heard it, or when; whether the tradition came from sources which would make it evidence, even as to a matter respecting which tradition or reputation is admissible, does not appear. Mima Queen v. Hepburn, 7 Cranch [11 U. S.] 295. It falls far short of proving the fact of her death before 1788, with that certainty which is necessary, to let the complainant in, to overturn a possession of upwards of eighty years' duration. But if this were otherwise, the case of the complainant would not be relieved from the bar. The proviso in the statute of Rhode Island includes only "persons under age, non compos mentis, feme covert, or those imprisoned, or those beyond the limits of the United States, they bringing their suit therefor, within ten years next after such impediment is removed." I consider the true exposition of this statute to be that it is only persons to whom the right first comes, and who are then under disability, who are within the saving clause; and that when the statute has once begun to run, it runs over all subsequent disabilities; and, consequently, if Betsy Waterman died before the expiration of the ten years allowed to her after she became of age, no new period of ten years was allowed to her infant heir, the complainant, and a fortiori, that the complainant was not allowed till her full age; and a multo fortiori, not another period of ten years to be added thereto. Many of the authorities on this subject are collected in Ang. Lim. 519 et seq., and notes. But even if this were otherwise, the complainant became of age in 1805, her ten years expired in 1815, and the bill was filed in 1851. Here also the supposed life-estate of her father was relied on, as a reason why she was not bound to sue. But, as already shown, he had no life-estate, for the want of actual seizin.

It is also insisted that Benjamin Waterman was the guardian of the complainant's mother, and therefore must be considered as holding the lands which he purchased from the administrator of Manton, as her trustee, and so neither he, nor any one claiming under him, can set up the statute of limitations. To this the case of Mercer's Lessee v. Selden, already referred to, affords an answer. In that case, Selden was the statute guardian of his children, under one of whom the plaintiffs claimed, in right of the descent to that child from its mother. Selden took a conveyance of the land, from a third person, and held possession. When his title was questioned he set up the statute of limitations; and the supreme court of the United States decided it was a legal bar. This is in conformity with repeated decisions of that court. Blight's Lessee v. Rochester, 7 Wheat. [20 U. S.] 535; [Society v. Town of Pawlet] 4 Pet. [29 U. S.] 506; Willison v. Watkins, 3 Pet. [28 U. S.] 53; Bradstreet v. Huntington, 5 Pet. [30 U. S.] 440; Boone v. Chiles, 10 Pet. [35 U. S.] 177.

The complainant also relies on her absence from the state. But the rule against cumulative disabilities applies, for her mother was in the state when her right is said to have accrued, and died here; and the complainant was here when her supposed right accrued, and did not remove to New York, until 1795, and of course could not, by then going out of the state, suspend the running of the statute. Besides, whatever may have been the ancient statute of Rhode Island, the present law of limitations does not save the rights of absent persons, unless out of the United States; and it is the existing law which must govern the remedy.

On the whole, I am of opinion, that the statute of limitations affords a complete bar to this bill; and considering that the transactions charged to be fraudulent, occurred upwards of eighty-six years ago; that not only every person in any way connected with these transactions, but all who could possibly have had any knowledge of them, are long since dead; that they grew out of the settlement of an estate at a time when, from the state of the country, and the habits of the people, there was great inaccuracy in such proceedings, and still greater negligence in preserving the evidences of what was done; that it would be impossible to investigate these charges with a reasonable hope of arriving at the truth; and that the bill seeks to disturb possessions after descents, purchases, and

family settlements, which have run through three generations. I think it must be admitted that the case affords a striking exemplification of the wisdom of that statute which forbids further inquiry.

[On the complainant's appeal the case was taken to the supreme court, where the decree of this court was affirmed. 19 How. (60 U. S.) 69.]

Case No. 9,764.

MOORE et al. v. HARLEY.

[4 N. B. R. 242 (Quarto, 71);[1] 2 Balt. Law Trans. 666.]

District Court, D. Maryland. 1870.

BANKRUPTCY — PETITION NOT SUBSCRIBED — INCURABLE DEFECT.

When in an involuntary case the petitioners failed to subscribe the affidavit to the petition, *held*, the petition was defective, inasmuch as the forms prescribed by the supreme court required the affidavit and petition to be subscribed by petitioners. Defect incurable, since petition was not a petition in propria forma, such as could be amended.

[Cited in Hunt v. Pooke, Case No. 6,896.]

This was a case of involuntary bankruptcy [in the matter of Moore & Bro. against Harley.] The petition was regularly subscribed and sworn to, and the register who took the affidavit of the petitioners had signed his name in due form. But the petitioners had not subscribed the affidavit to the petition. Thereupon the respondent demurred to the petition, alleging that the petitioners had not by their petition made such a case as entitled them to have the respondent declared a bankrupt, within the provisions of the act of congress entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867 [14 Stat. 517]. Upon the hearing the demurrer was sustained, and the petition dismissed with costs. It was held that the petition was defective, inasmuch as the forms prescribed by the supreme court require that the affidavit as well as the petition should be subscribed by the petitioners, and that the defect was incurable, since the petition was not a petition in propria forma, such as could be amended.

R. McLaughlin, for plaintiffs.
Albert Ritchie, for defendant.

Case No. 9,764a.

MOORE v. HOFFMAN.

[2 Hayw. & H. 173][2]

Circuit Court, District of Columbia. Nov. 6, 1854.

DESCENT AND DISTRIBUTION — ADOPTED CHILD — WILL.

An adopted child cannot inherit property in this District, unless by will.

Appeal from the orphans' court.

[Petitioner claimed that] Thos. Moore, deceased, was the petitioner's father, and in proof thereof produced his indentures of apprenticeship, in which he was described as the son of Thomas Moore, and many witnesses testified to the fact of Thomas Moore speaking of, and acknowledging him as his son. The appellee, Mary Hoffman, the sister of the deceased, denied that the said Richard H. Moore was the son of the said Thomas Moore, or that he ever had a child, and therefore claimed, as next of kin, to be entitled to the administration of the estate of Thos. Moore, and produced proof that the wife of said Thomas Moore was never delivered of a child, and that Richard H. Moore was the son of another woman, delivered at the house of said Thomas Moore and abandoned by her, and by said Thomas Moore adopted.

The following is the decision of Wm. F. Purcell, judge of the orphans' court.

"I have examined the evidence in this case with care, as well as the laws referred to by the counsel, Messrs. Carrington and Wallach, for the parties, and decide that Richard H. Moore, the petitioner, is not the legitimate child of the deceased, but was raised by him and adopted as his son. The law in such cases does not allow such persons to inherit property unless it be willed to them, according to the statute in such cases made and provided. The petition of said Moore is therefore dismissed, and the next of kin of the deceased applying for the same will be appointed."

Carrington & Davidge, for appellant.
Bradley & Wallach, for appellee.

On appeal to the circuit court the case was fully argued by counsel. THE COURT affirmed the decision of the orphans' court, and decided that Mrs. Hoffman had the right to the estate as next of kin to Thomas Moore.

Case No. 9,765.

MOORE et al. v. HOLLIDAY et al.

[4 Dill. 52.][1]

Circuit Court, E. D. Missouri. 1876.

TAXATION — RAILROAD PROPERTY — CONSTRUCTION OF CHARTER — INJUNCTION TO RESTRAIN SUIT IN STATE COURT.

1. The judgments of the supreme court of Missouri construing the charter of the Hannibal & St. Joseph Railroad Company as to the taxation of the company's property, adopted and followed.

2. An injunction to restrain suits in the state courts for the collection of taxes, denied.

3. Under special circumstances, a temporary injunction to restrain the collection of retrospective taxes on the company's property, for all the years between 1860 and 1871, was allowed.

This is a bill [by Lewis H. Moore and others against Thomas Holliday, state auditor, and

[1] [Reprinted from 4 N. B. R. 242 (Quarto, 71), by permission.]

[2] [Reported by John A. Hayward, Esq., and George C. Hazelton, Esq.]

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

others] for injunction and relief. On motion, on the bill, for a temporary injunction.

Mr. Carr, for plaintiffs.
Mr. Henderson and others, for defendants.

DILLON, Circuit Judge. This is a bill by stockholders of the Hannibal & St. Joseph Railroad Company against the state auditor and various counties and municipalities along the main line of the road, and along the Cameron & Kansas City Branch, to restrain the collection of various taxes—state, county, school, and municipal—amounting to several hundred thousand dollars. Upon an examination of the bill, and consideration of the arguments of counsel, the following are the conclusions to which I am brought:

1. So far as the bill rests upon the proposition that section 3 of the act of September 20th, 1852, makes the mode of ascertaining the value of the road and property of the company (viz.: by the sworn statement of the president of the company), a legislative contract which cannot be altered by subsequent legislative provision, my opinion is that the proposition is unsound. The supreme court of Missouri has expressly so decided in Missouri v. Hannibal & St. Joe R. Co. [60 Mo. 143], and in the case of Livingston Co. v. Hannibal & St. Joe R. Co. [Id. 516], at the May term, 1875. That court there approves and follows the decision of the supreme court of the United States in the case of Bailey v. Maguire, 22 Wall. [89 U. S.] 215.

I am inclined to think that it is impossible to make any solid distinction between the Bailey Case and the present case, as respects the point under consideration. By the supreme court of Missouri it is held that, under the above-mentioned section 3 of the act of September 20th, 1852, the property of this railroad company is exempt from taxation for county purposes, but not from taxation for municipal, school, or other local purposes. Livingston Co. v. Hannibal & St. Joe R. Co. (May term, 1875), and prior cases there cited. This view I adopt and follow. But as respects Clay and Clinton counties, situated on the so-called branch, my opinion is that they are not within the operation of the said section 3 of the act of 1852, and other statutes applicable to the subject.

2. So far as the bill in this case asks to enjoin suits already brought and now pending in the state courts, to enforce the collection of any of the taxes complained of, it is sufficient to remark that an express statute of the United States has prohibited such interference, since the act of March 2, 1793, reenacted in section 720 of the Revised Statutes.

3. So far as the bill seeks to enjoin the taxes for 1874, by reason of the alleged illegal action of the board of equalization under the act of March 15, 1875 (Laws 1875, p. 113). my opinion is that the bill presents no sufficient grounds for the allowance of the writ of injunction. By that act the state board was made an assessing as well as an equalizing body.

4. But, as to the taxes for 1873, the bill makes just such a case as was made in several cases in this court in respect of the taxes for that year against the Iron Mountain and other companies, and where this court (Miller, Dillon, and Treat, JJ., concurring) made an order for the allowance of an injunction on the companies paying to the proper officers by a short day the amount of taxes which would be due on the basis of the valuations fixed by the county courts. If such payment was made, we would enjoin the excess pending the determination of the question. If not made, the injunction would be denied. Parmley v. St. Louis, I. M. & S. R. Co. [Case No. 10,768]; Paul v. Pacific R. R. [Id. 10,845]. A similar order will be made in the case as respects the taxes for 1873.

The injunction may also go against the collection of any county taxes by the defendants, or any of them, except on the branch road. In view of the allegations of the bill as to retrospective taxation for all the years from 1860 to 1871, inclusive, and the mode by which, and the basis on which, as alleged, the valuation was determined, I think the case made is such as to justify the allowance of a temporary injunction as to the collection of such taxes, not to interfere, however, with suits already brought to enforce them. Counsel must understand that we never have interfered, and do not intend to interfere, with suits actually depending in the state tribunals, Ordered accordingly.

MOORE (HOMANS v.). See Case No. 6,655.

Case No. 9,766.

MOORE v. HOUGH.

[2 Cranch, C. C. 561.] [1]

Circuit Court, District of Columbia. April Term, 1825.

JUSTICES OF PEACE—JURISDICTIONAL AMOUNT—SEVERAL NOTES GIVEN FOR AN ENTIRE DEBT.

If an entire debt of $250, be settled by the debtor's giving his five several promissory notes for $50 each, payable at different times; each note is within the jurisdiction of a justice of the peace; and if all the notes have become payable he may issue his five separate warrants, and render judgment against the debtor in each case.

Appeal from the judgment of a justice of the peace in five several cases.

The appellant [Alexander Moore], being indebted to the appellee [George S. Hough] in the sum of $250, gave his five several promissory notes to the appellee, payable at different periods. When they had all become payable he obtained from a justice of the peace five

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

separate warrants, upon which the appellant was arrested, and judgment was rendered against him in each case; from which judgments he appealed to this court.

Mr. Fendall and Mr. Mason, for appellant, contended that the splitting up the debt in this way, was a fraud upon the law, and that as the notes were all due and payable and constituted but one debt, the justice of the peace had not jurisdiction. The words of the act of March 1, 1823 [3 Stat. 743], giving jurisdiction to the justice are, "where the real debt and damages do not exceed the sum of fifty dollars." Here the real debt exceeds that sum, consequently the justice had not jurisdiction of the case.

Mr. Fendall cited Anon., 1 Vent. 65; and Girling v. Alders, Id. 73; Clerk v. Andrews, 1 Show. 11; Girling v. Aldas, 2 Keb. 617; Thompson v. Shepherd, 9 Johns. 262; Cazenove v. Darrell [Case No. 2,539], in this court at November term, 1823.

But THE COURT affirmed the judgments. CRANCH, Chief Judge, would have looked further into the cases, but the other judges seeming to be clearly against the appellant, he acquiesced.

Case No. 9,767.

MOORE v. JACOBS.

[4 Cranch, C. C. 312.] [1]

Circuit Court, District of Columbia. May Term, 1833.

SLAVERY—IMPORTATION INTO DISTRICT—RUNAWAY NEGRO.

A female slave, owned in Alexandria, D. C., is removed with her owner to Maryland to reside; she runs away from her owner in Maryland and comes to Alexandria; her owner in Maryland, sells her (running) to a resident of Alexandria. This escape of the slave into Alexandria, was not a voluntary importation into Alexandria; and the sale was not such a sale as could give her a right to freedom under the Maryland law of 1796, c. 67.

Petition for freedom. The petitioner [the negress Clara Moore] was owned by Mr. Mills, in Alexandria, D. C., who removed to Maryland to reside, and settle there, and took the petitioner with him. She ran away and returned to Alexandria. While there, her owner in Maryland, sold her ("running") to the respondent, Thomas Jacobs.

Mr. Neale, for petitioner, contended that the sale within three years after the removal gave her a right to freedom, under the third section of the Maryland act of 1796, c. 67.

Mr. Taylor, contrá. There was no sale in Maryland within the meaning and intent of that act. The slave was not then in Maryland, but in Alexandria.

Mr. Neale, in reply, referred to the case of Delilah v. Jacobs [Case No. 3,773], in this court at the last term.

THE COURT (nem. con.) was of opinion that the slave was lawfully imported into Maryland; and that her escape to Alexandria was not a voluntary importation into Alexandria county; and that the sale in Alexandria, after such escape, was not such a sale as could give the petitioner a right to freedom under the Maryland act of 1796, c. 67.

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

Case No. 9,768.

MOORE v. JONES et al.

[23 Vt. 739.]

District Court, D. Vermont. Oct. Term, 1848.

BANKRUPTCY—RIGHT OF ASSIGNEE TO JUDGMENT RECOVERED BY BANKRUPT—REMEDIAL STATUTE—ACTION TO RECOVER USURY PAID—JURISDICTION OF DISTRICT COURT—EXPENSES OF ATTORNEY OF BANKRUPT.

1. Whenever a judgment is recovered for a debt, or claim, due to a bankrupt and belonging to his assignee, whether by the bankrupt himself or by a third person in his right, the assignee is entitled to the money recovered by such judgment; and if the judgment recovered have not been paid, a court of equity may arrest the payment of it to the bankrupt, or the one who sues on his right, and order the money paid to the assignee.

2. There is a distinction between an action given by statute to the party aggrieved, and an action given to any one who will sue,—the former being remedial, and the latter penal.

3. Under the statute of Vermont, which gives to one paying usurious interest the right to recover back, by action of assumpsit, the amount so paid, the excess of interest paid becomes money in the hands of the creditor belonging to the debtor, and recoverable as money had and received to his use; and an absolute and perfect interest therein vests in the debtor, existing anterior to the bringing of an action, and not a mere inchoate right, dependent on his suing, or on any other personal act, to be by him performed.

4. And the right to recover back money so paid is a right vested in property, or, in the words and sense of the bankrupt act of 1841 [5 Stat. 440], a "right of property," which passes to and vests in the assignee under the bankruptcy.

5. And if the bankrupt, after the decree of bankruptcy, have brought such action in his own name in the state court, and obtained a judgment, without his bankruptcy being pleaded by the defendant in bar of the recovery, the district court of the United States have power, upon petition brought by the assignee, while the judgment remains unpaid, to so far interfere with the judgment, as to order the amount paid to the assignee.

6. And it is no objection to this power being exercised by the district court within one district, that the decree of bankruptcy and the proceedings under it were had in the district court within another district.

7. But if the assignee asks the interposition of the equity powers of the court, to give him the benefit of the judgment recovered by the bankrupt, he must take it, if he would have it, subject, not only to such charges in the suit at law as were legally taxable and recoverable as costs, but also to all other reasonable charges and expenses incurred in obtaining the judgment.

8. But charges for services rendered by the attorney of the bankrupt, in the suit at law, in opposing a motion there preferred by the assignee to be allowed to enter and prosecute the claim, do not come within this principle, and cannot be allowed as a charge against the fund.

9. And if the attorney is made a defendant in the proceedings in this court, as it is proper he

should be, and the fund, by interlocutory decree of the court, is allowed to be paid to him, subject to the future order of the court, and the ultimate decree of the court be, that he pay the money to the assignee, he will be allowed to retain, in addition to the amount allowed for the charges and expenses incurred in prosecuting the suit at law, all his necessary actual charges and expenses in this proceeding, but not fees for his services as counsel in defending it; but, if he have himself acted as his own counsel in this proceeding, he will be allowed costs, as between party and party.

This was a petition addressed to the equity jurisdiction of the court under the bankrupt act, and set forth the following facts. [Samuel W.] Jones, one of the respondents, was declared a bankrupt, on his own application, by the district court of the United States in the Northern district of New York, and [Amasa C.] Moore, the petitioner here, was appointed his assignee. After Jones had obtained his certificate of discharge, an action for money had and received was commenced in his name, by his direction, or consent, in the state court in Vermont, against the respondent Austin, on a claim or cause of action which had accrued to Jones prior to his bankruptcy, but which he had omitted to insert in his schedule of property accompanying his application to be declared a bankrupt, and of which the assignees had no knowledge. Austin, the defendant in the action, did not plead the bankruptcy of Jones in bar of a recovery, and a judgment was recovered against him in the county court, which was ultimately affirmed in the supreme court. The petition, after stating the above facts, claimed the money recovered in the judgment as assets belonging to Moore, as assignee of Jones, and prayed, that it might be decreed to be paid to him for the benefit of the creditors under the bankruptcy. It was alleged on the part of the respondents, that the claim on which the judgment was recovered, was for illegal interest received by Austin of Jones in violation of the statute of Vermont on the subject of interest, and therefore was a claim of such a nature, that it did not go to the assignee of Jones on his bankruptcy. A sale and transfer of the claim by Jones before his bankruptcy were also alleged. With these additional statements, the facts set forth in the petition were admitted. A temporary injunction was granted on filing the petition, prohibiting the payment of the money to Jones, but allowing the judgment debtor to pay it into the hands of Mr. Linsley, the attorney of Jones, and also one of the respondents, to be held by him subject to the future order of the court.

S. H. Hodges, for petitioner.

C. Linsley, for respondents.

PRENTISS, District Judge. There can be no doubt, that whenever a judgment is recovered for a debt or claim due to a bankrupt and belonging to his assignee, whether by the bankrupt himself, or by a third person in his right, the assignee is entitled to the money recovered by such judgment. It has been often determined, that where an uncertificated bankrupt sues and obtains judgment, as he may do unless his assignees interfere, for a debt accrued to him subsequent to the bankruptcy, and is paid the amount of the judgment, or where a creditor, after an act of bankruptcy, attaches a debt due the bankrupt, obtains judgment therefor against the debtor, and thereupon receives the amount of the debt attached, the assignees may recover of the bankrupt in the one case, and of the creditor in the other, the money so respectively recovered by them. Surely, in either case, where the judgment recovered has not been paid, a court of equity may arrest the payment of it to the bankrupt, or the creditor, and order the money paid over to the assignees. The principal question in the present case therefore is, whether the claim, on which the judgment was recovered against Austin in the state court, being a claim for money paid by Jones for usurious interest, passed to and vested in the assignee of the latter under his bankruptcy. If it did, it is quite clear, that the petitioner, as such assignee, is, in equity, entitled to the money contained in the judgment, and that it ought to be paid over to him. In the case of Brandon v. Pate, 2 H. Bl. 308, it was held, that the assignees of a bankrupt might recover money lost by the bankrupt at play, in an action of debt against the winner, on the statute 9 Anne, c. 14, although by the statute the action was limited to the loser himself within three months, and after that to a common informer. The only question made in the case was, whether under the statute there was any debt or vested interest existing in the loser of the money until he brought his action. The argument on the part of the defendant was, that the action being given to the loser for a limited time only, and then to a common informer, no debt vested in the loser, any more than in the common informer, until action brought. But Rooke, J., said, there was a clear distinction between remedial and penal acts,—that in the former a debt is due to the party grieved before the commencement of the action, but not in the latter; and upon that distinction, as well as upon other considerations of weight, judgment was given for the plaintiffs. In Brandon v. Sands, 2 Ves. Jr. 514, a case involving the same general question, it was again urged, that no debt existed in the loser of money at play, until he brought his action, and consequently that the right of action given by the statute was strictly personal in him. But the lord chancellor said, he had no doubt upon the case; that nothing was so clear, as that where a statute gives an action to the party grieved, there is an interest vested in him; that the limiting the time is to let in the penal action by the common informer; but that while the action rests in the party injured, it is a vested interest in him, which on his bankruptcy passes to his

assignees. In Carter v. Abbott, 1 Barn. & C. 444, a more modern case of an action on the statute for money lost by the bankrupt at play, although a recovery was strenuously contested on other grounds, the right of the assignees to sue was not even questioned. The principle thus asserted was recognized and acted upon by the supreme court of this state as long ago as when I had the honor of being a member of it. In delivering the opinion of the court in Hubbell v. Gale, 3 Vt. 266, I put the decision expressly upon the distinction, now found to be so fully sustained by adjudged cases directly in point, between an action given by statute to the party aggrieved, and an action given to any one who will sue,—considering and treating the former as remedial, and the latter as penal. If the right of the assignees to sue and recover was sustainable in the cases which have been adverted to, there would seem to be little or no question as to the right of the assignees in the present case. The statute regulating the rate of interest in this state (Rev. St. § 366) contains two distinct provisions on the subject. In one, it is enacted, that no person shall take for the forbearance of money, a greater rate of interest than six per cent. per annum. In the other, it is declared, that whenever a greater rate of interest has been paid, the person paying the same may recover back the amount so paid above the legal interest, with interest thereon from the time of payment, in an action of assumpsit, declaring for money had and received, or for goods sold and delivered, as the case may be. The right of action is not given, first for a certain time to the party paying the usurious interest, and then to any one who will sue, but is given wholly and only to the party paying, —thus distinguishing the case in that particular from the cases which have been cited. The excess of interest paid, being taken in violation of the prohibitory clause of the statute, is recoverable back, with interest thereon from the time of payment, in an action of indebitatus assumpsit in common form, subject to the same limitation, and no other, as actions of assumpsit in general. Whether money so paid be treated as a debt due, as so much money owing the party paying it, or simply as money exacted and held from him without right and against law, can make no difference in the result of this case. According to the provisions of the statute, which in substance, as far as concerns the remedy, is merely in affirmance of the common law, the excess of interest paid was money in the hands of Austin belonging to Jones, and recoverable as money had and received to his use. An absolute and perfect interest was vested in him, existing anterior to the bringing of an action,—not a mere inchoate right, dependent on his suing, or on any other personal act by him performed.

By the bankrupt act, "all property, and rights of property of every name and nature," whether in possession or in action, are made the subject of assignment, and pass to and vest in the assignee. While the act does not extend to rights of a mere personal nature, as claims for damages arising out of a breach of promise to marry, or out of personal torts and injuries, it comprehends every right and interest, and every right of action, founded in or growing out of property. Money exacted by way of interest beyond the rate prescribed, is property unlawfully and wrongfully taken from the party paying it, and the right to recover it back is a right founded in property, or, in the words and sense of the bankrupt law, a "right of property." It is no more a right personal to the party himself, especially when given to and vested in him absolutely, than the right to recover back money obtained by fraud, or money wrongfully and illegally extorted in any other way. Whether Jones could or could not, after his bankruptcy, under any circumstances, have a right to maintain an action in his own name to recover the money in the hands of Austin, or, in other words, whether his bankruptcy might or might not have been pleaded in bar of a recovery by him, is a point not essential to be determined. In either case, whether the bankruptcy might or might not have been so pleaded, or whether the judgment recovered by Jones would or would not be a protection to Austin against a suit by the assignee, the latter would have a remedy against Jones, if he had received the money, and, as he had not received it, is entitled to have, what is virtually the same thing, the benefit of the judgment recovered by him. It may be observed, however, that the right of the assignee was undoubtedly absolute and exclusive, so that Jones had no right of action whatever to recover the money. In England, it is true, as has been already intimated, an uncertificated bankrupt may maintain an action in his own name for property acquired by him, or upon causes of action that have accrued to him, subsequent to the bankruptcy. His right in such case, is good against all the world but his assignees; and unless they interpose, and require a delivery of the property or payment of the money to them, the bankruptcy cannot be set up in bar of the action. But this doctrine prevails, under the English system, only in the particular class of cases mentioned,—a class unknown here,—and is applicable to no other class. Here, as we have already seen, a bankrupt, by the decree of bankruptcy, is divested of all his property and rights of property of every name and nature, and the same, whether in possession or in action, are, by force of the decree, ipso facto, by operation of law, vested absolutely in his assignee. A recovery of the money in the hands of Austin, by Jones, might therefore have been prevented by pleading his bankruptcy in bar of the action brought by him; and it was by reason of such a plea not being interposed, that he obtained judgment for that which belonged to the assignee, and to which he himself had

no right. If there had been, as was alleged and has been attempted to be shown, a bona fide transfer of the claim against Austin, by Jones, before his bankruptcy, it would not have passed to his assignee. In such case, the assignee would have had no right to the claim, unless, indeed, the transfer were made in contemplation of bankruptcy, but the person entitled to the claim under the transfer might properly sue and recover upon it for his own use and benefit, in the name of Jones. The evidence to make out a transfer is very weak,—too weak, at any rate, to prevail against the fact, which is fully established, that the person, to whom the transfer is alleged to have been made, was used as a witness on the part of Jones in the suit in which the judgment was recovered, and swore, that he had no interest whatever in the event of the suit. The existence of the supposed transfer is utterly irreconcilable with this solemn denial of all right and interest in the subject matter of the suit, and cannot be admitted without imputing to the person said to have received it wilful and corrupt false swearing, and the commission of a most aggravated fraud upon the administration of justice. The court, acting on the declaration made by him under oath, admitted him as a witness; and on his testimony and that of others, the judgment was recovered. Under such circumstances, it might be worthy of consideration, in a case calling for a decision of the question, and not dependent on the right as it existed in fact at the time of the bankruptcy, whether he would not be conclusively bound by the declaration he had made, and estopped to assert any right in himself in opposition to it.

On the merits of the case, it appears to be evident, that the assignee is entitled to relief, and as to the power and right of this court, in ordinary cases under the bankrupt act, to interfere, as far as is here required, with a judgment and execution of the state court, the case of Christy v. City Bank of New Orleans, 3 How. [44 U. S.] 292, is an authority quite decisive. The doctrine laid down in that case fully sustains the exercise of the power. The principal difficulty attending the question of jurisdiction arises out of the particular circumstances of the case. Jones was decreed a bankrupt, not in this court, but in the district court of the Northern district of New York; and the question is, whether, that being the case, this court can take jurisdiction of the matter in controversy, or, indeed, of any matter arising under or growing out of the bankruptcy, the court having no equity jurisdiction whatever, except what is given it by the bankrupt act. In Ex parte Martin [Case No. 9,149], it was held, that the equity jurisdiction of the district courts of the United States, under the bankrupt act, was not confined to cases of bankruptcy originally arising and pending in the particular court where the relief is sought. It was considered, that as cases of bankruptcy, originally instituted and pending in one district, might apply to reach persons and property situate in other districts, and require auxiliary proceedings in such districts to perfect and accomplish the objects of the act, the intention of congress was, that the district courts in every district should be mutually auxiliary to each other for such purposes and proceedings. This decision comes from a quarter, which entitles it to great respect; and the question being clear as to the right of the assignee to relief on the merits, it may well be held, on the authority of the case referred to, that this court is competent to grant the relief.

The only questions, which remain to be considered, are questions arising upon exceptions filed to the report of the commissioner, to whom a reference was ordered to ascertain and report the amount of the expenses incurred in the prosecution of the suit, in which the judgment in question was recovered, and to state the nature and character of the expenses.

It appears, that after judgment was rendered in the county court, and while the cause was pending in the supreme court, the assignee, becoming in the mean time apprised of its pendency, applied to the court, by motion, for leave to enter and prosecute the suit for the benefit of the creditors under the bankruptcy. Mr. Linsley, as attorney and counsel for Jones, resisted the motion; and the court, upon the ground that the suit was not pending at the time of the bankruptcy, but was commenced afterwards, overruled and dismissed the motion. The commissioner has allowed Mr. Linsley for his services as counsel in opposing that motion; and to this allowance exception is taken. The order of reference to a commissioner did not proceed upon the ground of a lien, as usually allowed to an attorney by courts of law and equity, but upon the more enlarged ground, that as the assignee comes in and asks the interposition of the equity powers of the court to give him the benefit of the judgment recovered by Jones, he must take it, if he would have it, subject, not only to such charges as were legally taxable and recoverable as costs, but also to all other reasonable charges and expenses incurred in obtaining the judgment. To such charges, the assignee, in the ordinary course, would have been subjected, if he had himself commenced and carried on the suit in his own name; and to that extent, Mr. Linsley, the attorney and counsel in the suit, has an equitable claim on the judgment as against him. But services rendered in opposing the motion of the assignee for leave to enter and prosecute, which was a collateral proceeding, forming no part of the principal suit, but presenting a question between the assignee and Jones only as to the control of the suit, do not come within the principle adopted. Mr. Linsley opposed the motion in behalf of Jones, and with full

knowledge of the right of the assignee, of which the motion itself was notice. If the assignee mistook the proper form of enforcing his right, and his motion was not sustainable in point of law, all he could be liable to would be legal taxable costs on the motion. That is all that a party who has a right, but misconceives his remedy, is ever subject to. The assignee has a clear equitable right to the fruits of the judgment, which any court of general equity jurisdiction might enforce; and services rendered, not in recovering the judgment, nor in any way conducive to that end, but in a collateral proceeding, and in hostility to the right of the assignee, can form no charge on the judgment, in equity, as against him.

The commissioner has farther allowed Mr. Linsley for services as counsel in defending this petition, to which exception is also taken. It is quite obvious, that in allowing for these services the commissioner exceeded his authority. He was confined, by the order of reference, to services performed, and expenses incurred, in the suit in which the judgment was obtained. Mr. Linsley is a party to this petition, and if he is entitled to any remuneration for being brought into court, it must be in the way and in the form of costs. He was made a party. not only because he had a claim on the judgment for services as attorney in obtaining it, but also because he had the control of the execution, and might, unless enjoined, receive and pay over the money to Jones. It is usual to give costs to a trustee, where there is a fund in his hands, notwithstanding the decree is against him,—sometimes only common costs, but generally all necessary actual charges and expenses in addition. If the rule extended beyond actual charges and expenses, a party who is a professional man, and performs the duties of counsel himself, might be tempted to raise questions and protract the suit for the sake of professional profit. The principle applicable to the case of a trustee seems to be applicable to the case of Mr. Linsley; for he is a mere holder of the money, and it is a matter of indifference to him, whether he pays it over to the assignee, or to Jones. If he had employed and paid counsel, there would be no hesitation in allowing him for expenses so paid. If he has incurred no such or other expenditure, it is difficult to see how, according to any well recognized rule of practice, he can be allowed costs otherwise than as between party and party. Such costs, with the sum he is entitled to on the report of the commissioner, as modified, Mr. Linsley will be allowed to retain out of the money received by him on the judgment; and a decree will be entered, that the balance of the fund in his hands, as reported and thus adjusted, be paid to the assignee.

NOTE. The case of Hubbell v. Gale, 3 Vt. 266, referred to in the above opinion, was an action brought by a third person on a former statute of this state against usury. Among the observations made by Prentiss, C. J., in delivering the opinion of the court, are the following: "The first section of the statute prohibits the taking of more than six per cent. interest, and the taking of more is an offense against the statute. The second section gives to the person paying the usury the liberty, within one year, to sue for and recover it back; and on his neglect, any other person is authorized, within one year thereafter, to sue for and recover the same. As it respects the party paying the usury, the action is like an action on a contract to recover a debt already due, and is clearly not of a penal nature. The party has a right, on common law principles, to recover back the money, and the statute saves the right to him for one year; but if he does not avail himself of his right within that time, then the amount of the usury is given, as a forfeiture, to any one who will sue for the same. The statute is partly remedial, and partly penal;—remedial, as to the right given to the party paying to recover back the money, and penal, as to the right given to any other person to sue for it on his neglect. Where a statute gives an action to a stranger to recover a forfeiture, he is a common informer, and the action a penal action; though it is otherwise, where the statute gives damages, either single or accumulative, to the party aggrieved."

Case No. 9,769.

MOORE et al. v. JONES et al.

[3 Woods. 53;[1] 2 Nat. Bank. Cas. (Browne) 144.]

Circuit Court, D. Louisiana. April Term, 1877.

BANKS — LIABILITY OF STOCKHOLDER — STOCK TAKEN AS SECURITY.

A person who allows a transfer to be made to him upon the books of a national bank of shares of stock therein, even though such transfer is made solely as security for a debt due the transferee, becomes individually liable for all contracts and engagements of the bank to the extent prescribed by the currency act [12 Stat. 665].

[Cited in Florida Land & Imp. Co. v. Merrill, 2 C. C. A. 629, 52 Fed. 80; Id., 8 C. C. A. 444, 60 Fed. 21.]

[Cited in Keyser v. Hitz, 2 D. C. 477.]

In equity. Heard on demurrer to the bill. The bill was filed by Robert Moore and Thomas Janney against C. M. Jones and F. F. Case, the latter as receiver of the First National Bank of New Orleans, and alleged in substance that in the year 1866, and before and after that time, the complainants were commercial partners under the name of Moore & Janney; that on December 22, 1866, the defendant C. M. Jones was indebted to complainants, as such partners, in the sum of sixty-five hundred dollars, to secure which he, on the date last named, pledged to complainants sixty-five shares of the capital stock of said national bank, then owned by him, and, to make said pledge effectual, the said Jones delivered to complainants the certificates of stock which had been issued to him by the bank. The bill further alleged that the complainants never were the owners of said stock, and that they had no right or interest therein except as pledgees in the manner and for the consideration aforesaid; that the said pledge

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

was perfect by the delivery of the certificates of stock, but that, in ignorance of their legal rights, they had said shares of stock transferred to them on the books of the bank, under the erroneous belief that such transfer was necessary to the validity of said pledge, and that said transfer was made on the 22d day of December, 1866, before the failure of said bank to redeem its circulating notes, and before the appointment of said receiver. The bill claimed that the transfer on the books of the bank of the stock was unnecessary to invest the complainants with a privilege on said shares, and that, notwithstanding the transfer, Jones continued to be the actual owner of the shares and was alone liable to the obligations imposed by law upon shareholders in national banks. It was further alleged that the receiver, the said bank having failed to redeem its circulating notes and having been put in liquidation by the comptroller of the currency, had commenced an action at law against complainants to enforce against them the individual liability provided by the currency act against the holders of shares in national banks. The averment was, that if any ground existed for said action against the shareholders of the bank, the action should be against the said C. M. Jones, who was the real owner of the stock, and not against complainants; that the said defense of complainants could not be made at law, and that the aid of a court of equity was necessary to their complete and adequate protection. The bill therefore prayed that said receiver might be enjoined from further prosecuting said suit at law against complainants; that said C. M. Jones might be decreed to be the owner of said stock, and that the transfer thereof to the complainants might be declared to have been made in error and be corrected so as to exhibit the said C. M. Jones as the owner thereof; and that it might be decreed that the complainants are not individually liable thereon. To this bill the defendant F. F. Case, receiver, interposed a demurrer, on the ground that the bill did not make a case for equitable relief.

John Finney and Henry C. Miller, for complainants.

John D. Rouse, for the receiver.

WOODS, Circuit Judge. The demurrer is well taken. The currency act (Rev. St. § 5139) declares that "the capital stock of each association shall be divided into shares of one hundred dollars each and be deemed personal property, and shall be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of said shares." Now, according to the averments of the bill, Moore & Janney became the transferees of the stock of Jones by transfer on the books of the association. According to the terms of the act such transfer made them stockholders and subjected them to all the rights and liabilities of the prior holder of the shares, among which is that shareholders shall be held individually responsible equally and ratably, and not one for another, for all contracts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. So far as the bank and the public were concerned, Moore & Janney were the owners of the stock. They were entitled to vote the stock at stockholders' meetings, to draw dividends, and to transfer the stock to whom they pleased. The public were advised by the list of stockholders kept in the office where the business of the bank was transacted (see Rev. St. § 5210) that Moore & Janney were shareholders to the amount of sixty-five shares. By appearing on the stock book of the bank and upon the list of shareholders required to be posted in the business room of the bank, they assumed the liability of shareholders. Neither the bank nor the public were required to take notice of the private understanding between Moore & Janney and the person from whose name the stock had been transferred. The individual liability falls upon the person who appears on the stock book of the bank by transfer to him to be the owner of the stock. The law organizing the banks seems to place it there. To allow one who, by inspection of the stock book, appears to be a shareholder who has allowed himself to be held out by the bank to the public as a shareholder, to set up secret arrangements between himself and the real owner as a defense to his individual liability for the debts of the bank, would be to make of no avail the individual liability clause of the currency act. "It is well settled that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the register of the corporation as the owner of the stock is, in the event of the insolvency of the corporation, chargeable as a stockholder for the benefit of creditors." Thomp. Stockh. § 223; Adderly v. Storm, 6 Hill, 624; Rosevelt v. Brown, 11 N. Y. 148; In re Empire City Bank, 18 N. Y. 199, 223; Holyoke Bank v. Burnham, 11 Cush. 183; Magruder v. Colston, 44 Md. 349; Crease v. Babcock, 10 Metc. [Mass.] 525, 545; Wheelock v. Kost, 77 Ill. 296; Pullman v. Upton, 96 U. S. 328. Moore & Janney, so far as the bank and the public were concerned, were to all intents and purposes shareholders and individually liable as such. The demurrer to the bill must be sustained.

MOORE (JUDSON v.). See Case No. 7,569.

MOORE (LATIMER v.). See Case No. 8,114.

MOORE (LIVINGSTON v.). See Case No. 8,416.

MOORE (McDONALD v.). See Cases Nos. 8,762 and 8,763.

MOORE (McIVER v.). See Case No. 8,831.
MOORE (MAYOR & COMMONALTY v.). See Case No. 9,359.
MOORE (MEISTER v.). See Case No. 9,398.
MOORE (MILLER v.). See Case No. 9,584.

Case No. 9,770.

MOORE v. MITCHELL.

[2 Woods, 483.] [1]

Circuit Court, S. D. Alabama. Dec. Term, 1874.[2]

TRUSTS — SEPARATE ACCOUNT BY TRUSTEE — PAYMENTS RECEIVED IN CONFEDERATE MONEY — UNDERSTANDING WITH TESTATOR CREATING TRUST.

1. A trustee who keeps no separate account of the trust fund, but mixes it with his own money, renders himself liable to account for it in case of loss.

2. A trustee having received the trust funds in good money, and loaned them out, afterwards received in repayment of the loan at par, Confederate treasury notes which were worth only thirty cents on the dollar, and which afterwards became worthless in his hands. *Held*, that he was not entitled to a credit for the amount unless he could show that he received the depreciated paper upon actual compulsion.

3. The trustee could not, under these circumstances, save himself from liability to account for the trust fund by offering to show that there was a parol understanding between the testator, from whose estate the trust fund came, and himself, whereby he agreed to manage the business of the trust with the same care as his own, and to make no charge for his services as trustee.

4. Where there is a prayer for general relief, a court of equity may afford such relief as the averments of the bill and the proofs warrant, although the complainant may not be entitled to the relief specifically prayed for.

In equity. Heard for final decree on the pleadings and evidence. The facts were as follows: By the last will and testament of James Mitchell, deceased, late of Sumpter county, Alabama, which was executed on September 29, 1855, the defendant, Daniel Mitchell, was made trustee for the complainant, Catharine Moore. There were devised to him in trust for said Catharine two slaves which he was authorized to hire or sell, and he was directed to pay to her during the lifetime of her husband either the hire or the interest of the money obtained from a sale of the slaves. The defendant was also entrusted by the will with the distributive share of the complainant in the testator's estate, and directed to pay her the interest thereon during the lifetime of the husband. On the death of her husband, the defendant was directed to pay to complainant the corpus of the trust fund committed to his hands by the provisions of the will. In February, 1856, the defendant, as authorized by the will, sold the slaves and obtained therefor $1,375. On August 31, 1857, the defendant received the distributive share of complainant in the estate of James Mitchell, amounting to $1,150. The defendant loaned out the trust fund on interest. He testified in regard to its management as follows: "I kept no separate account of the trust funds after they came into my hands; I accounted for the annual interest to the agent of complainant, and was ready to pay over the principal in the event of the death of complainant's husband, which was the time fixed by the will for me to pay her the corpus of the estate. I thought that was all I was required to do, and therefore kept no separate and distinct account of the trust fund, and cannot give the dates of the loans and other particulars inquired about. All the trust funds were put together and treated in the same way, and when necessary, I put some of my own funds with the trust funds to make out the sum a borrower might want. I kept no separate account of the trust fund and cannot furnish any." The last loan of the trust funds was made by defendant to one Simmons Harrison. To the trust funds the defendant added about $1,500 of his own money, making the loan about $4,000. In March, 1863, the representatives of the estate of Harrison, the borrower, tendered defendant in payment of the debt Confederate treasury notes, which were at that time worth at the rate of three and a half dollars for one of gold. The defendant accepted the notes in payment. He did not invest them in property of any kind, nor loan them again, but as he says, retained them till the close of the war. He has never rendered, or offered to render, any account of his trust, nor does he produce or has he ever exhibited to complainant the Confederate treasury notes which he says he received from Harrison's estate in payment.

The purpose and prayer of the complainant's bill was that the trust created by the will of the late James Mitchell in her favor might be established, and an account taken of what was due complainant by reason thereof; that the trustee might be removed and decreed to pay to complainant whatever might be found due to her on account of said trust, and that she might have such other and further relief as it may appear to the court she was entitled to. The defendant claimed by way of defense that by a verbal understanding with his father, the testator, had just before his death, he undertook to manage the trust as he managed his own business, and without any compensation; that he did so manage the trust estate; that he was compelled to receive Confederate money for the trust funds loaned to one Simmons Harrison; that at the same time, he received the same kind of currency for a debt due to himself from the estate of Harrison; that having received such funds, he found it impossible to invest them or loan them, and they became worthless on his hands as a consequence of the late war. The proof to sus-

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

[2] [Affirmed in 95 U. S. 587.]

tain the defense, that the Confederate treasury notes were received in payment of the debt due the trust estate by compulsion, consisted of the depositions of the defendant himself and of James M. Winston and Jonathan Bliss. On this point the defendant testified: "If I had refused to receive the Confederate money for a debt of any kind, I would have incurred the strong condemnation of my neighbors and friends, and would have been looked upon as a disloyal and suspicious character, and might have been subject to serious annoyance and injury in my person and property. To have refused to receive this money from the representative of a Confederate soldier, killed in battle, would have subjected me to the additional odium of trying to make money out of the widow and orphans of a dead soldier, and of using my money to oppress them. The bare suspicion of such an attempt on my part would have brought down on me the contempt of every one, and could not have been done without risk of personal injury." James M. Winston testified that in 1863, Confederate currency was the only money in circulation in Alabama; "but I do not know," he says, "that the money was imposed on the people by irresistible force by the late Confederate government. Said currency was made current as dollars in the county of Sumpter, where defendant resided, by the irresistible force of public opinion. If a creditor had refused Confederate money when tendered, he would have been subject to great reproach and denunciation; but I cannot say how far it might have been carried. It would have been regarded as a stab at the Confederacy, and as disloyalty to it and to the independence of the Confederate States." Jonathan Bliss testified: "I cannot say that Confederate currency was ever imposed upon the people of Alabama by irresistible force of the Confederate government directly applied. The force compelling the circulation of Confederate money was a compound one, made up in part of the action and influence of the Confederate government, its officers and friends, in part by the action and influence of the state government and officers, in part by the necessities of life, and largely by the public voice and demand; and by the further fact that there were in some places combinations of men acting as committees of vigilance, claiming to supervise and deal with obnoxious individuals considered disloyal to the Confederate cause. In 1863, a refusal of Confederate money would have subjected the party to much reproach and indignity, and unless he was fortified by strong personal position, to degrees of violence and outrage." On cross examination, this witness testified in answer to the question whether he knew any persons who refused to take trust money in Confederate notes and were not mobbed or murdered: "I refused to take it in such cases as long as I could, but finally felt constrained to yield as to interest, and in some cases when I thought there was danger of the debtor becoming insolvent, as to the principal."

R. H. Smith and R. I. Smith, for complainant.

William Boyles and G. Y. Overall, for defendant.

WOODS, Circuit Judge. The complainant bases her claim for relief substantially on two grounds: 1. That the defendant did not keep the trust estate separate from his own, but mingled it with his own money, and thereby made himself the debtor of complainant and liable to pay absolutely the trust money with interest. 2. That the defendant was not justified in receiving Confederate money worth less than thirty cents on the dollar, and then retaining that without investment until it became entirely worthless.

As to the first ground, it is obvious to remark that the evidence of the defendant himself shows that he treated the trust fund as his own, and mingled it with his own. He kept no account and could render no account. He cannot state at what rate of interest the trust money was loaned, and with the exception of Simmons Harrison, he does not name any person to whom it was loaned. When the loan was returned to him in Confederate money by the representatives of Harrison, he makes no pretense of keeping the funds separate from his own. In fact they had before that time been mingled with his own, so as to be indistinguishable. It seems evident from defendant's own testimony that he thought he would discharge his trust by paying over to complainant the interest yearly, and then upon the death of her husband, paying over to her the principal. He therefore kept no account of the trust funds, but mixed and loaned them with his own. It does not appear that he ever took a note payable to himself as trustee, or that the evidences of debt received by him for the loan of trust funds had any ear mark by which to distinguish them from his own. In fact he states distinctly that he mixed his own funds with the trust funds in making his loans. A trustee is not permitted to so treat the trust property. When he does so, he becomes debtor to the trust, and if there is a loss, it is his loss and not the loss of the trust estate.

It has been held that where the subject of a trust is money, the trustee, in making a deposit of it in the bank, should be careful to do it to the account of the trust estate and not to his own account; for should he deposit it to his own account, he would render himself liable for it on the failure of the bank. Wren v. Kirton, 11 Ves. 377; In re Stafford, 11 Barb. 353; McAllister v. Com., 30 Pa. St. 536. If the trustee deposits the trust funds in his own name, he thus mixes them with his own private funds which always renders him liable in case of loss. Lupton v. White, 15 Ves. 432; Chedworth v. Edwards, 8 Ves. 46; Duke of Leeds v. Earl of Amherst, 20 Beav. 239; Fellows v. Mitchell, 1 P. Wms.

81; Trustees of Auburn Seminary v. Kellogg, 16 N. Y. 83; Spear v. Tinkham, 2 Barb. Ch. 211; Stanley's Appeal, 8 Pa. St. 431.

2. But suppose the defendant had kept the trust funds distinct from his own, that he had loaned them separately and taken evidence of debt to show that the money loaned belonged to the trust, was he justified under the circumstances detailed in the evidence in receiving repayment of the loan in Confederate notes? When Harrison's representatives paid up the money borrowed by their intestate in March, 1863, Confederate notes were worth less than thirty cents on the dollar, according to the statement of the answer. According to the same authority, it was impossible to invest them in any permanent or valuable property. A trustee who lends good money and receives it back in such a pretense for a currency ought to be able to show good reason for so doing. No stress of public opinion, no odium or unpopularity arising from a refusal to take such currency would justify him in thus dissipating the trust estate. Nothing but compulsion would justify a trustee in such a course. Horn v. Lockhart, 17 Wall. [84 U. S.] 581.

There was no law of the Confederate States obliging the defendant to receive Confederate treasury notes. They were not even made a legal tender. No law of the state of Alabama compelled the defendant to receive such currency. And the testimony fails to satisfy me that a trustee, refusing to receive funds of the trust estate in such a depreciated currency, would have been subjected to any injury of person or property, and nothing short of such compulsion would have justified the trustee in thus administering the trust estate.

The defendant claims, however, that by a verbal understanding with his father, the testator, he agreed to receive no compensation for his discharge of the duties of the trust, and that he was to manage the business of the trust with the same care as he did his own, and that having done that, he is discharged from liability, notwithstanding the loss. In reply to this, it is sufficient to say that the trust is created by will, and cannot be modified by verbal understanding had between the trustee and the testator. Nor does the fact that the trustee agreed to manage the trust without compensation relieve him from the consequences of his mismanagement. Under the will by which the trust was created, the defendant was entitled to compensation. He cannot relieve himself from liability for mismanagement by now saying that he did not charge or expect compensation.

Finally, it is insisted that under the will by which the trust is created, the trust money was to be kept in the hands of the trustee until the death of the husband of the complainant, and then paid over to complainant, that the bill prays, among other things, that the trust fund be paid over to complainant, her said husband being still in life; that this prayer is contrary to the terms of the trust, and ought not to be granted, and that no other relief than that prayed for can be administered, even though there is a prayer for general relief. I cannot yield assent to this proposition. "The usual course is for the plaintiff, in this part of his bill, to make a special prayer for the particular relief to which he thinks himself entitled, and then to conclude with a prayer of general relief at the discretion of the court. The latter can never be properly or safely omitted, because if the plaintiff should mistake the relief to which he is entitled in his special prayer, the court may yet afford him the relief to which he has a right under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill." Story, Eq. Pl. § 40, and cases there cited.

My conclusion is, therefore, that there should be a decree for complainant, establishing the trust, removing the trustee, and decreeing him to pay over the trust fund with interest, to a suitable person to be appointed trustee in his stead, and referring the cause to a master to ascertain and report the amount of the trust fund, including the interest, which has not been already paid by the trustee.

[The defendant appealed to the supreme court, where the decree of the circuit court was affirmed. 95 U. S. 587.]

MOORE (NATIONAL EXCH. BANK v.). See Case No. 10,041.

Case No. 9,771.

MOORE v. NELSON et al.

[3 McLean, 383.] [1]

Circuit Court, D. Illinois. June Term, 1844.

DEEDS—ILLINOIS STATUTE—HOW EXECUTED OUT OF STATE—DEPOSITION—TAKEN BEFORE MAYOR.

1. Under the act of 1831, in Illinois, a deed will convey land in that state, if executed according to the law of the state where it is made.

2. A statute may make good the defective acknowledgment of deeds.

3. It operates as a rule of evidence, as regards the execution of the instrument.

4. A deposition before a mayor of a city, under the act of congress, is sufficiently certified, "as taken in pursuance of the act," though it be not stated that the witness was cautioned.

[This was an action of ejectment by Moore against Nelson & Ashworth.]

Mr. Butterfield, for plaintiff.

Logan & Baker, for defendants.

OPINION OF THE COURT. This is an ejectment to recover the possession of one hundred and sixty acres of land. Patent to Patrick Cain, dated 6th October, 1817; a deed from him to Patrick Benson, dated 17th May,

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

1819. This deed was executed in New York. The eleventh section of the act of Illinois, of the 24th of January, 1831, provides that a deed made out of the state, "the acknowledgment thereof having been made in the manner hereinafter directed, before any judge or justice of the peace of the proper county, in which such deed may have been made and executed, and certified under the seal of such county by the proper officer, shall be valid," &c. The signature of one of the subscribing witnesses being proved, the other witness could not be found. Deed read in evidence, dated 22d January, 1840, from the widow and heirs of Benson to the plaintiff. A deposition under the act of congress to prove this deed, taken before the mayor, &c., was objected to, because the mayor does not certify the witness was cautioned in the words of the act. The certificate states "that the witness was sworn in pursuance of the act of congress, and carefully examined and sworn." As under the above act, depositions are taken without notice, great strictness has been required. Perhaps in some instances this may have been carried too far. For, if on examining the deposition, surprise can be alleged by the other party, the court in the exercise of their discretion, will give time to re-take the deposition. In this case we think the objection must be overruled. The certificate does not state the witness was cautioned, but it states "that he was sworn in pursuance of the act." This is sufficient. The defendant offered a deed from Patrick Cain, for the land in dispute, to Wordsworth, dated in 1818. This deed was acknowledged before a master in chancery. There is no evidence that the person who took the acknowledgment was a master in chancery, and the deed is objected to on that ground. The act of 1822, provides, "that all deeds, mortgages, &c., which shall have been, or may be hereafter, perfected and executed according and in conformity to the laws of the state or territory in which they may be respectively made, for lands lying within this state, shall be and are hereby declared to be valid, to all intents and purposes, good and available in law." By the second section of the same act, "all deeds which have been made and acknowledged as above, are made valid." This section operates as a rule of evidence. The act of 1822, on this subject, was repealed by an act of [January 21] 1827 [Rev. Laws Ill. p. 129]. The act of 1833 repeals all acts within its provisions, prescribing a different mode. The deed offered by defendant was not recorded under the act of 1822. But the only question in relation to this deed is, whether the acknowledgment is a sufficient proof of its execution, and is within the above statute. There is no proof that the person who took the acknowledgment was a master. A master is appointed by the state court, and if he be authorised to take an acknowledgment of a deed in New York, this court cannot be presumed to know that he is authorised to act as master. On this ground, the deed offered by the defendant is overruled.

Verdict for the plaintiff.

Case No. 9,772.

MOORE et al. v. NEWBURY.

[6 McLean, 472; [1] Newb. 49; 18 Law Rep. 50.]

Circuit Court, D. Michigan. June Term, 1855.

PAYMENT—EFFECT OF RECEIPT—PAYMENT BY NOTE.

1. A receipt of payment by a note is not conclusive, but only a prima facie evidence of payment.

2. A clerk invested with general authority to collect debts, presented a bill for supplies which were furnished on the credit of the vessel, and the debtor, not denying the claim, said that he was not then able to pay. On a subsequent application, the clerk expressed his willingness to take a negotiable note, if a certain third person would join in the note, and said he would then give the debtor the time desired, but if this were rejected, he should be compelled to attach the vessel. The note was given, and a receipt given of "payment by note." The note was endorsed by libellants, cashed the same day, and not being paid at maturity, returned to them, and was now produced in court and offered to be cancelled. *Held*, that the original debt was not extinguished, and that the lien on the vessel was not waived or abandoned.

[Cited in The Washington Irving, Case No. 17,244; The Dubuque, Id. 4,110; The Eclipse, Id. 4,268; The Helen M. Pierce, Id. 6,332.]

[2][This was a libel in rem for a balance alleged to be due on a bill of ship chandlery, furnished to the Fashion, during the spring of 1853, by Moore & Foote, merchants at Detroit. The only controversy was as to the amount due to the libelants. The balance claimed in the libel was $141.44. The answer of the claimant, who was the master and also the owner of the boat, alleged that only $13.53 remained unpaid; and that that amount, with costs, had been duly tendered to the libelants, and by them refused. From the allegations and admissions of the parties, and the proofs taken in the case, it appeared that a bill of the amount due to the libelants on the 22d of May, 1854, was presented for payment on two occasions, by George F. Bagley, a clerk of the libelants, to Henry L. Newberry, the owner of the Fashion, at Chicago, Illinois. Bagley intimated to Newberry, that unless payment was made, the boat would be attached. On the second occasion, Newberry wishing for further time, Bagley offered to take a negotiable note for the amount, to be signed by Newberry and some other person. This offer was acceded to by Newberry, who thereupon gave to Bagley the promissory note of himself and one J. R. Hugenins, for the amount claimed, payable in thirty days, to the order of the libelants. On receiving this note, Bagley delivered the bill which he

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

[2] [From Newb. 49.]

had presented, to Newberry, after first writing at its foot as follows: "Chicago, May 22, 1854. Received payment, by H. L. Newberry & J. R. Hugenins' note, at 30 days. Moore & Foote, per Bagley." The note was delivered to the libelants, who subsequently procured it to be discounted at an exchange office on the strength of their indorsement. It was not paid at maturity, and the libelants were compelled to take it up. It still remaining unpaid, the libelants produced it in court to be canceled or surrendered to the makers. Bagley testified that he had general authority to collect the libelants' demand, but no special authority to waive their lien on the steamboat, or to take a note in payment of the account. The question made on the hearing of the cause was as to the effect of taking the note of Newberry and Hugenins on the libelants' demand.

[Mr. Walkers and Alfred Russell, for libelants.

[The taking of the note operated only as a suspension of proceedings on the libelants' demand, not as a satisfaction of the debt. Schermerhorn v. Loines, 7 Johns. 311; Stedman v. Gooch, 1 Esp. 4; 1 Cow. 306; Id. 359; 2 Metc. [Mass.] 76; 8 Pick. 522; 8 Johns. 304; [Peter v. Beverly] 10 Pet. [35 U. S.] 532; 3 Denio, 410; Franklin Ins. Co. v. Lord [Case No. 5,057]; The Chusan [Case No. 2,717]; North v. The Eagle [Id. 10,309].

[Mr. Hunt and John S. Newberry, for claimant.

[I. The giving of a negotiable note by a debtor to a creditor extinguishes the original debt. (1) To hold a contrary doctrine, in case like the one at bar, would give two separate rights of action, distinct in their nature, for one cause of action. The original creditor might sue the boat—the holders of the note sue the maker. (2) A contrary decision would give secret liens to a class of floating property, which might lie dormant and secret for years, until the note matured, and then be brought forward, to the great damage of innocent purchasers of a vessel.

[II. When new parties are taken on a note in payment of a debt, it then is an absolute discharge, unless a contrary agreement is proved.

[III. The assignment of a lien, or the claim of a material man, on a vessel, is an extinguishment of the lien, and once having been extinguished, it can never be revived. 6 Shep. [Me.] 249; 10 Shep. [Me.] 211; 1 Rich. Law, 111; [Sheehy v. Mandeville] 6 Cranch [10 U. S.] 264; 13 Vt. 456; 12 Johns. 410; 1 Hill, 516; 16 Vt. 30; 2 Metc. [Mass.] 173; 18 Pick. 360; 21 Pick. 230; 24 Pick. 13; 1 Day, 510; Weed v. Snow [Case No. 17,347]; 14 Wend. 116; 7 Barr, 394; 4 Ga. 185; 1 Smith, Lead. Cas. 393 et seq.; 10 Barb. 372; 1 How. (Miss.) 144.][2]

[2] [From Newb. 49.]

WILKINS, District Judge. The clerk of the libellants, invested with a general authority to collect debts, presented a bill for the amount claimed, to the respondent, on the 22d of May last, 1854, and demanded payment. The respondent, not denying the accuracy of the account, stated that he was not able at the time to make payment. At a subsequent interview, the clerk renewed his application, expressed his willingness to take a negotiable note for the amount, if a certain individual, whom he named, would join in the same, and that then he would extend to the respondent the time desired, but that if this proposition was rejected, he would be compelled to attach the vessel. The note indicated was procured by the respondent, received by the clerk, and the account adjusted by a receipt, given in this language: "Received payment by note. Moore & Foote, by G. F. Bagley, Clerk." This note, being endorsed by the libellants, was, on the same day, cashed at a broker's office, and not being paid at maturity, was returned to them; it is now exhibited in court, and offered to be cancelled. This libel is exhibited on the original account. The answer alleges payment, and denies the existence of the maritime lien. Such being the facts, two questions are presented: 1st. Was the original debt extinguished by the note? If not, 2dly. Does the transaction show an abandonment or waiver of the lien?

The circuit court for the United States, for this district, in Allen v. King [Case No. 226], and in Weed v. Snow [supra], has settled the law for this court, namely, that a receipt of payment by note is not conclusive, but only prima facie evidence of the payment of the debt, and that such evidence may always be explained by other extraneous circumstances, showing the intention of the parties when the receipt was given, and that there was in fact no actual payment of the debt. This renders unnecessary the consideration of the conflicting decisions in other states. This court will follow the rulings of the circuit, as long as they are unreversed by the supreme court of the United States. Most of the cases cited were considered in Allen v. King [supra], and there is nothing in this receipt which takes it out of the ruling in that case. Here there is no proof of an agreement that the note should discharge the pre-existing debt, and no proof that it should not so operate. Our judgment must rest on the intention, as manifested by the conversation and conduct of the parties at the time. The receipt, unexplained, as in De Graff v. Moffat [Case No. 3,748], cited by the respondent's proctor, would have been conclusive. The proofs exhibit these facts: The master was not able or not willing to pay when the account was first presented. He did not contest the sum due. But he wanted time as a convenience to himself. The agent or clerk was willing to give time on certain conditions. With this spirit of accommodation the note

in question was procured and received. The statement of the clerk, that unless the proposed arrangement was acceded to, the vessel should at once be attached, can, by no fair principle of construction, be held to signify his design to receive the note as absolute payment, and an extinguishment of the debt. Moreover, it appears that the agent was only authorized to collect debts. He had no power to exchange securities, especially a higher for one of less grade,—a security in rem for one merely in personam. Such power is not necessarily implied in a simple agency to collect. And certainly the cashing of the note by the broker was solely on the strength of the contract of endorsement. Had the intrinsic credit of the drawers been sufficient, the face of the obligation would have been otherwise.

Holding, therefore, that the note, independently, was not a satisfaction of the debt, the only question remaining is,—was the lien abandoned by the libellants' receiving the note, and thus recognizing the act of the clerk? It is to be observed that, as the transaction took place in Chicago. the libellants did not, in fact, receive the note, but only the money raised by its discount, when it was too late for them to disavow or repudiate the transaction. Where materials are furnished a vessel, the credit is given either to the owner, the captain, or to the ship, and the law creates the lien on the latter. Such lien, however, may be waived, either at the time the materials are furnished, or be abandoned by a subsequent agreement, expressed or implied, on the part of the creditor. He may, at his option, look to other security, and if so, no lien attaches to the ship. In the case of De Graff v. Moffat [supra], so confidently relied upon, the contract, at the time it was entered into by the parties, embraced a credit by the notes of the respondent. After the libellant had closed his proofs, the respondent introduced in evidence a settlement between the parties—an account current in the handwriting of the libellant—in which sundry promissory notes were credited and admitted as cash. This account was balanced, and for the sum remaining due, a receipt in full was given, being expressed at the foot of the account as a payment by note, which was not produced or offered for cancellation. No evidence was introduced showing any understanding modifying or contradicting this receipt, and it was, of course, held, as in Allen v. King [supra], prima facie evidence of payment. Besides, the original agreement, as shown by the account, certainly waived all lien upon the vessel. Although a note under certain circumstances will not operate as an extinguishment of the debt, yet, when the creditor accompanies the act of receiving it in payment with the manifest intention to take it as his sole security, and not to look to the ship, such intention clearly expressed or certainly implied, operates as the abandonment of the lien which the law gave him. Such an intention was not manifested in this case. There was no understanding to release the vessel. It is true that she was not yet attached by process; and it is true that the clerk threatened it; but it is alike true that, at that interview between the clerk and the respondent, all the latter wanted was further time to pay the debt. The former wanted the money due; and under these circumstances the note was given and taken.

But if the note was not taken with the understanding that it was absolute payment, can it be inferred that it was received as additional security? If it was, it would not help the respondent's defense. He pleads payment, and relies upon a change of securities. The note was not a higher security than the ship. Why, then, collateral, or why a change? There can be but one answer. The note was received to raise the money at the time for the mutual accommodation of the clerk and the respondent, by placing the former in possession of funds which he then needed, and extended to the latter further time to meet an acknowledged obligation then due. This intention of the parties is too obvious to be disregarded or overlooked. The one did not receive the note in discharge of the lien; the other did not give it with such an understanding. The intention must govern. The note was to be payment, if paid at maturity; if unpaid, all the relations of the parties as to the vessel and the debt, remained unchanged. The circumstance, so ingeniously pressed, that the note was cashed, and the libellants thereby received the amount of the lien, (which then ceased and could not be revived,) does not materially vary the transaction, or exhibit a different intention. The note gave thirty days' time to the respondent. Until that time elapsed, the vessel could not be attached. Why? Certainly not because the debt was paid, or the lien waived, but because the note and its discount evidenced an understanding to await its maturity, and the default of the makers to meet it. It was in proof that the note was discounted on the endorsement of the libellants. That it was never paid by the respondents, but by the former, fully appears by their present possession. The witness stated that the note was returned by the endorsees, who had cashed it in May last, and that the libellants were charged with the amount in their account current with the broker. In other words, the note, when due, was lifted by the libellants. In cases of this description, the material man is not to be deprived of any of his remedies, except upon the most conclusive proof that exclusive credit has been given to other security than the owner, the master, or the ship. Looking to either of the former, to the exclusion of the latter, releases the lien, but must be clearly established. In no case will either be released, unless such was the manifest intention of the party. The maritime law guards, with

most scrupulous care, its various subjects. The material man, the furnisher of supplies, and the mariner are equally protected. That credit was originally extended to the vessel in this case, is not questioned. The schedule appended to the answer, reads: "Steam Boat Fashion, to Moore & Foote, Dr. To merchandise rendered on account." To this the receipt is attached upon which the defense is based. So that the lien was in existence and recognized the day the note was given. There is no proof that it was ever waived—no proof of an intention to waive it.

The court was forcibly impressed during the hearing with the fact that the instrument was negotiable, and had been discounted, and that, therefore, as the libellants had received the money, their relation to the vessel had ceased. But the subsequent production of the note, and its tender for cancellation, removed all difficulty as to sustaining the lien. This note is not now outstanding. No innocent endorsee can be affected by the decree, nor can it be discovered how sustaining the libel on the principle stated will peril vessels hereafter by secret liens. The purchaser of a ship or any vessel afloat, purchases with a presumed knowledge of the existing legal responsibilities. The note and the lien cannot both be sustained. While the one is still current as cash, or outstanding, the other is without force or vitality; but if the former is itself dead and as waste paper, the legal existence of the latter is not impaired. Here the ship contracted the debt. That debt never has been paid. The note was but a promise to pay—a broken promise. It was made and accepted with the sole view to an extension of time. Certainly in this tribunal, as a court of equity, the respondent cannot complain of being dealt with inequitably by a decree enforcing payment of the debt of the boat from the boat; a debt not denied either in its character or amount. Decree for the entire claim and costs, and the cancellation of the note on payment of the decree.

Case No. 9,772a.

MOORE v. PAXTON.

[Hempst. 51.] [1]

Superior Court, Territory of Arkansas. Oct., 1827.

LIMITATION OF ACTIONS—FOREIGN JUDGMENT.

1. The statute of limitations is not pleadable to a judgment rendered in another state.

2. Where process is served on the defendant, or his appearance entered to the action, the judgment of another state is conclusive; and no pleas can be interposed thereto, nor can it be impeached in any other way than it could be in the state where rendered.

[This was an action by Alexander S. Moore against Joseph Paxton.]

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

OPINION OF THE COURT. This is an action of debt brought by the plaintiff against the defendant, upon a judgment obtained in the state of South Carolina. The defendant has plead the statute of limitations, to which plea the plaintiff has demurred. The statute is as follows: "All actions of debt grounded upon any lending or contract, without specialty, shall be brought within five years after the cause of action shall accrue." Geyer, Dig. 274. This has been considered a question of great importance, and has been ably argued at the bar. We are satisfied that the statute of limitations cannot be plead to an action of debt founded on a judgment from another state, or territory, where the process was served upon the defendant in person, or his appearance entered to the action. The judgments of sister states do not stand upon the same footing as foreign judgments; but where the defendant has personal notice by the service of process, or enters his appearance, the judgment is conclusive, and cannot be inquired into in any other way than it could be in the state where the judgment was obtained, and no other pleas can be interposed thereto. This doctrine has been settled by the supreme court of the United States, in Mills v. Duryee, 7 Cranch [11 U. S.] 481, and Hampton v. McConnell, 3 Wheat. [16 U. S.] 234. The demurrer to the plea of the statute of limitations must be sustained. Judgment for plaintiff.

MOORE (PLASTIC STATE-ROOFING JOINT-STOCK CO. v.). See Case No. 11,209.

MOORE v. REED. See Case No. 9,860.

Case No. 9,773.

MOORE v. RINGGOLD.

[3 Cranch, C. C. 434.] [1]

Circuit Court, District of Columbia. May Term, 1829.

SALE—POSSESSION—CREDITORS.

A bill of sale of goods is void as to creditors, unless the possession accompanies and follows the deed.

[Cited in brief in Brawn v. Keller, 43 Pa. St. 105.]

Replevin of a horse taken by the defendant, as marshal, in execution against Dunning, and found in his possession. The plaintiff claimed the property under a sale from Dunning, who testified that he sent the horse to Moore, with a bill of sale; that Moore sent him back to Dunning with the bill of sale, saying that as he had no other horse, he might keep him till he (Moore) should send for him.

THE COURT (nem. con.), upon the authority of the case of Hamilton v. Russell, 1 Cranch [5 U. S.] 309, instructed the jury

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

that the sale was void as to creditors, unless the possession accompanied and followed the bill of sale. Verdict for the defendant.

MOORE (ROBERTS v.). See Case No. 11,905.

MOORE (ROBINSON v.). See Case No. 11,960.

Case No. 9,774.

MOORE v. ROSENBERGER.

[27 Leg. Int. 148;[1] 7 Phila. 576; 4 West. Jur. 204.]

Circuit Court, E. D. Pennsylvania. May, 1870.

EXECUTION—LEVIED ON ONE PARTNER'S INTEREST —PURCHASER UNDER EXECUTION SALE— TITLE TO WHAT PASSES.

Under a writ of fieri facias, a levy upon and sale by the sheriff of a co-partner's interest in a firm of which he is a member, passes to the purchaser only the defendant's interest in the chattels actually seized upon the writ, and not in his interest in rights of actions or credits of the partnership.

This case originated in a petition of one John D. Rosenberger, a bankrupt, in voluntary bankruptcy. It appeared in the proceedings thereon, that about six months prior to the filing of the same. and just on the eve of a creditor's obtaining a judgment against the bankrupt, his brother, the defendant in this case, procured a judgment against him by confession, and immediately issued a fi. fa. thereon. This writ was returned by the sheriff, "Levied upon right, title and interest of defendant, in and to the firm of J. D. Rosenberger & Co., and sold the same for $50." The plaintiff in the execution became the purchaser; at the time of the sale the stock on hand of the firm was small, its principal assets consisting of its outstanding credits. These were collected in by the liquidating partner, E. B. Taggart, who having discharged the debts of the firm, shortly thereafter, paid over to the order of the purchaser at the sheriff's sale aforesaid, the sum of $4,420.65, on account of the interest of the bankrupt therein so alleged to have been sold as aforesaid.

Upon the hearing of the petition of the bankrupt for a discharge from his debts, the foregoing facts appearing, CADWALADER, District Judge, observed that the bankrupt had neither disclosed in his schedule, nor surrendered to his assignee, the proceeds of his interest in the firm of John D. Rosenberger & Co., which had not and could not have passed to the purchaser at the sheriff's sale any thing beyond the bankrupt's interest in the chattels actually seized on the fi. fa. That any notion to the contrary was one that prevailed only in Philadelphia, and here to a limited extent, and was unknown generally in the state. That it had arisen here from a clear misapprehension of some decisions of the supreme court of Pennsylvania, which, upon examination, would appear to rather conflict with than support the position. Again, the fact that not unusually upon the sale of a partner's interest the outstanding credits were used to settle the outstanding debits of the firm, and so the chattels seized would be relieved, and that the purchaser at the sheriff's sale would almost always be entitled in equity to have the assets so marshalled, might have also had something to do with the mistake. The bankrupt's discharge was refused.

This suit was then brought by the assignee of the bankrupt against the purchaser at the sale, to recover the proceeds of the bankrupt's interest in the firm, received by him, other than such as were derived from the chattels actually levied on.

N. H. Sharpless, for plaintiff.

Geo. W. Thorn, for defendant.

McKENNAN, Circuit Judge, and CADWALADER, District Judge, were both clearly of the opinion theretofore expressed by Judge CADWALADER in the court of bankruptcy; and Judge McKENNAN said, that the law certainly had been so understood in the Western district.

Upon another point arising in the case a juror was withdrawn.

[1] [Reprinted from 27 Leg. Int. 148, by permission.]

MOORE (RUTHERFORD v.). See Cases Nos. 12,173 and 12,174.

Case No. 9,774a.

MOORE v. SEARCY.

[Hempst. 52.][1]

Superior Court, Territory of Arkansas. April, 1828.

LIENS—DEBT DUE TO TRUSTEE BY CESTUI QUE TRUST—CLAIM OF TRUSTEE TO BE FIRST SATISFIED.

1. S. having the legal title to land, but one half of it in equity belonging to C. deceased, cannot have a debt against C. satisfied out of the land, to the exclusion of other creditors, but must come in equally with them.

2. The land decreed to be sold for the benefit of all the creditors.

Bill in chancery.

Before JOHNSON, ESKRIDGE, and TRIMBLE, JJ.

OPINION OF THE COURT. This is a suit in chancery brought by Thomas Moore, administrator of the estate of Thomas Curran, deceased, to coerce the conveyance of certain real property, namely, one undivided half of the east half of the north-east quarter of section ten of township thirteen north, in range six west, containing eighty acres, more or less; also the one half of forty acres of ground, more or less, of section seventeen of township thirteen north, in

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

range six west, lying below the town of Batesville, fronting White river, and joining the lands of Charles Kelly and Hartwell Boswell, lying and being in the county of Independence and territory of Arkansas. The bill charges, that the said Curran in his lifetime, and said Richard Searcy, with their joint funds and in partnership, entered the property in controversy at the United States land-office at Batesville; that, by agreement between the parties, the patents for said lands issued in the name of said Searcy; that Curran afterwards died insolvent, and prays the conveyance of one half of the above described lands. The defendant, in his answer, admits the several allegations as set forth in the complainant's bill, but alleges that Curran died indebted to him in the sum of five hundred and sixty-seven dollars and sixty-six cents, which is not denied by the complainant; and contends that he holds a lien in equity on the property in controversy for the full amount of his debt against the estate. This is a controversy between the creditors of Curran, of whom the defendant is one, and a decree of conveyance will be for the benefit of all. Searcy, as a creditor, has only the same equity that the others have; and the accidental circumstance of his being invested with the legal title, cannot avail him in a court of equity to the prejudice and exclusion of the other creditors. Sale decreed accordingly.

Case No. 9,775.

MOORE v. SHIELDS.

[2 Cranch, C. C. 529.] [1]

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

REPLEVIN—ACTION ON BOND—BREACH OF CONDITION—RETURN ELOIGNED.

In order to support an action upon a replevin-bond, it is not necessary that the defendant in replevin who has recovered judgment against the plaintiff in replevin for damages and costs, should obtain a writ of retorno habendo returned "eloigned;" but the non-payment of the damages found by the jury, is a breach of the condition of the bond upon which an action may be maintained.

Debt on a replevin-bond. The breach alleged, was the non-payment of the damages and costs found by the verdict of the jury in the trial of the action of replevin, for the defendant in replevin against the plaintiff in replevin. The defendant, who was a surety in the replevin-bond, pleaded in substance, that the plaintiff in replevin was always, after the judgment of the court in that action, ready to return the replevied property, and still is ready to return it. To this plea there was a general demurrer and joinder. The condition of the bond was to prosecute the writ of replevin with effect; to return the goods replevied, if a return thereof should be adjudged by the court, and to pay all such costs, charges, and damages as may be adjudged by the court to be sustained by occasion of replevying the said goods; and in all things well and truly to observe and perform the judgment of the said court upon the premises.

Mr. Ashton, for defendant, contended that no action could be maintained upon the bond until a writ of retorno habendo should have been issued and returned "eloigned." But in the action of replevin the defendant in replevin did not obtain a judgment for a return.

THE COURT (nem. con.) adjudged the plea to be bad, and rendered judgment upon the demurrer, for the plaintiff, for the penalty of the bond and damages, to be released on the payment of the damages found for the defendant in replevin in that action and the costs of the replevin, and the costs of the present action upon the bond.

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

MOORE (SHULTS v.). See Case No. 12,824.

MOORE (SHULTZ v.). See Case No. 12,825.

MOORE (STARR v.). See Case No. 13,315.

MOORE (SUMNER v.). See Case No. 13,610.

MOORE (TAYLOR v.). See Case No. 13,798.

Case No. 9,776.

MOORE et al. v. THOMAS et al.

[3 Ban. & A. 13; [1] 14 O. G. 1.]

Circuit Court, S. D. Ohio. July, 1877.

PATENTS—IMPROVEMENT IN SEED-DRILL—CLAIMS—STRICT CONSTRUCTION—DILIGENCE.

1. The second claim of the letters patent granted to Hiram Moore, November 20, 1860, for improvements in seed-drills, was for the combination of the separate bearings of a cylinder for distributing the seed, with a single shaft-bearing in the cylinder, shorter than the cylinder and larger than the shaft. In the defendants' machine the seed was distributed by a revolving wheel or disk with flanges upon the periphery. *Held*, upon the construction of the patent given by the court, that the claim must be limited to that class of machines having cylinders, and does not include those with flanged disks or wheels, and that consequently there was no infringement.

2. The third claim of the patent was for "a distributing-cylinder for seeding-machines, having a bevelled bearing substantially in the manner and for the purposes specified." *Held*, that as, upon the construction given to the patent by the court, and upon the evidence, it appeared that the object of the bevel in complainant's patent was to prevent dust and other obstructions from entering the bearings, and that the construction of defendants' seed wheel was such that there was no liability of such obstructions entering the bearings, and further, that if there was any bevel in the defendants' machine more than was incident to the molding of it, it was so slight as to bear no part in the operation of the machine, such bevel did not constitute an infringement.

3. The sixth claim of the patent issued in 1861, to the same patentee, was for the combination of a removable driving-shaft, with a series

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

of seeding-cylinders having independent bearings, whereby said shaft could at pleasure be removed to allow any of said cylinders to be taken out for repairs, without displacing the rest. *Held*, that this claim was merely for a multiplication or aggregation of the seeding cylinders described in the first patent, and was not patentable.

4. The invention of the patentee, under which the defendants manufacture, having been completed at about the date of that described in the complainants' patent, and there being no lack of diligence in applying for a patent, the court construed complainants' patent strictly, to avoid infringement, and to sustain both grants.

This was a suit in equity for the infringement of letters patent No. 30,685, November 20th, 1860, and No. 31,819, March 26th, 1861, granted Hiram Moore for certain improvements in seed-drills. The defendants [Joseph W. Thomas and others] manufactured under the patent granted to Gilbert Jessup, June 25th, 1861, No. 32,627.

Bowman, Pringle & Scot, for complainants.
Wood & Boyd, for defendants.

BROWN, District Judge. Complainants claim to recover for an infringement of the second and third claims of Moore's patent of 1860, and for the sixth claim of his patent of 1861. I will proceed to dispose of these claims in their order. The second claim of the patent of 1860 is as follows: "2. I claim the combination of the separate bearings of the cylinder with a single shaft-bearing in the cylinder, shorter than the cylinder and larger than the shaft, in the manner and for the purposes substantially as specified."

To understand exactly the nature of complainants' invention, it is necessary to examine with some care the language of Moore's specification. After setting forth the general nature of his improvement, he says: "The object of my said improvements, is more evenly and equally to distribute the grain or seed to be sowed, and to render the machine more simple, and less liable to get out of order, and they relate particularly to that class of seeding-machines in which a toothed distributing cylinder is used at the bottom of a seed-box or hopper, in order to distribute the grain or seed. They consist, first, in combining a conduit or passage for the grain, arranged between the bottom of the hopper and the discharging-orifice, with the oblique discharging-orifice and the distributing-cylinder. Second, in combining separate bearings for the cylinders with a single bearing in the cylinder for the shaft, in the manner hereinafter described. By this means we attain important advantages. The warping or twisting of the seed-box is a fruitful source of trouble in machines of this class, for the hopper, being rigidly fastened at the bottom of the seed-box, any warping or twisting of the latter will cause the hopper to change its position relative to the shaft, and if the cylinder be firmly fastened upon its shaft, it will bind against the sides of the hopper, and, in its bearings, producing much friction and increasing the draft of the machine and its liability to get out of order. By having the shaft-bearing in the cylinder larger than the shaft, and short, the evil effects of a displacement of the cylinder will be obviated in a great measure, as the axis of the cylinder need not be coincident or even parallel with the axis of the shaft, but may vary considerably from it without the cylinder binding upon the shaft, and the cylinder will still be controlled by the revolution of the shaft, the cylinder being retained in place within the hopper by its own independent bearings. I am aware that distributing-cylinders have before this been placed loosely upon shafts at the bottom of hoppers, but without separate bearings, so that they cannot retain their proper relative position within and to the hoppers, and consequently the flow of seed or grain is irregular and uneven."

Bearing in mind that his actual invention was an improvement in machines in which a a tooth distributing-cylinder was used; that in his specifications he announces that his improvements relate particularly to that class of seeding-machines; that the cylinder is a prominent feature in all of his claims; that the evil, which the device set forth in the second claim was designed to remedy, "is said to be a fruitful source of trouble in machines of this class," I think the words "shaft-bearing in the cylinder, shorter than the cylinder and larger than the shaft," were intended to be limited to that class of machines having cylinders, and not flanged disks or wheels, for the distribution of seed. When they are applied to machines having toothed distributing-cylinders, the value of complainants' invention is at once manifest. If the shaft-bearing were made the whole length of the cylinder, the shaft would have to be made smaller than the bearing, in order to get the lateral play so essential to prevent binding and friction, and the longer the bearing the smaller would have to be shaft. But if the bearing be very short, a difference of one thirty-second of an inch between the shaft and the bearing will allow sufficient play. The value, too, of an independent bearing for the cylinder is no less obvious. By this means the cylinder is retained in its exact relative position to the hopper, while its position to the shaft may constantly change without binding, or impairing the operation of the machine.

Defendants' device is constructed on a different principle. In his machine, the seed is distributed by a revolving wheel or disk, with flanges upon the periphery. There is nothing in the wheel which answers the definition of a cylinder, unless this word be extended and construed to include the hub. Webster defines a cylinder to be "a long, circular body, of uniform diameter, and its extremities forming equal parallel circles."

I think the application of this term to the hub of the wheel is unwarranted by the definition, or by the common acceptance of the term.

Moore states in his specifications, that distributing-cylinders have, before this, been placed loosely around shafts at the bottom of the hoppers, but without separate bearings, so that they cannot retain their proper relative position within and about the hoppers, and consequently the flow of seed or grain is irregular and uneven. Now, it being conceded that the shaft may be made smaller than the bearing without infringing the second claim, and admitting that separate bearings may be used for the hub or cylinder, provided that the short shaft-bearing be not also used, it seems to make no practical difference in the operation of defendants' devices whether the shaft-bearing in the hopper be made shorter than the hub, or not. If defendants' witnesses, Blanchard, Bogle and Ludlow, are to believed, and they seem to be uncontradicted, there is no liability to warping or twisting in their machine, and hence, no utility in a shaft-bearing shorter than the hub. I think complainants' exhibit, "defendants' seed-cup," is not an infringement of this claim even upon complainants' theory, since the bearing is of uniform size throughout the whole length of the hub, with the exception of slight and immaterial coring out in the middle; neither do I regard defendants' exhibit, "Thomas, Ludlow & Rogers' seeder," an infringement, since the flanged wheel has no hub at all, but simply a square hole in the centre for the reception of the shaft, and, hence, no separate bearings, the wheel dropping upon its periphery when the shaft is removed. It is true there is a hub or thimble upon one side of the wheel, separate from the wheel, which revolves with the shaft upon a bearing of its own within the casing, and perhaps this might constitute a separate bearing for the wheel, within the meaning of the patent; but, as the square apertures through the hub and the wheel are the same size, the shaft-bearing cannot be said to be shorter than the cylinder, unless the other side of the hopper, which contains a round hole for the passage of the shaft, be also construed as a part of the cylinder. I do not think it will warrant this construction.

There is more difficulty about complainants' exhibit, "defendants' hopper, with seed-cup and driving shaft;" and upon complainants' theory of the construction of their patent there would be an infringement, inasmuch as the hub has a separate bearing of its own, and a shaft-bearing shorter than the hub and larger than the shaft, but holding, as we do, that complainants' patent was intended to apply to a different class of machines, and that the short hub of the vertical distributing-wheel or disk used by defendants is not embraced in the word "cylinder," used so often in complainants' specification, we also feel bound to hold there is no infringement in defendants' device.

There are strong equities in favor of the defendants arising from the respective dates of their inventions. It is well settled, that an invention is not patentable until a machine has been perfected; and, if not actually used, made capable of useful operation. Agawan v. Jordan, 7 Wall. [74 U. S.] 583; Seymour v. Osborne, 11 Wall. [78 U. S.] 552; Goodyear v. Day [Case No. 5,569]; Coffin v. Ogden, 18 Wall. [85 U. S.] 120. Within this definition Moore's invention was not patentable until the spring of 1859, although it seems that as early as the summer of 1857 he had made some experiments, and completed rough drawings of his invention, in the state of Michigan, in or near Grand Rapids. In the spring of 1858 he seems to have had a contrivance substantially in the form of his invention, which he kept in his house, and worked as a model. He left Michigan in March, 1858, and moved to Wisconsin, and during the winter of 1858-59 had a full-sized drill completed, containing seed-cups like his exhibit, operated by a square wooden shaft, which was experimented with by his nephew in sowing wheat on his farm, on or about April 27th, 1859. From all this testimony, I think we are not authorized to conclude that his invention was perfected before the spring of that year.

While these experiments were going on, one Gilbert Jessup, in another state, and some hundreds of miles distant, with no opportunity or suspicion of piracy, was perfecting an invention embodying the substantial principle of defendants' device. While the exact day upon which his invention was so far perfected as to be patentable cannot be ascertained, the testimony shows that he had completed twelve machines by May, 1859. It is scarcely probable that he would have made that number of machines until after he had perfected his invention, and I think, under all the circumstances, we are authorized to conclude that he was entitled to a patent quite as soon, if not sooner than Moore. He appears to have commenced proceedings to obtain a patent as soon as May, 1860, but owing to some delay on the part of his solicitors in New York, his application was not placed upon file until after the Moore patent had been issued. It is very difficult to fix the precise relative dates of these inventions, but in view of the fact that no suspicion of bad faith attaches to Jessup; that his invention was at once put into practical operation and the manufacture of machines commenced on a large scale, we think the court is bound to sustain his invention, if possible, particularly as the principle upon which it operates is quite different from that of the complainants' device.

The third claim of complainants' patent of 1860 is as follows: "I claim a distributing-cylinder for seeding-machines, having a bevelled bearing, substantially in the manner and for the purposes specified." Here again complainant limits himself to distributing-cylinders, evidently having reference to the periphery feeding-cylinder set forth in his specifications. The value of a bevelled bearing in cylinders of this kind results from the tendency of particles of earth, chaff and dust, car-

ried on the periphery of his wheel, to work toward the end and into the bearings, whence they are discharged with the seed. If we are to believe the testimony of defendants' witnesses upon this point, it would appear that the construction of their seed-wheel is such as to prevent the dust and chaff from entering the bearings of the seed-wheels, the repeated revolutions of the wheels having a tendency to throw such particles toward the periphery, and that the taper of the hub performs no function whatever in sowing the grain. It seems, too, that the operation of molding both hub and periphery is assisted by a slight taper from the centre outward, and if the bevelling in the hub is greater than the convenience of molding requires, it is so slight as apparently to play no part in the operation of the machine. Upon this point defendants' witness, Bogle, testifies as follows:

"I have never discovered any difficulty arising from the effects of dirt or straw getting into the bearings of the seed-wheel and casing. In fact, the seed-cups referred to as manufactured by our company are so constructed that there is no liability whatever of dirt, straw or obstructions getting into said bearings, the hub of the distributing-wheel being entirely incased by casing, said casing being so formed that it affords a conducting surface by means of which the grain is carried over the bearing down into the seed and against the vertical face of the distributing-wheel, thus being prevented from coming in contact with the bearings of said wheel, in any manner. The said casing is fitted closely to the vertical face of the distributing-wheel, and the rotating motion of the wheel inclines the grain or other material finding its way into the seed-cup, toward the inner periphery of the carrying-flange found upon the vertical face of the wheel, thus conducting it directly away from contact with the bearings of the wheel and casing, and if the space between the casing and face of the wheel was even large enough to permit dirt, straw or other obstructions to pass through, the motion of the wheel, aided by gravity, would tend to carry such obstructions immediately toward the flange of the wheel, as above stated, thereby preventing any trouble whatever that might occur under a different construction of the seed-cylinder and its casing."

The sixth claim of Moore's patent of 1861 is for "the combination of a removable driving-shaft with a series of seeding-cylinders having independent bearings, whereby said shaft can at pleasure be removed to allow any of said cylinders to be taken out for repairs without displacing the rest, substantially as described."

The same principle of construction allied to the two prior claims will also limit this to the toothed distributing-cylinders described in the specifications. It seems to me, too, that so far as this claim is concerned, there is nothing in the patent of 1861, not already found, or at least suggested to a mechanic of ordinary intelligence, in the patent of 1860. The shaft used in the earlier patent, being smaller than its bearing, must have been removable, and as the later patent does not claim any particular device for removing, it is satisfied by any shaft which is removable. Nothing else is set up in this claim but a multiplication of the seeding-cylinders described in the first patent. This is not patentable. The bill must be dismissed.

[For another case involving these patents, see Westcott v. Wayne Agricultural Works, 11 Fed. 298.]

Case No. 9,777.

MOORE v. UNION MUTUAL LIFE INS. CO. et al.

[5 Ins. Law J. 517.] [1]

Circuit Court, D. Nebraska. July, 1876.

USURY — LIFE INSURANCE COMPANY LOAN — CONFESSION OF JUDGMENT.

1. The acceptance of mortgages by a life company in Nebraska in 1872, as security for loans, was not illegal.

2. Where mortgages for $20,000 were given as security for loans on which life insurance for about $80,000 was required on the life of the borrower and others, and the net loans, after deducting premiums, interest, commissions, etc., amounted to about $16,000, *held*, that the insurance was excessive, and the mortgages were usurious, and the contract void to the extent declared by the statute.

3. Where loans had been made on certain securities by a life company, and, the borrower being threatened by judgment creditors to the amount of about $6,000, the company advanced $3,000, with which its agent obtained the satisfaction of the judgments of record, after which the borrower confessed judgment for $6,000 in favor of the company, *held*, that the confession stands as security for only $3,000 with interest.

The action is brought for an accounting between complainant [James W. Moore] and the company and [John F.] Kinney, and for a decree declaring certain mortgages executed by [David B.] McMechan and his wife void, and for a perpetual injunction restraining the company from issuing order of sale or execution upon certain confessions of judgment given by McMechan to the company about forty days before he was adjudicated a bankrupt.

McMechan was a dealer in hardware, stoves, etc., in Nebraska City. In 1872 he became embarrassed; judgments aggregating several thousand dollars were obtained against him, and executions were being levied upon his stock. Kinney was the company's general agent in Nebraska. The company's loans were generally made in connection with life insurance, the applicant taking a certain amount of insurance upon his life, and paying the premiums to the company, the usual proportion being $5 of insurance to $1 of loan. McMechan applied to Kinney for $12,000, which, on application to the company, was granted, the agreement being, in con-

[1] [Reprinted by permission.]

sideration of the amount of the loan, that he should take only $36,000 insurance, pay twelve per cent. interest in advance on the loan, and pay a bonus of three per cent. upon the sum loaned to Kinney. McMechan thereupon executed his note and a mortgage upon certain realty for $12,000. Before the money had been advanced, a further loan of $8,000 was negotiated, the agreement being for $40,000 additional life insurance and the payment of a three per cent. bonus and $1,000 to Kinney. As security, a second mortgage upon the realty and a mortgage upon the stock for $8,000 were executed by McMechan, and for further security notes given by his customers were placed in the hands of Kinney. The company's limit on a single risk being $20,000, two brothers of McMechan were examined for policies and the premiums charged to him. The policies were not delivered to the applicants, and $15,000 of the insurance for which premiums were paid was not applied for, but the premiums stood as a credit on the company's books, for which a policy might be taken. The company paid the net sum, deducting premiums, interest, etc., $16,005.65, to McMechan's creditors, through Kinney, in various sums, on the order of McMechan. In January, 1874, McMechan again became embarrassed, and judgment creditors to the amount of about $6,000 threatened to contest the chattel mortgage held by the company. These judgments were satisfied of record by a further advance of about $3,000 by the company, the creditors accepting fifty per cent., whereupon McMechan, according to agreement, confessed judgment in favor of the company for $6,734.40, and also confessed judgment in foreclosure for $8,779.11, the amount claimed as due under the second loan of $8,000, and decree was entered directing the sale of the real estate in the mortgage mentioned. In February the company issued execution upon their judgment at law, which was levied for its full amount upon McMechan's stock in trade in his store. Kinney, acting for the company, purchased the entire stock on the agreement that the goods were to be inventoried at the cost price, with freight added, and the amount credited upon what McMechan owed the company. The inventory showed a valuation of $9,000, according to the company, and from $11,000 to $13,000, according to plaintiff. McMechan's store building was leased by the company at a monthly rental of $50, and retained in its possession, and McMechan conducted the business thereafter as an employee of the company until the goods were seized by the sheriff for taxes against McMechan. It was alleged that through the negligence of Kinney in regard to collecting the notes placed with him as collaterals, a large amount was lost to McMechan. It was also alleged that a large amount had been paid by McMechan, and many notes collected or converted by the company; also that the company received from McMechan the proceeds of sales of his goods, which were misapplied. It was claimed by the company that the taking of life insurance was not a condition precedent to the loan; also that the bonus or commission of Kinney was for services to McMechan, with which the company had nothing to do; also that the advance of $3,000 was not a loan to McMechan; also that the notes given as collateral were mostly worthless; also that McMechan was satisfied with the judgment transaction; also that the stock of goods was seized and sold by the sheriff on another claim, and no consideration for them was received by the company; also that a full accounting was had with McMechan at the time of confessing judgment; also that McMechan, was put into bankruptcy by the creditors whose claims had been satisfied, by means of new obligations obtained secretly from McMechan. On the case being brought up, leave was granted to the company to file a cross bill to foreclose the $12,000 mortgage.

E. F. Warren and Savage & Manderson, for complainant.

A borrower may avail himself of usury in the contract to obtain relief, and his assignee in bankruptcy is in the same situation. Schermerhorn v. Talman, 14 N. Y. 93; Williams v. Fitzhugh, 37 N. Y. 444, citing Post v. Bank of Utica, 7 Hill, 391; Peters v. Mortimer, 4 Edw. Ch. 279; Pearsall v. Kingsland, 3 Edw. Ch. 195; Dry-Dock Bank v. American Life Ins. & Trust Co., 3 Comst. [3 N. Y.] 351; Riggs v. Powers, 6 Ohio St. 19; 1 Ohio St. 298–312; Rev. St. U. S. § 5046; Allen v. Massay, 17 Wall. [84 U. S.] 351.

The transaction was usurious, first, because interest was charged from the date of the $12,000 note, while the money was not advanced until over three months later. It was claimed that the money was ready, and it was McMechan's fault that it was not sooner disbursed, but no check was then sent by the company to Kinney for such loan, as was their usual course. Second, premiums were charged for policies not delivered. Fulton Bank v. Benedict, 1 Hall, 480; Fire Cases of Utica Ins. Co. v. Cadwell, 3 Wend. 296; New York Fire Ins. Co. v. Donaldson, 4 Edw. Ch. 199, distinguished. Third, about $15,000 of insurance was charged and paid for, on which no risk was assumed. The requiring of $80,000 insurance where only $20,000 would be accepted on the borrower's own life, and charging premiums on insurance not taken, are evidence that the insurance was a condition precedent to the loan.

The transaction was usurious on account of the excessive sums retained as charges and commissions. Kinney was not entitled to them on account of any adequate service rendered. As general agent accustomed to effect loans for the company his acts were those of the company. He was not the agent of McMechan in the transaction. Kinney re-

ceived no salary for attending to loans, but was remunerated by commissions. The company must have been knowing to the facts. Any loss imposed on the borrower, in addition to the amount lent and lawful interest, is a violation of the law restricting the lender to a specified rate. The money received by McMechan cost him thirty-three and one-half per cent. per annum. Rogers v. Buckingham, 33 Conn. 86; Butterworth v. Pecare, 8 Bosw. 671, 675–677. Tyler, Usury, 325 et seq.; Williams v. Hance, 7 Paige, 581; Bank v. Hoyt, 32 N. Y. 119; Reed v. Smith, 9 Cow. 648–650; Bank v. Owens, 2 Pet. [27 U. S.] 527; McFarland v. Carr, 16 Wis. 529; Cases of Crane v. Hubbel, 7 Paige, 413; Barretto v. Snowden, 5 Wend. 181; Condit v. Baldwin, 21 N. Y. 219, where the lender was ignorant of bonus exacted by agent, distinguished.

It is urged that the sums were willingly paid by McMechan, but the law regards usurious terms as involuntary and the result of compulsion. Schroepel v. Corning, 5 Denio, 236. Though usury paid may not be recovered, the debtor may insist on its deduction from any part of the debt unpaid, and it may be applied to the satisfaction of the principal. Farwell v. Meyer, 35 Ill. 40; Booker v. Anderson, Id. 66; Saylor v. Daniels, 37 Ill. 216, 331; Wood v. Lake, 13 Wis. 84; Gill v. Rice, Id. 549. The company were guilty of gross negligence in that Kinney did nothing more to collect the notes than to notify the debtors by letter of the fact, and request their payment, and McMechan is entitled to credit for the entire amount of the same. Jennison v. Parker, 7 Mich. 355; Watts v. Willing (Pa.) 2 Dall. [2 U. S.] 100; 2 Pars. Cont. p. 111; Lamberton v. Windom, 12 Minn. 241 [Gil. 151]; Ex parte Mure, 2 Cox, 63; Noland v. Clark, 10 B. Mon. 239; Beale v. Bank, 5 Watts, 529; Lyon v. Bank, 12 Serg. & R. 67; Bank v. Peabody, 8 Har. [20 Pa. St.] 457; 3 Lead. Cas. Eq. 556, 557; McKinister v. Bank of Utica, 9 Wend. 46; Smedes v. Bank of Utica, 20 Johns. 372; Roberts v. Thompson, 14 Ohio St. 1; Douglass v. Reynolds, 7 Pet. [32 U. S.] 113.

The mortgages given to the company were contrary to the policy of the state, prejudicial to its interests, and contrary to the express power of the statutes, and therefore void. A foreign corporation can do nothing in Nebraska contrary to the policy or statutes of the state, or prejudicial to its interests. Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519; Paul v. Virginia, 8 Wall. [75 U. S.] 181; Ducat v. Chicago, 10 Wall. [77 U. S.] 410; Insurance Co. v. French, 18 How. [59 U. S.] 407; Ranyon v. Coster's Lessees, 14 Pet. [39 U. S.] 122; Stoney v. Ins. Co., 11 Paige, 637; Ins. Co. v. Owen, 15 Gray, 491; State Bank v. Coquillard, 6 Ind. 232; Bard v. Poole, 12 N. Y. 495; Ang. & A. Corp. (9th Ed.) § 265. At the date of these mortgages it was unlawful for a company in the state to hold or purchase real estate, except such as was necessary in its legitimate business of insurance, and deeds or conveyances for any other purpose were void. The term "deed" included every instrument in writing by which any estate or interest in lands was created, aliened, mortgaged or assigned. Gen. St. c. 11, § 4; Revision 1873, p. 161; Rev. St. 1866, c. 25, § 4; Revision 1873, § 23, c. 25, p. 395; Id. § 46, c. 61, p. 880.

The policy of the state has been to impose similar restrictions though more liberal, on domestic corporations. Gen. St., Revision 1873, § 16, c. 33, resembling Rev. St. U. S. § 5137, p. 999, which was construed in Kansas Valley Bank v. Rowell [Case No. 7,611]. Case of Bank v. North, 4 Johns. Ch. 371, distinguished. Gen. St., Revision 1873, c. 11, §§ 19, 22, 42, 49, 61, 74, 85, 125, 165; Id. § 41, c. 33, p. 445. The company's charter provides that real estate mortgaged to it for security, or taken on loans, shall be offered for sale every four years. Under this provision the company cannot be forced to sell, and unless the mortgages are invalid a release from the mortgagor would merge the title, and the corporation would be able to bar alienation of real property. Carroll v. City of East St. Louis, 67 Ill. 568, 2 Cent. Law J. 557. If the mortgages be illegal the whole transaction is void, and cannot be enforced. Philadelphia Loan Co. v. Towner, 13 Conn. 249; Utica Ins. Co. v. Scott, 19 Johns. 1, excepted to; Coppel v. Hall, 7 Wall. [74 U. S.] 542, 558; Fowler v. Scully, 72 Pa. St. 456; Seidenbender v. Charles, 4 Serg. & R. 160; Bank v. Owens, 2 Pet. [27 U. S.] 538; Bank v. Lanier, 11 Wall. [78 U. S.] 369; Burkholder v. Beetem, 65 Pa. St. 496; Mitchell v. Smith, 1 Bin. 110; Maybin v. Coulon (Pa.) 4 Dall. [4 U. S.] 298; [Duncanson v. M'Lure] Id. 308; Badgley v. Beale, 8 Watts, 263; 6 Watts. 231; 7 Watts. 343; Fowler v. Scully, 72 Pa. St. 456.

If the $3,054.75 advanced by the company to obtain satisfaction of judgments against McMechan of record was not a loan to McMechan, as alleged by the company, it was a voluntary payment, for whose repayment they have no valid demand, and the subsequent confession of judgments might be inquired into as fraudulent. The judgments were void, having been made while the debtor was insolvent and in contemplation of bankruptcy. McMechan was adjudged bankrupt on the ground that he had confessed judgment in favor of the company, intending to give them an unlawful preference. Sections 35, 39, Bankrupt Act. The confessions estop the debtor from inquiry, but not the assignee. The judgments can only be assailed for fraud. Credit was not given to McMechan for the inventoried value of the goods, as agreed, and, if the company never received any consideration on account of a seizure by the sheriff, it is their own concern. The sheriff's claim was known to Kinney and the company at the time of seizure, and the company alleged the purchase in two previous suits. The company, having

reason to believe McMechan insolvent at the time of confessing judgment, should not be allowed to prove for more than half the debt. Section 39, Bankrupt Law. To secure themselves as against other creditors having judgments aggregating upward of $6,000, the company induced McMechan to confess for double the amount advanced, and issued execution, and directed the levy on his stock.

E. Wakely, for defendant.

The position that the company had no power to loan on real-estate security in Nebraska is sweeping and far-reaching. Millions have been so loaned by foreign corporations, and, if the position is sound, the securities are worthless, even if the loans are not void. The objection is easily met. By its charter the company had power to make such loans. Charter, § 6, p. 6; Id. § 1, p. 1. A corporation may do in any state what its charter empowers it to do in its own, provided the act is not forbidden by or against the policy of such state. Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519; Kennebec Co. v. Augusta Ins. Co., 6 Gray, 204; American Mut. Life Ins. Co. v. Owen, 15 Gray, 494; Arms v. Conant, 36 Vt. 744; Western v. Genesee Mut. Ins. Co., 2 Kern [12 N. Y.] 258; Farmers' L. & T. Co. v. McKinney [Case No. 4,667]; Connecticut Mut. Life Ins. Co. v. Albert, 39 Mo. 181; Blair v. Perpetual Ins. Co., 10 Mo. 559; Lathrop v. Commercial Bank of Scioto, 8 Dana, 114; Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109; Bard v. Poole, 2 Kern [12 N. Y.] 505; 18 Wis. 109.

By the strongest implication, Nebraska statutes recognize the power of foreign companies to loan on real-estate security. St. 1866, § 5, pp. 189, 190, 193, 194, 188. This chapter applies to life companies. Gen. St. Neb. p. 428, c. 33, §§ 1, 41. Kinney had no authority to contract the loan. It was made by the company at the home office. The entire $12,000, less one year's interest and premiums, and the $8,000, less premiums, were forwarded to Kinney. The company neither knew of nor sanctioned the bonus of Kinney. It was given for services of Kinney to McMecham. There is no usury unless the lender knows of or sanctions an agreement for commission. The agent has no implied authority to do an unlawful act. If for services to the borrower, commission is not usury. The only contract was in writing by officers of the company. An agent without power to contract has no power to make a lawful agreement usurious by his own private agreement for compensation. Condit v. Baldwin, 21 N. Y. 219; Bell v. Day, 32 N. Y. 175; Thurston v. Cornell, 38 N. Y. 281; Muir v. Newark Sav. Inst., 1 C. E. Green [16 N. J. Eq.] 537; Conover v. Van Mater, 3 C. E. Green [18 N. J. Eq.] 481; Hyde v. Goodnow, 3 Comst. [N. Y.] 266; Baxter v. Buck, 10 Vt. 548; Fay v. Lovejoy, 20 Wis. 407; Rogers v. Buckingham, 33 Conn. 81; Banks v. McClellan, 24 Md. 62; Jones v. Berryhill, 25 Iowa, 289; Mining Co. v. Gwyer, 48 Ga. 11; Beadle v. Munson, 30 Conn. 175; Corlies v. Estes, 31 Vt. 653; North v. Sergeant, 33 Barb. 350; Philo v. Butterfield, 3 Neb. 256.

The condition requiring life insurance was not usurious. The premiums were the usual rates required, without a loan. The insured had the full value of his premiums in the obligation of the insurer to pay at death. Clarke v. Sheehan, 47 N. Y. 188; Utica Ins. Co. v. Cadwell, 3 Wend. 296; New York Fire Ins. Co. v. Donaldson, 3 Edw. Ch. 199; Brooklyn Bank v. Waring, 2 Sand. Ch. 1; Dowdall v. Lenox, 2 Edw. Ch. 267; Bullock v. Boyd, Hoff. Ch. 299; Valentine v. Conner, 40 N. Y. 248; Fellows v. American Life Insurance & Trust Co., 1 Sand. Ch. 203; Stille v. Andrews, 4 C. E. Green [19 N. J. Eq.] 409; Jarvis' Appeal, 27 Conn. 432; Roane v. Bank of Nashville, 1 Head. 526.

Usury is alleged because the company took and retained papers which bore interest from a date prior to the receipt of the money by the borrower. The papers were dated as of the time of execution and acknowledgment of mortgage, which could not properly have been changed. The money was then in readiness. The only claim could be for an inadvertent omission to indorse a few days' interest credit, by which alone the discrepancy could properly be corrected. The lender has a right to interest from the time the loan is to take effect, where the money is ready and the delay in paying it over is not the fault of the lender. Bank of U. S. v. Wagner, 9 Pet. [34 U. S.] 378–399; Knox v. Goodwin, 25 Wend. 643; Booth v. Swezey, 8 N. Y. 276; Dowdall v. Lenox, 2 Edw. Ch. 266; Walker v. Bank of Washington, 3 How. [44 U. S.] 62; Muir v. Newark Sav. Inst., 1 C. E. Green [16 N. J. Eq.] 537; Howell v. Auten [1 H. W. Green] 2 N. J. Eq. 44; Ware v. Thompson, 13 N. J. Eq. 66; Auble v. Trimmer, 7 N. J. Eq. 242; Beals v. Benjamin, 33 N. Y. 61; Doak v. Snapp, 1 Cold. 180; Stark v. Coffin, 105 Mass. 328–333; Banks v. Van Antwerp, 15 Harek, 29.

This court cannot enjoin proceedings to enforce the judgments. The bankrupt law does not provide for it. Peck v. Jenness, 7 How. [48 U. S.] 612; Orton v. Smith, 18 How. [59 U. S.] 263; Ingraham v. Dawson, 20 How. [61 U. S.] 486; Freeman v. Howe, 24 How. [65 U. S.] 450; 4 Ch. 179; 7 Ch. 279.

The larger judgment was simply for the foreclosure of the $8,000 mortgage, which the bankrupt law does not prohibit. The smaller judgment was for a present consideration, for money to pay off other debts, not to get a preference. There was no fraud; it was done in good faith; and without fraud a person may advance money to an insolvent debtor, and take property as security. Cook v. Tullis, 18 Wall. [85 U. S.] 332; Gibson v. Warden, 14 Wall. [81 U. S.] 244; Tiffany v. Luces, 15 Wall. [82 U. S.] 410; O'Connor v. Parker, 23 Mich. 22; Darby v. Boatman's

Sav. Inst. [Case No. 3,571]; Gaffney v. Signaigo [Id. 5,169]; Darby v. Lucas [Id. 3,573]; McKinney v. Harding [Id. 8,866]; Lenihan v. Hamann, 55 N. Y. 652; Bentley v. Wells, 61 Ill. 59; Biddle's Appeal, 68 Pa. St. 13; In re Burns, 7 A. S. Ry. 100; Vogle v. Lathrop [Case No. 16,985].

No accounting respecting the collaterals is necessary. All sums received on them have already been settled between the parties. A creditor cannot be compelled to exhaust his collaterals before resorting to other securities, where the assignee represents general creditors and no lienholder. Kinney was guilty of no negligence in regard to them; there has been no conversion, nor offer to redeem them. They were practically almost worthless.

The argument of complainant against the right of the company to take mortgages is a misconstruction of the statute in which companies are prohibited from holding lands, but permitted to take mortgages, while in another chapter quoted, for certain prescribed purposes only, mortgages are included in conveyances. To hold land is a different thing from having a mortgage lien. The mortgagor holds the land. Gen. Rev. § 55, p. 881.

There is no foundation for the distinction alleged between foreign and domestic companies. Chapter 25, St. 1866, §§ 1, 2, and prohibiting section. The act of 1873 quoted was subsequent to the execution of the mortgages, and excepts life companies, while it recognizes the power to take mortgages. Case of Carroll v. City of St. Louis concerned the unlimited purchase of land, not the policy of Nebraska concerning the mortgage securities. To entitle a debtor to credit for collaterals not collected, the remedy against him must be shown to be lost through the negligence of the creditor holding them. McMecham virtually controlled proceedings to collect.

The policies were clearly delivered. They were held by Kinney ready for delivery when called for. In case of death the money could have been collected. The $300 premiums unapplied were applicable to any policy when applied for; and the company has not refused to issue a policy.

McMechan's equity under the $8,000 was worth nothing. A creditor may foreclose an equity by a confessed judgment, and no wrong be done an unpaid creditor, unless it was valuable.

DILLON, Circuit Judge. I am of opinion:

1. That the defendant company had the power to take and receive the mortgages, and they are not void ab initio.

2. I find that the mortgages are usurious. This result I reach upon the special circumstances of this case, placing it largely upon the ground that the requiring of such a large and extraordinary amount of insurance, not only upon the life of the borrower, but upon that of others, as a condition of making the loans, is a direct loss to the borrower, and in violation of the purpose and policy of the usury laws. Under the statute of Nebraska, no previous tender by the borrower is necessary as a condition of relief, and the contract, though usurious, is void only to the extent declared by the statute. Rev. St. Neb. p. 447.

3. The confession of judgment for $6,734.40 stands as a security only for $3,054, and interest.

4. The contracts being usurious, payments are to be applied in reduction of the principal.

5. An account must be taken in respect of all the transactions between the parties set forth in pleadings. The company is to be charged with the goods purchased at agreed price, $11,046.80, less amount of valid taxes thereon at time of sale, as to which proofs may be taken by the master, if the question has not been fully adjudicated. The company is to be charged with the amounts actually received on the collaterals. I find that there is no liability in respect to the alleged negligence in not collecting the collaterals. The company to be charged with net amounts received from sales of goods, deducting fair and reasonable expenses of sales, and respecting and carrying out any fair and just settlement of the parties in this regard. Also with the rent of the store at agreed rate, $50 per month. Also with any premiums charged in respect of the $15,000 life insurance for which no risk was assumed by the company. The commissions at 3 per cent. to be credited on the respective mortgages; the other charges of the agent may stand unless by further proof they are shown to be more than the value of the services rendered. The credits to the estate in bankruptcy to be applied first on the $3,054 and interest thereon; next on the $8,000 loan, and any balance on the $12,000 loan. Let interlocutory decree be drawn accordingly, and cause referred to master to take and state an account. Right reserved, on coming in of report, to modify the foregoing.

MOORE (UNITED STATES v.). See Cases Nos. 15,801–15,805.

Case No. 9,778.

MOORE v. VOSS.

[1 Cranch, C. C. 179.] [1]

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

PAYMENT—DISCHARGE IN BANKRUPTCY—EVIDENCE—HOW PROVED.

1. Bankruptcy of the plaintiff cannot be proved by parol.

2. If the original entries are lost, a copy may be given in evidence.

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

Assumpsit for goods sold and delivered.

Mr. Hewitt, for defendant [Nicholas Voss] offered parol evidence to prove the bankruptcy of the plaintiff [Thomas Moore] and assignment of his effects, to show that the plaintiff could not maintain the action. Refused.

At the prayer of the defendant's counsel, THE COURT (KILTY, Chief Judge, absent) gave the following direction to the jury: That if they should be of opinion, from the evidence, that the book produced is the original entry of the sale and delivery, or if they should be of opinion, from the evidence, that a former entry had been made, but that the same is now lost or destroyed, and that this book was truly copied from the original entry by the witness, then this book is evidence; but if they should be of opinion that prior entries exist which are not produced, then this book is not evidence. Peake, Ev. 136; Church v. Perkins, 3 Term R. 749.

MOORE (WALKER v.). See Case No. 17,080.

Case No. 9,779.

MOORE et al. v. WALTON et al.

[9 N. B. R. (1874) 402.] [1]

District Court, N. D. Mississippi.

PARTNERSHIP — MONEY ADVANCED — RIGHT OF ELECTION—BANKRUPT ACT.

A was an experienced merchant, without means. B and C each had some money which they were willing to risk in a mercantile enterprise, but did not intend to render themselves liable for the debts of the concern, should it prove unsuccessful. B and C advanced the money to purchase the stock of merchandise, the business to be carried on in A's name, giving B and C the option to share in the profits, if successful, and if not, then to receive back the amount advanced with ten per cent. interest. *Held*, that B and C did not have such an interest in the business as to render them liable as partners, within the meaning of the bankrupt act, the evidence showing there was never an election, on the part of B and C, to share in the profits, and a partnership inter se was never entered into. Petition dismissed as to B. and C.

In bankruptcy.

HILL, District Judge. This is a petition in involuntary bankruptcy, filed by petitioners against the defendants, J. C. Walton, H. W. Berkley and Wm. F. Parks, charging that the said defendants were co-partners, doing business as merchants in the village of Red Banks, in this district, under the firm name and style of J. C. Walton, and that as such they did, within six months before the filing of the petition, commit an act of bankruptcy within the meaning of the bankrupt law [of 1867 (14 Stat. 517)], in this, that they suspended the payment of their commercial paper, and did not resume payment within fourteen days. The petition further charges that the defendants had fraudulently, and with a view of defeating the petitioners and their other creditors of said firm, combined together to place their assets and means beyond the reach of their creditors. That said Parks and Berkley were dormant and secret partners of said firm, contributing the capital and receiving part of the profits, and that to avoid liability as such the said Walton had executed a pretended deed of trust to one Gandum, upon the pretence of conveying to him all his goods, debts, &c., as security for a pretended debt due from said Walton to Berkley, and that Walton had conveyed or was about to do so, and invested in property in Tennessee in the name of his wife, a large portion of the money belonging to said firm. The defendants have filed separate answers denying the partnership and denying that Berkley and Parks ever had any interest in the business other than that they each had loaned Walton one thousand dollars at ten per cent. interest, for the purpose of purchasing the stock; that Berkley, as a friend of Walton, had paid Parks, and for repayment of this sum and the amount advanced by himself, took the trust deed mentioned, and deny all fraud charged. Walton admits his insolvency and suspension and non-resumption of payment of his commercial paper as charged; so that so far as he is concerned there is no doubt of his having committed an act of bankruptcy, and must be so declared.

The difficult question to be determined under the facts as established by the proof, under the rules of law as applied thereto, is as to whether Berkley and Parks were partners, either as secret partners, as charged; or, if not, whether they had so held themselves out to the world as partners as to render them liable to be declared bankrupts as such. I must admit that of the many cases brought before and considered by me under the bankrupt law, I have never found one so difficult of a satisfactory solution, either as to the facts or the law. Without entering into a particular analysis of the proof, I will state the facts which to my mind it establishes. Walton was an experienced merchant, but without means. Berkley and Parks each had some money which they were willing to risk in a mercantile enterprise, but did not intend to render themselves liable for the debts of the concern should it prove unsuccessful; to avoid this they advanced the money to purchase the stock of merchandise, the business to be carried on in Walton's name alone, giving to them the option to share in the profits if successful, or if not successful, then to receive back the amount advanced with ten per cent. interest. The business was conducted with this understanding, until in January, 1870, when Parks, becoming dissatisfied, demanded a settlement, which was made, and Berkley executed to him his note for the balance due him, which was afterwards paid, and he ceased to have any

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further connection with it. Berkley continued under the original agreement until the failure of the business, about the end of the year 1870, when he took possession of the remnant of the merchandise and debts, claiming under the trust deed dated in April previous, but not admitted to record until the last of October, 1870. The notes executed to petitioners were executed upon the 4th of June, 1870. The proof shows that both Parks and Berkley aided Walton in the sale of the goods, and that both manifested an interest in the business, the former up to the settlement stated, and the latter up to the failure, inconsistent with any other conclusion than that they were either interested in it, or contemplated becoming so. This is especially shown by the conduct of the parties about the time and during the settlement with Parks in January, 1870. The most remarkable conclusion is that neither had determined whether to take a share of the profits or the money with interest up to the falling out between Parks and Walton in January, 1870, when he elected to take his money with interest, which he, as between themselves, had a right to do under the agreement; and that Berkley did not make his election until the filing of the trust deed for record, last October, 1870, and perhaps not until the business was broken up, shortly before this petition was filed, when he claims, as a creditor and not as a partner, to take what was left. Walton denies that he took anything with him, and there is no proof that he did, and, if not, Berkley got all that remained.

The above conclusions are fairly deducible from the proof. The question is, do they establish in Berkley and Parks, or either of them, such an interest in the business as to render them liable as partners within the meaning of the bankrupt law? Partnerships are formed in various ways; usually it is an agreement between two or more, in which it is stipulated that the parties will contribute their capital and skill, one or both, in an enterprise, and share the profits and bear the losses in such proportions as may be agreed upon. It matters not what that proportion may be, one may have more, another less, the extent of the interest being immaterial, but the quality of it must be the same; each must have a voice in controlling the business, and each is the agent for his co-partners with authority to bind them in reference to matters within the scope of the co-partnership business. These are the principal elements of a general partnership. Or as between themselves one may furnish the capital and another transact the business. The business may be conducted in such name as the members may choose to adopt. Some may be secret or dormant members of the firm, and unknown to the world, or to any but themselves; yet if such members have an interest in the profits as such, it will render them liable for all the contracts entered into by the firm within the scope of the co-partnership business. Again, one having, as between himself and the other member or members of the firm, no interest whatever, either in sharing the profits or bearing the losses, yet by holding himself out to the world as a partner may render himself liable as such to those dealing with the firm; he may be willing to give his credit to it, and this is usually done by permitting his name to be used as a member of the firm, or by representing himself as such. Those dealing with the firm have no interest, in questions of interest as between the members themselves. Or one representing himself, to an individual or an individual firm, as a member of a firm, will be liable to those to whom he thus represents himself for any contract made with such person or persons by such firm, but if such representation is confined to those to whom made, with the restriction that it is not to be repeated to another, the liability will be limited to those to whom the representation is made. If no restriction is imposed, then the repetition of the representation so made, by those to whom made, to others, will bind the party, for by his representation without restriction he has added, by credit, to the firm, and must be held by it.

These being some of the general rules, what is the result when applied to the facts as forced from the proof? I am inclined to the opinion that there was no partnership as between themselves, without an election to share in the profits, and that, although both Parks and Berkley contemplated making such election, it was never in fact made, and that a partnership inter se was never entered into. I am, however, inclined to the opinion that their acts and conduct in relation to the business was such as to justify those who gave credit to the business conducted in the name of J. C. Walton, to believe that they were partners and to render them liable for contracts as were made upon the belief that they were such partners. But the difficult question of solution is, can they, for such liability, be proceeded against as partners under the bankrupt law? This is a question of first impression in this or any other court, so far as I am informed, and is one of importance. This involuntary feature of the bankrupt law is punitive in its character and effects, and, as such, should only be applied to those who do some act forbidden by the law, or who fail to do some act required by it. It is not the contracting the debt or debts only, that constitutes the act of bankruptcy, but it is something that is done or neglected to be done afterwards, and contemplates the power in each individual to refrain from doing the thing forbidden, or having the power to do the thing required. This, every partner is presumed to possess, but one who has only lent his credit to the firm by holding himself out as

such and thereby liable to those who gave credit upon that account, having no interest in the business, or having no voice in the control over its affairs, has not such power, and such being the case, it seems, ought not to be subject to this feature of the law, whilst he may be liable in action at law, or other legal proceedings, for the debts incurred by the firm, upon the faith of his liability, by reason of his acts or words in so holding himself out, either to one or more individuals, or to the public in general, and if the latter, then he would be bound, whether the party giving the credit knew it or not, for if he held himself out as such to the public, the public, or any member of it, had a right to give him credit. If I am correct in these conclusions it follows that neither Parks or Berkley can be declared bankrupts under these proceedings, although they may be liable to the creditors in a proper action brought for that purpose, which, as a matter of course, cannot be adjudged in this proceeding. But the case, as now presented by the pleadings and proof, shows that the stock of merchandise seized by the marshal, and the debts due to J. C. Walton, or their proceeds, belong to said Walton, and are subject to the payment of his debts, and for that purpose the title to the same will vest in the assignee when one shall have been appointed, and until that is done the provisional assignee will take all necessary steps to collect the same. The question as to the validity of the trust deed, not being directly put in issue in this proceeding is reserved, but this does not interfere with the right of the assignee to collect all the debts due, as though no such conveyance had been made.

The judgment of the court, therefore, is that the proceedings be dismissed as to defendants Parks and Berkley, and that J. C. Walton be declared a bankrupt; that warrant issue and all other regular proceedings be had as in such cases. It is further ordered that the provisional assignee pay the costs of this proceeding, out of the funds in his hands, as such assignee, and that he also refund, out of the same, to petitioners the amount deposited by them and paid as costs.

Case No. 9,780.

MOORE v. WATERS.

[5 Cranch, C. C. 283.] [1]

Circuit Court, District of Columbia. March Term, 1837.

JUSTICE OF PEACE — JURISDICTION — INCIDENTAL QUESTIONS.

A justice of the peace may have jurisdiction of a matter, incidentally, of which he would not, if it were the principal cause of action; therefore he may have jurisdiction in an action of debt upon a bond, in the penalty of fifty dollars, conditioned that if a certain bay mare should be proved not to be the property of J. B., the bond should be in full force, otherwise, void; and thus collaterally try the title to the mare.

Replevin of the plaintiff's property, taken by the defendant [John Waters] who was a constable, under and by virtue of a fieri facias issued by a justice of the peace upon a judgment, by him rendered, in an action of debt upon a bond, in the penalty of fifty dollars, the condition of which was that if a certain bay mare (described therein) should be thereafter legally proven not to be the property of James Brown, then the bond to be in full force; otherwise void.

Mr. Brent, for plaintiff [James Moore], contended that the justice had no jurisdiction to try the title to the mare, which was the only matter tried by the justice.

Mr. Bradley, contra. The cause of action is a debt of fifty dollars; this is within the jurisdiction of the justice, and he cannot be ousted of that jurisdiction by reason of any collateral matter which may come in question, incidentally upon the trial.

THE COURT (MORSELL, Circuit Judge, doubting) was of opinion that the justice had jurisdiction of the cause. The bond was a contract to pay $50, upon a certain event. Whether that event had or had not occurred, was a question incidental to the question whether the debt was due or not. If the justice admitted improper evidence, it was error, but could not oust him of jurisdiction. Verdict for defendant.

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

Case No. 9,781.

MOORE v. WILMARTH et al.

[4 Leg. Int. 195.]

Circuit Court, D. Massachusetts. Nov. 5, 1847.

EXECUTION — IMPRISONMENT FOR DEBT — FEDERAL COURTS — FOLLOWING STATE PRACTICE — PUBLIC AND PRIVATE DEBTORS.

1. If a debtor, after suit in this court, takes the benefit of the insolvent laws of Massachusetts, he is entitled, under the acts of congress as to imprisonment for debt, to have an execution issued against his property alone.

[See Moan v. Wilmarth, Case No. 9,686.]

2. The body of a private debtor, when sued in a United States court, is imprisoned, or not, on execution, according to the laws and policy of the state in which the execution issues; but an execution against a debtor to the United States is governed by the uniform and fixed laws of congress.

[See Moan v Wilmarth, Case No. 9,686.]

Before WOODBURY, Circuit Justice.

[Nowhere more fully reported; opinion not now accessible.]

Case No. 9,782.

MOORE v. YOUNG.

[4 Biss. 128.][1]

Circuit Court, D. Indiana. Jan. Term, 1868.

BANKRUPTCY—VOID PREFERENCE—CHATTEL MORTGAGE—RIGHT OF MORTGAGEE TO TAKE POSSESSION—ATTEMPT TO SELL—RECORDING—RIGHTS OF ASSIGNEE.

1. The filing by the mortgagor of a voluntary petition in bankruptcy is "an attempt to sell," within the meaning of the usual clause in chattel mortgages.

2. A chattel mortgage on a stock of goods can only be prima facie fraudulent, as being out of the usual and ordinary course of business, and its validity may be established by proof.

3. In Indiana an unrecorded chattel mortgage, where the property is not delivered to the mortgagee, is absolutely void, as against the assignee in bankruptcy of the mortgagor.

[Cited in Re Oliver, Case No. 10,492.]

4. The assignee is not one of "the parties to the mortgage," but for the collection of assets he represents the creditors, and may sue in every case where they might have sued had the debtor not become bankrupt.

[This was a bill by George J. Moore, assignee in bankruptcy, against Zebulon J. Young.]

A. C. Downey, for complainant.

Carter, Downey & Gordon, for defendant.

McDONALD, District Judge. This is a proceeding in chancery under the bankrupt law. The bill was filed October 30, 1867. The case it proceeds on is substantially as follows: On the first of July last, one Shadrach Hathaway and William H. Hathaway were indebted to the defendant Young to the amount of four thousand dollars, for which they executed to him a note for that sum, payable in one year; and, to secure its payment, they executed to him a mortgage on about twelve thousand dollars worth of goods in a store at Vevay, in Switzerland county, Indiana. The Hathaways then resided at Rising Sun, Ohio county, Indiana. Of this stock of goods, Young had then, and till August following, the custody as their agent and clerk to retail the same.

On the 28th of August, 1867, the Hathaways were, on their own petition, by this court adjudged bankrupts; and Moore, the complainant, was chosen their assignee in September following. At the time when the mortgage was executed, and till the time when the bill was filed, the goods in question were kept in a store-house in Vevay, which was held by the Hathaways under a lease for years.

On the 23rd of October, 1867, Moore, as assignee, demanded the possession of said store-house and goods from Young, who refused to deliver them, claiming the right to retain the goods by virtue of the mortgage. The store-house is not included in the mortgage.

The bill charges that Young was not justified in withholding the store-house and goods by virtue of the mortgage,—1, because the store-house is not mortgaged; 2, because no default by the mortgagors has happened entitling the mortgagee, according to the terms of the mortgage, to take possession of the goods; 3, because the mortgage was made in contemplation of insolvency within four months of the filing of said petition in bankruptcy, with a view to give a preference to Young as a creditor of the bankrupts, he then having reasonable ground to believe that they were insolvent, and that the mortgage was made in fraud of the bankrupt law [of 1867 (14 Stat. 517)]; 4, because the mortgage was not made in the usual and ordinary course of business of the Hathaways; 5, because the mortgage is void on its face; 6, because the mortgage was never recorded in the county where the mortgagors resided.

A copy of the mortgage is exhibited with the bill.

The answer filed admits the proceedings in bankruptcy; the appointment of Moore as assignee; that the goods in question are in Young's custody, and are worth eleven thousand eight hundred thirty-three dollars and twenty-four cents; and that the mortgage was never recorded in the county where the mortgagors resided. But it denies all fraud; and alleges that the mortgage was made bona fide, not in contemplation of bankruptcy or insolvency, without any view to a preference, without any ground to believe that the Hathaways were insolvent or contemplated insolvency, and in the usual course of their business. The answer avers that the assignment in bankruptcy was such an attempt to sell the mortgaged property as, by the terms of the mortgage, entitled Young to the possession of the goods.

A general replication has been filed; and the cause has been submitted for final hearing and decree on the bill, answer, exhibits, depositions, and certain evidence heard on the trial.

If the mortgage was made bona fide, on a proper consideration, and not in violation of any of the provisions of the bankrupt law, and if it is valid on its face, and is not rendered void as to the assignee by the omission to record it,—I suppose that this action must fail as to the goods. For if, under the facts alleged and proved, Young has a valid lien on the goods, the assignee's course was, not to file this bill, but to apply to the court for leave to redeem the goods from the mortgage lien. Such is the course pointed out by the 14th section of the act and the 17th rule of the supreme court. As to Young's refusal to deliver possession of the store-house, the record shows no justification or excuse for it on the part of the defendant. There must, therefore, be a decree against him on this branch of the case.

As to the goods claimed by the defendant by virtue of his supposed mortgage lien; I

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

will consider the complainant's objections to that claim set forth in the bill, in the order in which they are above stated.

1. The complainant urges that no default has yet happened, touching any condition in the mortgage; and that, therefore, the defendant is not entitled to the possession of the goods. The note, the payment of which the mortgage was intended to secure, will not be due till July next, so, there has been no default in payment.

The mortgage provides that the goods are to remain in the mortgagors' possession till default be made in payment; but that any attempt to sell the goods, without the consent of the mortgagee, shall entitle him to their possession. Were the proceedings in bankruptcy an attempt to "sell" the goods within this provision of the mortgage? I am inclined to answer this question in the affirmative. On the principle that we must construe such instruments as this most strongly against the makers of them, according to the spirit of them, and according to the intent of the parties, I rather think that the transfer of the goods in the bankrupt proceeding was an attempt to sell them, as a sale of them would be the consequence. And this view, I think, is sanctioned by the maxim, "Qui facit per alium, facit per se." The mortgagor could no more authorize their sale by a proceeding in bankruptcy, than he could sell them himself, without breaking the condition of the mortgage.

2. The bill avers that the mortgage is void, because it was made in contemplation of insolvency within four months next before the filing of the mortgagors' petition in bankruptcy. The thirty-fifth section of the act provides that transfers of property, made in contemplation of insolvency within four months before proceedings in bankruptcy by or against the party making the transfer, shall be void, the person to be benefited thereby "having reasonable ground to believe such person is insolvent," and that such transfer "is made in fraud of the provisions of" the bankrupt law. But the evidence does not bring the defendant and his mortgage within the provisions of this section of the act. On the contrary, it is clearly proved that the mortgagors, in executing this mortgage, did not contemplate insolvency, and did not execute it with intent to violate the provisions of the act; and it is equally well proved that the mortgagee, when he took the mortgage, had no reason to believe that the mortgage was made in fraud of the bankrupt act, or that the mortgagors were then insolvent, or even under any pecuniary embarrassment. This objection to the mortgage, therefore, fails for want of proof.

3. The mortgage is objected to as void under the bankrupt law, because it was not made in the usual and ordinary course of the business of the mortgagees. The thirty-fifth section of the act declares that if such a mortgage as the present "is not made in the usual and ordinary course of business of the debtor, the fact shall be deemed prima facie evidence of fraud." It is not easy to see precisely what is here meant by the phrase—"the usual and ordinary course of business of the debtor." But I am inclined to think that, upon the evidence, the mortgage in question was made in the usual and ordinary course of business as much as any chattel mortgage could be. It was made to secure an honest debt, part of which was money loaned at the time. But be this as it may, the mortgage could at most be only prima facie fraudulent; and I think the evidence plainly overthrows any such prima facie presumption against this mortgage. This objection to the validity of the mortgage, therefore, can not be sustained.

4. Does the omission to record the mortgage in the county where the mortgagors resided render it void as to the assignee in bankruptcy? The answer to this question must depend on our construction of the bankrupt act and of the Indiana statute relating to the recording of chattel mortgages.

As to the bankrupt act, the defendant insists, that it gives to the assignee precisely the same rights—neither more nor less—which the bankrupt had before the commencement of proceedings in bankruptcy; and that, as an unrecorded chattel mortgage is confessedly good between the mortgagor and mortgagee, so it must be good as between the assignee in bankruptcy of the mortgagor and the mortgagee. It must be admitted that this view is sustained by many decisions under the bankrupt act of 1841 [5 Stat. 440], and that it is supported by the high authority of Judge Story. Yet nearly all these decisions, except from the rule the case of a fraudulent conveyance by the bankrupt, which is allowed to be good as to the bankrupt himself, but void as to his assignee. This exception has obtained on the ground that such a conveyance is a fraud upon creditors, and that, as the bankrupt law took away the right of action by creditors for such fraud, it must be deemed to have vested the same right of action in the assignee—else the creditors would be without remedy. Does not the reason of this exception equally apply to the case of an unrecorded chattel mortgage? It is very clear that, as to creditors, an unrecorded chattel mortgage, where the property is not delivered to the mortgagee, is absolutely void. And, in the present case, it is certain that if the Hathaways had not been decreed bankrupts, their creditors might have subjected the goods in question to the payment of their debts, notwithstanding this mortgage. But now their right to do so is taken away by the adjudication in bankruptcy; and is it not just as reasonable to suppose that the right vested in the assignee, as that it does so in the case of a fraudulent conveyance? Besides, is it very clear that the failure to record a chattel mortgage, in cases where the mortgagor retains the chattels, is not, in

law, a fraud? It is the rule in Twyne's Case, 3 Coke, 80, that the retention of possession by a vendor or mortgagor of chattels, is in law conclusive evidence of fraud; and there is no authority which makes such retention less than prima facie evidence of fraud upon creditors. The Indiana statute, indeed, so far alters the rule, that if the mortgage is duly recorded the retention of the possession of the goods by the mortgagor is here, perhaps, no evidence of fraud at all. But if the mortgage is not recorded, I think the case is left, as under the statutes of 13 and 27 Eliz., in which such retention of possession is at least prima facie evidence of fraud. In the present case, therefore, the omission to record the mortgage is, in my opinion, a fraud upon the creditors of the bankrupts; and so the case falls literally within the exception to the general rule insisted on by the defendant and supported by the authority of Judge Story.

The third proviso of the fourteenth section of the bankrupt act seems to sustain the view here taken. It declares, "That no mortgage * * * made as security for any debt or debts in good faith, and for present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States, or of any state, shall be invalidated hereby."

This provision saves from the operation of the act all prior bona fide mortgages made on present considerations, and duly recorded; and it saves no others. The inference from it appears to me to be fair, and even irresistible, that mortgages not so made and recorded shall be invalidated by the bankrupt act. And, upon this proviso alone, I would think the mortgage in question void as to the complainant.

The Indiana statute provides that, "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in cases of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof." 1 Gavin & H. St. p. 352.

It should be noted that this statute is unlike most statutes relating to the recording of deeds and mortgages of real estate, by which, unless recorded within a given time, they are "fraudulent and void as against any subsequent purchaser or mortgagee in good faith and for valuable consideration." 1 Gavin & H. St. p. 261. Under such provisions the unrecorded instrument is held good as to all men except purchasers and mortgagees in good faith and for valuable consideration; and he who has notice of such unrecorded instrument is not such purchaser or mortgagee in good faith, and it is valid even as to him. Whereas, the statute above cited makes the unrecorded mortgage of chattels absolutely void as to all men but "the parties thereto," even though they have notice thereof, the only question, as to the mortgage under consideration, seems to me to be thus: Is Moore, the assignee in bankruptcy, a "party thereto"? Without the aid of any authority, we might well answer this question in the negative: the parties thereto are the mortgagors and the mortgagee only. But in rendering this answer, we are not without authority; we are supported by a controlling authority. The supreme court of Indiana, in Lockwood v. Slevin, 26 Ind. 124, has so decided. That case decides that in the case of a voluntary assignment by an insolvent debtor for the benefit of his creditors, his assignee shall hold the goods assigned as against a prior unrecorded mortgage of them; and that such mortgage is void as to such assignee. And Judge Frazer, who delivered the opinion in that case, says that "the statute expressly enacts that a mortgage of chattels, where the possession is not changed, shall not be valid against any other person than the parties to it, unless it is recorded within ten days after the execution thereof. The language is so plain that no room is allowed for construction. Actual notice can make no difference." This decision is in point. It is a construction of the Indiana statute concerning the recording of chattel mortgages, given by the supreme court of Indiana; and it is binding on the courts of the United States. Chicago City v. Robbins, 2 Black [67 U. S.] 418; Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 175; Christy v. Pridgeon, 4 Wall. [71 U. S.] 196; Green v. Van Buskirk, 5 Wall. [72 U. S.] 307. Then, the supreme court of Indiana has settled the meaning of the Indiana statute in question, and has held that a prior unrecorded chattel mortgage is void as between the mortgagee and an assignee under a voluntary assignment for the benefit of creditors. If as to such an assignee it is void, the inevitable conclusion must be that it is void as to an assignee in bankruptcy; for surely the former can have no greater rights than the latter. Indeed there is strong reason to conclude that they are not so great, since the one is a mere volunteer and the whole proceeding voluntary; whereas the other is appointed and controlled by a United States court, and governed by an act of congress. But it is enough for the purpose of this decision that the two stand in all respects upon an equality.

In my opinion, it is an error that an assignee in bankruptcy stands in all respects in the condition of the bankrupt, and represents him only. I think that, in the collection of assets, he also represents the creditors; and, as a general rule, may sue in every case in which they might have sued, if the debtor had not become a bankrupt. Upon the whole case, as made in the bill, the decree must be for the complainant.

NOTE. In a state where a mortgage is void as to creditors unless recorded, the assignee takes title as against an unrecorded instrument. Allen v. Massey [Case No. 231]; In re Wynne [Id. 18,117]; Brock v. Terrell [Id. 1,914]; Bank of Leavenworth v. Hunt, 11 Wall. [78 U. S.] 391; Harvey v. Crane [Case No. 6,178], and cases there cited. Nor can the mortgagee rely upon possession taken under his unrecorded mortgage. Harvey v. Crane, last above cited; In re Hussmann [Case No. 6,951]; In re Manly [Id. 9,031]; Foster v. Hackley [Id. 4,971]; Bean v. Amsink [Id. 1,167]; Seaver v. Spink [65 Ill. 441]; In re Morrill [Case No. 9,821].

As to what is a sale, in "the usual and ordinary course of business," consult In re Hunt [Case No. 6,881]; Rison v. Knapp [Id. 11,861]; Darby v. Lucas [Id. 3,572]; Judson v. Kelty [Id. 7,567.]

The assignee, as to parties claiming rights or liens against the estate, represents the creditors, and any transaction which would be void for fraud as against creditors if no petition had been filed, is void as against the assignee. He takes the title, and it is his duty to proceed legally to annul a fraudulent conveyance. In re Wynne [supra]; In re Metzger [Case No. 9,510]; Boone v. Hall, 7 Bush, 66; Bradshaw v. Klein [Case No. 1,790]; Pratt v. Curtis [Id. 11,375].

MOORE, The ENOCH. See Case No. 6,331.

MOORE, The JOHN T. See Case No. 7,430.

MOOREHOUSE (BROOKS v.). See Case No. 1,956.

Case No. 9,782a.

MOORES et al. v. CARTER et al.

[Hempst. 64.] [1]

Superior Court, Territory of Arkansas. Oct., 1828.

HUSBAND AND WIFE—PERSONAL PROPERTY ACQUIRED BY WIFE—PLEADING AT LAW—JOINDER OF WIFE.

1. Although a wife may live separate from her husband, and acquire property by her personal labor and exertions, or by gift, yet it belongs to the husband, and he alone must sue for any injury to it. The wife cannot join in the action.

2. It is not error to refuse to allow an amendment, by striking out the name of one of the plaintiffs in a suit.

Error to the Crawford circuit court.

[This was an action of trespass vi et armis by Benjamin Moores and Ann Moores, his wife, against Lawrence F. Carter, Frederick Thomas, and William Clark.]

Before ESKRIDGE and BATES, JJ.

OPINION OF THE COURT. The plaintiffs brought an action of trespass vi et armis against the defendants, and in their declaration aver, that the plaintiff, Benjamin Moores, is a private soldier in the United States army, and is stationed at Fort Gibson in this territory; and that he lived separate and apart from his wife, Ann Moores, who by her industry had become possessed of a small dwelling-house; and had furnished it at her own expense, and resided in it, separate and apart from her husband; that the defendants with force and arms, entered the dwelling-house, and threw her into great fear by their menacing manner, by breaking open her chests, searching all the private apartments, greatly disturbing her and injuring the property, and took and carried away various articles of property, of the proper goods and chattels of the plaintiffs. At the appearance term, on the motion of the defendants, the proceedings and declaration were quashed; and after the above order was made, the plaintiffs' attorney asked leave to amend the declaration, but his motion was overruled, and the suit dismissed.

Two questions are presented in this case: First, can the plaintiffs join in the action; and second, if they were improperly joined in bringing the suit, should the court have permitted the declaration to be amended. We have no doubt that the wife was improperly joined with the husband in bringing the action. Although she lived separate and apart from him, the marriage was in full force, and he was legally entitled to all the marital rights. The dwelling-house, and all the goods and chattels purchased or owned by the wife, belonged to the husband, and for an injury done to that property the husband alone must sue. This doctrine is too well settled to be controverted; and it is not necessary to support it by reference to authority. It has been argued, that she was the meritorious cause of action, and therefore had a right to join. If this was true, the consequence might follow; but she was not the meritorious cause of action in the sense contemplated by law. Every species of personal property which the wife may acquire by purchase, by her own personal labor, or by gift, during the coverture, belongs to the husband, and consequently an injury to that property, or the taking of it away, can only give a right of action to the husband, and not to the wife.

Upon the second question, as to the amendment, we have no doubt that the declaration could not be amended, by striking out one of the plaintiffs. It would have been more regular if the defendants had demurred, instead of moving to quash the declaration. But we are not inclined to regard an objection as to form only, since the motion was in the nature of a demurrer, and the judgment of the court was in substance the same.

It is true there is no judgment in favor of the defendants for costs in the court below; but of this the plaintiffs have no right to complain. Judgment affirmed.

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

MOORHEAD (SCOFIELD v.). See Case No. 12,510.

Case No. 9,783.

MOORMAN et al. v. HOGE et al.

[2 Sawy. 78; 6 Am. Law Rev. 365; Cox, Manual Trade-Mark Cas. 210; 4 Am. Law T. Rep. U. S. Cts. 217; 14 Int. Rev. Rec. 155; 1 South. Law Rev. 127.] [1]

Circuit Court, D. California. Oct. 21, 1871.

TRADE-MARK—REGISTRY AS EVIDENCE—FORM OF BARREL.

1. The certificate of the registry of a trade-mark, issued to the claimant by the commissioner of patents, under the act of congress of July 8, 1870 [16 Stat. 198], is not conclusive evidence that the device claimed as a trade-mark, is, or can become, a lawful trade-mark, or that the claimant is the first appropriator, and entitled to its exclusive use.

[Cited in L. H. Harris Drug Co. v. Stucky, 46 Fed. 628.]

2. A barrel of peculiar form, dimensions and capacity, irrespective of any marks or brands impressed upon, or connected with it, cannot become a lawful trade-mark, or a substantive part of a lawful trade-mark.

[Approved in Harrington v. Libby, Case No. 6,107. Cited in Philadelphia Novelty Manuf'g Co. v. Rouss, 40 Fed. 587.]

[Cited in Ball v. Siegel, 116 Ill. 143, 4 N. E. 667; Brill v. Singer Manuf'g Co., 41 Ohio St. 133.]

Bill in equity [by C. P. Moorman and others against Walter Hoge and others], the object of which, is, to obtain a decree restraining an alleged infringement of complainants' trade-mark. From some time prior to 1857, till July 2, 1860, one J. H. Cutter, and complainant, Moorman, were doing business as partners at Louisville, Kentucky, under the name of "J. H. Cutter & Co." The firm was engaged in the manufacture and sale of whisky. Their whisky acquired throughout the country, and particularly in the state of California, a high reputation for excellence, and, was generally known as "Cutter Whisky." The said "J. H. Cutter & Co.," adopted for their California trade, a barrel of peculiar shape and size, in which their whiskies for said market, were put up, shipped and sold. The said barrel was adopted as a trade-mark, in part, to enable dealers in whiskies to more readily distinguish the whiskies of said firm, from those manufactured and sold by other parties. The said barrel is made of staves thirty-eight inches in length, and one and one fourth inches thick. It is twenty inches diameter at the head, has sixteen wooden, and four heavy iron hoops, and is of the capacity of fifty gallons; while ordinary whisky barrels are but thirty-two inches long, with staves of half that thickness, and fewer hoops, and have a capacity of only forty gallons. These barrels, thus used by said "J. H. Cutter & Co.," to contain the whiskies manufactured and sold by them, were branded on the head with the words, "J. H. Cutter, Old Bourbon," and "J. H. Cutter, Pure Old Rye." The words "J. H. Cutter," being in an arc of a circle, the words "Old," and "Pure," respectively being in a straight line within the arc under the words "J. H. Cutter," and, the words "Bourbon" and "Old Rye," on a straight line directly under the others, below the arc formed by the name. The initials, "J. H. C." were also branded on the barrel near the bung-hole, as a bung mark. In the year 1859, they added an English crown, as a part of the trade mark, which was branded on the head just below the centre, and under the words "J. H. Cutter, Old Bourbon," and "J. H. Cutter, Pure Old Rye." These barrels and marks were used by said J. H. Cutter & Co., in their whisky trade till on, or about, July 2, 1860, when said J. H. Cutter, for a valuable consideration, sold and transferred all his right, title and interest in the business, and to the trade-marks and brands, and the sole right to use, and sell the same, to the complainants in this case; and the said complainants under the firm name of "C. P. Moorman & Co.," have continued to carry on the said business, of manufacturing and selling whiskies at Louisville, Kentucky, and putting them up and selling them in said barrels, branded with said marks, from said date to the present time claiming the said barrel, and said marks as their trade-mark. In the month of November, 1870, the complainants filed, and caused to be recorded, in the United States patent office, at Washington, a verified statement and claim of said trade-mark, having annexed thereto a fac simile of the said barrel, together with the marks aforesaid branded thereon, and under the English crown, the further words in five elliptical lines, "A. P. Hotaling & Co., San Francisco, Sole Agents, for Pacific Coast." And on the other end in three lines forming an ellipse, the words "C. P. Moorman & Co., Manufacturers, Louisville, Ky.;" and, thereupon, the United States commissioner of patents issued to said complainants the certificate provided for in the act of congress relating to the subject. A true copy of the fac simile of said barrel, and of the said marks branded thereon, is annexed to the bill. Upon the issue, as to whether J. H. Cutter was the originator of said barrel, and whether he and his successors, the said complainants, solely used said barrel, and, whether it was generally known in the whisky trade, as the "Cutter Barrel," the testimony is very voluminous, and is in striking conflict. After a careful consideration of the testimony, the court found that J. H. Cutter did originate, and first use this peculiar barrel in the liquor trade; that the barrel was of unusual form and dimensions; that when the pattern was furnished, it was necessary to have staves, and other stock got out expressly for this barrel; that Cutter adopted it for his whiskies, and continuously used it for the California trade, till he transferred his interest in the business, barrel, and brand to complainants; that the complainants have continued

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Am. Law Rev. 365, and Cox, Manual Trade-Mark Cas. 210, contain only partial reports.]

to use it from that time till the present, claiming it as their barrel; that the said barrel has not been used by other parties, except occasionally, when it has been manufactured clandestinely, and used without the knowledge, or when known, against the protest and claim of the complainants, and their assignor; that especially for upwards of ten years last past, the complainants and their assignor, have shipped every year large quantities of whiskies in said barrel to California, and sold them on the Pacific coast under the name of "Cutter Whisky," and that no other person has, during that time, and prior to the acts of defendants complained of, shipped any considerable quantity of whisky in similar barrels; that the said barrel had become very generally known in the trade in San Francisco and on the Pacific coast, as the "Cutter Barrel," so much so, that, if a party familiar with the trade and this barrel, should see such barrel, even at a distance, as across the street, he would expect to find it contain "Cutter Whisky." The defendants are agents at San Francisco, California, for the sale of whiskies on the Pacific coast, for Jesse Moore & Co., a firm engaged in the manufacture and sale of whisky at Louisville, Kentucky. Within the two years next preceding the filing of the bill, said Jesse Moore & Co. shipped to defendants at San Francisco, several hundred barrels of whisky for sale, and the said defendants have sold, and they are now engaged in selling, said whiskies in California, and elsewhere on the Pacific coast. Said whiskies are put up in barrels, which are in all respects as to size, shape, and general appearance, so far as the barrel itself is concerned, a close imitation of the barrel which complainants use for their "Cutter Whisky." The appearance of the two barrels is manifestly alike, and any party looking at the two barrels, without regarding the marks on them, would at once pronounce them the same barrel. The defendants, doubtless, intended the barrels to be alike; for they directed their principals to send their whisky in such barrels, and that they might do so, sent them the measures of the barrel used by the complainants, and called the "Cutter Barrel." But the marks on the barrels are wholly different. The Bourbon whisky barrel of defendants has branded on one head in the centre, and within a circle burnt into the head, and in a circular form, the words, "G. H. Moore, Bourbon;" and within the circle formed by these words, the word "Old," in a straight line with a star above and below it. Over this centre brand are the words "E. Chielovich & Co.," forming the arc of a circle, and under these words, in three straight lines, are the words, "San Francisco, Cal., Sole Agents for the Pacific Coast;" and at the bung, as a bung-mark, the initials "G. H. M." The rye whisky barrel has the words in a similar form and situation, "E. Chielovich & Co., San Francisco, Cal., Sole Agents for the Pacific Coast. J. Moore & Co., Old Rye Whisky;" and as a bung-mark, the initials "J. M." There is no similarity in the marks and devices branded on the barrels of the respective parties, or in the form in which the words are arranged. There is nothing in these marks or devices aside from the barrel that would lead a purchaser to mistake one for the other. The only similarity between the packages is the barrel itself, independent of the marks upon it, but in this particular the defendants' package is a clear imitation of complainants'. As there is no claim that there is any simulation of the marks or brands on the barrel, it will be unnecessary to more particularly describe them. The defendants sell their whiskies as Jesse Moore & Co.'s whiskies, and make no representation that their whiskies are "Cutter Whisky," other than so far as the fact that they use a similar barrel to that in which "Cutter Whisky" has been so long sold, as to become known as the package which ordinarily contains "Cutter Whisky," can be regarded as such a representation.

Wm. H. Patterson and Alex. Campbell, for complainants.

Hall McAllister and W. H. Rhodes, for defendants.

SAWYER, Circuit Judge. The complainants do not claim that there is any infringement upon that part of what they claim to be their trade-mark, which consists of the words and devices stamped upon the barrel. The claim is that there is an infringement by the use of the barrel only. Is the plaintiff entitled to the exclusive use of a barrel of this peculiar form, construction and capacity, without regard to any mark or device impressed upon, or connected with it? Can a barrel of this description be appropriated as a trade-mark, or substantive part of a trade-mark, so as to exclude the rest of the world from using it in the same branch of business? If so, the complainants, in my judgment, are entitled to the relief sought, otherwise, not.

Complainants invoke the act of congress, of July 8, 1870, entitled, "An act to revise, consolidate and amend the statutes relating to patents and copy-rights." 16 Stat. 198. The seventy-seventh section provides, "That any person or firm domiciled in the United States * * *, and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt, and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark by complying with the following requirements, to wit:" stating the conditions.

The seventy-eighth section provides that the party or firm, performing the statutory conditions, shall be entitled to use the trade-mark for thirty years, and that "no other person shall lawfully use the same trade-mark, or substantially the same, or so nearly resembling it, as to be calculated to deceive upon substantially the same description of goods."

The seventy-ninth section provides a remedy for violation of the right by imitation, etc., by an action for damages, and injunction. It, also, provides, that, "the commissioner of patents shall not receive and record, any proposed trade-mark which is not, and cannot become, a lawful trade-mark." The eightieth section makes the certificate of the commissioner under seal of the patent office, "evidence in any suit in which such trade-mark shall be brought into controversy."

It is not denied that the complainants have performed all the acts required by the act of congress to secure the protection contemplated, and that the certificate of the commissioner of patents was in form regularly issued. This being so, complainants insist, that the court can only look to the certificate, and the act of congress, to determine the question at issue; that the act of congress confers upon the commissioner jurisdiction to examine and determine whether the proposed trade-mark is, or, can become a lawful trade-mark; whether it was first used and appropriated by the claimant, or is not identical with a trade-mark appropriated to the same class of goods, and belonging to a different party, or already registered, or, received for registration; and whether it does not so nearly resemble any trade-mark registered or filed for registry, as to be likely to deceive the public; and, that having jurisdiction to determine these matters, his determination is conclusive, and the questions are not open to examination in this court. Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 796, and Eureka Co. v. Bailey Co., 11 Wall. [78 U. S.] 492, are cited as sustaining the proposition.

I cannot assent to this view. The cases cited only go to the point, that a patent cannot be collaterally attacked on the ground that the extension and re-issue of the patents in question had been procured by fraud. It was held, that, if the patents themselves were to be avoided on the ground of fraud in their issue, the patents being otherwise good, it must be done by a direct proceeding in equity to vacate them. That is an entirely different question from the one now presented. The proceeding before the commissioner to obtain protection for a trade-mark under the act of congress, is purely ex parte. Other parties have no notice, actual or constructive. They have no opportunity to be heard, and their rights cannot be thus conclusively determined in a proceeding to which they are in no sense parties. The certificate of the commissioner of patents, I take it, can have no more conclusive effect as to the rights of third persons, than a patent issued under the patent laws by the same commissioner of patents. The commissioner in such cases is required to investigate the claim to the patent, and to determine whether the subject of the application is patentable; whether the applicant is the inventor; whether it is new, and useful, etc. While the patent is held to be prima facie evidence, that the machine is new and useful, it is nowhere held to be conclusive on these points, or upon the point whether the machine, or device, or article, is the proper subject of a patent. On the contrary, in every-day practice in the courts in patent cases, the very questions most frequently considered and determined, are, whether the thing patented is patentable; whether it is new, or useful, etc.; and, in the very cases cited to sustain complainants' position, the court determined questions as to the patentability of the articles involved in the patent. If the principle contended for could be maintained, there is not a barrel, or package of any kind in use in mercantile transactions, which could not be appropriated as a trade-mark, no matter how long, or how generally it had been in use, if a party could, in an ex parte application, by any representation, fraud, or other means, once procure it to be registered, and the certificate issued: for this would be conclusive upon all the world, upon the points that it could become a trade-mark, and that the applicant was the first to appropriate and use it, for that purpose.

This point, in my judgment, must be determined against the complainants.

This brings us to the great, and highly important question, whether a barrel of peculiar form and dimensions, without any marks, symbols, or devices of any kind impressed upon, or connected with it, can, in fact and in law, become a trade-mark, or a substantive part of a trade-mark, so as to invest the claimant with an exclusive right to use it. It will be observed that the statute, under which the claim is made, does not define the term, "trade-mark," or say of what it shall consist. The term is used as though its signification was already known in the law. It speaks of it as an already existing thing, and protects it as such. The thing to be protected must be an existing lawful "trade-mark," or something that may then for the first time be adopted as a lawful trade-mark independent of the statute. There must be a lawful trade-mark adopted without reference to the statute, and then, by taking the prescribed steps, that trade-mark so already created and existing, may receive certain further protection under the statute. This is apparent from the language of the seventy-seventh section, which speaks of parties, "who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use," etc., and, by the seventy-ninth section, which forbids the commissioner to receive and record any proposed trade-mark which is not, and cannot become a lawful trade-mark. It does not say what shall constitute a lawful trade-mark. We must, therefore, go to the law of the land, outside this statute, to ascertain what is, or what may become a lawful trade-mark; for the statute leaves the definition of a trade-mark to the law, as it

before stood. The definition of a trade-mark, given by Mr. Upton, is as follows, to wit: "A trade-mark is the name, symbol, figure, letter, form, or device, adopted and used by a manufacturer, or merchant, in order to designate the goods that he manufactures, or sells, and distinguish them from those manufactured or sold by another; to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise." Upton, Trade-Marks, p. 9.

This is a good general definition, broad enough in its terms, probably, to cover every case to be found in the books, but it would not alone, perhaps, be sufficient as a test by which every individual claim of a device, as a proper trade-mark, can be tried and determined, without looking into the cases from which the definition is compiled, to see what names, symbols, figures, letters, forms, and devices have been recognized and protected as trade-marks. The words "form," and "device," for instance, are very broad terms, and they might, in a general and comprehensive sense, embrace the form of a barrel, or package, or of the article of merchandise itself sold. But the words of definition are all used in connection with the word, "mark," and the word "mark," in its first and usual signification is defined, by Webster, to be "a visible sign, made or left upon any thing; a line, point, stamp, figure, or the like, drawn or impressed, so as to attract the attention, and carry some information, or intimation; a token; a trace." And some such mark used in connection with, impressed, cut, or stamped upon, or attached to the article manufactured, or sold, in the ordinary course of trade, embraces the usual and ordinary idea of a "trade-mark." The primary and the sole object of the trade-mark, is to distinguish the goods as being a particular manufacture, or as belonging to a particular party. It is cut, stamped, engraved, impressed upon, attached, or in some way appended to the goods, the vessel containing them, or the covering wrapped around the goods for this sole purpose. The object of using a barrel, box, or other package, is to contain, carry, protect, and preserve the goods, or for their convenient handling; and form of some kind and dimensions, are essential in a box, barrel, or package, without which it can have no existence. But the size or shape of the barrel, box, or package can scarcely be considered a mark, nor can that be the sense in which the terms, "form" or "device," are used when employed as a definition of a mark, used for purposes of trade. So general is the idea that the symbol, figure, letter, form, or device, used for a trade-mark, must be a mark, impressed, cut, engraved, stamped, cast upon, or in some way wrapped around, or appended to, the article, or the package, as something independent of the article itself, or the package used to contain it, that it is carried into the statutes of some states, where it is, doubtless, only intended to adopt the common law definition.

Thus, in the statute of California, the language used is, "any peculiar name, letter, mark, device, figure, or other trade-mark, or name, cut, stamped, cast, or engraved upon, or in any manner attached to, or connected with, any article, or with the covering or wrapping thereof manufactured, or sold," etc. This indicates that it was not supposed that the barrel, package, covering or wrapping itself, which is used for another purpose could properly be used as a trade-mark, but that the trade-mark must be some mark of the kind indicated in some way, impressed, cut, cast upon, or connected with, such package, covering, etc., or the article itself.

The complainants in this case prior to the passage of the act of congress in question, filed their trade-mark in the office of the secretary of state, of California, and, in so doing, they omitted the barrel as a part of their trade-mark, although it had, long before that time been adopted and used by them in their California trade. The reason assigned for this omission by their counsel, on the argument of this cause, in answer to the suggestion that the omission constituted an abandonment of the barrel, was, that, under this statute of California, they could not adopt the barrel as a trade-mark, for that the trade-mark, under the act, must be cut, engraved, stamped, impressed, cast, etc., on the barrel, package, etc., and this, I apprehend, is the true idea of a trade-mark at common law with respect to this point.

I have examined with care a large number of cases involving infringements of trade-marks, including all the recent cases, which I have been able to find, so far as they bear upon the question in hand. It would be an arduous and unprofitable task to comment upon them all, and I shall content myself with stating briefly the result of my examination.

In every case there was a trade-mark proper, such as is indicated in this opinion, embracing some name, symbol, figure, letter, form or device, cut, stamped, cast, impressed or engraved upon, blown into, or, in some manner attached to or connected with the article manufactured or sold, or the package containing it, or the covering or wrapping thereof. Where the vessel containing the article was of glass, iron or other metal, whether of peculiar shape and dimensions or not, the trade-mark proper was often blown, or cast, in the vessel, sometimes on a shoulder, sometimes in the body of the vessel. There were various ways of impressing upon, or connecting with the vessel, package or article, the mark; but there always was a mark in fact, other than the shape or size of the vessel, or package. I find no case

where the vessel, box, package, or whatever contained the article, has been held to constitute a trade-mark by reason of its peculiar form or dimensions, independent of any symbol, figure or device impressed upon, or connected with it for a trade-mark. I find no case where the use of a package of peculiar form and dimensions has been restrained without having imprinted upon, or connected with it, some other symbol, word, letter, or form, adopted as a trade-mark. There are numerous cases where the use of a bottle, or other vessel, or package, having upon it the device adopted as a trade-mark, has been enjoined, but, I find none restraining the use of the bottle, vessel or package without the device impressed upon, or connected with it.

A manuscript copy of a recent decree rendered by the court of chancery at Louisville, Kentucky, in the case of Wilder v. Wilder [unreported], has been furnished me by complainants' counsel, as a case in point. But in that case, the defendants were restrained from selling "any preparation or compound under the name and style of 'J. B. Wilder & Co.'s Stomach Bitters,' printed, stamped, or engraved upon the bottles, labels, wrappers, covers, boxes or packages thereof. Also, from using the bottle herein exhibited marked 'B. 2,' and from imitating or causing to be imitated in any manner, either the bottle or label of the plaintiff herein marked respectively, 'A. and B.'"

This case does not appear to be in any respect inconsistent with the view indicated. Here was a trade-mark proper in connection with the bottle, and, as the court restrained defendants from selling the compound in connection with the trade-mark, "printed, stamped or engraved upon the bottle," doubtless, the complainants' bottles referred to as exhibits in that case, had the trade-mark impressed upon, or blown into the bottles, and this being so, it would be impossible to use those bottles without their having the trade-mark on them, and, therefore, also using the trade-mark itself. The trade-mark, in such cases, constitutes a part of that particular bottle. If this is not the true state of facts, then the copy of the decree furnished me does not show what the exact case is. At all events, it does not appear to be an exception to the general rule before stated. There are numerous cases where the use of a particular bottle or package has been restrained, when the bottle or package had the trade-mark impressed upon or blown into its structure, making it a part of the package itself, and it was necessary to include the particular description of bottle in order to restrain the use of the trade-mark indelibly impressed upon it. But, as before stated, I find no instance where the use of a bottle, vessel or package of a peculiar form and size has been enjoined with the trade-mark of the complainant, or colorable imitation thereof, used upon, or connected with it, omitted.

Doubtless a bottle, vessel, or package of a peculiar form may be used as auxiliary to the trade-mark proper, and may be of use in solving a question of intent of a party, in imitating, or using an evasive simulation of another's trade-mark. As, for instance, a party may adopt a trade-mark, and imprint it upon, or connect it with, the package of peculiar shape containing the article of his manufacture. Another party might make a colorable simulation of the trade-mark so used, but so different as to render it doubtful upon a mere inspection of the simulation of such mark alone, whether it was intended to be an imitation or not, or whether it would be likely to mislead the public. But if the imitator should, in addition to this, use the peculiar shaped package adopted by the party entitled to the trade-mark, and impress upon, or connect with it, the simulation of the trade-mark, all doubt as to the intention and the effect would at once vanish. In this view, a peculiar package might be a valuable auxiliary to the trade-mark, although it could not, of itself alone, constitute a lawful trade-mark, or a substantive part of a lawful trade-mark. But its use would be in aiding to determine the character and effect of a colorable imitation of the trade-mark proper, and the use of the imitation, or the simulated trade-mark, or the use of the package with such simulation connected with it, would be the thing restrained. In this case, there is no pretence that there is any imitation, or colorable simulation, of the marks and brands upon the package, or barrel. The use of the barrel with a simulation of the complainants' trade-mark impressed upon it, would doubtless be restrained. But to extend the privilege of trade-mark to the barrel in question alone, without having impressed upon, or in any way connected with it, any of the other words, symbols, or devices claimed and used by the complainants as a part of their trade-mark, or any colorable imitation of it would, in my judgment, be to go further than any case heretofore decided, and extend the privileges of trade-marks to objects not recognized by any established legal principles applicable to the subject. After a careful examination of the question, my conclusion is, that the barrel in question, without any other marks, or symbols, is not, and that it cannot become, a lawful trade-mark, or a substantive or integral part of a lawful trade-mark, and that complainants have no exclusive right to its use as such. The result is, that complainants' bill must be dismissed with costs, and it is so ordered.

Case No. 9,784.

MORA v. FOSTER et al.

[3 Sawy. 469.] [1]

Circuit Court, D. California. Sept. 22, 1875.[2]

MEXICAN LAND GRANTS—GRANT TO CHURCH—DEPARTMENTAL ASSEMBLY—SALE—SUBSEQUENT GRANT—DAMAGES.

1. A claim to land made by the Catholic bishop, of Monterey, by virtue of a Mexican grant to the church for religious purposes, is "of a right or title derived from the Spanish or Mexican governments," and is, by the terms of the act of congress one, the validity of which, the board of land commissioners was authorized to consider and determine.

2. The board of land commissioners having adjudged the claim to be valid, and its decree not having been subsequently set aside or impeached by any direct proceeding for the purpose, it cannot be collaterally questioned in an action to recover the land based upon such confirmed title.

3. The departmental assembly of California under the Mexican government, had no power to authorize the sale of any lands other than those of the department. It could not confer upon the government any power over the domain of the nation, its authority upon that subject being limited by the colonization laws to the approval or disapproval of grants made by the governor under those laws.

4. Where a grant made to the church for religious purposes in 1796, was finally confirmed by the board of land commissioners to the Roman Catholic bishop of Monterey, and another grant to another party embracing the same land by governor Pio Pico, in 1845, upon a sale made by direction of the departmental assembly, was also finally confirmed: *Held*, that the latter grant affords no defense to an action to recover possession of the land founded upon the former.

5. Where there is no evidence of the possession of the defendants at any time anterior to the date of the commencement of the suit to recover possession of land, only nominal damages can be allowed.

[6. Cited in Mora v. Munez, 10 Fed. 640, to the point that the patent issued upon a confirmed Mexican grant is the final, authentic, and conclusive record, which establishes the legal title in the patentee, which must prevail in an action at law against any party having no patent to the land, that it is conclusive and unassailable collaterally by any party having no patent.]

[This was an action of ejectment by Francis Mora against John Foster and others.]

Doyle & Barber, for plaintiff.

John B. Felton and E. L. Goold, for defendants.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

FIELD, Circuit Justice. The questions involved in this case have been substantially determined by the supreme court in the cases of U. S. v. Workman [1 Wall. (68 U. S.) 745], and Beard v. Federy [3 Wall. (70 U. S.) 478], as will be seen by their examination. The present action is ejectment for the possession of certain church lands of the Mission of San Juan Capistrano in the county of Los Angeles, consisting of the church, churchyard, cemetery, garden, orchard and vineyard with the necessary buildings and appurtenances, the whole comprised within an area of forty-four acres and four-tenths of an acre. The plaintiff traces his title through Joseph S. Alemany, formerly Catholic bishop of Monterey, to whom a patent of the premises was issued by the United States on the eighteenth of March, 1865. The record of the proceedings before the board of land commissioners, which resulted in a decree confirming the claim, upon which the patent was issued, was introduced in evidence; and in the petition of the bishop it was averred, in substance, that at the time of the conquest and cession of California to the United States, the canon law of the Roman Catholic Church was recognized, and in force, as the law of Mexico, as it had been in Spain, when Mexico was a dependency thereof, in all things relating to the acquisition, transmission and disposal of property real or personal belonging to the church, or devoted to religious uses; that by the laws of Spain and Mexico thus in force in California, the title, control and administration of all ecclesiastical or church property were vested in the hands of the bishop and clergy of the diocese, who for such purposes were regarded as a body corporate; that at the date of the conquest and cession of California the Catholic Church had been in the actual and undisturbed possession of the premises in controversy since the year 1796; and that for the purpose of enabling the petitioner to hold the church property and administer the temporalities of the church and manage its estate and property, he had been incorporated as a sole corporation by legislation of the state of California, under the name and title of Bishop of Monterey. The claim thus asserted by the Catholic Church, through its bishop, to the lands in controversy, is "of a right or title derived from the Spanish or Mexican governments," and is thus by the very terms of the act of congress, one the validity of which the board of land commissioners was authorized to consider and determine. Having considered it and having adjudged it to be valid, its validity not having been in any direct proceeding subsequently impeached, cannot now be questioned in the present action.

The defendants assert title under a grant of land made by Governor Pio Pico in 1845, upon a sale directed by order of the departmental assembly, which grant was confirmed under the act of congress of March 3, 1851 [9 Stat. 631]. It is admitted for the purposes of this action that the confirmation has been followed by a survey approved by the surveyor-general of the United States. But this grant and confirmation cannot aid the possession of the defendants as against the patent under which the plaintiff claims. The departmental assembly possessed no power to authorize a sale of any lands other than those of the department. Its powers

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

[2] [Affirmed in 98 U. S. 425.]

were very carefully considered by the supreme court in the case of U. S. v. Workman [supra], and it was there held that that body could not confer upon the governor any power over the domain of the nation, and that its own power in the alienation of public property of that character was limited, by the colonization laws of Mexico, to the approval or disapproval of grants made by the governor under those laws.

The counsel of the defendants feeling the force of the adjudication in that case, contends that the title to the church lands was never vested in the bishop, or in the Catholic Church, but remained in the Mexican nation at the time of the conquest and cession of the country; and that the patent to the bishop is not therefore evidence of any title anterior to its date, and can only be treated as a conveyance of the interest which the United States then possessed; and that the defendants' confirmation and approved survey, taking effect by relation as of the date of their petition to the land commission, carries an earlier title.

The obvious answer to this position is, that the adjudication of the supreme court that the departmental assembly had no authority to authorize the governor to sell any portion of the public domain, nullifies the effect of the confirmation. That confirmation does not of itself translate the title of the United States. As declaring the validity of an existing title it might operate to protect the estate of the confirmee. But the validity of that title having been assailed by the supreme court and overthrown, the confirmation can afford no aid to the defendants in their contest with the title of the plaintiff.

The patent is also something more than a mere conveyance of the government; it is evidence having the force and operation of a record that the title claimed was valid, or at least entitled to recognition and confirmation, at the time the sovereignty of Mexico over the country was superseded by the sovereign authority of the United States. It is evidence to that extent which is not open to dispute in an action of ejectment, except where the assailant comes into court possessed of a similar record or one of equal dignity. The defendants stand in no such position; they have no such record; their confirmation and survey being of a claim, belonging to a class adjudged invalid by the highest tribunal of the nation, furnishes no vantage ground to them in an attack upon an established and patented title, beyond that held by mere trespassers.

The plaintiff is therefore entitled to the premises. It is admitted that the defendants were in possession at the commencement of the action, but there is no evidence of their possession at any previous period. There is therefore no foundation laid for the recovery of any other than nominal damages, and none will therefore be awarded.

The plaintiff must have judgment for the possession of the premises with one dollar damages, and it is so ordered.

[Upon a writ of error, the judgment of this court was affirmed. 98 U. S. 425.]

MORA (WILLIAMS v.). See Case No. 17,730.

MORAGA (UNITED STATES v.). See Case No. 15,806.

Case No. 9,785.

MORAN v. BAUDIN.

[2 Pet. Adm. 415.] [1]

District Court, D. Pennsylvania. 1788.

SEAMEN — VOYAGE CHANGED — DISCHARGE AND WAGES DEMANDED—FOREIGN SEAMEN—RIGHTS DETERMINED BY WHAT LAW.

1. A French seaman claimed his wages from a ship which had changed her voyage from that for which he originally entered. The court decreed his wages.

[Distinguished in Thomson v. The Nanny, Case No. 13,984. Cited in The Saratoga, Id. 12,355; The Maria, Id. 9,074; Nevitt v. Clarke, Id. 10,138; Davis v. Leslie, Id. 3,639; Bucker v. Klorkgeter, Id. 2,083; The Becherdass Ambaidass, Id. 1,203.]

[See The Bee, Case No. 1,219.]

2. The case of a French seaman to be determined by the marine law of France.

3. What deviation from the original voyage will justify mariners in demanding their discharge.

[Cited in The Becherdass Ambaidass, Case No. 1,203.]

The libel in this case states, that Charles Moran the libellant entered as a mariner on board the ship L'Heureux at Nantz, in France, on the twenty-third day of October, 1786, under an engagement for a voyage from the said port of Nantz to New Orleans in the Mississippi, from thence to go to Martinique, and from thence to return to France. That Alexander Baudin the captain, had totally altered this voyage by repeated deviations, whereby the contract was broken, and thereupon the libellant prays a discharge and the amount of wages due. The circumstances of this case appear from the testimony exhibited, to be as follows: That this vessel sailed from Nantz the twenty-third of October, 1786; that the mariners understood and were informed that this voyage was to be to New Orleans first, thence to the West Indies and thence back to Nantz or to some port of France, and that it would continue from 10 to 15 or 16 months, and under this expectation the mariners were registered at the proper office at Nantz, according to the manner of registering seamen in France. That instead of pursuing this voyage, as designated to them, they were taken three times to New Orleans, twice to Martinico, thence to Aux Cayes, once to the Havannah and were now brought to Philadelphia. That in the course of these several voyages, the libellant and

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

others of the crew made frequent complaints of the deviation from and prolongation of the originally intended voyage, and had applied to the intendants of some of the ports they were at, demanding to be discharged, or taken back to France, but were detained in the service of the ship by repeated assurances of the captain, that from the then next intended port they should be taken back to France. That in particular, when they were at Martinico the second time, the whole crew complained and demanded their discharge, whereupon the captain threw the boatswain and another sailor into prison, and that the boatswain wrote to the commanding officer of a frigate there, who sent for him on board, obliged the captain to pay him his wages and discharged him.

To this libel and testimony, the respondent hath urged in reply: That no contract or articles between the captain and crew at Nantz hath been exhibited or proved; that the libel itself is deficient in form, and that, let the deviations from the original voyage be what they may, the libellant hath for his part justified the whole by signing a process verbal on board the ship on the 30th of April last, certifying that the ship L'Heureux had suffered damage by storm, and consenting to put into the port of Philadelphia in distress, which verbal process, so signed, was exhibited in court. As there is no ordinance of the United States, or act of the legislature of Pennsylvania touching the present point, the claim of the libellant, who is a French subject, and was shipped in France, will most properly be determined by the marine ordinances of the country to which he belongs, and under which he engaged in the service of this vessel. These ordinances strictly prohibit any captain or master of a vessel from receiving on board his ship any mariner, as such, who is not entered on his role d'equipage, made up in the commissary's office, or bureau de classes, of the port where the vessel shall be. See Ord. de Marine, vol. 1, pp. 422, 715. Now, as it has not been controverted but that the libellant has served on board this ship ever since she sailed from Nantz, it is in vain to call upon him for proof of the contract made at Nantz, since the role d'equipage, or a transcript of it, is in the captain's hands, and never in the mariner's. Had no such engagement taken place as mentioned in the libel, or should the libellant demand larger wages than had been agreed upon, the captain would have shewn the role d'equipage in proof against him. As he has not done this, although in his power, it follows that the allegation of the libellant must be admitted as true. Indeed it is in positive testimony that the libellant entered on board at Nantz, and was to receive 50 livres per month, wages; which is sufficient proof of a contract.

The next point is to consider the repeated deviations from the original voyage, and how far this should operate in releasing the mariner from his contract. To lay it down as a general rule that the least deviation from a designated voyage, should invalidate the articles and discharge the mariners in a foreign port, would perhaps be construing shipping articles too strictly, and certainly very injurious to commerce. Shipping articles are not to be construed by the same rules with a policy of insurance, their object and ground of reason being quite different. Yet gross and unnecessary deviation shall free a mariner from his contract; but there is no occasion to fix a general rule now—this cause is to be determined by the positive laws of France, and there is an ordinance express to the purpose. Ord. de Marine, vol. 1, p. 548, art. 4. See 2 Pet. Adm. Append. p. 14. "If at any time after the arrival and discharge of the vessel at the port of her destination, the captain or master, instead of returning, shall freight or load his ship to go elsewhere, the mariner may leave her if he chuses, unless it has been otherwise determined by his special engagement." And this rule is further enforced by Valin's commentary on the article. There appears to me a strong presumption that the boatswain who was paid off and discharged at Martinico by order of the commander of a frigate there, claimed the benefit of this ordinance. It is said, indeed, that his mother was dead, and he had business in France: but this, I think, would hardly be admitted as a sufficient reason to discharge a mariner in the midst of a voyage. Such as it was, it is plain that Captain Baudin did not deem it sufficient, for he put the man in prison for demanding his wages and claiming his discharge.

The objections to the libel in point of form are not sufficient to exclude this cause from the notice of the court. It is indeed, not so precise as might be wished, but the substance of the complaint is alleged, viz. an engagement for a certain voyage, frequent deviations from the voyage proposed, and a citation prayed for, to shew cause why the wages accrued should not be paid, and the libellant discharged. The verbal process signed by the libellant on board the ship is the next circumstance relied on by the respondent; but this, I think, cannot have the operation expected. If the ship was really in distress as declared, there is no doubt but any mariner would sign his consent to put into a strange port, to avoid impending danger and refit the damaged rigging. But this deviation, occasioned, as it should seem, by necessity, cannot be deemed a justification of former deviations, where no such necessity appears, or is even pretended.

I am clearly of opinion, that if this cause was tried before a French court of justice, the libellant could not be refused the benefit of the marine ordinances of France, so expressly in favour of his claim. Therefore, I adjudge and decree, that Charles Moran have and receive from the respondent in this cause, his wages at the rate of 50 livres per month,

from the 23d of October, 1786, to the date of the present libel, and that the respondent pay the costs of suit.

Case No. 9,786.

MORAN et al. v. SCHNUGG et al.

[7 Ben. 399.] [1]

District Court, S. D. New York. Aug., 1874.

BANKRUPTCY — PRIORITIES — MORTGAGE — MECHANIC'S LIEN.

A mortgage recorded before the filing of a mechanic's lien is entitled to priority. When the bankruptcy court takes possession of property on which there are mechanics' liens, and sells it free and clear of the liens, it forecloses the liens, and the lien holders are not bound to renew or continue their liens, to preserve their rights against the proceeds of the property.

This was an action [against John Schnugg and others] brought by [James H. Moran and others] assignees in bankruptcy [of Leopold Bohm] to set aside certain mortgages and mechanics' liens upon the bankrupt's property, which the court had sold free and clear of both mortgages and liens. On the evidence the court held that the mortgages were valid. The question remained as to the mechanics' liens and their priority.

Abbott Bros., for plaintiffs.

Boardman & Boardman, W. B. Putney, L. B. Bunnell, and Otto Meyer, for defendants.

BLATCHFORD, District Judge. As between the mortgages and the mechanics' liens, the former are not only valid, but are prior in time. The former were recorded before any of the latter were filed. This gives priority to the former.

The mortgages must, therefore, be decreed to have validity and precedence, both as regards the mechanics' liens and the assignees in bankruptcy, the Schnugg mortgage for the full $10,000, and the Baerlein mortgage for $6,800.

As between the mechanics' liens and the assignees in bankruptcy, I think the liens are not open to any of the objections urged against them by the plaintiffs.

The bankruptcy court, within the year from the filing of the liens, took possession of the property, and sold it free and clear of the mechanics' liens, and put the proceeds of sale into the hands of its officers, in place of the estate so disposed of. It did this by virtue of the provisions of the 20th section of the act [of 1867 (14 Stat. 526)]. It thereby foreclosed the liens. It converted into money the property that was subject to the liens, and thereby prevented the lienors from ever taking measures to foreclose the liens. The lienors were not only relieved thereby from any duty to renew or continue their liens within the year, but they had no right to renew or continue a lien against property which the bankruptcy court had sold free from such lien.

As regards renewing or continuing the lien, so as to make it continue operative against the proceeds of the sale, it is sufficient to say, that at least from the commencement of this suit, which was within the year, the rights of the lienors were fixed, and whatever their rights as lienors were when this suit was brought, such they must be adjudged in this suit to be. As between the plaintiffs and the lienors, the fund must be administered and distributed as of the time when the plaintiffs came into this court and asked this court to administer and distribute it.

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

Case No. 9,787.

MORAN v. STRAUSS et al.

[6 Ben. 249.] [1]

District Court, S. D. New York. Nov., 1872.

MORTGAGE—BY CORPORATION—REAL AND PERSONAL PROPERTY—CONSENT OF STOCKHOLDERS.

1. A corporation, incorporated under the general manufacturing law of the state of New York, executed a mortgage on real and personal property, and an assignment of two patents, as security for moneys due to the mortgagees from the company. The consent of two-thirds of the stockholders to the mortgage of the real estate was given. The holder of seventy-five shares, whose signature made up the two-thirds, had bought them at a sale ordered by the board of trustees, the stock having been held by two of the trustees, for the benefit of the stockholders. The purchaser of the shares at this sale, which was on credit, was a trustee. The sale was approved by the board. The assignee in bankruptcy of the company filed a bill to set aside the mortgage and assignment: *Held*, that the mortgage was consented to by two-thirds of the stockholders, and its consideration was advanced in good faith.

2. No consent was necessary to the mortgaging of the personal property, or the assignment of the patents.

3. The mortgage and the assignment could not be set aside, but must be regarded as security for the moneys due from the company to the defendants at the time, and moneys advanced by the defendants on the faith of them.

The plaintiff in this action filed this bill to set aside a mortgage. The bill alleged that, on March 19th, 1869, the Columbian Metal Works filed a petition in voluntary bankruptcy, and were adjudged bankrupt, and the plaintiff [James H. Moran] was appointed assignee; that the bankrupts were a corporation incorporated under the general manufacturing law of the state of New York, and were the owners of real estate in Morrisania, New York, and also of personal property, among which were two patents; that, on August 30th, 1867, they executed to the defendants a mortgage on all the real and personal property, except the patents, and also assigned to them the patents; that both the mortgage and the assignment were void under the laws of New York; that the money purporting to be the consideration

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

of them was not paid, and the company was insolvent, and the written consent of the stockholders owning two-thirds of the stock was not obtained, inasmuch as seventy-five shares, purporting to be owned by one Freeman, one of the trustees of the company, who gave his assent to the mortgage, really belonged to the company; that the defendants [David Strauss and others] had foreclosed the mortgage by suit in a state court, in which the company had allowed a decree to be entered. The defendants answered, denying in substance the allegations of the bill, except as to the facts of the bankruptcy, the execution of the mortgage and assignment, and the decree of foreclosure.

W. H. Arnoux, for complainant.
J. M. Van Cott, for defendants.

BLATCHFORD, District Judge. In this case I have arrived at the following conclusions:

(1.) The petition in bankruptcy having been filed March 19th, 1869, the title of the assignee relates back to that date, and the decree of foreclosure made on the 26th of March, 1869, in a suit to which he was not a party, is of no effect to prejudice his rights.

(2.) If the mortgage was unauthorized and void, as being ultra vires, it was such a fraud on the general creditors of the corporation, that the plaintiff can impeach it.

(3.) The holders of two-thirds of the stock consented to the mortgage. The 75 disputed shares belonged to Pirsson, as surviving trustee. They had been originally lawfully issued as full paid stock, and passed from the parties to whom they were issued, and went into the hands of Pirsson and Freeman, as trustees, as working capital, for the benefit of the stockholders, to be disposed of under the direction of the board of trustees, in such manner as they should deem for the best interests of the company. Freeman had died. A sale of the 75 shares, on credit, to H. O. Freeman, was a lawful sale. It was approved by the board. It was made in good faith, according to the testimony. Even if the 75 shares could not be represented by H. O. Freeman, the consent of Pirsson, and of the other four members of the board of trustees was given to the mortgage, and so the 75 shares, as represented by Pirsson, or by the individuals composing the board, must be counted among the consenting shares.

(4.) The defendants, at the time the mortgage was given, owned only 28 shares, not enough to make the two-thirds, if the 75 shares be excluded.

(5.) The consideration of the mortgage, so far as appears, was advanced by the defendants in good faith, and went to the uses of the corporation.

(6.) The mortgage is not impeached as being in violation of the bankruptcy act [of 1867 (14 Stat. 517)].

(7.) Construing the consent as applying only to a mortgage of the real estate, no consent was necessary to enable the corporation to mortgage the personal property, or to assign the patents. The mortgage did not cover the patents. They were assigned by a separate instrument, and, even though it be taken that they were really assigned only as security, yet the corporation had power by law to convey its personal property, which power includes the power to mortgage, or to transfer as security. A mortgage is none the less a conveyance because it is defeasible. The greater includes the less, unless the less is expressly excluded.

(8.) The suit to set aside the mortgage wholly cannot be maintained, but it must be regarded as, together with the letters patent assigned, a security for such moneys, if any, as the corporation owed the defendants when the mortgage was given, and such moneys as the defendants paid for or advanced to the corporation on the faith of the mortgaged property and the patents. If it be doubtful whether such moneys, with interest, exceed the proceeds of the mortgaged property and of the patents, the amount due to the defendants must be ascertained on proof.

[See Case No. 3,039.]

Case No. 9,788.

MORANCY et al. v. QUARLES et al.

[1 McLean, 194.] [1]

Circuit Court, D. Kentucky. Nov. Term, 1833.

WILLS—DEVISE OF LAND — CHARGE — STATUTE OF FRAUDS—COMPROMISE UNDER SEAL—PAROL AGREEMENT FOR COSTS.

1. A devise of land to an individual, and in consequence of the great value of the land thus devised, the devisee was required to pay specific legacies, constitutes a charge on the land, though sold and conveyed to a stranger.

[Cited in Clyde v. Simpson, 4 Ohio St. 461; Nellons v. Truax, 6 Ohio St. 102.]

2. An agreement under seal which compromises a suit, does not prevent either party from setting up and proving a parol undertaking, that one of the parties should pay the costs that had accrued.

[Cited in Winn v. Chamberlin, 32 Vt. 321.]

3. Such an agreement does not contradict or vary the written agreement; but is distinct and independent of it.

In equity.

Mr. Wickliffe, for complainants.
Mr. Haggin, for defendants.

OPINION OF THE COURT. The complainants [E. Morancy and others] have filed their bill against Quarles, and his sureties, as executor of Tunstall Quarles, and against Buford as purchaser and in possession of, certain lands, on which the complainants claim to hold a specific lien for certain legacies of five hundred dollars each, to the complainants, devised to them by Tunstall Quarles.

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

The clause in the will under which the lien is attempted to be enforced is: "I devise to my son James Quarles, and his heirs forever, the tract of land I reside on, and also that part of Mrs. Walker's alias Mrs. Stephenson's dower, I purchased of Joseph G. Walker, which will more fully appear by reference to his bond. The said James Quarles takes this with the incumbrances devised to his mother, in the previous part of this will, and pays in consequence of the great value of the lands devised, at lawful age, or intermarries, twelve months thereafter, five hundred dollars each; I mean the children of Archibald Kirkhead, &c." This tract of land was afterwards conveyed by the devisee to Buford the defendant; and the question is whether the land in his hands is chargeable with the payment of the devises to the children of Kirkhead. And we can entertain no doubt that the devise of the land does constitute a specific lien for the bequests to Kirkhead's children. Such was undoubtedly the intention of the testator. He gives the land to James Quarles, subject to the incumbrances devised to his mother, and to pay the several devises of five hundred dollars. And the reason why this payment is to be made, is stated to be, the great value of the land devised.

Now it would not only be unjust, but in violation of the intention of the testator to permit the devisee to take this land, free from the lien of the specific devises, and by a conveyance of it, as in this case defeat them. The will was notice to the purchaser and he was bound to examine it and ascertain the extent of the right devised. We are therefore clear that the land in the hands of the defendant Buford, is bound for the payment of the specific devises; and unless the payment shall be made at a time to be fixed the court will order a sale of so much of the land, as shall amount to these devises.

At this stage of the proceedings, and before the final decree was pronounced, the defendant Buford asked leave to file a plea, on the ground, supported by affidavit, that he had fully satisfied and paid the demand of the complainants. And on leave being given he filed the following plea. "This defendant by protestation, &c., that on the 17th July, 1832, in the district aforesaid, the complainants by a certain Morancy, the attorney of the complainants, under their hands and seals for the consideration of sixteen hundred dollars to him paid, did release and acquit and among other things, did covenant to release and acquit this defendant from the demands in the bill of the complainants mentioned. Whereupon the defendant prays, &c." In the agreement exhibited there was no provision as to the payment of the costs, which had accrued in the suit. And the complainant obtained leave to amend his bill; and in which he alleged that at the time the compromise was made and the release executed, stated in the plea of the defendant, it was distinctly understood and agreed between the defendant Buford and the agent, that the former should pay whatever costs had accrued. To this amended bill there was an answer which relied principally on the ground that the parol agreement set up in the amended bill is contradictory to the agreement under seal, and cannot be received.

The principle is well settled, that a parol agreement cannot be received to vary or contradict a written contract. But the parol agreement alleged is in no respect contradictory to the written contract. It sets up a parol contract beyond the writing. So far as the written agreement goes it is conclusive, and not being of doubtful construction, no parol evidence can be heard to contradict or vary it. But this writing does not cover the whole ground. There is nothing said in it, as to the costs which had accrued, and the parol agreement is limited to the payment of these costs. There is then, no legal objection to the verbal agreement; as it must be considered separate and distinct from the contract under seal. And the court are satisfied from the proof in the case that it was the understanding of the parties to the compromise, that Buford should pay any costs, that had accrued in the case. But, it seems not to have been known, to the agent of the complainants, that suit had been commenced, or that any costs had certainly been incurred. The agreement was, therefore, conditional, to pay costs, if any costs had accrued. The court, therefore, enter the following decree.

It appearing to the satisfaction of the court, that defendant Buford has purchased the right of complainants to recover in the suit, and that the defendant, William Buford, as a part of the consideration of said purchase and compromise, agreed to pay the complainants the fee promised in the cause to counsel, and to pay the costs of the suit; and it appearing to the court that the fee agreed to be paid to counsel by the complainant is one hundred dollars, which the court deem reasonable. It is therefore decreed and ordered, that this suit, as to all the defendants except Buford, be dismissed without costs, and that it be dismissed as to him so far as the bill claims payment of legacies. And the court decree and order that Buford pay to the complainants one hundred dollars, and also the costs of this suit.

Case No. 9,789.

The MORAVIAN.

[2 Hask. 157.] [1]

District Court, D. Maine. June, 1877.

CARRIERS—LIABILITY FOR DAMAGE—BILL OF LADING—HOW GOODS PACKED—BURDEN OF PROOF.

1. A bill of lading, reciting, "two cases sewing machines shipped in good order and condition;

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

quantity, condition and contents unknown; not accountable for breakage," is evidence of the good external condition of the cases when received by the carrier, and casts the burden upon the owner to prove that an injury to the machines resulted from the negligence of the carrier.

2. The fact, that the cases were in good order when received and broken when delivered, raises the presumption that they met with injury, while in the possession of the carrier, damaging their contents.

3. Evidence, showing that the injury would not have resulted in the common course of events, with proper care, in the absence of explanation, proves it to have been caused by negligence.

4. Shippers of merchandise of large experience, in absence of evidence to the contrary, are presumed to use the best method of packing the same to be carried over land or upon the sea.

In admiralty. Libel in rem against the steamship Moravian for damages to merchandise shipped by her at Liverpool, England, for Portland, Maine. The claim and answer alleged that the claimants were not liable by reason of the stipulations in the bill of lading, and because the damage did not result from any act of their own or of their servants, but from improper packing of the goods, and that it was inflicted before they came to their possession.

Emery S. Ridlon and Sewall C. Strout, for libellants.

John. Rand, for claimants.

FOX, District Judge. The libellant, Palmer, ordered from the manufacturer at a place in England, said to be about sixty miles from Liverpool, two sewing machines, to be forwarded to him at Portland by the Allan steamers. These machines, none of which are made in this country, are of a novel description, and are used for the sewing of boots and shoes, having an iron plate about two and one-half feet long, and ten to twelve inches in width. The machines were in pieces, packed in two pine boxes, one of which contained, with other portions of the machines, the two plates, which were secured by cleats at each end of the box.

These boxes, it is said, were taken by sail to Liverpool, then placed on board the Moravian about the first of last March. The vessel arrived here the thirteenth. Her cargo was placed in the sheds of the company, which are bonded warehouses. The libellant was notified of their arrival about the twenty-fourth of March, by the presentation of the freight bill; but it was not paid for about four weeks, the goods remaining in the shed until April twenty-fourth, when they were taken to the custom house for examination by the appraisers. On opening this box, the upper plate was found broken about ten inches from the narrow end, and this piece had evidently lapped forward upon the other portion of the plate, and, by its friction, had rubbed the paint, rendering the plate in spots quite bright. After the box had been opened, it was carefully examined, and the end next to the fracture was found to be split nearly across, originally a seamcrack, and much widened, and this split had extended across one side of the box for some distance. By handling the box, these cracks had been enlarged so that they now extend across the side and end, and the portion of the box above the cracks is entirely separate from that below. There is also an indentation on the end of the box near the plate, as if it had been caused by a blow from an iron bar.

To recover for the damages thus done to this plate the present libel was instituted. In the bill of lading for the merchandise, is found the ordinary language, "two cases sewing machines, shipped in good order and well conditioned;" but further on it is stipulated that "quality, condition and contents are unknown, and the ship owner not accountable for the same;" and in the margin is also found, "not accountable for breakage."

In Clark v. Barnwell, 12 How. [53 U. S.] 272, the bill of lading was substantially of a similar character. It recited that the goods were shipped to be delivered in like good order, etc., but there was also added "contents unknown." It was then decided by the supreme court of the United States that this acknowledgment of the master, as to the condition of the goods when received on board, extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the articles, their condition at the time received on board, or whether properly packed in boxes or not.

Where, by the terms of the bill of lading, the ship is exonerated from liability for certain losses, it has also been decided by the supreme court, that, when such losses are occasioned by the negligence of the ship owner or his servants, the ship still remains accountable for losses so caused; but the burden of proof is changed, and the libellant must establish such negligence. New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 6 How. [47 U. S.] 344. The Invincible [Case No. 7,055].

The box with its contents were produced in court. From an examination of both parts of the broken plate, I can have no doubt that the fracture occurred before the goods left the ship. The paint is very much worn from the upper surface of the larger portion of the plate upon which the smaller portion chafed by the motion of the ship at sea, and the grains of the metal of the broken end are also worn down and smoothed, indicating that the movements of the one piece upon the other must have continued for a much longer time than merely while the box was being taken from the ship to the shed. I believe the counsel on both sides are satisfied with this conclusion of the court. The teamster who took

the box to the custom house testifies that it was carefully done by him, so that the injury could not have then occurred.

It is said that the plate may have been broken before the box was received by the carrier, as it was transported sixty miles, more or less, by rail from the factory to Liverpool. The bill of lading, according to the decision of the supreme court of the United States, is evidence that the box, so far as its external condition would indicate, was in good order when received by the ship; and, as it was found to be split and broken at the end and on one side when received at the custom house, I think that the fair inference is that, while on board of the ship, or while in charge of those employed in her lading, it met with some injury which damaged the box and its contents.

The box being thus apparently in good order when received by the carrier, and found to be injured when delivered up by him, the burden is on the libellant under the terms of the present bill of lading to establish that the damage was occasioned by the negligence of the carrier. The rule of law laid down in the Exchequer, Scott v. London & St. K. Docks Co., 3 Hurl. & C. 597, is that, when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

On the end of the box, which is not broken, there are a number of indentations worn quite smooth, and, as I think, clearly indicating that during the voyage this box stood on that end, resting upon the heads of a number of bolts which were pressed into the wood of the box by the weight upon it, or else that the box fell some distance, striking this end upon the bolts. The other end, as before stated, was badly split through, not entirely broken off when brought to the custom house; and there is also a dent in the wood just over the split, indicating a blow from some sharp, hard instrument; and it is strenuously contended that by such a blow the plate was broken, the force of the blow communicating to the plate through the cleat nailed to the end of the box and the iron protuberance upon the plate, which was fitted into a notch in the cleat to make steady and secure the plate. I do not feel certain that the injury was thus occasioned. I rather think it more probable that it was caused by heavy weights placed upon the box, or by rough handling from the stevedores and laborers when moving the box and storing it on board the ship.

The box being under the control of the carrier who was, by the bill of lading, informed as to its contents, and being apparently in good order, and such serious damage to such a package not ordinarily happening with due care, reasonable credence is afforded under the rule in Scott v. London & St. K. Docks Co., that the injury arose from want of due care, unless a satisfactory explanation is given in this behalf.

In the present case, no evidence is produced by the ship-owners as to the position of this box on ship-board, whether heavy articles were or not placed upon it, or whether it was at any time by accident or otherwise injured and broken by the servants of the ship-owners while under their control. For all that appears, it may have slipped from the slings when going on board and have fallen the whole depth of the hold, or have been thrown down with great violence, the servants of the carrier been guilty of the greatest negligence in their duty in this behalf, and the matter kept concealed from the court. There is certainly nothing to discredit any such theory.

From the marks upon the box and the damage it has sustained, it is quite apparent that it had not received that care and fair usage which a package of sewing machines should have received; and while there was nothing on the box to indicate the contents, as I have before stated, the carrier was fully advised in relation to it.

The claimants contend that the plate which was broken was not securely packed, and that for this cause they are not to be held accountable for the damage, even if they were otherwise negligent. A large number of witnesses have been examined upon this branch of the case by each side, and the matter is certainly not free from doubt. The manner in which this plate was placed in the box is beyond dispute. The two plates were a little larger than the box, and were laid in diagonally, resting upon cleats of wood which were nailed to each end of the box, the upper one, which was broken, being kept in position by a projection upon one end of the plate that fitted into a notch cut in the cleat at the broken end. The ends of the plate rested upon the cleats, and there was no other support under the plate; nothing between the plates; the ends of the plates did not touch the ends of the box, nor did the box cover rest on the plate; both plates were secure and immovable so long as they were unbroken.

It is said by quite a number of witnesses that this packing was defective because the plates were only supported at the ends with nothing around or between the plates to break the force of any blow or strain that might happen to the box; that if the plate had been enveloped in straw or shavings, it would not probably have been broken, or at any rate would have been much more likely to escape a fracture from any blow, or by any fall of the box. Other witnesses express an entirely different opinion, and say that the plate was well secured, in their judgment, so as not to be liable to injury if properly handled, and that the soft packing would not have protected the plate, if exposed to unrea-

sonable violence. A number of witnesses of very extensive experience in the packing of sewing machines state that they have never known the manufacturer to use any kind of soft packing about these machines when fitted for transportation; that they are only secured in place by cleats, and they have sent them long voyages in safety thus packed; but none of these witnesses, I think, have had any acquaintance with machines having so large a casting as the present.

In this conflict upon the question, whether the box was packed with reasonable care and skill to protect its contents if fairly handled, I think the court may well take into consideration the fact that these manufacturers, Pitt Bros., had been so long and extensively engaged in this business that they had become so well known in this country that goods were ordered of them by parties on this side of the water.

If permitted to refer to their hand bills found in the box with the broken plate, it appears that they had been engaged in this branch of business more than twenty-five years. During all this time, we must believe that they must have shipped large numbers of these machines to various quarters of the globe, and by experience had ascertained the safest and best method of packing the same for transportation by land and by sea. If their machines were delivered in bad order, they certainly must have been informed of their condition; and it cannot be presumed that they would continue a practice which would thus endanger the safety of their merchandise and subject themselves to all the consequences attending a negligent or unskillful method of packing their goods. They would clearly be answerable for damages to the party injured, if they were not packed with due care and precaution, or if they were still the owners of the property, they would subject themselves to the loss occasioned by their own neglect.

I must presume that in twenty-five years they could not but have ascertained the safest method for packing these plates, and that in the present instance, as there is nothing to establish the contrary, they adopted it. Whether shavings or other soft material should have been used was expressly brought to the attention of the packer of this box, as it appears that some portions of the machine in this box were packed with shavings, manifesting that this material was at his command, and his judgment was applied to the determination of whether it was or not expedient that the plates should be thus packed, or whether the course adopted of securing them in the box, as was done, was on the whole the most judicious.

This view, I think, is quite persuasive and influences my opinion, so that I am brought to the conclusion that the libellant is entitled to recover for damages occasioned by the negligence of the carrier to his property. Decree for libellant.

Case No. 9,790.

MORDECAI et al. v. The MARY EDDY.

District Court, D. South Carolina.

MARITIME LIEN — DEFINITION — DISTINGUISHED FROM EQUITABLE LIEN.

[MAGRATH, District Judge, cites from The Young Mechanic, Case No. 18,180, the remark by Judge Curtis wherein he distinguished a maritime from an equitable lien, and adopted the definition by Pothier of an hypothecation, as an accurate description of a maritime lien under our law,—"the right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold in order to have the debt paid out of the price,"—and adds that a maritime lien, in general, gives no right to the creditor to take possession; that is executed by the suit in rem.]

[Nowhere reported: opinion not now accessible. The above statement of the point determined was taken from Cohen's Adm. Law, 202.]

MORE (SADLER v.). See Case No. 12,208.

Case No. 9,791.

MOREHEAD v. JONES.

[3 Wall. Jr. 306.] [1]

Circuit Court, E. D. Pennsylvania. Nov. Term, 1860.

PLEADING IN EQUITY—ANSWER—AMENDMENT BY STRIKING OUT ADMISSIONS—PATENTS.

In a bill for infringing a patent the defendants were allowed, under special circumstances, and there being no laches, to strike out an admission in their answer, that they had made certain articles, their making of which the complainant was seeking by the bill to enjoin.

[This was a bill by James K. Morehead against J. Hervey Jones.]

Morehead & Co., as assignees of a patent granted to one Sherwood for an improvement in door locks, filed their bill at the last term to restrain the respondents from infringing, and for an account. The defendants answered, admitting their use of the improvement, and claiming a right to use it by reason of a prior assignment to them by the patentee. They also filed a cross-bill, alleging their ownership of the patent, and praying for an injunction and account as against the complainants. After answer and replication, and when the parties were about to begin taking their testimony, the defendants, at the same term to which the bill was filed, made application to a judge of the court, by petition, for leave to amend their answer by striking out an admission that they had made door locks having substantially the improvements mentioned and specified in the patent, as stated in the complainants' bill, and inserting a modified admission, denying an infringement of any of the claims of the patent, except one of them, which was specified. They prayed for leave, also, to amend by taking an issue to the validity of the patent to Sherwood.

[1] [Reported by John William Wallace, Jr., Esq., and here reprinted by permission.]

The ground of the application was, that supposing Sherwood to have a valid patent, they had purchased a right to use it; that after filing their answer they had discovered that it was not a good patent, and that the assignment made to them was bad. Accompanying their petition was an affidavit that the matters and things set forth in their proposed amendment had only recently come to their knowledge, and since they had filed their answer. The district judge to whom this application was made did not grant it when made to him, but adjourned the matter till the present term, when the motion was again argued before the court. In he meantime the testimony on both sides had been taken, and the case set for hearing at this term.

GRIER, Circuit Justice. That amendments may be allowed by the court after issue and at any time before final decree, when it is manifest that the purposes of substantial justice require it, is admitted. But while it is thus admitted that the courts have such authority in the use of a sound discretion, they must be very cautious in its exercise. When the object is to let in new facts and defences wholly dependent on parol testimony, the reluctance of the court is greatly increased.

As the bill in this case was filed to the last term, and as the application for leave to amend was first made before the testimony was taken, it is not subject to the charge of laches, or great delay. The defendants have sworn also that the matters and things set forth and contained in the said proposed amendment only recently came to their knowledge, and subsequently to the filing of their said answer. This can only refer to the last matter of amendment, to wit, the invalidity of the patent. As to the first and second. there is no allegation or proof of any mistake of fact or law in the answer first sworn to, or that the extent of their infringement was not as well known before as since the answer was sworn to. These amendments cannot be allowed.

The only question, therefore, is, whether the respondents should now be allowed to set up a matter of defence inconsistent with their first answer. Assuming their answer and affidavit to be true, the case stands thus: They purchased a patent right from the patentee; supposing they had obtained a valid patent: they make defence to the complainants' bill, alleging a previous purchase: after filing their answer, they discover that the patent is invalid and their title to it good for nothing. Why should they not be allowed to contest the validity of the patent, and show that the complainants, as well as themselves, have been defrauded by the patentee? For if, under such circumstances, the respondents should be enjoined from using the supposed invention, it would present this anomaly, that the respondents would be hindered from using that which belongs to the whole world. Under the peculiar circumstances of this case, we think it would not be an abuse of the sound discretion of the court to permit the respondents to file a supplementary answer setting up this defence, on payment of costs which have accrued on the abandoned defence: 1st. Because there has been no laches or delay, the application being made during the term to which the bill was filed. 2d. The application was made as soon as the fact was discovered, and before any testimony was taken. 3d. If the defence be true, as we now assume, although the defendants might have discovered it before by proper diligence, yet believing their title to the patent better than that of complainants, their attention was not called to contest its validity till they discovered the invalidity of the title which has been imposed on them by the patentee. 4th. There is nothing contradictory or inconsistent between the answer as filed and the amendment proposed to be made: The first was made under the supposition that the patent, as well as the respondents' title to it, were valid. The new discovered defence admits they were doubly wronged by a bad title and by a worthless patent.

Whether this defence can be satisfactorily established is the matter to be tried.

[NOTE. There was a decision in this case in favor of complainant. Case No. 8,413. It was subsequently heard upon motion to treble the damages. Motion refused. Id. 8,414. The decree of the circuit court was for perpetual injunction and awarding $13,282.92 damages for infringement. From this decree an appeal was taken to the supreme court. The injunction was modified, and one dollar nominal damages awarded. 1 Wall. (68 U. S.) 155.]

Case No. 9,792.

MOREHEAD v. UNITED STATES.

[Hoff. Op. 404.]

District Court, N. D. California. May 26, 1859.

MEXICAN LAND GRANT—LOST GRANT—EXPEDIENTE REGULAR—SUSPICIOUS FACTS.

[1. The rule is that, before the contents of a paper alleged to be lost can be proven, satisfactory evidence must be produced to prove its execution and the loss. But in cases where three things are so intimately blended together, and there can be no question as to the contents, and no possible motive for withholding it, the contention being in reference to the execution, then the court will not be so strict as to evidence as to loss.]

[2. Where the archives show the expediente to be regular and its signatures genuine, and a grant to have issued thereon, and there is no evidence to show any fraud or tampering with the archives, the grant will be allowed, although there is evidence to throw doubt upon the fact that the claimant was at the place where the grant purports to have been signed and delivered to him.]

HOFFMAN, District Judge. The land claimed in this case consists of ten leagues, situated on the Sacramento river, at the place now called "Knight's Landing," in the county of Yolo. The claim was rejected by the board, for non-fulfillment of the con-

ditions of occupation and cultivation. It appears, however, from the evidence, that Knight, the grantor, settled on the land in 1842 or 1843, and continued to occupy it until 1849, when he died, on the Stanislaus river, a distance of about one hundred miles. As early as June, 1843, Knight petitioned Governor Micheltorena for the land alleged to have been subsequently granted to him by Pio Pico, but in pursuance of Jimeno's recommendation, the proceedings on this, as on numerous similar applications, were suspended, until the governor should make his projected visit to the Sacramento and San Joaquin valleys. On the 22d December, 1844, Micheltorena issued the document known as his "general title," whereby he granted to all the citizens who had solicited with reports in their favor from General Sutter, the lands described in their respective petitions and maps. As Knight had not only not obtained the favorable report of Sutter, but as the report of the alcalde of Sonoma to whom the application had been referred by Sutter, had declared the land to be occupied by Don Tomas Hardy, he was, of course, not embraced within the class of grantees mentioned in the general title.

The grant on which the claimant, [James G. Morehead,] who is the administrator of Knight, relies, is alleged to have been made by Pio Pico on the 4th of May, 1846. The original grant is not produced, and evidence has been offered to prove its execution, loss and contents. It is objected that the loss of the original is not sufficiently proved to justify the admission of secondary evidence as to its contents. "Where evidence of the contents of a writing alleged to be lost is proposed to be given, the natural order of making the proof is to show—First, that the original existed; secondly, that it has been lost; and, thirdly, its contents. It has been said, however, that unless proof is adduced satisfactory to the court, of the loss or destruction, evidence as to execution and contents can not be submitted to the jury." Jackson v. Frier, 16 Johns. 193; [De Haven v. Henderson], 1 Dall. [1 U. S.] 424; 3 Har. & J. 219. "But these facts are frequently so intimately blended together, and have such a mutual relation to, and dependence upon each other, that it is difficult and often impossible to observe strictly the logical order of the proofs. The amount of proof of loss or destruction which will be exacted, depends in a great degree upon the nature of the case. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made as to the reasons of its nonproduction. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original." Minor v. Tillotson, 7 Pet. [32 U. S.] 99, 101. "Where there is no ground for suspicion that the paper is intentionally withheld, nor any discernible motive for deception, courts are extremely liberal in regard to secondary evidence." 6 Vt. 399. "Where the paper is of that description that no doubt can arise as to proof of its contents, there can be no danger in admitting secondary evidence." [Renner v. Bank of Columbia], 9 Wheat. [22 U. S.] 581–587; U. S. v. Doebler [Case No. 14,977]. "Ordinary diligence is usually enough and it will ordinarily suffice that the paper has been sought for, where it might be supposed likely to be found or was usually kept and that the search was fruitless." 3 McCord, 322.

The above observations taken from the decisions of various courts apply with much force to the case at bar. The original grant is alleged to have been lost;—but the claimant produces from the archives the expediente containing the original petition with the marginal order of the governor, the decree of concession which directs the title to be made out, and a copy of that title as delivered to the party. If these papers are genuine, the existence and contents of the lost grant are sufficiently proved, and no motive can be suggested for its suppression. The copy produced shows it to have been in the usual form and with the usual conditions, and the description of the land is, as usual, taken from the petition.

The real controversy of the case is not as to the contents of the lost grant, but as to whether a grant was ever issued. As the court, before it can be satisfied that a paper has been lost or destroyed, must first be satisfied that it once existed, the proofs on the latter branch of the inquiry must first be considered. If, then, the evidence in this case is sufficient to establish that a grant was made on the petition produced from the archives, I am clearly of opinion that the proofs of loss are sufficient to meet the technical requirements as to the admission of secondary evidence. If, on the other hand, the evidence does not establish that a grant was made, then the claim must be rejected because the claimant has failed to make out his case; but not for the reason that he has not furnished sufficient preliminary proof of the loss or destruction of his title to allow secondary evidence of the contents to be given.

It is proper to add that though the objection as to the insufficiency of the proof of loss was taken, the arguments of the counsel who represented the United States were chiefly directed to an investigation of the evidence relating to the existence at any time before the conquest of any grant of the land. To this inquiry which is thus, in any point of view, preliminary, we will now address ourselves. The only witness who testifies that he knows the grant was made, is Jose Matias Moreno. He states that when he was secretary to the government in 1846, Knight petitioned for a tract of land on the Sacramento. The governor made a decree for a title to the land peti-

tioned for, and the title was accordingly issued. He further swears that he believes the copy of the grant found in the expediente is a copy of the title issued to Knight. If this witness were entirely worthy of credit this testimony confirmed as it is by the expediente found in the archives would be sufficient to establish the facts to which he swears. This court has, however, on more than one occasion been compelled to reject as simulated and ante-dated grants, the genuineness of which was positively sworn to by Moreno. A careful investigation of all the testimony in the case is therefore necessary, notwithstanding his positive statements. J. M. Harbin swears that Knight was with him in the spring of 1846 at Los Angeles about three weeks. That the witness was there about a month and that he found Knight there, but he left the place before the witness; that Pio Pico, the governor, told him he had given Knight his papers, and that Knight also told him he had them, when he was getting on his horse to leave. Knight also told him that he was going to leave his papers with John Wilson of Santa Barbara, that he might obtain their confirmation by the departmental assembly. N. A. Den swears that he saw Knight in the spring of 1846, either in March, April or May, on his way to Los Angeles, and also on his return. On his return he stated that he had got his papers for his rancho, and a short time afterwards, in looking over the archives at Los Angeles, the witness saw evidence that he had done so. J. C. Davis swears that about the 5th of June he was in Col. Fremont's camp at the "Buttes," when Knight came in and informed them that all the Americans in California would be ordered out of the country by the government. Some one then remarked that he would, in that event, lose his rancho, to which he replied that he had just returned from the lower country, and had procured his title papers, at the same time producing some papers which he said were his title, but which the witness did not read.

Evidence has been offered on the part of the United States to show that Knight could not have been at Los Angeles in the beginning of May, as sworn to by Harbin, and that the relations which then existed between the Mexican authorities and the American settlers rendered it in the highest degree improbable that the government could have been induced to make him a grant. Knight's conduct and declarations are also relied on as showing that the only title papers he possessed were the Micheltorena papers of 1884. Major John Bidwell, after detailing the circumstances connected with Knight's first application to Governor Micheltorena, and his failure to obtain a grant from that officer, states that he returned those papers to Knight in 1844, and that he did not see them again until the spring or summer of 1847, when Knight brought them to him and asked him if anything more could be done with them, and if his title was a good one, as the papers then stood; that some persons were under the impression that the American governors had the same authority to grant lands as the Mexican governors had possessed, and that Knight made the inquiry of him whether anything could be done with the papers, because he entertained such views or understood that they were entertained. The witness states that at this time Knight exhibited no other papers than those which he (witness) had returned, unless, perhaps, a copy of the general title of Micheltorena; but he is positive that there was no formal title shown him, nor was any reference made by Knight to any other title papers for the land than those he exhibited to the witness. Major Bidwell also states that in the spring of 1846 a journey from the Sacramento valley to Los Angeles and back would have required some six weeks to accomplish, and that it was considered unsafe unless in companies of eight or ten persons. Riding and pack horses were necessary, with provisions and led horses; that the water courses were high, as they usually are in the spring, and that he (witness) was waiting in the spring of 1846—March, April and part of May—to make the trip, on account of the height of the water courses necessarily crossed in traveling in that direction. He further states that he thinks Knight was in the Sacramento valley, at his place, in the spring of 1846; that if he had been absent or far away he thinks he should have known it, because there were but few Americans in the country. "We knew each other, and if one had been absent I think I should have known it." That persons leaving the valley uniformly applied to General Sutter for passports. That Knight did not make such an application; that he (witness) was with General Sutter, kept his books, and did most of his writing. General Sutter testifies that he knows that in 1845 or 1846, probably in the fall of 1845, Knight went to Los Angeles to get a title for his rancho from Pio Pico; that he is doubtful whether it was in the spring of 1846, for the water courses, as is usual in the spring, were very much swollen: In a subsequent part of his deposition he states that in the winter of 1846, just before the Bear Flag was raised, he and Knight had a dispute about the quantity of land solicited by Knight; that Knight said he would not take a grant for less than ten leagues, and became so excited about it that he drew a pistol upon him (witness), and that subsequently they had no intercourse. He adds that Knight could not have been in Los Angeles in May, 1846, because he was then with Colonel Fremont. The testimony of this witness rather tends to establish the facts alleged by the claimants than to dis-

prove them. He states positively, it will be observed, that Knight went to Los Angeles to get a grant from Pio Pico in 1845 or 1846; but he thinks it was in the fall of 1845. The conversation with Knight, which he says occurred in the succeeding winter, shows that at that time Knight did not have his grant. If, then, Sutter is right in saying that Knight went to Los Angeles at all to obtain a title from Pico, it would seem most probable that he went in 1846, and not in the fall of 1845.

J. P. Leese testifies that the marginal note on the petition to Micheltorena, dated January 26th, 1844, was written by him at the time it bears date, except the words, "una parte de ello," which were added subsequently at the solicitation of Knight and in the presence of Hardy; that these words were added at the time he made the certificate which is appended to the papers, and which was made October 8th, 1849; that Knight represented that he had been unable to get his title from the governor, because his (witness) report showed that the land had been granted to Hardy, and that he (the witness) thereupon added the words above mentioned to his report, and appended his certificate to the papers. He further states that Knight on this occasion brought all his papers to be examined by the witness, and that the only papers he recollects seeing were the Micheltorena papers. On his cross-examination, Leese modifies the foregoing statement in an important particular. He testifies that Knight informed him he had not been able to obtain a grant in the fall of 1845, and not in 1847, as he had previously sworn; and that Knight never made to the witness any declaration to the same effect subsequently. He also states that the words "una parte de ello," were added by him when he was going out of office in 1845; and, finally, that he cannot swear that those words were added by him at all.

From the whole of Leese's testimony, it may, I think, be fairly concluded that the words added to his report were, in all probability, placed there in the fall of 1847; but that the declaration of Knight that he had not obtained a title was made in 1845, before the date of the title now claimed to have been issued. D. M. Berrey testifies that he has heard Knight speak on several occasions of his title papers; that he abused Bidwell for not getting a grant for him from the governor; that he thought his claim would be doubtful in consequence; that he had the alcalde's papers, which were a shadow of title, and that Fremont or Bidwell had told him a shadow of title would be good; that in 1847 he refused to sell the witness a part of his rancho, fearing to weaken his title by dividing the land, and saying that when he got his grant or title to the rancho he would let him (witness) have as much as he wanted. William Gordon testifies that he saw Knight at his house, about eleven miles from Knight's rancho, in the early part of June, 1846; that he was then with the war party which shortly afterwards took Sonoma. He adds that Knight told him, after this campaign, that he had his papers "all regulated about right in his land affairs," but did not mention that he had been to Los Angeles to get them fixed. It will be observed that the date at which the witness saw Knight at his house (in the early part of June), is quite consistent with the hypothesis that Knight left Los Angeles in the beginning of May. As also with the statement of Davis, that Knight came into Fremont's camp at the "Buttes," about the 5th June. This witness also states that he does not remember having seen Knight at any time in the early part of 1846, before the month of June, although he may have done so. Major Gillespie, who was an officer of the marine corps "under special and confidential order from the president of the United States," testifies that he met Knight in the Sacramento valley early in the month of June, 1846; that he (Knight) joined the Bear Flag insurrection between the 26th May and the 1st June; that in the latter part of April and the month of May the country between Sutter's Fort and Los Angeles was overflowed, so much so that his courier, Sam Neal, was obliged to turn back, cross the Sacramento river at the fort, and go down by way of Sonoma; that it would have required to make the journey, under ordinary circumstances, about six weeks, but on express fifteen or twenty days. In reply to the twenty-first interrogatory, Major Gillespie states that he does not know the exact distance from Sutter's Fort to Los Angeles; that at that time it was computed by day's travel more than by miles. "By ordinary traveling, it took fifteen days; by express, from six to seven days." There is probably some error in reducing the deposition of the witness to writing, but as the distance between the two places is about seven hundred miles, it is probable that the last answer as to the time usually required to make the journey is the correct one. Gillespie further testifies that the rising of the American settlers in the Sacramento valley took place in the latter part of May, 1846; that its immediate cause was a proclamation of Castro requiring all who had not been a year in the country, and had not been naturalized, to leave California immediately, and that the settlers had heard that a military force had orders to march against them; that the hostile feeling had prevailed from the time of Fremont's attempt to pass through the country, in March, 1846, and that from that period the communications of American settlers with the lower parts of the country were precarious and doubtful. The witness states, however, that he made during the spring a journey from Monterey to the north of Klamath Lake and back to Yerba Buena (San Francisco), though he was "in constant fear of being picked up by the authorities."

With respect to this testimony, the same observation may be made as to the deposition previously noticed, viz: that the fact that Knight was with the insurgents about the end of May or 1st of June is entirely consistent with his having been in Los Angeles about the 4th of May preceding. He is stated by Major Gillespie, to have been "a famous horseman," and even of he enlisted on the 26th of May, he would have had more than twenty days to make a journey which Gillespie says could be performed in six or seven days. The United States have introduced, however, more positive testimony to show that Knight could not have gone to Los Angeles as alleged: William Bartee swears that during the months of April, May, and June, 1846, Knight was at his rancho; that he and the witness frequently hunted together, and that during those months not more than eight or ten days could have passed without his seeing Knight. The witness states on cross-examination, that he kept no memorandum of dates, but the men with him did so; and he recollects the dates well. But that Knight was not at his rancho during the month of June is clear from all the testimony in the case. All the witnesses, both those for the United States and those for the claimants, concur in stating Knight to have been with Fremont at the end of May or beginning of June, and that he was on the expedition to Sonoma, in the early part of the latter month. Colonel Fremont himself states that Knight was employed by him as a spy in May, and that his occupation led him to the neighborhood of the Bay. Bartee is thus clearly in error in stating that Knight was on his rancho during the month of June. John Grigsby testifies that he saw Knight at his house, on the Sacramento river, on or near the 1st day of May, 1846; that he was in pursuit of a mule which had been stolen from him "by a gentleman named Dr. Carter;" that the train in which Carter was, was to start, as he understood, on the 1st of May, and he therefore hurried on to recover his mule before they started; that Knight lent him a horse when he reached his rancho, but on reaching Feather river he learned that the train would not start until the 15th, and he employed Mr. Hardy to cross the Feather river and get the mule, as soon as the waters permitted; he then returned to Knight's rancho; that he was at home, and Hardy brought him the mule in about ten days. Samuel W. Chase testifies that he saw Knight on his rancho on the 18th or 20th of April, 1846, and that John Gordon was with him at the time. John Gordon's testimony is by no means explicit. He states that he, in company with Chase, saw Knight at his rancho, but he cannot remember the day or the month; he thinks it was in the spring of 1846, some four or five months before Fremont's party started for Sonoma; that from that time until the party started for Sonoma he saw him at intervals, sometimes, of three or four days, a week, or a month. If this witness is correct in stating that the time at which Chase and himself saw Knight at his rancho was four or five months before the expedition to Sonoma, then it must have been in January or February, 1846. Knight would thus have had ample time to make his journey to Los Angeles, and to reach Fremont's camp at the end of May or beginning of June. Nicholas Algier testifies that 1846 he lived about eight miles distant from Knight; that during that year he saw him nearly every week two or three times a week; that he saw him in March two or three times at Sutter's Fort, and at his own house, about the 10th or 15th of May; that he remembers this from the circumstance that he was ploughing to plant corn.

The foregoing testimony is chiefly relied upon by the United States, as showing that Knight could not have been at Los Angeles, as contended for by the claimants. It cannot, however, be considered as establishing the fact in a very satisfactory manner. Bartee, as we have seen, states that during not only April and May, but June, 1846, Knight was at home at his rancho; and yet it is clear that at the end of May he was at the Buttes with Fremont, and the latter testifies that he employed Knight as a spy during the month of May, and that his occupation led him to the neighborhood of the bay. S. W. Chase is not only contradicted by Gordon, by whom he says he was accompanied on a visit to Knight's rancho, about the 18th or 20th April, 1846; but in his affidavit, filed some months before his deposition was taken, he says that he saw Knight on his rancho on or about the last day of April of 1846; that he was mistaken as to one or the other of these statements is evident. It is not unreasonable to suppose that he may be mistaken in both, and that he has no distinct and reliable recollection of the date at which he saw Knight at his residence. Algier's statement, that he saw Knight at his rancho on the 10th or 15th May, 1846, is not inconsistent (if we adopt the latter date) with the hypothesis that Knight left Los Angeles about the 5th, and the witness states no fact which, after so large an interval of time, would justify us in concluding with any degree of certainty that the true date may not have been a few days later. Knight's presence at his rancho towards the end of May is entirely consistent with the theory of the case as presented by the claimants. Major Bidwell's testimony is much relied on by the United States, not only on account of the character of the witness, but because the reason he assigns for thinking Knight was in the valley during the spring of 1846 is such as, when the state of affairs in the country at the time is considered, to render it impossible that if he had been absent his

absence should not have been noticed. "There were but few Americans in the country. We knew each other, and if one had been absent I think I should have known it." It is to be remarked, however, that Major Bidwell does not swear that he knows Knight was in the valley. He merely testifies in effect, that he does not remember that he was absent, and that if he had been he thinks he should have noticed it. But Major Bidwell's deposition shows that on other points his memory is by no means reliable. He states that Knight, in 1844, petitioned the alcalde of the Sonoma district for land; that the petition was acceded to by the alcalde, and was then referred to General Sutter, from whom a favorable report was obtained. A second petition to the governor was then made out, and both petitions were presented to the governor, and by him referred to the secretary of state. An examination of the Micheltorena papers shows this account of the proceeding to be entirely erroneous. The petition was addressed to the governor, and by him referred to the prefect. The prefect referred it to General Sutter, who referred it to the alcalde of Sonoma, and the alcalde of Sonoma reported unfavorably to the petitioner. There was thus no petition to the alcalde, no favorable report by him, no reference by him to Sutter, and no favorable report by the latter. When we find Mr. Bidwell's memory so treacherous upon points like these upon which he testifies with apparent confidence, it is surely unsafe to rely upon it on others where the probabilities of error would seem to be greater. General Sutter, as we have seen, to a certain extent corroborates the statement of the claimant's witnesses, for he swears that he knows that Knight went down in 1845 or 1846 to get a title from Pio Pico. He thinks, however, that it must have been in the fall of 1845, because in the spring of 1846 the water courses were much swollen. It is not pretended that Knight obtained a title in 1845, and the conversation with Knight, related by Sutter, which he says occurred in the winter of 1846, just before the Bear Flag was raised, shows that at that time Knight had no title. If he had at that time been to Los Angeles and failed to obtain it, it is not probable that he should have omitted to mention it and have left General Sutter ignorant, as he swears he is, whether he obtained it or not. It seems, therefore, most probable either that Sutter is mistaken in his positive statement that "he knows Knight went down to get a grant from Pico," or else, if that statement be true, Knight must have gone in the spring of 1846 after his conversation and quarrel with Sutter.

It is urged by the counsel of the United States that in this case the negative testimony of Bidwell that he did not know of Knight's absence, has all the force of positive statement; that the American settlers in the Sacramento valley were a small band, menaced with extermination or expulsion from the country, and driven to rely upon each other for protection; that at such a time the absence of a bold, active man like Knight could not have escaped observation, and that, therefore, Major Bidwell's statement that he did not know of his absence, is equivalent to a positive statement that he was not absent. There is undoubtedly force in the argument. It is to be recollected, however, that the actual rising of the settlers did not take place until the latter part of May, which was also the date of the decree or bando of General Castro, ordering all Americans who had not become naturalized, and not been a year in the country, to leave California. The settlers also heard about the same time that Castro and Vallejo were collecting horses to send to San Jose to mount their men. It is true that Major Gillespie states that the causes which produced the rising had been in operation from the time of Fremont's attempt to pass through the country in March. But it is evident that during the months of March and April no such measure could have been contemplated by the American settlers, for Fremont after remaining more than a month in the valley directed his march towards Oregon, which he assuredly would not have done had he supposed that he was abandoning his countrymen to the violence of the Californians. Even so late as the 22d of April, 1846, he left Lassen's rancho, the furtherest north of the American settlements, still continuing his march towards Oregon. It was only on the 9th of May, after being overtaken by Gillespie, that he counter marched, and returning reached the American settlements on the 24th. It was then that the settlers joined him and hostile operations took place. That Knight was with him then is clear; that his absence at that time could not have failed to be noticed is also evident. But I see no reason to conclude that the same observation can be applied to an absence during the month of April and the early part of May.

It is urged that Knight could not have made this journey by reason of the height of the waters in the streams. But Fremont found no difficulty in marching from Klamath Lake to Sacramento, between the 9th and 24th May, the upper waters, at least, of the Sacramento and San Joaquin being then low; and Major Gillespie, about the same time, made the journey from Monterey to Klamath Lake, and back to San Francisco. That the journey was attended with some difficulty may be admitted, but it cannot be affirmed that to a bold horseman like Knight it was impossible. It is urged that such a journey to an American would have been attended with great difficulty, owing to the hostile feelings of the Californian authorities and population; such, no doubt, was the fact. But Knight was a naturalized Mexican, married to a Mexican woman, and had resided

a long while in the country. The bando of Castro only embraced settlers who had not become Mexican citizens, and who had not been a year in the country; and Fremont states that though Knight was a prominent actor in the rising, he was not "ostensibly so," and that he employed him as a spy—"an occupation which led him to the neighborhood of the bay, where he could communicate with the Mexicans and ascertain their movements." Knight must, therefore, have preserved his friendly relations with the Mexicans; and if his real sentiments were so little known that Fremont could, in May, and subsequently during the whole campaign, employ him as a spy, it is to be presumed that, in the preceding April, he could have had little to fear from the hostility of the Californians. It is urged that Fremont states that he does not know whether Knight was in Los Angeles in May, 1846, and that he would certainly have known it had he been there. But it would seem that this statement of Colonel Fremont furnishes as strong an argument for the claimants as against them. If Knight was in Fremont's employ, or with him, during the whole month of May, as contended for on the part of the United States, Colonel Fremont would have been able to state positively that he was not in Los Angeles during that month. His inability to state anything on the subject shows that Knight could not have been with him; nor was he acquainted with his movements during the period alluded to. It may also be observed that Colonel Fremont mentions that Knight brought him his papers just before his death; that he described them; but the witness does not recollect his description; that he does not recollect his saying anything of Micheltorena in connection with them; he thinks he spoke rather of Pico; and that he does not recollect that he stated that his papers were imperfect.

On the whole, after a careful consideration of the evidence on the point we have been considering, my opinion is that the United States have not established satisfactorily the fact that Knight was not in Los Angeles at the time mentioned by the claimants' witnesses. Many circumstances render it improbable; but it is positively sworn that he was there, and the statement may very possibly be true. I have been unable to bring my mind to the conclusion that the claim ought to be rejected as spurious, on the ground that he was not, and could not have obtained it at the time stated by the witnesses. The only testimony to show that the grant was in fact issued, to which we have thus far adverted, is that of Moreno and that of N. A. Den. If the case of the claimants rested on this testimony alone, I should not hesitate to reject it, for I should consider it too unreliable or too loose to justify me, under all the circumstances, in considering the issuance of the title as proved, but the claimants have produced from the archives an expediente, which if genuine establishes beyond doubt the facts of Knight's application for the land and of the grant made by Governor Pico. The expediente consists of a petition by Knight, a marginal order by Pico, a decree of concession signed by the same officer and the usual borrador or copy of the title delivered to the party. The signature of Pio Pico and Moreno as they appear on these papers are proved to be genuine, nor is any question made on that point. The signatures on the borrador or copy are not those of Pico or Moreno, as that instrument was a copy of the grant issued to the party, which was attached to other papers in the expediente on which the governor's signature was usually written or else copied by the clerk who prepared the borrador, but the marginal order, and the decree of concession directing the title to issue, bear the genuine signatures of the governor.

It is said that the existence of these papers in the archives proves nothing, for they may have been fabricated and placed there subsequently to their dates. The archives of the former government after Monterey was taken possession of by the United States, were transferred, as is well known, to Sutter's Fort, where they remained until the Spring of 1847. They were then returned to Monterey, and remained in charge of Governor Mason, and the officers under him, until February, 1850. Both Fremont and Major Halleck swear that while they remained in their charge they were carefully guarded, and Major Halleck testifies that while they were in his charge no paper was placed among the archives without placing a memorandum upon it giving the date at which and the person by whom it was deposited. That an expediente may, notwithstanding, have been foisted into the archives is possible, but not probable; but the indexes which were, during the year 1847, prepared by Hartnell and Halleck, show at that date at least this expediente was archived. Captain Halleck, who was secretary of state under Governor Mason, states that he was assisted in the duties of that office by W. P. E. Hartnell, and that early in the year 1847, Mr. Hartnell commenced arranging and numbering the expedientes in the office—that he before the month of June, 1847, had prepared an index of the expedientes on file. That subsequently in 1848, Mr. Hartnell and himself prepared a second index which was similar to the first except that a few expedientes were noted on it which had been overlooked by Mr. Hartnell when the first was prepared. A note of these was also inserted by Mr. Hartnell on his first index. Both of these indexes are now found in the surveyor general's office—they are identified by Major Halleck. On both, this expediente is noted not among the omitted expedientes but among those originally indexed. The expedientes found in the archives appear to have been numbered by the Mexican authorities from one to five

hundred and twelve inclusive. This numeration was therefore continued by Mr. Hartnell and the remaining expedientes were numbered by him up to five hundred and seventy-nine. The number of the expediente was written on its back, and was also noted in the index made by him. On the back of the expediente produced in this case the name of the land "Carmel" with the number 550 appear, and the grant is mentioned by the same name and number in the index. The handwriting [of the] index, is proved to be Hartnell's. That the numbers were inscribed upon the expedientes before the index was made, appears probable, but it is certain that when the index was made this expediente must have been in the archives—and this for two reasons: first, that the note of it seems to be written with the same ink, and apparently at the same time with the rest of the index; and secondly, because it is numbered as its date requires. It is dated, as has been said, May 4th, 1846. It is numbered 550; No. 549 is dated May 2d, 1846; No. 551 is dated May 6th, 1846. It must, therefore, with the other expedientes, have been in the office when the index was prepared, and its number affixed to it. It could not have been subsequently deposited and a note of it inserted in the index, for in that case it would either have had no number, or there would have been two expedientes, both numbered 550. Unless, therefore, the testimony of Major Halleck be entirely rejected, and it has not been contradicted, we must believe that in 1847, when the index was made, there was in the archives an expediente for the grant of a place called "Carmel" to William Knight. It has been suggested that that expediente may not have been the one now produced. That the expediente on the outer sheet of which Mr. Hartnell placed the number 550, and which he noted in his index, may have been the expediente of the Micheltorena papers heretofore alluded to. But this conjecture or suspicion seems unsupported by facts.

First. It seems from all the evidence that the Micheltorena papers remained in Knight's possession from the time they were returned to him after his unsuccessful application to the governor. The tesimony of Leese is relied on by the United States to show that in October, 1847, he added his certificate and appended certain words to his report. They are now produced from the custody of Knight's administrator. No evidence whatsoever has been adduced to show that they were ever in the archives. And—

Second. On the back of the expediente and in the indexes the name of the land granted ("Carmel") appears. This name is in the handwriting of Mr. Hartnell. It appears to have been written at the time when the No. 550 was inscribed upon the document. Mr. Hartnell could only have known the name of the place from inspection of the papers; and the Micheltorena papers contain no designation of the place by name. The name "Carmel" for the first time appears in Pio Pico's decree of concession.

Third. Had the Micheltorena papers been contained within the cover of the expediente, the number 550 could not have been affixed to it. The latest of these documents is dated 1844. The expedientes were numbered by Mr. Hartnell in the order of their dates. It is impossible that he should have affixed to documents dated in 1844 the number 550, while he numbered a document dated May 2d, 1846, 549, and another dated May 6th, 1846, 551.

I think it clear, therefore, that at the date of making the index of Hartnell this expediente was on file in the archives. It is admitted that Pio Pico left California in August 1846, and did not return until July, 1848. As his signatures, as they appear on the documents contained in the expediente, are shown to be genuine, it follows that he must have made the grant either at its date, or subsequently, before his flight, or during his absence in Mexico.

It has been argued with great earnestness that it is in the highest degree improbable that Pico, with his known hostility to Americans, would have made this grant in May; but it is still more improbable that he would have made it in June, July or August, after the insurrection had broken out, or after Monterey had been captured. During all these months Knight was with Fremont, and he marched south with him at the close of June. It seems equally improbable that Pico could have made the grant during his absence in Mexico. Certainly he would not have done so unless some pecuniary or other inducement had been held out to him. The course of events surely had not tended to diminish any hostility to Americans he might previously have entertained. It does not appear that Knight had any pecuniary resource, nor did the nature of his employment leave him much time to enter upon and consummate such a negotiation with an ex-governor of California, residing in Mexico. Major Gillespie testifies that he remained on duty in the Sacramento valley until late in the fall of 1846. He then went south as a guide to Colonel Fremont, and arrived in Los Angeles about January, 1847, for the first time after the commencement of hostilities. He remained in Los Angeles about a month, and then went north as a bearer of dispatches. But the expediente, as we have seen, must have been in the archives at least as early as the middle of 1847. It seems, therefore, scarcely possible that Knight could, during this time, have procured the grant from Pio Pico, in Mexico, and subsequently have succeeded in placing the expediente in the archives before the index was made, and without the knowledge of either Hartnell or Halleck.

The counsel for the United States have dwelt with much force on the fact that Knight, so late as October, 1847, was procur-

ing certificates from Leese and Hardy, and apparently relying solely on the Micheltorena papers. It is to be considered, however, that at that time, if Brannan is to be believed, Knight had lost the grant alleged to have been issued to him by Governor Pico. The archives which had been carried to Sutter's Fort, and there remained until the spring of 1847, had only a few months before been taken to Monterey. They were then, and for a long time afterwards, in much confusion. It is, therefore, possible that Knight may have regarded the loss of his grant from Pico as fatal to his claim, and turned his attention to the Micheltorena papers, with a view of making out some "shadow of title," which he had been advised would be sufficient. The fact that he was engaged on the Micheltorena papers in October, 1847, would seem to indicate that up to that time he was not aware that the expediente since produced was among the archives. If it had been fraudulently placed there already, the fraud must have been accomplished without Knight's knowledge, which is impossible. That it was among the archives at the end of 1847 we have seen has been proved.

After a most careful consideration I have been unable to resist the conclusion that the existence of this expediente in the archives in 1847 must be taken as proved, and that the hypothesis that it was placed there after its date and during the absence of Pico from California is not only unsustained by proofs but is extremely improbable. If this conclusion be correct, it follows that the execution and issuance of the title to Knight must be considered as established by proofs from the archives, in their nature far more satisfactory than would have been the production by the claimant of the title unsupported by such proofs—for the genuineness of a document of this kind produced by the claimant and unconfirmed by the public records is always open to suspicion. The evidence thus furnished by the archives is not in my opinion rebutted by the testimony already examined as to the whereabouts of Knight in May, 1846, the difficulty of making the journey to Los Angeles or the improbability that Pico would have made the grant, for the testimony on these points is inconclusive and unsatisfactory; while the evidence from the archives, if Maj. Halleck's statement with respect to the indexes be correct, is positive and reliable.

It is objected that the grant, even if made by the governor, is void, because the expediente does not contain any order of reference or "informe" by officers, which by the regulations the governor was required to obtain. In support of this position the case of U. S. v. Cambuston, 20 How. [61 U. S.] 62, is relied on. In that case no expediente whatever was produced, neither a petition, a map, a marginal order, reference for information, informe or decree of concession appeared to have been made; nor was any evidence offered to show that any one of the preliminary steps made requisite by the act of 1824, and the regulations of 1828 to a grant by a Mexican governor, had been observed. The recital in the grant itself, the supreme court declare "not to be conclusive or even satisfactory evidence of the facts when the question is raised whether or not the alleged grant was made in conformity with the requirements of law—in other words, whether the preliminary conditions had been complied with which enabled the governor in the particular case to make the grant, especially in respect to those preliminary proceedings which are required to be of record, and of which record evidence should have been produced or its non-production satisfactorily accounted for."

But the case at bar is essentially different. The record evidence is produced showing that a petition was presented—that a decree of concession was made—and that the title, a copy of which is contained in the expediente, issued. The decree of concession alludes to a report of the alcalde of Sonoma, which is not found in the expediente, and the petition states that a report of that officer is annexed to the petition. What has become of that report does not appear, but I cannot consider that the absence of that single document even unaccounted for, is sufficient to defeat the grant. The evidence that the governor complied with the preliminary conditions which enabled him to make the grant does not consist, as in the case of Cambuston, merely of a general recital that the customary investigations had been made, which recital is contained in a document produced from the claimant's custody, but it clearly appears that a petition was presented by the applicant, which purports to be accompanied by a report. This report is specifically alluded to by the governor in making his preliminary decree according to the petition, and all this is of record. It is also to be remarked that the regulations of 1828, while they require that a petition expressing the name, country, religion, etc., of the applicant, shall be addressed to the governor, merely direct the governor to obtain the necessary "information as to the land and the petitioner, in order that the application may be attended to—or if it be preferred the municipal authority may be consulted whether there is any objection to making the grant." It is clear that this regulation left it discretionary with the governor whether to consult the municipal authority or not. Nor does the direction to him to obtain the necessary information in terms oblige him to resort to any particular mode of ascertaining the facts. It would seem, therefore, that where the governor is from personal knowledge or oral information satisfied that the land is vacant and that the petitioner has the necessary qualifications and thereupon without requiring informes in writing accedes to the petition, the grant ought not to be avoided because no informes are found in the expediente, and such seems

to have been the view of the supreme court in the subsequent case of U. S. v. Sutter [21 How. (62 U. S.) 171], the claim in which was confirmed notwithstanding that no informes were contained in the expediente.

After the best consideration I have been able to give this case, my opinion is that although there are some suspicious or rather improbable circumstances connected with the claim, yet on the whole the preponderance of proof is in favor of its genuineness, and that it ought to be confirmed. A decree of confirmation must therefore be entered.

Case No. 9,793.

MOREHOUSE et al. v. The JEFFERSON.

[1 Pet. Adm. 46.] [1]

District Court, S. D. New York. 1803.

SALVAGE—MASTER AND CREW TAKEN OFF—GREAT PERIL AND EXERTION—AMOUNT AWARDED.

1. The schooner William fell in with the Jefferson at sea, in great distress, and took her master and crew from on board her. She was then abandoned. On the following day some of the crew of the William went on board of her, and, after great peril and exertion, brought her into New York. The district court allowed one-half of the net proceeds as salvage.

[2. Cited in The Waterloo, Case No. 17,257, to the point that one-half of the net proceeds is the ultimatum of salvage to be allowed in cases of derelict.]

To the Honourable John Sloss Hobart, Judge of the District Court of the United States for the New York District: Humbly complaining, shew unto your honour, in this honourable court, Andrew Morehouse, James Ford, Elihu Carrington, and Rienhold Willenbrant, at present in the city of New York, in the New York district, mariners, for themselves jointly, and separately, and also for Nathaniel L. Griswold and George Griswold of the same place, merchants, Noah Pratt, Jesse Lyon, and Peter Jones, severally and respectively, according to their rights, interest, and claims as hereinafter and hereby particularly set forth and made manifest, and as the same shall be judged right and decreed in and by this honourable court. That the said Nathaniel L. Griswold and George Griswold were at all the times hereafter mentioned the true sole and lawful owners of the American schooner called the William, which said schooner sailed from the island of Tobago, in the West Indies, on or about the nineteenth day of October, in the year of our Lord 1803, bound to the city and port of New York, in the New York district, with a cargo of merchandize, the said schooner's crew consisting of the said Noah Pratt, who was master, your libellant Andrew Morehouse, who was mate, and the other libellants, James Ford, Elihu Carrington, and Rienhold Willenbrant, together with the said Jesse Lyon, who were seamen, and the said Peter Jones, who was cook of the said schooner William, for the said voyage. And these libellants further shew, and give the court here to understand and be informed, that on or about the fifteenth day of November in the year last aforesaid, while the said schooner William was on her said voyage from Tobago to this port of New York, and navigating as aforesaid, and in latitude by observation thirty-six degrees and fifty-five minutes north, at or about four of the clock in the afternoon, the said schooner William on the high seas fell in with a certain brigantine or vessel called the Jefferson of Newbury Port, commanded by one James Adams, which said brigantine, as the libellants were then informed, and believed to be true, was last from St. Bartholomews, and was bound to the port of New York, in the New York district, with a considerable cargo on board. And your libellants further shew and declare, that shortly after the said schooner William fell in with the said brigantine Jefferson, the said James Adams came on board of the said schooner William, and informed that the said brigantine some time previously, and on or about the ninth day of the said month of November, at night, and while it was very dark and disagreeable weather, had been run foul of by a Spanish or French ship of war, and that the said brigantine had thereby lost a great part of her sails, rigging and spars, and was very materially injured, wrecked and broken in the hull, all which these libellants afterwards discovered, and therefore aver to be true. And the said James Adams, then also declared, that he and the residue of the crew of the said brigantine were determined, for the preservation of their lives, to leave and abandon her, and desired a passage on board the said schooner William to New York, which was consented to on the part of the captain of the said schooner. And these libellants further shew, and give the court here to be informed and understand, that, in order to get a further supply of provisions and water on board the said schooner, so that the crews of both the vessels might have a supply on their passage to New York, your libellant Andrew Morehouse, together with two others of the seamen belonging to the said schooner William, went on board of the said brigantine, to endeavour to get such supply from her, especially of water; but, in attempting to get water out of the brigantine into the boat, the cask was unavoidably stove, which frustrated their intention in that respect. And your libellants further shew, and for truth declare, that at or about five of the clock in the afternoon of the same fourteenth day of November, being the fifteenth of that month by sea reckoning, the said James Adams, the master, and all of the crew of the said brigantine abandoned her and her cargo, and came on board the said schooner William, then on the high seas, bringing with them only the brigantine's boat, in which they came, with their chests of clothes and bedding, and a small quantity of provisions. And the said captain and crew of the said brigantine Jeffer-

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

son then declared, they would not return to her, nor make any further attempt to navigate her into port. And these libellants further shew, and give the court to be informed, that, after the captain and crew of the said brigantine had so abandoned her, as aforesaid, and came on board the said schooner William, on the high seas, it was thought most advisable by the captain and crew of the said schooner, for them to endeavor to keep in sight of or near the said brigantine, during the night then ensuing, in order to see her situation in the morning; and, if opportunity offered, to attempt to save her and her cargo, or at least to endeavor to get a cask of water from her, and put on board the schooner William, as a further supply for the people then on board her, during the residue of the voyage; and, though this was attempted, they lost sight of the said brigantine during the night, and did not see her again until at or about the hour of eleven of the clock in the forenoon of the next day, when they saw her at as great a distance as she could be discovered, and considerably to windward, when the said schooner William was steered for, and about five of the clock, post meridian, came up with the said brigantine Jefferson, it being, by sea reckoning, the sixteenth day of November, and in latitude, by observation, about thirty-six degrees and fifty-five minutes north; but the sea being then rough, and the vessel rolling very much, it was deemed impracticable to get any water out of the said brigantine that night; it was, nevertheless, agreed upon, after consultation between the captain, mate, and crew of the said schooner William, that the mate and three seamen of the schooner should go on board of the said brigantine, if practicable, and examine her situation, and thereupon to judge of the expediency and propriety of taking possession of, and endeavouring to navigate her into port; whereupon, your libellants went on board the said brigantine, and, after the best examination they could make of her situation, they returned to the schooner; whereupon it was agreed between the captain and the rest of the crew of the schooner, and your libellants, that your libellants should go on board and take possession of the said brigantine, and use their best endeavours to navigate her into port. And that the said schooner should endeavour to keep company with the brigantine, and render her what assistance they could towards getting her into port; in consequence of which agreement, your libellants, the said Andrew Morehouse, James Ford, Elihu Carrington, and Rienhold Willenbrant, with the approbation of the captain, and the rest of the crew of the said schooner, went on board of, and took possession of, the said brigantine, taking with them their clothes, beds, bedding, and such other necessaries as they wanted, and could be spared from the said schooner William. And your libellants further shew, and give the court here to be informed, that they then took possession of the said brigantine, twenty-four hours or upwards after she had been abandoned by her former captain and crew, as before set forth; whereupon, after having so taken possession of the said brigantine, your libellant, Andrew Morehouse, took the command of her, and, with the assistance of the other libellants, made what sail they could upon the said brigantine, and with great difficulty, and imminent danger, navigated her into this port of New York, in the New York district, where they arrived on the second day of this present month of December, where the said brigantine, and all the cargo she had on board when these libellants took possession of her, as aforesaid, now are; the particulars whereof are not known to these libellants with certainty, but they were informed by the said James Adams, the former master of the said brigantine, before they took possession of her, as aforesaid, that the cargo consisted of eighty-three hogsheads of sugar, and two hogsheads of coffee; and these libellants know, from inspection, that a great proportion of the said brigantine's cargo consists of sugar, but they have not yet discovered any coffee on board as part of the cargo, the said cargo not having been yet landed. And these libellants further shew, and for truth declare, that said brigantine and schooner kept company, or in sight of each other, with great difficulty, until about five of the clock of the afternoon of the seventeenth day of November last, when they lost sight of each other in a violent gale of wind, and never came in sight of each other again until they respectively arrived in this port of New York: and these libellants further shew, and give the court here to understand, that the said Noah Pratt, the captain, and the residue of the crew of the said schooner, did all in their power to keep company with the said brigantine, and to render her and these said libellants assistance, until the said vessels were parted in a gale of wind, as aforesaid; when, having entirely lost sight of the said brigantine, and there being no reasonable prospect of again falling in with her at sea, the said schooner made the best of her way to the port of New York, being the port of her destination, where she arrived on the twenty-fourth day of November last. Wherefore, these libellants pray due process of law, against the said brigantine, called the Jefferson, her tackle, apparel and furniture, and all and singular the cargo so taken possession of and brought into port, and saved as aforesaid, and against all and every the owners and owner thereof, or any part thereof; and that they be duly cited to appear and answer the premises, and to perform such order and decree touching the premises as it shall seem meet to this honourable court to make; and that the said brigantine, her tackle, apparel, and furniture, together with all and singular her cargo so saved and brought into port, may be sold in pursuance of a decree or order of this honourable court; and that the proceeds of such sale or sales, or such part or portion

thereof as shall seem just and equitable, may, by virtue of an order and decree of this court, be adjudged and paid over to your libellants, or to them and such other person and persons as by means of the premises shall be deemed and adjudged entitled to salvage or compensation out of the same; and that your libellants, and others interested in the said property, as salvors thereof, may have such further or other relief in the premises as law and justice may require, and as to this honourable court shall seem meet. And your libellants will ever pray. Riggs, Proctor. A. Hamilton, Advocate. New York, Dec. 7, 1803.

The answer and claim of Gilbert Robinson, of the city of New York, merchant, for himself and James Brown, his co-partner, together composing the firm of Gilbert Robinson & Co., consignees of eighty hogsheads of Muscovado sugars, shipped on board the brigantine or vessel called the Jefferson, for and in behalf of George Cruden and Company, of the island of St. Lucia, merchants, the owners of the said sugar, and for and in behalf of the underwriters and all others interested therein, to the libel of Andrew Morehouse, James Ford, Elihu Carrington, and Rienhold Willenbrant, for themselves, jointly and separately, and also for Nathaniel L. Griswold, and George Griswold, Noah Pratt, Jesse Lyon, and Peter Jones, against the said brigantine Jefferson, her tackle, apparel, furniture, and cargo. The claimant, by protestation, saving to himself and all others for whom he claims all right of exception as well to the truth as to the sufficiency of the said libel, for answer thereunto, or unto so much thereof as it is necessary for him to answer, alleges and declares that the said brigantine, called the Jefferson, being at the said Island of St. Lucia, and bound on a voyage from thence to the port of New York, the said house of George Cruden and Co., did there ship and lade on board the same eighty hogsheads of Muscovado sugars, marked and numbered as follows, to wit, B. I. No. 1 to 80, for which a certain James Adams, the then master of the brigantine, did then and there, in the usual form, sign and deliver regular bills of lading, binding himself to deliver the same at New York to this respondent and his co-partner, by the description of Messrs. Gilbert Robertson & Co., merchants there. That the said George Cruden & Co. did shortly afterwards forward to this respondent and his co-partner, under the firm aforesaid, two of the said bills of lading subscribed by the said James Adams; and, by invoice and letter of advice bearing date respectively on the tenth and eleventh of October last past, did assign the same to this respondent and his said co-partner, under the firm aforesaid, to be sold for the account and risk of the said George Cruden and Company, as by the said bills of lading, invoice, and letter in the possession of this respondent, ready to be produced to this honourable court, may appear. And this respondent, further answering, saith that he hath been informed and believes that the said brigantine, having on board the said eighty hogsheads of sugar, did set sail and proceed on the said voyage, and, in the prosecution thereof, did fall in with the said schooner, called the William, and that she was navigated and brought to the said port of New York by the libellants, but under what circumstances of risk or danger this respondent is ignorant. And this respondent submits himself in the premises to the judgment of this honourable court, and humbly prays that the said eighty hogsheads of sugar may be discharged from arrest under the process of this honourable court and may be restored to the possession of this respondent and his said co-partner, for the use of the owners thereof, and that this respondent may be hence dismissed with his reasonable costs and charges in this behalf sustained. Gilbert Robinson. T. L. Ogden, Proctor for Claimants.

Sworn in open court this twenty-seventh day of Dec., 1803. Edward Dunscomb, Clerk.

Decree: The court having taken time to advise as to its decree, and as to the proportion and distribution of salvage in this case, doth now order and decree, that the said cargo of the said brigantine Jefferson, and every part thereof, mentioned in the libel filed in this cause, be and the same is hereby condemned, pursuant to the prayer of the said libel, and that the same be sold by the marshal of the district, at public auction in the city of New York, to the highest bidder, or for the best price that can be got for the same, after giving at least four days' notice thereof in a newspaper, entitled the Daily Advertiser, and one other of the public newspapers printed in the said city; and that the said marshal have the monies arising from the said sale, together with the writ at the next district court of he United States, to be held for the district of New York after such sale, and that he then pay the same to the clerk of this court. And it is further ordered, sentenced, and decreed by the court, that one moiety or equal half part of the net amount of sales of the said cargo (after deducting the duties on the cargo and the costs and charges which have accrued or may accrue in this cause, by reason of the libel, claim and petition filed in this cause) be paid to the libellants in this cause, or to them and the said Nathaniel L. Griswold, George Griswold, Noah Pratt, Jesse Lyon, and Peter Jones, or their proctor, by way of salvage; and that the same be distributed in manner following, that is to say, one equal half part of the said moiety or salvage to be paid to the said Nathaniel L. Griswold and George Griswold, the owners of the schooner William and part of her cargo; and to the said Noah Pratt, the master of the said schooner, and owner of the other part of her cargo, according to their respective interests therein; and that the other half of the said moiety or salvage be divided into two equal parts, the other one-half of which to be divided equally between the said Noah Pratt, the master of the said schooner William, and the said

libellant, Andrew Morehouse, who acted as master of the said brig, and navigated her into the port of New York; and the other half to be divided into five equal parts, or shares, one of which to be paid to the said libellant James Ford, one to the said libellant Elihu Carrington, and one to the said libellant Rienhold Willenbrant, who were seamen on board the said brig at the time of her said arrival at the port of New York, but were formerly part of the crew of the said schooner William; and one other of the said shares to be paid to the said Jesse Lyon, a seaman on board the said schooner William, and the other said share to the said Peter Jones, cook, on board the said schooner William, or their proctor. And it is further ordered, sentenced, and decreed by the court, that the other moiety of the nett amount of the said sales be retained by the clerk of this court until the further order of the court respecting the same.

MOREL (UNITED STATES v.). See Case No. 15,807.

Case No. 9,794.

MORELAND v. MARION COUNTY.

[8 Chi. Leg. News, 25; 1 N. Y. Wkly. Dig. 326.]

Circuit Court, D. Oregon. Oct. 4, 1875.

PLEADING UNDER CODE—EJECTMENT—DEFENSE—WHAT ANSWER MAY CONTAIN—SUIT AGAINST COUNTY—DISTRICT ATTORNEY—COUNSEL TO ASSIST.

1. In an action of ejectment the defense may consist of either a denial of the plaintiff's right to recover by controverting any or all of the material allegations of the complaint, or of an averment or plea of such an estate in the premises, or license, or right to the possession thereof, in the defendant, as is inconsistent with a present right of possession in the plaintiff, or both. Civ. Code Or. § 316.

2. The statement of new matter in the answer must be "concise," and it must constitute a "defense" to the action, and like the statement in the complaint of "the facts constituting the cause of action," it must be limited to the ultimate facts of such defense, and should not contain the evidence of them.

3. A defense which states in detail the circumstances by which it is claimed that a dedication of the premises was made to the defendant to certain public uses, is irrelevant as a pleading; it should have alleged a right of possession in the defendant, in pursuance of a dedication, for the purposes and time claimed as prescribed by statute. Civ. Code Or. § 316.

4. Facts stated in a defense do not amount to an estoppel, unless pleaded as such.

5. A plea of estoppel must allege that the plaintiff ought to be precluded from showing some fact or matter stated in the complaint, to which the estoppel is interposed, because of some other fact or matter alleged in the plea, which constitutes the estoppel.

6. A district attorney, by virtue of his office, is the attorney for the several counties in his district, and as such must prosecute or defend all actions to which any of such counties may be a party, without reference to the locality of the court in which they may be pending.

7. The county court may employ counsel to assist the district attorney in the prosecution or defense of a particular action, but the district attorney is entitled to control the proceedings in court, and the county cannot appear by any other attorney.

8. If the pleading of a county is not subscribed by the proper district attorney, it is not duly subscribed, and may be stricken out of the case. Civ. Code Or. §§ 79, 103.

[This was an action by W. W. Moreland against Marion county to recover the possession of certain real estate.]

H. Y. Thomson & W. Lair Hill, for plaintiff.

Reuben P. Boise, for defendant.

DEADY, District Judge. This action is brought by a citizen of the state of California, against the defendant, a county of the state of Oregon, to recover the possession of block 6 in the town of Salem in said county, alleged to be worth $130,000, together with the sum of $500 damages, for withholding the possession of the same. The answer of the defendant first denies the material allegations of the complaint except those concerning the citizenship of the parties and the value of the property. It also contains a second defense styled "a further and separate answer," which the plaintiff moves to strike out as irrelevant and frivolous, as well as the whole answer, because "the same is not subscribed by the defendant or its attorney."

The second defense is divided into 12 articles or paragraphs, and states substantially, that about the year 1844 William H. Willson and Chloe A., his wife, settled upon a tract of public land including the premises, since designated in the United States surveys as donation claim No. 44; that in July, 1853, the said Willson and wife having resided upon and cultivated said claim for four successive years, and otherwise complied with the provisions of the donation act of September 27, 1850 [9 Stat. 496], the surveyor general of Oregon, issued to them donation certificate No. 20, for said claim, designating therein the north half thereof, which includes the premises in controversy, as enuring to the wife, and the south half to the husband; that on February 4, 1862, a patent issued from the United States for said claim, to said Willson and wife; that between the years 1844 and 1850 said Willson, with the knowledge and consent of his wife, laid off the town of Salem upon said claim, and on March 22, 1850, recorded the plat thereof, and that upon said plat said block 6 was designated as a public square and dedicated to the use of the people of said county and town for the purpose of building a court house thereon; that said people, in 1852, with the knowledge and consent of said Willson and wife, took possession of said block and built a court house thereon, and by virtue of said dedication, have used the same for public purposes ever since, and that said Willson contributed largely to the building of the court house; that said Willson and wife, after they ac-

quired title to said claim, sold lots with reference to said plat, and continued to recognize said dedication of the premises until the death of said Willson, in 1856, after which the said Chloe A. sold lots in said town with reference to said plat, and continued to recognize the dedication aforesaid up to the time of her death in 1874, and assented to the said dedication of said block; that, in 1872, the defendant erected a court house upon said block, with the knowledge and consent of said Chloe A., at a cost of $100,000; and that whatever interest the plaintiff has in the premises is derived from said Chloe and was acquired since the erection of said last mentioned court house and with a knowledge of these facts.

In an action of this kind the defense may consist of either a denial of the plaintiff's right to recover, by controverting any or all of the material allegations of the complaint, or of an averment or plea of such an estate in the premises, or license or right to the possession thereof in the defendant, as is inconsistent with a present right of possession in the plaintiff, or both. Civ. Code Or. § 316.

The answer of the defendant substantially admits that the plaintiff is the owner in fee of the premises, but undertakes to set up in bar of the action to recover the possession, a dedication of the same to the use of the defendant, by Chloe Willson, under whom it is alleged the plaintiff claims. This attempt to plead a license or right to the possession in the defendant consists of a detailed narrative of the settlement and occupation of donation claim No. 44, by William H. Willson and Chloe A. Willson, from 1844 to 1874, including their acts and doings with reference to the defendant and said block 6.

The motion to strike out the second defense as irrelevant must be allowed. Much of it is immaterial—even as evidence of a dedication by Chloe A.—while none of it is relevant as an allegation or pleading to the complaint. Lee Bank v. Kitching, 7 Bosw. 668. The statement of new matter in the answer is required to be "concise," and to constitute a "defense" to the action. Like the statement in the complaint of "the facts constituting the cause of action," it must be limited to the ultimate facts of such defense, and should not contain the evidence of them. Wooden v. Strew, 10 How. [51 U. S.] 50. Section 316, supra, provides that in an action to recover the possession of real property: "The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession, shall be set forth with the certainty and particularity required in a complaint." For instance, if the defendant relies upon a right to the possession of this property, arising from a dedication thereof by Chloe A. Willson to itself, for the purpose of building and maintaining thereon, forever, a court house, it should plead that fact as directed by this statute, and not what council may consider the evidence of it. This could be done in a few words, without burdening the record with a story of a dozen folios concerning the circumstances out of which the defendant claims such a right arose, or imposing upon the plaintiff the unnecessary hardship and disadvantage of replying in detail to this statement of these circumstances before any proof is offered in support of them, and thereby in effect convert the answer into a bill of discovery.

On the argument, counsel for the defendant claimed that the facts stated in this defense were also relied upon as a bar to the action by way of estoppel. But they are not pleaded as such. There is no fact stated in the complaint, which the defendant alleges the plaintiff ought not to be permitted to show. A plea of estoppel must allege that the plaintiff ought to be precluded from showing some fact or matter stated in the complaint, to which the estoppel is interposed, because of some other fact or matter alleged in the plea, which constitutes the estoppel. For instance, in an action of ejectment by the vendor of the premises claiming under an after acquired and superior title, the vendee and defendant might plead that the plaintiff ought to be precluded from showing that he was seized of the premises and entitled to the possession thereof, because on some day prior to the commencement of the action he had conveyed the same to the defendant with full covenants of warranty. Section 79 of the Oregon Civil Code provides that "every pleading shall be subscribed by the party or his attorney;" while section 103 declares that any pleading not "duly subscribed" may be stricken out of the case. In support of the motion to strike out the whole answer, upon the ground that it is not duly subscribed, counsel for plaintiff contends that the district attorney for the judicial district, including Marion county, is the attorney for the defendant. That he is appointed such attorney by means of a public election in the district held in pursuance of law, and that the defendant cannot disregard such appointment and appear in this action by another, and, therefore, this answer is not duly subscribed and is liable to be stricken out of the case. Section 945 of the Oregon Civil Code prescribes the duties of the district attorney, as follows: "He shall prosecute for all penalties and forfeitures to the state, which may be incurred in any county in his district, and for which no other mode of prosecution and collection is expressly provided by statute, and in like case, prosecute or defend as the case may be, all actions, suits or proceedings in any county in his district to which the state or such county may be a party."

The answer is subscribed by certain attorneys of this court as "attorneys for defend-

ant." The motion is not made upon affidavit or other proof as to who is the district attorney for the Third district, which includes the defendant. I do not think the court can take judicial knowledge of the fact that any particular person is district attorney for that district, or that neither of the attorneys who have subscribed the answer is not such officer. On the other hand, the subscription to the answer does not profess to be made by a district attorney, as it should, if made by one. The motion asserts that the answer is not subscribed by defendant's attorney, and upon the argument it was substantially admitted that neither of the attorneys subscribing the answer is the district attorney for the district, including the defendant. Assuming then, that the answer is not subscribed by the attorney for the Third district, is it subscribed by the attorney of the defendant as required by statute?

Until the contrary appears, the court will presume that when one of its attorneys subscribes a pleading as the attorney of a party, to a proceeding before it, that he is authorized to do so. But in the case of a public corporation, like the defendant, which has a regular official attorney, appointed by law, there is no room for the presumption that any other attorney has authority to represent it. The voters of the various counties in the Third district have, by the election of the district attorney, constituted him the attorney of such counties, with authority "to prosecute or defend, as the case may be, all actions, suits or proceedings" to which any of them may be a party, during his continuance in office. Admitting even, what is very doubtful, that a county may authorize an attorney, other than the proper district attorney, to represent it in court, there is certainly no presumption that it has done so—the fact must be made to appear. Regularly this should be done by an order of the county court, and a copy of the same, under its seal, filed with the appearance of the attorney. The presumption is, that the defendant has an official attorney in the person of the attorney for the Third judicial district upon whom the law casts the authority and duty of defending this action. The court is therefore not at liberty to presume that the gentlemen whose names appear signed to the answer of the defendant were authorized to do so.

It is not doubted but that the county court may, with the assent of the district attorney, and it may be without his assent, employ counsel to assist him in the prosecution or defense of a proceeding to which it is a party; but even then the district attorney would be the attorney of the county and entitled to control the proceedings and required to authenticate the pleadings by his subscription. It may, also, as representing the county, control and direct the conduct of a cause to which the latter is a party the same as a natural person might do (Civ. Code Or. § 871); but unless there is a vacancy in the office of district attorney, it must appear in court by him. He may be assisted, but he cannot be ignored.

It has been suggested that this action is not within the purview of section 945, supra, because it is not prosecuted or defended "in any county" in the Third district. But it is quite certain from the language of the whole section that it was the intention of the legislature to make the district attorney the law officer of the county, and require him to appear for the county in any action to which it might be a party, without reference to the locality of the court in which it may be pending. It is true, this action is not prosecuted in the county of Marion, because this court does not happen to sit there, but the cause of action arose therein, and the county is a party to it, and this brings it within the statute which requires it to be defended by the district attorney of the Third district.

The motion to strike out is allowed on both grounds.

MOREWOOD (IREGUIST v.). See Case No. 7,061.

MOREY (FLETCHER v.). See Case No. 4,864.

Case No. 9,795.

MOREY v. NEW YORK LIFE INS. CO.

[2 Woods, 663; [1] 3 Ins. Law J. 493; 1 Am. Law T. Rep. (U. S.) 160; 1 Cent. Law J. 139; 4 Bigelow, Ins. Cas. 158.]

Circuit Court, S. D. Mississippi. Nov. Term, 1873.

INSURANCE—LIFE—NOTICE OF PREMIUM FALLING DUE—PROMISE OF AGENT—TENDER TO AGENT—RECEIPT.

1. A life insurance company is under no obligation to give notice to the assured when the annual premium is about falling due, of that fact, unless it has agreed to do so, even though it had been the practice of the company to give such notice.

2. The promise of the local agent of a life insurance company, that he would give the assured such notice, was only a personal contract of the agent, and not binding on the company, unless the agent was authorized by the company to make such promise.

3. Where the assured has been in the habit of paying the annual premium to the local agent of the company, and such payments have been accepted by the company without objection, although the policy provided for payment at the principal office of the company, a tender to such agent of the annual premium, on the day it falls due, is sufficient to prevent a forfeiture of the policy for nonpayment of the premium.

4. The failure of the insurance company to place the receipt for the premium in the hands of the local agent does not excuse payment or tender of payment on the day the premium falls due.

Action at law [by Sarah L. Morey against the New York Life Insurance Company]. Submitted to the court on the issues of fact, as well as of law.

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

John Handy, for plaintiff.
T. J. Wharton, for defendant.

HILL, District Judge. This action at law was brought in the circuit court of Madison county, and removed into this court, to recover the amount of a policy of insurance, issued by the defendant on the first day of April, 1871, for the sum of five thousand dollars, payable to plaintiff upon the death of her late husband, John B. Morey, upon the payment of $197.90, then made, and the same amount to be paid thereafter on the first day of April, of each year during the continuance of said policy, with the usual condition annexed, that if said premium should not be paid on or before the first day of April of each year, the policy should become void, and all payments theretofore made become forfeited to defendant. The plea is that the policy became void under this stipulation by reason of the nonpayment of the premium due on the first day of April, 1873, to which the plaintiff replies: First, that when said John B. Morey made application for said policy, it was to one Morey, a local agent of defendant, doing business for defendant in the city of Canton; that at the time, he stated to said agent that he feared he would forget the time when the premiums would become payable, and fail to make them in proper time, and thereby the policy would become forfeited; that the said agent stated, as an inducement to said John B. to take said policy, that the company was in the habit of giving thirty days previous notice of the time, and that he would give the notice and save the forfeiture; and, secondly, that it was understood that payment would be made to the local agent in Canton; that at the time the premium fell due, the agent at Canton had not been furnished with the printed premium receipts, without which he was not authorized to receive payment; that the failure to give the notice and to furnish the receipt was a waiver of the right to a forfeiture of the policy. A jury being waived, the questions of both law and fact are submitted to the court.

The only facts shown by the proof, and necessary to be stated for the application of the rules of law, are as follows: Morey, the agent of defendant, did make the statements to John B. Morey at the time the application for the policy was made as stated in the pleadings; the advance premium was paid on the delivery of the policy; no notice of the time the premium fell due was given; John B. Morey died the 3d day of April, two days after the premium fell due, without having paid or tendered the same to any one. On the 5th, payment of the premium was tendered to the agent at Canton, and refused, for the reason that John B. Morey had died on the 3d. The premium receipt was not forwarded to the general agents at Vicksburg until the 4th, and not forwarded to the local agent until the next day. The question upon the pleadings and proof is, did the want of notice of the time of payment, and the absence of the receipt in the hands of the local agent, excuse the payment of the premium upon the day it became due, and thereby avoid the forfeiture stipulated in the contract? The policy, and the conditions annexed to it, constituted the contract, and must be held binding on both parties to it, unless its conditions have been waived by some act or omission of the party against whom it is sought to be enforced, or by the authorized agent of such party. The proof fails to show that the agent Morey had any authority to engage that notice should be given; indeed none such is claimed; but it is claimed that, being the agent, it was a fraud in him to make such a promise, as it misled the assured, and induced him to take the policy which he would not otherwise have done; but it is apparent from the proof that he did not make the promise as agent, or pretend to bind the defendant, but only made it as a friend and relative of John B. Morey; it was a mere personal promise, for the fulfillment of which he could only look to him who made it. Morey, the agent for this purpose, was more the agent of the assured than of the insurer; so that, upon the facts, this want of notice cannot avail the plaintiff.

The remaining question is, did the failure to place in the hands of the agent at Canton the premium receipt, on or before the time of payment, waive and excuse payment on that day? The conditions of the policy require payment at defendant's office, in the city of New York, unless a different place is stipulated for in writing between the parties, or to an agent having for delivery a printed receipt, signed by the president of the company or other officer mentioned. The advance payment was made to the local agent in Canton upon the delivery of the policy. The fact that the premium receipt for the second payment was forwarded to the local agent in Canton shows that that was the place where payment was expected to be made, and where it doubtless would have been made but for the death of said Morey. Such evidently being the understanding between the parties, I am satisfied that had the tender of the amount due been made to the local agent at Canton on the day and within the time stipulated, the forfeiture claimed could not have been maintained; but, unfortunately for the plaintiff, this was not done. I cannot accept the position as correct, that nothing can avoid the forfeiture but an agreement of waiver of payment made by the principal officers of the company in New York, or by actual payment or tender of payment there, or to a local or other agent having the premium receipt, signed as provided for. Where, by an express agreement or by the course of business between the parties, it is understood that payment will be made to the local agent, and no notice has been given in

sufficient time that payment must be made at the office and principal place of business stipulated in the contract, a tender of payment to the local agent, whether received by him or not, will excuse the policy holder and prevent the forfeiture. To hold otherwise would open the door to the grossest frauds upon the part of these foreign insurance companies. It is said, and is in proof, that these receipts are furnished to the local agents through the general agency for the state; and if the agent's accounts at the principal office are not satisfactory, the receipts are withheld. The answer to this is, that it is a thing about which the policy holder is not presumed to know anything; it surely cannot be held that he is responsible, or to be affected by dereliction in duty of the company's agent, over whom he has no sort of control. John B. Morey is not presumed to have known of the absence of the receipt, and its absence could have had no influence upon his unfortunate neglect; and however much it is to be regretted that the widow and orphan will be deprived of the maintenance and support a kind husband and father intended for them, the rules of law must be applied to the facts, which being done, necessarily results in favor of the defendant. If the company, when its coffers have been in part filled with the hard earnings of the policy holders, could withhold the receipt from him who had been depriving himself and family of the comforts if not the necessaries of life for years, to provide, as he supposed, something for his helpless family when he should have been laid in the grave; and when he comes, perhaps on the last moment in which payment can be made, he is for the first time informed that he must pay in New York, or all he has paid will be forfeited—a thing which it is impossible for him to do—would be gross injustice. Judgment for defendant.

Case No. 9,796.

In re MORFORD.

[1 Ben. 264;[1] 1 N. B. R. 211; Bankr. Reg. Supp. 46; 6 Int. Rev. Rec. 12; 24 Leg. Int. 220.]

District Court, S. D. New York. July 5, 1867.

PRACTICE IN BANKRUPTCY—AMENDMENT—POWER OF REGISTER.

1. Where a petitioner in bankruptcy applied to the register for leave to amend the schedules attached to his petition, which the register refused, and certified to the court the questions: (1) whether registers had power to allow amendments; and (2) whether, if they had such power, the amendments should be made before the register, and certified copies filed with the clerk, or vice versa. *Held*, that under section 4 of the bankrupt act [of 1867 (14 Stat. 519)], and rules 5 and 7 of the general orders in bankruptcy adopted by the supreme court, the court has the power to allow such amendments, and, that for the purpose of allowing such amendments, where they are uncontested, the register is the court, and has power to allow them on a direct application to him.

[Cited in Re Blaisdell, Case No. 1,488; Re Heller, Id. 6,339.]

2. The co-ordinate power of allowing them rests with the judge; the original amendments permitted to be made should be filed with the clerk; in making them, general orders No. 14 and No. 33 should be observed; and when they are filed, the registers will act on them under general order No. 7 and rule No. 4 of this court in bankruptcy.

In this case the petitioner [Charles A. Morford] applied to the register for leave to amend the schedules to his petition, and the register denied the application, upon the ground and for the reason that the power of ordering amendments to the schedules rested entirely with the court, and that only the judge could allow such amendments. The register certified such question to the court, and stated the points on which the opinion of the court was desired to be these: (1.) Whether registers, to whom causes in bankruptcy are referred by order of the court, may allow amendments to be made to schedules filed with them. (2.) If the registers can allow such amendments, whether such amendments can be made directly before the registers, and certified copies thereof be filed with the clerk; or whether the original amendments permitted to be made should be filed with the clerk, and the registers thereafter receive copies from the clerk, as in the case of the original petition and schedules.

BLATCHFORD, District Judge. By section four of the bankrupt act it is provided, that every register duly appointed and qualified shall have power, and it shall be his duty, to sit in chambers and despatch there such part of the administrative business of the court, and such uncontested matters, as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct. By rule 5 of the general orders in bankruptcy, framed by the justices of the supreme court of the United States in pursuance of the tenth section of the bankrupt act, it is provided that the registers may conduct proceedings in relation to the following matters, when uncontested, namely (among others), ordering amendments of any proceedings. Among the amendments so referred to is unquestionably the amendment of a voluntary bankrupt's schedule of creditors and property, for, by section twenty-six of the act it is provided, that a bankrupt shall be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts; and, by rule 7 of the general orders in bankruptcy, before referred to, it is provided, that the court may allow amendments to be made in the bankrupt's petition and schedules, upon the application or the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt.

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

These provisions apply as well to a case where the petitioner has not yet been adjudged a bankrupt, as to a case where he has. For the purpose of allowing such amendments, when they are uncontested, the register is the court, and has power to allow them on a direct application to him. Of course the co-ordinate power of allowing them in like cases also exists in the judge.

The original amendments permitted to be made should be filed with the clerk, and, in making them, rules 14 and 33 of the general orders in bankruptcy, before referred to, should be observed. When they are so filed, the register will act on them, in conformity with rule 7 of said general orders in bankruptcy and rule 4 of the rules of this court in bankruptcy.

Case No. 9,797.

In re MORGAN.

[8 Ben. 186.] [1]

District Court, S. D. New York. July, 1875.

BANKRUPTCY—PROOF OF DEBT—CORPORATION—DISSOLUTION.

M. was elected president of a corporation, incorporated under the act of the state of New York authorizing the formation of corporations for mechanical and other purposes. At that time he was a stockholder, but he afterwards ceased to be one. The capital stock was not all paid in within two years from its incorporation, as required by that act, but no proceedings were taken for the dissolution of the corporation. Thereafter M. went into bankruptcy, and, in the bankruptcy proceedings, a proof of debt was presented on behalf of the corporation, which proof was made by M., as president of the corporation, and was for moneys belonging to the corporation, which he had received as president: *Held*, that the corporation had the right to collect claims due to it; that the register had no power, on the re-examination of its claim to determine its right to continued corporate existence; and that M. was to be taken to be president of the corporation, for the purpose of the proof of the debt.

The register in this case certified to the court the following case:

The North River Petroleum Company is a corporation organized under the act of the legislature of the state of New York, authorizing the formation of corporations for manufacturing and other purposes, passed February 17th, 1848. The corporation was organized in 1865, and in that year Henry N. Morgan (the present bankrupt), a stockholder and trustee of said company, was elected president. Since such election no other election has been held. The petition for adjudication of bankruptcy was filed herein December 19th, 1874. The proof of debt under objection was made by said Morgan as president of said company, and is for the sum of $2,718.71, being for moneys received by him, belonging to said company, in his capacity as president, and in which sum he remained indebted to said company at the time of his bankruptcy.

Mr. Hutchins, for petitioning creditor, opposing said claim, having offered to prove that the company failed to pay in all the capital stock within two years from its incorporation, and to file a certificate thereof in the county clerk's office, required by sections 10 and 11 of the act of incorporation, passed in 1848, claimant's counsel objected to such proof as immaterial, and the register sustained the objection, to which the petitioner's counsel excepted.

And Mr. Hutchins, for petitioning creditor, opposing said claim, objected to the proof of debt: (1) Because, if such capital was not paid in, as required by statute, such corporation claimant was ipso facto dissolved; and (2) because Henry N. Morgan, who made the proof of debt, ceased to be a stockholder in said company, and, not being a stockholder, could not, according to the third and fifth sections of said act, be trustee or president, and, therefore, had no capacity to make said proof. He therefore asked the register to expunge the said proof of debt.

The register's opinion was as follows:

1. No proceedings have been had to dissolve the corporation, and, until proceedings and judgment for dissolution, its creditors may enforce their rights against it and it may collect its claims. The re-examination of a claim, on petition, before a register, under the 34th general order, is summary, and brings to view the subject matter of the claim. To hear and determine incidentally the right of a corporation claimant to continued corporate existence denied by the objector, upon account of failure to perform some act required by statute, is not within the province of the register

2. For the purpose for which Henry N. Morgan now appears in this proof of claim, he is to be taken as the president of the corporation. He was duly elected while a stockholder, and the mere fact of his ceasing to be such did not vacate his office, so as to make this proof of claim a nullity.

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

[NOTE. It was subsequently decided that there was no objection to the appearance of one as counsel for a creditor who had previously appeared as counsel for bankrupt. Case No. 9,798.]

Case No. 9,798.

In re MORGAN.

[8 Ben. 232.] [1]

District Court, S. D. New York. Aug., 1875.

ATTORNEY AND CLIENT—REPRESENTING ANTAGONISTIC INTERESTS—BANKRUPT PROCEEDINGS.

There is no legal objection to the appearance by counsel, who has previously acted as counsel

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for the bankrupt, as counsel for a creditor whose claim is under re-examination.

[This case was formerly heard upon the proof of debt of a corporation of which the bankrupt had been president. Case No. 9,797.]

The register in this case certified to the court that, on the re-examination of the claim of Yale & Co., alleged creditors of the bankrupt, Mr. Pelton, who had appeared in all the proceedings as counsel for the bankrupt [Henry N. Morgan], and was still acting as such, appeared as counsel for Yale & Co.; and that the creditor who had required the re-examination of such claim objected to such appearance for Yale & Co., by reason that such counsel occupied the antagonistic position of counsel for the bankrupt. And the register certified to the court this question: "Does any legal objection exist to Mr. Pelton's acting as counsel for the claimants, Yale & Co., on the ground that he is the counsel for the bankrupt?" with his opinion thereon, as follows: "The objection is one that it might be very material for the claimants to consider; but it is not perceived how the fact stated as the foundation of it can work injury to the objector, nor that the choice made by the claimants, is to be forbidden by the court."

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

MORGAN v. The BEN FLINT. See Case No. 1,299.

MORGAN (COOKINGHAM v.). See Case No. 3,183.

MORGAN (CROFFORD v.). See Case No. 3,403.

MORGAN (CROSS v.). See Case No. 3,433.

Case No. 9,799.

MORGAN v. CURTENIUS et al.

[4 McLean, 366.] [1]

Circuit Court, D. Illinois. June Term, 1848.[2]

EJECTMENT—ALTERATION IN PATENT—PROOF OF DEEDS AND WILLS—PROBATE COURT CERTIFICATE—ASSIGNMENT OF PRE-EMPTION RIGHTS.

[1. The fact that the name of the grantee in a patent appears to have been changed by scratching out a dot over the letter "i" is not sufficient to exclude the patent as evidence, it not appearing that the alteration was material, or that it was made after the patent came into the patentee's possession.]

[Cited in Re Heller, Case No. 6,339.]

[2. The certificate of a probate judge to the copy of a will is not invalid for want of a seal, where that court, though formerly held to be a court of record, is now no longer such, which fact is certified by the judge with the statement that the court has no seal.]

[3. A certificate to the proof of the execution of a deed which fails to state that the subscribing witness was personally known to the officer taking the acknowledgment, as required by the Illinois statute (Rev. St. 1845, p. 107, § 20), is fatally defective.]

[4. Parol proof of the signature of a grantor in a deed may be made without first proving the signature of the subscribing witness, it being shown that the latter has left the country, and it not appearing that his hand writing can be proved.]

[Cited in brief in Clardy v. Richardson, 24 Mo. 296.]

[5. Deeds conveying lands to which the grantor has acquired only a pre-emption right may, in an action of ejectment, be received in evidence to prove outstanding title, where the patent has since actually issued, although the statute makes all assignments of pre-emption rights prior to the issuance of patents invalid (Act July 14, 1832).]

[Cited in Dillingham v. Fisher, 5 Wis. 479. Cited in brief in McKean v. Crawford, 6 Kan. 116.]

[This was an action of ejectment by Benjamin F. Morgan against Alfred G. Curtenius and others.]

Butterfield, Goodrich & Merriman, for plaintiff.

Powell & Peters, for defendants.

OPINION OF THE COURT. This is an action of ejectment, to recover possession of twenty-three acres of ground. By a statute of Illinois, the fictitious forms and names of the action of ejectment are abolished. A patent for the land to John L. Bogardus, dated the 5th of January, 1838, was offered in evidence, which was objected to, on the ground that the name of the patentee appears to have been altered by scratching out a dot over the letter i, which made the name Bogardus, instead of Bogardies, as it now appears. The court overruled the objection, observing that it did not appear that the alteration was material, or that it had been made since the patent came into the possession of the patentee. It was proved that Bogardus, the patentee, died the 2d of June, 1838; and a copy of his will, and the probate thereon, was offered in evidence. This was objected to because the copy was not certified under the seal of the probate court. That court, formerly, was held to be a court of record, and had a seal. Now, it is not a court of record, and has no seal. This statement was made in the certificate of the judge of probate.

The act of 1845 requires the judge of probate to have a seal; and parol proof was offered to show there was a seal. The law makes a certificate without seal, valid where there is no seal. The court overruled the parol testimony offered, and admitted the certified copy of the will, etc. A deed was then offered in evidence, made by the executrix to Cole, dated 25th September, 1845, for the land in controversy. And also a deed from Cole to Frink for one-third of the fraction; and afterward a deed from the same to the same, for one-sixth of the fraction, dated 22d of May, 1846. Deed from Frink to Morgan,

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

[2] [Affirmed in 20 How. (61 U. S.) 1.]

the plaintiff, 19th December, 1846, for one-half of the thirty-three and one-third acres. It is objected that the deed was made to Morgan, a citizen of another state, merely to give jurisdiction to this court. The money with which Frink purchased the land, he borrowed, which, it appears, was afterward paid by Morgan, at or before the time the deed was made to him. This should have been pleaded to the jurisdiction of the court, but it is not made to appear that there was any intention to commit a fraud on the jurisdiction of the court, and the objection is overruled. To show an outstanding title, the defendants offered in evidence a deed from John L. Bogardus to Bigelow and McClure, for the thirty-three acres and ninety-three hundredths, dated the 5th August, 1834. This deed was proved before the clerk of the court, by proof of the hand writing of the subscribing witness, and of the grantor.

The act of Illinois (Rev. St. 1845, p. 107, § 20) requires the officer who takes the acknowledgment of the grantor, or proof of the execution of the deed by a subscribing witness, to state that the grantor or witness is personally known to him. The certificate to the proof of this deed does not contain a statement that the witness who proved the deed was personally known to him, and this defect is fatal to the proof of the deed. Parol evidence was then called by which the signature of the grantor was proposed to be proved, proof having been given that the subscribing witness had left the country, and had not been seen or heard from for fourteen years. To this evidence, the plaintiff objected until proof of the hand writing of the witness was made.

The court said the order of proof was a matter resting in the discretion of the court. That proof of the hand writing of the party was esteemed more satisfactory than that of the witness. Valentine v. Piper, 22 Pick. 90. In Jackson v. Waldron, 13 Wend. 178, 183, 196, 197, proof of the hand writing of the obligor was held not regularly to be offered, unless the party was unable to prove the hand writing of the witnesses. And such is the decision of a majority of the cases on this point. But judges seem to have so decided because it had previously been so decided, without any inquiry as to the reason of the decision. Under this view, however, the proof is admissible, as the witness has left the country, and it does not appear that his hand writing can be proved. The evidence is admitted.

The act of Illinois, 3d March, 1845 [Rev. St. Ill. 1845, p. 102], provides, where a deed purports to convey a fee simple estate when the grantor has only an equity, he shall, on acquiring the legal estate, be considered as holding it in trust for the grantee. It appears that on the 4th of August, 1832, Bogardus applied for the pre-emption of this land to the register of the land office, for the land in question, which was granted. And that on the 15th November, 1837, he entered the land and purchased it. The conveyance to Bigelow and McClure was as follows: "I do hereby bargain, grant, sell and convey unto the said Bigelow and McClure, their heirs and assigns forever, two undivided third parts of all my right, title and interest in and unto the land, etc., and I do hereby covenant with the said Bigelow and McClure, that if at any time hereafter, I shall acquire an additional title to the said lot of land, the same shall enure to them in proportion to the interest hereby conveyed to them." On the 5th of August, 1834, Bogardus conveyed his right and interest in the whole of the land, to Isaac Underhill. These titles having been given by Bogardus before the emanation of the patent, under his claim of a pre-emption are objected to by the plaintiff as void under the law. The 3d section of the act to grant pre-emptions, of the 29th of May, 1830, provides, "that all assignments and transfers of the right of pre-emption given by this act prior to the issuance of patents, shall be null and void." This act was continued in force by the act of the 14th of July, 1832, on the same subject.

It is argued that the above act of the 29th of May, 1830, only declared the pre-emption right should not be assigned so as to obtain a right of purchase. We suppose after emanation of the patent, we can not go behind it, and examine into the assignments. And the court instructed the jury, that the deeds given in evidence to show an outstanding title, and thereby defeat a recovery by the plaintiff, did constitute an outstanding title.

Verdict for the defendant. Judgment, etc.

[NOTE. The case was taken, by the plaintiff, to the supreme court, on a writ of error. Upon examination, the transcript of the record was found to be imperfect, and, continuing the case, a certiorari was issued to this court to supply the omission, and furnish a full and correct record at the opening of the next term of the court. 19 How. (60 U. S.) 8. This being done, at a subsequent date the supreme court affirmed the judgment of this court, with costs. 20 How. (61 U. S.) 1.]

MORGAN (DIBBLE v.). See Case No. 3,881.

Case No. 9,800.

MORGAN v. EVANS.

[2 Cranch, C. C. 70.] [1]

Circuit Court, District of Columbia. April Term, 1813.

PLEADING AT LAW—STATUTE OF LIMITATIONS—ISSUABLE PLEA—WHEN TO BE PLEADED.

The defendant has a right to plead the statute of limitations, at the first term after office judgment; it being an issuable plea.

Mr. Taylor, for defendant, at the last term, which was the first term after office judgment, moved to plead the statute of

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

limitations, and cited the 28th section of the Virginia statute of 12th December, 1792, which enacts that an office judgment may be set aside if the defendant, "at the succeeding court, shall plead to issue immediately." Downman v. Downman's Ex'rs, 1 Wash. [Va.] 28; 1 Chit. Pl. 505, 506; Rucker v. Hannay, 3 Term R. 124; Maddocks v. Holmes, 1 Bos. & P. 228; Willet v. Atterton, 1 W. Bl. 35, and Stadholme v. Hodgson, 2 Term R. 390.

THE COURT (nem. con.) having taken time to consider, admitted the plea, being of opinion that, as it was an issuable plea, and offered at the first term after office judgment, the court had no discretion.

Case No. 9,801.

MORGAN v. GRAHAM.

[1 Woods, 124.] [1]

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

STATES—ACTION TO RESTRAIN OFFICERS FROM ISSUING BONDS—COMMON INJURY—ADMINISTRATION OF GOVERNMENT.

1. A tax payer, who is liable to be assessed for the public taxes that will be necessary to pay the state debt and interest thereon, cannot maintain a private suit against the state officers to prevent them from executing and issuing bonds which the legislature has unconstitutionally authorized and required to be issued.

2. It is a general rule that an individual cannot maintain a private suit for an injury which he sustains in common with every other citizen.

3. The proper administration of the government in its several departments cannot be enforced by private actions brought by any tax payer or voter interested in the good government of the country.

Bill in equity heard on motion for injunction.

Miles Taylor, for complainant.
John A. Campbell, for defendant.

BRADLEY, Circuit Justice. In this case a citizen of New York, who is a tax payer of Louisiana, files his bill to restrain the governor of the state and other state officers from executing and issuing certain state bonds which the legislature has, by a special act, authorized and required them to issue. The grounds for the injunction are: 1. That the amendment of the state constitution, recently adopted, provides that prior to the 1st of January, 1890, the debt of the state shall not be so increased as to exceed twenty-five millions of dollars; and the state debt already exceeds that sum. 2. That the objects for which the bonds are to be issued are not such as the legislature has any constitutional authority to aid. The bonds are a donation to the New Orleans, Mobile and Chattanooga Railroad Company; and the legislature has no power to make such donations.

The bill assumes that a tax payer, who is liable to be assessed for the public taxes that will be necessary to pay the state debt and interest thereon, can maintain a private suit to prevent the state officers from executing and issuing bonds which the legislature has unconstitutionally authorized and required to be issued. I do not think that such a suit can be maintained. It is a general rule that a man cannot maintain a private suit for an injury which he sustains in common with every other citizen. To allow such actions would promote endless litigation. Every dissatisfied person in the community would institute an action for his supposed grievance. Public officers would be subjected to intolerable prosecution. They would be so harassed thereby, that no competent person would be willing to enter upon any office of general importance. It is not in this way that the public officers are to be called in question for a dereliction of their official duties. The proper administration of the government in its several departments cannot be enforced by private actions brought by any tax payer or any voter interested in the good government of the country. Without attempting to decide what remedy other than the force of public opinion, and liability to impeachment, may exist for the wrong which the complainant supposes is about to be committed; whether the bonds that may be issued will be void in the hands of the holders thereof; or whether the donee company may not hereafter be compelled to disgorge the money it may receive therefrom; it is sufficient to say in deciding this case that the complainant does not show any title to the relief which he seeks. The injunction must be denied, and the bill dismissed with costs.

NOTE. The proposition, that a particular individual cannot sue for a grievance which affects the entire public as well as himself, is sustained by the following cases: Doolittle v. Supervisors of Broome, 18 N. Y. 155; Roosevelt v. Draper, 23 N. Y. 318; Hale v. Cushman, 6 Metc. (Mass.) 425. But consult People v. Supervisors of Westchester Co., 57 Barb. 377; Hanlon v. Supervisors of Westchester Co., Id. 383.

MORGAN (HAMPDEN BANK v.). See Case No. 6,008.

MORGAN (HUBBARD v.). See Case No. 6,817.

Case No. 9,802.

MORGAN v. ILLINOIS & ST. L. BRIDGE CO.

[5 Dill. 96; [1] 7 Cent. Law J. 311; 6 Rep. 707.]

Circuit Court, E. D. Missouri. 1878.

NEGLIGENCE — DANGEROUS EXCAVATION — INJURY TO CHILD—BURDEN OF PROOF—DAMAGES.

1. The railway tunnel connecting the union depot in St. Louis with the Illinois and St. Louis

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

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

bridge was, at a point where it was uncovered, and within the line of a public street, left unguarded, exposing a perpendicular wall fourteen feet in depth below the surface of the street. The petitioner, a boy four years of age, strayed away from his home, about two blocks distant, under circumstances not disclosed by the testimony, fell into this excavation, and sustained a fracture of the thigh bone. It appeared (1) that his parents were poor and unable to employ a servant to look after him; (2) that he sustained no other injury except physical pain and suffering; (3) that the tunnel was in custody of receivers of this court: *Held*, (1) that the unguarded excavation was a nuisance, the continuing of which rendered the receivers liable to pay out of the fund in their charge damages for any injury of which it was the proximate cause; (2) that the petitioner was in law incapable of negligence, and that the burden of showing contributory negligence on the part of the parents, such as, imputed to the petitioner, would bar a recovery, rested with the respondents.

2. The mere fact that a child four years of age strayed a distance of more than two blocks from home, at play with other children, is not of itself evidence of contributory negligence on the part of its parents.

[Cited in Mayhew v. Burns, 103 Ind. 341, 2 N. E. 801.]

3. Damages may be given in such a case where there is no other substantial element than physical suffering.

This action was brought in the form of an intervening petition in a suit in equity which had been brought to foreclose a mortgage. This peculiar form of suit was necessitated by the fact that the property, the negligent construction of which produced the injury complained of, was in the hands of receivers appointed by this court. By consent of counsel, the petition was referred to Seymour D. Thompson, Esq., one of the masters in chancery of the court, who reported as follows:

"From the testimony I find the following facts: That on the 1st day of November, A. D. 1876, the receivers of this court, John P. Morgan and Solon Humphreys, were operating the structure known as the St. Louis tunnel, connecting the Illinois and St. Louis bridge with the union depot, in the city of St. Louis. That the said tunnel, as originally constructed, debouches from beneath the ground in the middle of Eighth street, in St. Louis, at the crossing of Clark avenue, and runs southwardly in the centre of Eighth street to Spruce street, which crosses it by means of a bridge; from which point said tunnel continues south a short distance, and then gradually deflects to the west, so that the western side of it crosses the western line of Eighth street at a point one hundred and forty-seven feet south of the Spruce street bridge. The uncovered portion of said tunnel thus runs within the limits of Eighth street for a distance of two blocks. The wall of said tunnel is surrounded by a flat coping of stone, about on a level with Eighth street, along which is built an iron railing, designed to protect men and animals traveling along the street from falling into it. At a point about three feet north from where the western wall of the tunnel intersects the line of Eighth street in deflecting to the west, as already stated, this railing, at the time of the accident in controversy, stopped. At the point thus left unguarded within the line of Eighth street, the distance to the bottom of the tunnel was about fourteen feet. Beyond the point where the western wall of the tunnel crosses the western line of Eighth street, the coping descends in the form of a stairway, at an angle of forty-five degrees. A rough sketch returned into court, marked 'Exhibit A to Testimony,' gives a fair idea of the geography of the tunnel, as thus described. The road which runs along the western side of the open tunnel in Eighth street is by this curve in the tunnel deflected to the west over private ground, and is a constantly traveled thoroughfare.

"On the date already mentioned, November 1st, 1876, the intervening petitioner, John Hagan, was between three and four years of age. He lived with his parents upon Clark avenue, near Ninth street—a little more than two blocks distant from the point where the western wall of the tunnel crosses the western line of Eighth street, as already indicated. His parents were poor. His mother was obliged to do her own house-work, and they were unable to employ a nurse or servant to take care of him. He strayed from home, and, while at play with other children upon the unguarded coping of the tunnel, at the point already indicated, just within the line of Eighth street, fell into the tunnel and received a simple fracture of the thigh bone. This fracture is well healed; the leg is not shortened, or the limb deformed, except by a slight callus, which will gradually be absorbed. I find from the evidence that the petitioner received no other injuries from this fall than physical pain and suffering.

"Upon this state of facts three questions would seem to arise:

"1. Were the receivers guilty of negligence in permitting a portion of the wall of the tunnel to remain unguarded at a point within the line of a public street constantly traveled, where the wall was perpendicular, where the excavation was fourteen feet deep, and through which trains were constantly passing? On this point I entertain no doubt. It seems to me clear that the tunnel company, leaving a portion of so dangerous an excavation unguarded at such a point, were the authors of a public nuisance, and that the receivers were continuers of it.

"2. Was there contributory negligence imputable to the plaintiff, such as should bar a recovery of damages? Children at the tender age of the plaintiff at the time of the injury complained of are in law incapable of negligence (O'Flaherty v. Union Ry. Co., 45 Mo. 70; Hartfield v. Roper, 21 Wend. 615; Mangam v. Brooklyn R. Co., 38 N. Y. 455; North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187); but the weight of authority is that the negligence of the parent, guardian, or other person lawfully in custody of a child which is injured, will be imputed to the

child, so as to bar a recovery of damages (Hartfield v. Roper, 21 Wend. 615; Waite v. Northeastern Ry. Co., 28 Law J. (Q. B.) 258; Ohio & M. R. Co. v. Stratton, 78 Ill. 88; Pittsburg, etc., Ry. Co. v. Vining, 27 Ind. 513; Lafayette, etc., R. Co. v. Huffman, 28 Ind. 287; Karr v. Park, 40 Cal. 188; Fallon v. Central Park, etc., Ry. Co., 64 N. Y. 13; Mangam v. Brooklyn R. Co., 38 N. Y. 455; Callahan v. Bean, 9 Allen, 401; Wright v. Malden & M. R. Co., 4 Allen, 283; Munn v. Reed, Id. 431; Louisville & P. Canal Co. v. Murphy, 9 Bush. 522; Downs v. New York Cent. R. Co., 47 N. Y. 83; Drew v. Sixth Ave. R. Co., 26 N. Y. 49). Yet some courts deny this, and upon grounds which seem entitled to much consideration. Daley v. Norwich & W. R. Co., 26 Conn. 591; Government St. Ry. Co. v. Hanlon, 53 Ala. 70; Norfolk & P. R. Co. v. Ormsby, 27 Grat. 455; Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257. Whatever may be the correct rule on this subject, it is clear upon authority that parents situated as the parents of the plaintiff were—poor, the father absent at his daily labor, the mother obliged to do her own house-work, unable to employ a nurse or servant to attend the child when upon the street—will not be deemed guilty of such negligence as will prevent a recovery of damages if the child is injured through the negligence of the defendant while straying upon the street unattended.

"3. In such a case, will damages be given on account of physical suffering where there has been no direct pecuniary loss? Upon this point I have some difficulty; but the tendency of the courts seems to be to sustain verdicts where the plaintiffs received no substantial injury except physical pain and mental suffering, unless the verdicts are so excessive as to create a presumption that the jury acted from passion or from prejudice—Sedg. Dam. (6th Ed.) 699, note 2; Trimble v. Spiller, 7 T. B. Mon. 394; Huckle v. Money, 2 Wils. 205; Beardmore v. Carrington, Id. 244; and whether such damages are called 'exemplary damages,' or 'smart money,' or 'compensation for injured feelings,' seems to be more nearly a debate about terms and definitions than about any substantial differences which are capable of being traced and maintained in the administration of justice (Hendrickson v. Kingsbury, 21 Iowa, 378; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Fay v. Parker, 53 N. H. 342, 381; McKinley v. Chicago & N. W. R. Co., 44 Iowa, 321). All the American courts seem agreed that physical suffering may be considered by the jury in estimating damages, even where the negligence was not gross or the injury so wilful as to warrant the giving of what are termed exemplary damages. Sedg. Dam. (6th Ed.) 699, note 2; Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; City of Chicago v. Langless, 66 Ill. 361."

The report concluded by recommending a decree that the receivers pay the petitioner out of the funds in their hands $500 and costs. Exceptions were filed to the foregoing report by the receivers, and on those exceptions the cause was submitted to the court.

Glover & Shepley, for receivers.

A. R. Taylor, for petitioner.

DILLON, Circuit Judge. The only exception to the master's report relied on by the counsel for the receivers, is that the master erred in not finding that the parents of John Hagan were negligent, and that such negligence defeats the right of the infant to recover the amount of the damages sustained by the negligence of the receivers. In the excellent report of the master, the principal cases upon the effect of the negligence of parents in defeating the right of action for a negligent injury to their child are collected. They cannot be entirely reconciled, although, when the facts of the particular cases are considered, the discrepancy is not as great as at first it would appear to be.

Upon the facts in this case, we entertain no doubt that the petitioner is entitled to compensation for the injury he sustained. The deep, unguarded excavation in the street was not only a public nuisance, but a dangerous one. The receivers ought not to have permitted it to continue. The natural instincts and habits of children lead them to play; and it is scarcely possible, and certainly not practicable, to keep them entirely off the streets, or under constant supervision. The injury here was not caused by any person or agency in the lawful use of the street. What right has the tunnel company to leave a dangerous pitfall in the public way, and then to insist that all the children in the neighborhood shall be imprisoned or kept off the street? If the petitioner's parents had lived immediately upon or very near this excavation, and, knowing the danger of permitting their child to go at large, had actually permitted it to go to the place of danger, or suffered this to be done through actual negligence, the case might present more difficult questions than now arise. The master does not find that the child was knowingly, or even negligently, permitted to go to, or remain in, the vicinity of the excavation. His parents lived over two blocks distant, and the finding is that he "strayed away from home," and was injured while at play with other children. It is not shown that the child was in the habit of going there; and as the receivers' negligence is positive and actual, and was the direct cause of the injury, and as the onus to establish the defence of contributory negligence is on the receivers (Railroad Co. v. Gladman, 15 Wall. [82 U. S.] 401), and they have failed to show such negligence, they are liable. It is not necessary, in this view, to go into the learning upon the subject of imputable negligence of parents to children, for in this case it is not shown that the parents were at fault in the child being at the place of the accident at the time when

the accident happened. Some of the cases seem to make the liability depend upon the means of the parents, and to countenance a distinction as to contributory negligence between parents able to employ nurses or attendants and those who are not. This distinction may be doubted, for there is not, in this country, one rule of law for the rich, and a different rule for the poor. It extends its protecting shield over all alike. The common law is justly distinguished for its solicitude for the public safety, and any person or corporation that illegally imperils the lives, limbs, or health of the people is liable. The tunnel company has no more right, by having a dangerous excavation in the public ways, unnecessarily to impose upon the rich the duty to employ an attendant for their children than to impose upon the poor the impracticable duty of never allowing their children to escape from sight, lest they may be injured by its wrongful and illegal act. 5 South. Law Rev. 684. The exceptions are overruled, and an order will be entered in conformity with the report of the master. Ordered accordingly.

NOTE. " 'People in the situation of life of those who had custody of the child,' said Wagner, J., in a recent case, 'cannot always attend to it strictly; and if it escapes from them unawares, it must not be injured simply because it so escapes.' Isabel v. Hannibal, etc., Ry. Co., 60 Mo. 483. In another case the same learned and humane judge, discussing this question, said: 'To say that it is negligence to permit a child to go out to play unless it is accompanied by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendants, and would amount to a denial of these blessings to the poor.' O'Flaherty v. Union Ry. Co., 45 Mo. 74. In a case very similar to this, another very learned and capable judge used the following language: 'The doctrine which imputes the negligence of the parents to the child in such a case as this is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian has placed a child in a position of danger, necessarily requiring the care of the adult to be constantly exercised, as where a parent takes a child into the cars, and, by his neglect, suffers it to be injured by straying off upon the platform. But here a mother, toiling for her daily bread, and having done the best she could, in the midst of her necessary employment, loses sight of the child for an instant, and it strays upon the track. With no means to provide a servant for the child, why should the necessities of her position in life attach to the child, and cover it with blame? When injured by positive negligence, why should it be without redress? A negligent wrong is done; it is incapable of contributing to it; then why should the wrong not be compensated?' Agnew, J., in Kay v. Pennsylvania R. Co., 65 Pa. St. 276. The same views are reasserted in Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257.

"In Littlefield v. Atlantic & Pac. Ry. Co., (intervention of McAuley), the learned district judge, sitting in this court, awarded an old man $500 as damages on account of having been wrongfully expelled from a passenger train of the receivers by its conductor, and compelled to walk three miles, crossing a high and dangerous bridge, to get to his home. This was a case for exemplary damages. On the other hand, in West v. Forrest, 22 Mo. 344, the defendant, in beating a female slave, accidentally inflicted some blows upon her mistress, the plaintiff. There does not appear to have been any attempt to prove that the plaintiff had suffered any direct pecuniary loss. The court sustained a verdict for $400, saying: 'The plaintiff's case was fully made out before the jury, and by their verdict of $400 they exhibited their sense of such a wrong, and properly vindicated the injuries and wounded feelings of the plaintiff.' In Cracker v. Chicago & N. W. Ry. Co., 36 Wis. 657, a railway conductor kissed a female passenger. Here was certainly no direct pecuniary loss; but the company was compelled to pay $1,000 for it. The damages were expressly placed upon the ground of compensation. In McKinley v. Chicago & N. W. Ry. Co., 44 Iowa, 314, the plaintiff was forcibly and successfully resisted by a brakeman in attempting to enter a passenger car of the defendant. There is no statement of the evidence as to the loss of time incurred or actual injury received; but these appear to have cut no figure in the case. It was charged by the court below, and held by the court above, that it was not a case for exemplary damages. The discussion related to the propriety of an instruction that the jury might take into consideration and give damages for 'the outrage and indignity' put upon the plaintiff. The instruction was held correct. Twelve thousand dollars damages were held to indicate passion and prejudice; but the court ordered the verdict to stand, if the plaintiff would accept a judgment for $7,000. Beck, J., however, thought $12,000 not too much, and Day, J., dissented, holding that outrage, indignity, and mental suffering are not elements of compensatory damages. In City of Chicago v. Jones, 66 Ill. 349, an award of $1,000 to a servant girl for breaking her right arm was not deemed excessive. In Collins v. Council Bluffs, 32 Iowa, 324, $15,000 were awarded a married woman for the breaking of the bone of her left thigh, in consequence of ice accumulated on the sidewalk. It appeared that it made her a cripple for life. The court refused to disturb the verdict." (The foregoing is extracted from the master's report.)

Case No. 9,803.

MORGAN et al. v. MASTICK.

[2 N. B. R. 521 (Quarto, 163).] [1]

District Court, N. D. Ohio. 1869.

BANKRUPTCY—OBJECT OF ACT—PREFERENCES—INTENT—WHO MAY HAVE THE BENEFIT OF BANKRUPT ACT—DISCHARGE.

1. The object of the bankrupt act [of 1867 (14 Stat. 517)] is to compel an equal distribution of a debtor's assets among all his creditors.

2. A debtor cannot discriminate among his creditors and prefer any one of them, but under the thirty-ninth section commits an act of bankruptcy if he makes a payment to one creditor before another.

3. Two things are to be considered to make such payment fraudulent, first, the debtor must be insolvent; second, he must intend to prefer his creditor.

4. Insolvency is a present inability to pay debts when due, even when there is surplus property more than enough to pay them at some future time.

[Cited in Graham v. Stark, Case No. 5,676.]

5. Under English and Massachusetts law only traders could take advantage of the bankrupt act; but under the present law any person may.

6. The intent constitutes the offence, not morally fraudulent but merely made so by the act of congress.

[1] [Reprinted from 2 N. B. R. 521 (Quarto, 163), by permission.]

7. If a debtor honestly believes himself solvent and pays a just debt, such payment cannot be considered fraudulent, though bankruptcy ensue; otherwise, if he is aware of his insolvency.

8. Fraudulent payments may be recovered by bankrupt's assignee.

9. Debtor is not entitled to certificate of discharge if he makes a fraudulent payment.

10. The intent is to be proven as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved.

[Cited in Re Gregg, Case No. 5,797.]

On the 15th of September, A. D. 1868, said petitioning creditors [Morgan, Root & Co.] filed their petition in involuntary bankruptcy against the said defendant [Erman E. Mastick], charging him with committing an act of bankruptcy under the thirty-ninth section of the bankrupt act, within six months before the filing of the petition, which act of bankruptcy consisted in making while insolvent a payment of money to certain creditors, relatives of the bankrupt, with the intent to give them a preference over the general creditors.

The defendant, a young man about thirty years of age, was a retail merchant in East Claridon, Geauga county, Ohio. In May last his store and stock of goods were consumed by fire, on which, however, he had a policy of insurance for four thousand dollars, receiving for it upon settlement the sum of three thousand two hundred and fifty dollars. His debts amounted to nearly seven thousand dollars, including a debt of eight hundred dollars due his father, Nathaniel Mastick. The latter was also surety for him on obligations to the amount of one thousand six hundred dollars. The bankrupt's assets consisted of personal property, notes, and accounts, a house and lot, and his insurance money, all of which, according to his own valuation, amounted to about one thousand dollars less than his liabilities, including the debt of eight hundred dollars due his father, which, it was agreed by his father, he need not take into account. It was evident that if the defendant availed himself of the benefit of the exemption laws, his assets upon his own estimate would not pay all his liabilities. The defendant answered the petition by denying his bankruptcy, and demanded a trial by jury.

At the present term the case came on to be tried upon the petition and answer, during which the following testimony was given: D. W. Tinan, an agent of Gordon, McMillan & Co., called upon defendant to pay a debt of about two hundred and fifty dollars or secure the same, Mastick having then collected about one thousand dollars from the insurance company, and on the request of Tinan informed him that he had expended the whole sum in taking up notes on which his father was surety, but that he would collect the balance of his insurance money and assets, and promised to pay G., McM. & Co., as soon as he had done so. In September Tinan again called upon Mastick, and was informed that the balance of the insurance money had been collected, but that other creditors, relatives of Mastick, had been paid. Tinan pressed the defendant to secure G., McM. & Co.'s claim by notes or personal security; he refused, informing Tinan that the balance of his creditors would have to wait for their pay until he could collect or earn enough. Charles Rhodes, also agent for G., McM. & Co., visited Mastick and told him that what he had done would not stand as against other creditors. Mastick took the bankrupt act and read, informing Rhodes that he presumed he had got himself into a bad fix. He refused, however, to secure the debt, saying he would take legal advice.

The bankrupt being put upon the stand testified to the same facts, but did not remember having told Tinan that his creditors would have to wait till he could earn the money. He also testified that when Tinan and Rhodes were at his place, he supposed he was solvent. That he had paid some of his creditors, believing that he was able to pay them all. His father had advised him to pay first those debts that were drawing the highest rate of interest, which advice he followed. About half the debts he had paid were those on which his father was security. That when he paid the debts referred to he did not intend to prefer them, for he then intended and now intends to pay all. The plaintiffs' attorney claimed that the fact of insolvency was established, and that the payment of the debts referred to was, under the bankrupt law, preferring them, and therefore, an act of bankruptcy; and cited among other authorities, the case of Jones v. Howland, 8 Metc. [Mass.] 377, wherein Hubbard, J., says: "The result of these cases is the drawing of a distinction between an actual insolvency and a contemplated bankruptcy; between the payment of a just debt in the course of business, though insolvency exists and is known to the insolvent, and the design to give a preference in view of stopping payment. And in view of all the authorities we hold the law to be this: that though insolvency in fact exists, yet if the debtor honestly believes he shall be able to go on in his business, and with such belief pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterwards ensue; and on the other hand, if the debtor, being insolvent, and knowing his situation, and expecting to stop payment, shall then make a payment, or give security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment, or giving security, is fraudulent as against the creditors; and property that is transferred in making such payment, or giving the security, may be recovered by his assignee, and the debtor will not be entitled to a discharge under the statute. It rests

upon the intent with which the act was done; and the intent is to be proved, as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved."

Plaintiffs' attorney also claimed: First. That insolvency, as the term is used in the bankrupt law, means the condition of a person unable to pay his debts as they fall due, or in the usual course of trade and business, although he may be able to pay his debts at a future time, upon the winding up of his business. In support of which were cited Hil. Bankr. 2; Thompson v. Thompson, 4 Cush. 127; Lee v. Kilbourn, 3 Gray, 594. Second. That when a debtor is insolvent, and with knowledge of that fact, makes payment to one creditor, knowing that such payment will, in fact, and necessarily must, operate as a preference to such creditor, he is conclusively presumed in law to have made such payment with intent to prefer such creditor. Hil. Bankr. 336; Avery & H. Bankr.; Arnold v. Maynard [Case No. 561]; Denny v. Dana, 2 Cush. 172; Beals v. Clark, 13 Gray, 18.

Defendant's attorney claimed that if Mastick at the time he made the payment honestly supposed that he was able to pay all his debts and intended to pay them, he did not make the payment with the intent to prefer his creditors, within the meaning of the bankrupt act.

The difference between the attorneys was mainly that while the plaintiffs' attorney claimed, that being insolvent and making a payment in full to one creditor, which in fact resulted in a preference, the defendant was presumed to have intended what was the natural and necessary result of his act, and therefore was guilty of an act of bankruptcy, the defendant's attorney claimed and insisted that the intent to prefer could not be deduced as an inference from the fact of preference, and cited Hil. Bankr. 329; 1 Metc. [Mass.] 366; 8 Metc. [Mass.] 377.

SHERMAN, District Judge, held that the decision in 8 Metc. [Mass.] 377, was a correct statement of the law of the case, and as such read it in full to the jury.

The jury could not agree as to the intent; while all were unanimous as to the defendant being insolvent, ten of them regarded the intent as fraudulent, and two that it was not. They were therefore discharged.

Case No. 9,804.

MORGAN v. NEW ORLEANS, M. & T. R. CO. et al.

[2 Woods, 244.] [1]

Circuit Court, D. Louisiana. April Term, 1876.

CONTRACTS — FRAUD IN PROCURING — LEX LOCI CONTRACTUS—EXCEPTIONS—LEX REI SITAE.

1. Where charges of fraud and misrepresentation in procuring a contract, which has been partly performed, are made as the ground for setting it aside, and where a rescission would involve the upsetting of many large and important transactions, the proof should be made clear to justify a court in making the decree prayed for.

[Cited in brief in Flint v. Babbitt, 59 Vt. 194, 9 Atl. 365.]

2. As a general rule a contract is to be governed as to its interpretation, nature, obligation, performance or dissolution, by the law of the place where it was made.

[Cited in Marvin Safe Co. v. Norton, 48 N. J. Law, 415, 7 Atl. 421.]

3. The principal exception to this rule is where the contract is made in one state or sovereignty, to be performed in another; in that case it is to be governed by the law of the place of performance.

4. But where a contract is made in one state, to be partly performed there, and partly performed in several other states, the contract is to be governed by the law of the place where it is made.

[Cited in The Brantford City, 29 Fed. 390; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 455, 9 Sup. Ct. 477.]

5. But in such a case where, in the performance of the contract, conveyances and transfers are to be made of property situate in several states, consisting of realty or other property subject to the local law, the conveyances and transfers should be made in accordance with the lex rei sitae.

[Cited in Marvin Safe Co. v. Norton, 48 N. J. Law, 415, 7 Atl. 421.]

In equity. Heard on pleadings and evidence for final decree. This bill was filed to obtain the rescission of a certain contract made between the complainant [Charles Morgan] and the New Orleans, Mobile & Texas Railroad Company, on December 12, 1871. The rescission was asked for on two grounds: First, on the ground of a fraudulent misrepresentation of facts by which the complainant was induced to enter into the contract; secondly, on the ground that the contract was a commutative one, and that the railroad company had not performed its part of it. The latter ground was based upon the peculiar law of Louisiana, by which, according to the Civil Code, arts. 2045, 2046, "the dissolving condition is that which when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed;" and such "resolutory condition is implied in all commutative contracts, to take effect in case either of the parties does not comply with his engagements."

R. H. Marr, H. J. Leovy, and F. A. Monroe, for complainant.

John A. Campbell, for defendants.

BRADLEY, Circuit Justice. The contract in this case was made for the purpose of putting an end to a ruinous competition which was being carried on between the two parties to it, in the freight and passenger business between Mobile and New Orleans, and for uniting their interest in that business and in a projected railroad business between New Orleans and Texas. The complainant Charles Morgan was, and had long been, engaged in

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

running a line of steamers between Mobile and New Orleans, the line being supplemented by a short railroad running from Lake Pontchartrain to the latter place, called the Pontchartrain Railroad, of which he owned the majority of the stock. He also owned a railroad called the Opelousas road which ran from the Mississippi river opposite New Orleans to the Atchafalaya river at Brashear City, where it connected with a line of steamers running to Galveston and other places on the Texan coast, being connected with the city of New Orleans by means of a ferry at that place. The complainant also had a charter for a continuation of his railroad from Brashear City westwardly and northwesterly to the Texas state line. The railroad company, at the time of the contract, had recently completed a railroad between Mobile and New Orleans, on which the opposition before referred to was maintained against the steamboat business of the complainant; and they had procured a charter for a railroad from New Orleans to the state line of Texas, and expected to obtain a charter for a continuation of the said road to Houston in that state; and had actually constructed a road west of the Mississippi, from opposite New Orleans, as far as Donaldsonville. Under these circumstances, it became evidently the interest of the parties in some way to compose their differences, and not to continue an opposition which must result in loss to them both. The transportation route betwen Mobile and New Orleans, being divided between two powerful interests, could not be a very valuable property to either of them unless some amicable arrangement could be made. By the agreement in question, an attempt was made to form such an arrangement. The general nature of it was as follows: Morgan, on his part, agreed to convey to the railroad company and the company agreed to purchase the property which he had in the line between Mobile and New Orleans, for the sum of $797,800, namely, certain wharves and wharf property at Mobile, two steamers, the Laura and the Frances, and his Pontchartrain Railroad stock, amounting to 5,078 shares, out of 7,500 shares, which constituted the whole capital. He further agreed to convey to the company, for the sum of $250,000 and interest thereon from April 15, 1870, his railroad rights and partly constructed road between Brashear City and Vermillionville, about sixty miles, and from thence west and north to the Texas line and to Red river; the company agreeing to complete said road by the time it should complete its main line from Vermillionville to the city of Houston. Morgan further agreed to subscribe to the stock and securities of the railroad company, the sum of $1,258,000, on the same terms as the other subscribers thereto had done, and the price of the property above named was to be taken as payment of his subscription as far as it would go; the balance to be paid by him in cash. The securities to be received by him for his said subscription were to be $899,000 first mortgage bonds of the company on its road west of the Mississippi, and $359,000 of second mortgage bonds guarantied by the state of Louisiana. He was also to receive (like the other subscribers) income bonds and stock of the company of each, to the amount of his subscription. It was also stipulated in the agreement that Morgan should have for the sum of $250,000 cash, that portion of the Pontchartrain Railroad running along the levee in New Orleans, and the new depot thereto attached. The purpose of the agreement was declared to be to put an end to the opposition in the passenger and freight business between Mobile and New Orleans, and to concede the whole business to the company; and Morgan agreed to take off his boats within fifteen days, and not to run or be concerned in steamboats on that line for fifteen years thereafter. It was further agreed that the gross receipts of the through business by railroad between New Orleans and Houston should, on the completion of the railroad through to the latter city, for seven years thereafter, be stocked and divided between the parties according to the length of railroad owned by each, namely, Morgan's road from New Orleans to Brashear City, and the company's road from New Orleans to Houston, including the branch from Brashear to Vermillionville. The agreement was made and executed in the city of New York, where Morgan and the officers and most of the directors of the company resided; and immediately after it was made, measures were taken to execute it and carry it into effect; and in the course of the following January, February and March almost every article was executed. Morgan subscribed the requisite amount to the securities of the company, in New York, namely, the sum of $1,258,000, and received the bonds and certificate of stock which the agreement called for, and conveyed and transferred to the company the several pieces of property which he was to convey and transfer, namely, the wharves and wharf property in Mobile, the steamers Laura and Frances, the Pontchartrain Railroad stock, and the railroad property and rights northwest of Brashear City; and paid the cash balance required to make up his subscription; and he also received a conveyance of the Pontchartrain Railroad track along the levee in New Orleans, and paid for it the sum of $250,000 in cash. In fact, within three months from the time of making the agreement, everything was done to effect a complete execution of it, except the construction by the company of the railroad to Houston, including the branch road from Brashear to Vermillionville. In addition to this, the firm of C. A. Whitney & Co., of New Orleans, who were the general agents of the complainant in that city, and had managed for him the business between Mobile and New Orleans, and were still managing his line between New Orleans and Texas, were appointed as the agents of the railroad company, and acted as such for several months,

namely, from the date of the agreement in December, 1871, until the latter part of the following April, and Morgan and three or four persons named by him were elected directors of the company in place of others who resigned. In the summer of 1872, the complainant changed the gauge of his road from New Orleans to Brashear City, so as to correspond with that of the defendants, and to be thus prepared for the through business to Houston, and in July he received one installment of interest on the bonds received by him. The defendants on their part, during the spring and summer of 1872, did some work on the line of road between Brashear City and Vermillionville, but never laid any rails there, and entirely suspended operations before the first of September; and nothing further has ever been done on that branch, nor has the road been completed from Donaldsonville to Vermillionville, nor has any part of it been constructed between Vermillionville and Houston. The time when, by the act granting state aid to the company (on which great reliance was placed), and when by express agreement with the state of Louisiana, the railroad company was to complete its road to the state line, was the 7th of May, 1873; and it was to complete the line to Houston within six months thereafter if the requisite legislation could be obtained from the legislature of Texas. In consequence of the failure of the company to furnish funds to pay its debts in Louisiana, and to go on with the work of construction of the railroads in contemplation, Whitney & Co. resigned the agency of the company in the latter part of April, 1872, and they and Morgan resigned their positions as directors. But no formal demand to have the agreement rescinded was made by the complainant until he filed the bill in the present case, which was on the 30th of May, 1873, shortly after the expiration of the time for completing the road to the Sabine river. The bill states, and it is not denied, that the company failed to pay interest on its securities as early as October, 1872, and that the trustees of the first mortgage of the road between Mobile and New Orleans had taken possession thereof, and had received the sanction of the court thereto; and that proceedings had been commenced for a sale of the franchises and property west of the Mississippi. By an amended bill, it is stated that James A. Raynor and Edwin D. Morgan were in possession of the company's road east of the Mississippi, claiming to be in possession as trustees under their first mortgage on that part; and that Frank M. Ames was in possession of the road west of the Mississippi, under a like claim, as trustee under the first mortgage on that part; and they were made parties to the bill, and have severally put in answers setting up their respective claims under said mortgages.

The bill, after setting out most of the foregoing facts, alleges by way of gravamen, that in the negotiation which took place in New York preliminary to the making of the contract, certain statements and representations were made to the complainant by a committee of the directors of the company, respecting the condition of its affairs, which he was assured were accurate and true, but which he has since discovered to have been false. The bill states that the committee referred to exhibited to the complainant a certain paper (which is referred to as Exhibit E), containing a statement of the condition of the company at that time, showing that the assets of the company then in its possession and available for the construction and equipment of the main line of road to be built from New Orleans to Houston, Texas, and of the branch from Brashear City to Vermillionville, amounted to the sum of $7,551,000, being composed of $4,255,000 of bonds of the company at par, $4,140,000 of Louisiana state bonds, at eighty cents on the dollar, and $1,500,000 second mortgage bonds, at sixty cents on the dollar, and a balance of $488,000 of first mortgage bonds in the Calcasieu Division, all being subject to an amount of $1,404,000 that would be due to original subscribers to a certain fund of "two millions of dollars." Also, that the committee exhibited to the complainant another paper (which is referred to as Exhibit F), which was represented to contain new subscriptions of sums of money to be applied to the construction and equipment of the said main line from New Orleans to Houston; that it had sixty-six names, with an amount affixed to each name, making a total of $4,895,700; and that the subscribers were represented to be, with two or three exceptions, possessed of large means, and able and willing to pay; and that the committee represented that the subscriptions were made in good faith, to furnish the funds required to construct and equip the said railroad west of the Mississippi; and that with the said assets in hand and said subscriptions, if the complainant also became a subscriber for a liberal amount, upon the same terms as the other subscribers, the company would have ample means to construct and equip the said railroads and have them in operation at the period contemplated by the charter. The bill alleges that the representations were not true, and were made in bad faith, to deceive the complainant and induce him to act, in relation to said proposed arrangement, in error of facts as to the condition of the company in regard to the possession of the means requisite for the construction and equipment and putting in operation of the said railroads, and in regard to the immediate intent of the company to prosecute and complete the same. The Exhibits E and F were produced in the evidence taken in the cause, and are before the court. The fact that after the agreement was made, very little of these large amounts of money was forthcoming, even to pay the floating debt of the company, and that very little was expended during the following season on the

works, and that the company was obliged absolutely to suspend operations in October, 1872, was sufficient, if the complainant understood the representations as stated by the bill, to raise in his mind the strongest suspicions that he had been deceived and duped. The answers furnish but little light on the subject. They are not sworn to, and consequently are not evidence. Those of the trustees of the several mortgages are filed by them as such trustees, and claim that they are not affected by any rights of the complainant growing out of the transactions between him and the company.

The evidence is more to the point. (Here the learned judge went into an elaborate discussion of the evidence. This discussion is omitted.)

In charges of this kind, laid as a ground for setting aside a contract where many things have been performed on both sides, and where a rescission would involve the upsetting of many large and important transactions, the proof must be very clear indeed of fraudulent misrepresentation or concealment, to justify a court in applying the judicial knife to the case. It must be clear that there has been such a misstatement of the facts as to mislead the injured party, and to induce him to enter into the transaction; and he must be prompt to avail himself of the objection as soon as it is discovered. He must not wait to experiment and see whether it may not, after all, turn out well. Acquiescence for a little time, in such cases, is condonation. I am not satisfied that there was any such misrepresentation of facts in this case as, under the circumstances, entitles the complainant to set aside the contract.

The next question is, whether the complainant is entitled to have the contract rescinded on account of nonperformance by the railroad company of their part of it. The demand for rescission on this ground rests upon the peculiar law of the state of Louisiana before referred to. If the contract is to be governed by that law, I should have no hesitation in saying that the complainant is entitled to the relief which he asks. The building of the railroad beyond Brashear City, so as to give the complainant a through connection between his Opelousas road and Texas, was undoubtedly a material consideration with him, amongst the other considerations moving to the contract. The contract was a commutative one. In that respect it fully met the definition of the Louisiana Code, which declares (article 1768): "Commutative contracts are those in which what is done, given or promised by one party is considered as equivalent to, or a consideration for what is done, given or promised by the other." It becomes material, therefore, to ascertain whether the contract is to be governed by the law of Louisiana. The general rule is, that a contract is to be governed as to its interpretation, its nature, its obligation, and its performance or dissolution, by the law of the place where it is made or entered into. In other words. "Lex loci contractûs est lex contractûs." The first and principal exception to this rule is, that if the contract is made in one state or sovereignty, and is to be performed in another state or sovereignty, it is to be governed by the law of the place of performance, because it will be presumed that the parties had the laws of the latter place in view when they entered into the contract. The rule and the exception have been fully discussed and commented upon by Mr. Justice Story in his Conflict of Laws, and by many other writers on private international law, and it is unnecessary to review those discussions here. In this case the contract was made in New York by persons who resided there. The railroad company, it is true, was a corporation originally chartered by Alabama, and subsequently capacitated by the laws of Louisiana and Texas to exercise all its faculties in those states; but its directors and officers mostly resided in New York and other Northern states, and its principal office was in New York, and the meetings of its directors were usually held there. In this case, all the negotiations which led to the contract were carried on in New York, and the contract itself was concluded and executed there. But, on the other hand, the interests, operations and property, which formed the principal object of the contract, were located in the Southern states bordering on the Gulf of Mexico, to wit: Alabama, Mississippi, Louisiana and Texas, and largely in the state of Louisiana. The contract was made with reference to these interests, operations and property, but its direct object, that is, the things stipulated and agreed to be done and performed, were to be, or might be in part, done and performed in New York as well as in the states referred to. This will appear when we look at the contract a little more particularly. It is altogether a personal contract, providing for the doing of certain acts on the one side, and on the other. Its object was a settlement of controversies, and a discontinuance of business opposition between the parties. It is evident that many of the acts stipulated to be done could be, and in fact were, done in the city of New York. There Morgan executed and delivered to the company the various deeds and transfers of property which he had agreed to do; the conveyances of the property in Mobile, the bills of sale of the steamers, the transfer of Pontchartrain Railroad Company stock, the conveyance of the railroad rights north and west of Brashear City. There he made his stipulated subscription to the securities of the railroad company. There the company delivered to him the said securities, namely, the bonds and certificates of stock. But the discontinuance of the steamboat business between Mobile and New Orleans and the delivery of the property con-

sequent upon the said conveyances were done in Alabama and Louisiana; and the building and completion of the railroad beyond Brashear City were necessarily to be done in the latter state. Now, by what law is such a contract to be governed, where it is executed in one state, and is partially to be performed in that state, and partially in other states?

I have no difficulty in saying that the conveyances and transfers to be made in pursuance of the contract were to be made in conformity with the laws of the states respectively in which the property, when consisting of realty, or subject to local law, was situated. And such conveyances and transfers, when executed, would be governed by the lex rei sitae. But that does not answer the question as to what law the principal contract is to be governed by. In Louisiana, nonperformance of a material stipulation renders the whole contract liable to be dissolved. But no one would apply that rule of Louisiana law to a contract not subject to its dominion, even though the breach should occur in Louisiana. The fact, therefore, that one of the acts to be performed in this case —the construction of the railroad—was to be performed in Louisiana, will not help to resolve the question, unless we can affirm that the entire contract is to be governed by Louisiana law. Does the fact, that a portion of the contract must necessarily be performed in Louisiana, subject it to that condition? If that does, then the like fact that a portion of the contract is necessarily to be performed in Alabama would subject it to Alabama law, and make it an Alabama contract. In this embarrassment, I do not know that I can do better than to fall back on the general rule that a contract is to be governed by the law of the place where it is made. The presumption, that where a contract is to be performed in a different jurisdiction, the parties must be intended to have in view the laws of the latter, seems to be repelled when the performance is to take place in several different jurisdictions. For when there are two equal and opposite presumptions, neither of them can prevail. The present case is still stronger; for much of the contract was performable, and actually performed in the place where it was made. I do not mean to say that where the main and principal part of a contract is to be performed in a state different from that in which it is made, the presumption will not arise that it is made in reference to the laws of such place of performance, even though some minor and incidental parts are required to be performed in still different states. Such may, very possibly, be the result in many instances that may occur. When they happen they will be governed by the force of their own circumstances. But I do not see that I am called upon to apply any such exceptional rule in this case. The building of the railroad in question was a very important consideration it is true; but the contract embraced many other considerations equally important, that were not necessarily to be performed in Louisiana.

The conclusion, therefore, to which I am forced to come is, that the principal contract, made on the 12th of December, 1871, between the complainant and the New Orleans, Mobile & Texas Railroad Company, was a New York contract, governed, as to its nature and obligation by the laws and jurisprudence of the state of New York; and as by these laws and jurisprudence, so far as appears, no such dissolving consequence follows from a nonperformance of part of the contract, as is claimed in this case, the claim is untenable, and the relief must be refused. As no relief can be granted on either of the grounds laid in the bill of complaint, the same must be dismissed with costs.

Case No. 9,805.

MORGAN v. The PHILIP DE PEYSTER.

[6 N. Y. Leg. Obs. 441.]

District Court, S. D. New York. 1848.[1]

COLLISION — LOOKOUT — VESSEL CLOSE HAULED — PRIVILEGED TACK.

1. The neglect of keeping a sufficient look-out in the day-time pronounced gross negligence. No custom contrary to the exercise of this precaution allowed weight.

2. A vessel close hauled on the starboard tack, when meeting one on the port tack, has the right to keep her wind and hold on, as a general rule, until the necessity of changing her course to avoid a collision, becomes apparent.

3. A vessel close hauled on the privileged tack has the right to suppose that the other is performing her duty in keeping a "look-out," and will avoid her.

4. Where the vessel on the unprivileged tack had no sufficient look-out, and was hailed from the other vessel, and the hail was not heard in time to avoid the latter: *held*, that the collision was attributable to the want of a look-out, and the vessel neglecting this precaution was answerable for the consequences.

[Cited in Smith v. The Blossom, Case No. 1,564; The Catharine and Martha, Id. 2,512.]

[This was a libel by Charles Morgan against the schooner Philip De Peyster.]

The ship Emily, in the month of November, during broad day and fine weather, was beating up the bay of New York, tide flood, wind from N. N. W., and blowing a six-knot breeze, the ship had tacked on the east shore, about a mile to the southward of Governor's Island, and was standing to the westward. The schooner Philip De Peyster, a coasting vessel, was also beating up, and was standing close hauled on the larboard or port tack, and was seen from the Emily when half a mile off. On board the schooner, besides the man at the wheel, was another on deck, others were below. The attention of the men on board of the schooner was called to the ship by a hail from her, when she was seen by

[1] [Affirmed by circuit court; case unreported.]

them for the first time, and on the lee-bow of the schooner. The helm of the schooner was at once put hard up (aport) and she kept away (fell off) so as to go into the ship abaft of midships, in an angular direction towards the ship's stern, doing great damage to the ship and making a wreck of herself, and was towed up to the city by a steamboat. The ship continued her course. There was some question and other proofs whether the ship had been about long enough to have steerage way on her; the clear weight of evidence, however, was that she had sufficient way to have gone in stays again.

E. Burr, C. Benedict, and W. R. Bebee, for libellant.

George Wood, Nelson Chase, and W. Q. Morton, for claimants.

BETTS, District Judge. 1. Upon the proofs it is found the Emily committed no fault in not taking measures to avoid the De Peyster previous to the hail. If she was without headway at the time, she had no power to do anything, and if she was under way and running six knots she had, by the usage of navigation, a right to hold her tack, until the necessity of changing it to avoid collision became apparent (2 Hagg. Adm. 174; Story, Bailm., 2d Ed., §§ 6, 11), and on the evidence, that was not until after ineffectual hails to the De Peyster.

2. It is further found on the proofs that after it was discovered the De Peyster did not observe the hails, the Emily could have made no movement that would have avoided the collision; for if she was running six knots and the De Peyster eight, they were approaching at the rate of fourteen knots and their distance, if supposed to be 80 or 100 rods would be run over in 15 minutes, and if they were only so many yards, instead of rods, distant apart they would meet in about three minutes (and the time of collision would conduce strongly to prove that the vessels could not have been 30 or 40 rods apart), and accordingly the Emily so situated could make no manoeuvre that would remove her out of the line of approach of the De Peyster, within the time necessary under either supposition.

3. The Emily had a right to suppose the De Peyster saw her, and though apparently coming close upon her, could and would avoid her; the practice of that kind of craft so to run is fully proved, and that the facility with which they are manoeuvred justified the Emily in holding her own tack, and relying upon the movements of the De Peyster until the hails were made, after that it is clearly shown she had no power to avoid a collision.

4. The De Peyster was guilty of a gross fault in keeping no look-out on the deck. The evidence is clear that the accident would have been avoided if a look-out had been kept. No custom or habit with such craft, however general, can dispense with the use of a precaution so necessary to the safety of other vessels as well as their own, and as the accident arose from that fault the schooner is answerable for its consequences. 2 Dod. 83, 85.

5. Upon the proofs I consider the injuries received by the ship to be at least $1,200, and I decree for the libellants to that amount with costs to be taxed. 1 Hagg. Adm. 109.

The above case was heard on appeal before Nelson, Circuit Justice, and further proofs introduced by the parties. The judgment of the district court was affirmed. [Case unreported.]

Case No. 9,806.

MORGAN v. RAILROAD CO. et al.

[1 Woods, 15.] [1]

Circuit Court, D. Louisiana. April Term, 1870.

CORPORATIONS—ACTION BY STOCKHOLDER TO PREVENT INJURY — OFFICERS DERELICT — PROPER PARTY TO BRING ACTION.

1. Unless a party has a right to sue in the local courts, he cannot sue in the federal courts. The latter cannot create a right to sue, and can only take jurisdiction when the right exists by law, and the plaintiff and defendant are citizens of different states.

2. A stockholder in a business corporation cannot sue in equity for relief against an injury done or threatened to the corporation in which he is a stockholder without an averment that the corporation or its officers are derelict in their duty.

3. The appropriate party to sue for such injury is the corporation itself, acting by its legal officers and managers.

4. The ownership of stock does not give the stockholder any legal estate in the property of the corporation.

[Cited in Kilgour v. New Orleans Gaslight Co., Case No. 7,764; Sala v. New Orleans, Id. 12,246; Gottfried v. Miller, 104 U. S. 528; Irvine v. Dunham, 111 U. S. 334, 4 Sup. Ct. 504.]

This was a bill in equity, which was heard upon the motion of complainant for a preliminary injunction.

Miles Taylor, for complainant.

John A. Campbell, for defendants.

BRADLEY, Circuit Judge. The plaintiff in this case has filed a bill for an injunction against the New Orleans, Mobile and Chattanooga Railroad Company, to prevent its doing a threatened injury to the Pontchartrain Railroad Company, of which the complainant is a stockholder; which threatened injury, the complainant alleges, will greatly diminish the value of his stock. It is not pretended that the Pontchartrain Railroad Company, or its officers or directors, are not competent and willing to vindicate its rights; or that they are guilty of any complicity with the defendants, or even of any neglect to perform their proper duties, for the protection of the interests of their stockholders. The only ap-

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

parent reason for the suit being brought in the name of the complainant is that he is a citizen of New York, and can maintain a suit against the defendants in the federal court; whereas the Pontchartrain Railroad Company, being a corporation of Louisiana, would be obliged to sue in the state court. This reason is not sufficient to give the complainant a right to maintain a suit. Unless he has a right to maintain a suit in the local courts, he cannot maintain one in the federal court. The latter court cannot create a right to sue; it can only take jurisdiction of such a right when it already exists by the state law. and when the complainant, at the same time, is a citizen of another state.

The demurrer in this case, therefore, raises the question, whether a stockholder of a business corporation can sue in equity for relief against an injury done, or threatened to be done, to the corporation of which he is a stockholder, without any averment that the corporation or its officers are derelict in their duty.

If such a writ has ever been maintained, it must have been at a period when corporations were much fewer, and when their powers and capacities were much less understood than they are at the present day; or because the objection was not taken to the proceeding.

The power to use a corporate name and seal, and to sue and to be sued by such name, is one of the essential and primary features of a corporation. Persons who are constituted a body politic or corporate lose, in respect of that association, their individual character and personality. A new and artificial person is created—totally distinct from the individuals who compose it. Its functions are not their functions; its property is not their property; its rights and liabilities are not theirs. Its officers and directors are not even trustees or agents of the stockholders, but trustees and agents of the corporation. The legal and equitable rights of the stockholders are, to vote at the stockholders' meetings, to participate in the profits, and to have the funds and property of the corporation devoted to their original use, and not diverted therefrom or otherwise wasted by the fraudulent act or willful neglect of the directors. For the vindication of these rights appropriate remedies exist, which act directly upon or against the corporation itself or the corporate officers who are charged with delinquency. And by and through the equity which the stockholder has against delinquent officers, he may often obtain relief against strangers combining with them. But in no other way can a stockholder prosecute a stranger for injuries done or threatened to the corporate property or franchises.

The appropriate party to sue for such injuries is the corporation itself, acting by its legal officers and managers. It is their duty to take care of the corporate interests. They are the only persons legally invested with the power to do it. The members of the corporation are clothed with a power to sue by the corporate name, and public policy requires that they should do so. The objects of the incorporation of the society would be largely defeated by allowing every member, at his discretion, to sue for real or supposed injuries to the corporate body. It would subject other parties to embarrassment. It would lead to an inconvenient multiplication of suits.

But, it is said that a stockholder has a direct legal interest in his stock, which may be affected by an injury to the corporation; and reference is made to the well known fact, that immense investments of capital are made in corporation stocks, which constitute a large portion of the funded property of the country; and that these stocks are really nothing but certificates of title deeds showing the proportionate interest of the holder in the property of the corporation itself. This is a specious statement of the case. But the conclusion aimed at is not true. The possession of capital stock does not give a person a particle of legal interest in the corporation property. Though he possess one-half the entire stock, he is not, therefore, one-half owner of the corporate property. The corporation still owns it all. There is no divided ownership in the case. Possession of the stock merely entitles the holder thereof to the incidental rights above enumerated—a right of vote, a right of dividend, a right of faithful appropriation of the funds. These rights are very different from the right of property. It is these rights which give value to the stock as a marketable commodity.

An injury to the corporate franchises or property will undoubtedly affect the market value of the stock; but that injury is so remote, indirect and consequential, that it can lay no foundation for an action or suit against the aggressor. The stockholder must rely on the corporation, which alone is directly affected by the injury, to obtain through its proper officers, the adequate redress. Should these officers refuse to perform their duty, then only can the stockholder appeal to the courts for aid against them, and through them for aid against the wrong doer. These principles are assumed as law in the cases of Dodge v. Woolsey, 18 How. [59 U. S.] 341; Bronson v. La Crosse R. Co., 2 Wall. [69 U. S.] 302; and Memphis City v. Dean, 8 Wall. [75 U. S.] 73. In the last case, the court say: "The judgment of the court in the case of Dodge v. Woolsey [supra] authorizes the stockholder of a company to institute a suit in equity in his own name against a wrong doer, whose acts operate to the prejudice of the interests of the stockholders, such as diminishing their dividends and lessening the value of their stock, in a case where application has first been made to the directors of the company to institute the suit in its own name, and they have refused. This refusal of the board of directors is essential in order to give to the stockholder any standing in court, as the charter confers upon the direct-

ors representing the body of stockholders, the general management of the business of the company. There must be a clear default, therefore, on their part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own behalf, or for himself and other stockholders who may choose to join." A large number of cases to the same purport will be found collected in Abb. Dig. Corp. tit. "Stockholders." See, also, Grant, Corp. 290–292; Ang. & A. Corp. (6th Ed.) § 391.

This is decisive against the right of the complainant in the present case to maintain his suit. So far from showing any complicity of the directors of the Pontchartrain Railroad Company with the defendants, or even any neglect or default on their part in protecting the interests of the corporation, the bill exhibits the record of a suit brought by the company in the state court for precisely the same relief which is sought here.

Under these circumstances, I have no hesitation in coming to the conclusion that the motion for injunction must be denied, and the bill dismissed.

Let a decree be entered accordingly.

MORGAN (REINTZEL v.). See Case No. 11,683.

Case No. 9,807.

MORGAN v. ROWAN.

[2 Cranch, C. C. 148.] [1]

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

TAXATION—MASTER AND SERVANT—POLL-TAX OF SERVANT—LIABILITY OF MASTER.

The by-law of Alexandria requiring the master to pay a poll-tax for his journeymen, is not repugnant to the general law of the land, and is authorized by the charter.

Trespass for taking seven pairs of shoes as a distress for not paying a poll-tax due to the corporation for sundry journeymen shoemakers, employed by the plaintiff. Upon a special verdict the question was as to the power of the corporation to compel the master to pay a poll-tax for his journeymen. Corp. By-Laws, pp. 5, 52, 93, §§ 3, 12.

E. J. Lee, for plaintiff.

J. D. Simms, for defendant.

THE COURT (MORSELL, Circuit Judge, contrà) was of opinion that the by-law was not contrary to the general law of the land, and was authorized by the charter of the town.

MORGAN (SANTIAGO v.). See Case No. 12,331.

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

Case No. 9,808.

MORGAN v. TAPSCOTT et al.

[5 Ben. 252.] [1]

District Court, E. D. New York. June, 1871.

ADMIRALTY JURISDICTION—POSSESSORY ACTION BY MORTGAGEE OF VESSEL.

Owners of a majority interest in a ship gave a mortgage on it to M. to secure advances. The mortgage having become due, M. took possession of the interest mortgaged, and claimed to hold the ship as majority owner. Thereupon S., the master, who was a part owner in the vessel, and T., another part owner, ejected M., and he thereupon filed a possessory libel against them and the vessel, to recover possession of the ship. *Held*, that the court had no jurisdiction of the action.

[Cited in The Grand Republic, 10 Fed. 399.]

This was a libel [by William D. Morgan,] to recover possession of the ship William Tapscott, and was filed against her and against James F. Tapscott, owner of eight forty-eighths of the ship, and James H. Spencer, master, owner of six forty-eighths of her. The libel alleged that James B. Bell, being the owner of thirty-three forty-eighths of the ship Wm. Tapscott, and being indebted to the firm of E. E. Morgan's Sons, on June 4, 1869, mortgaged that interest to the libellant to secure that indebtedness; that on April 19, 1871, the moneys secured by the mortgage had become due, and the libellant on that day took possession of the mortgaged interest, and became the absolute owner thereof, and majority owner of the ship, and entitled to hold the ship and the possession thereof against every one; and that on the 24th of April, the respondents violently ejected him from the ship. The respondents, claiming to be owners of thirty-three forty-eighths of the ship, besides answering to the merits, took an exception to the jurisdiction of the court, and the cause was heard on this exception alone.

Beebe, Donohue & Cooke, for libellant.

R. D. Benedict and James K. Hill, for respondents.

BENEDICT, District Judge. I am of the opinion that the decision of the supreme court of the United States, in the case of The John Jay, 17 How. [58 U. S.] 399, is decisive of this case. According to the reasoning of the case of The John Jay, such an action as the present cannot be maintained in the admiralty. The principle of the two cases is the same, and I am bound therefore to apply here the rule laid down by the supreme court, and pronounce against the jurisdiction.

The same effect was given to the decision of the case of The John Jay [supra], in a case similar in many aspects to the present, by the learned Judge Ware. The Wm. D. Rice [Case No. 17,691]. The exception to the

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

jurisdiction of the court, is, therefore, sustained, and the libel dismissed for want of jurisdiction.

MORGAN (TARDY v.). See Case No. 13,752.

Case No. 9,809.

MORGAN et al. v. TIPTON et al.

[3 McLean, 339.] [1]

Circuit Court, D. Indiana. May Term, 1844.

PRINCIPAL AND SURETY — EXTENSION OF TIME GIVEN — FRAUD BY INDORSER — PLEADING IN EQUITY—ANSWER — NEW MATTER—WHEN ANSWER EVIDENCE—USURY.

1. If the indorsee give time to the maker of the note or the executor of a mortgage to receive the payment of it, the indorsers are discharged.

[See Bank of U. S. v. Lee, Case No. 921; Bank of U. S. v Hatch, Id. 918.]

2. If there has been fraud on the part of the indorsers, they may be made liable on that ground.

3. A defendant in his answer cannot introduce new matter in the nature of a cross bill, and require the plaintiff, and others under whom he claims, to answer it.

[Cited in Lockwood v. Cleaveland, 6 Fed. 724.]

4. Such is not the English practice, which we have adopted. Under the laws of Indiana, no notes except those given to banks are placed under the mercantile law.

5. On all other instruments, the maker must be prosecuted to insolvency, before he can have recourse to his indorser.

6. A mortgage given to secure the payment of an usurious note, the usury not being purged, is infected, and subject to the same rule as the note.

7. In Indiana, usury makes void the instrument.

8. If the holder of an usurious note, not known to be usurious by him when received, yet have a knowledge of the usury before the mortgage was taken, it makes void the mortgage.

9. Even without any notice, the mortgage having been given for an usurious debt cannot be enforced.

10. The defendant's answer is evidence, when responsive to the bill.

[Cited in Tufts v. Tufts, Case No. 14,233.]

In equity.

Fletcher & Butler, for complainants.

Smith & Wright, for defendants.

OPINION OF THE COURT. The complainants [Morgan, Buck & Co.] represent in their bill that they are merchants in Philadelphia, and that Job Eldridge and Thomas J. Cummings, being indebted to them in a sum exceeding four thousand dollars, Eldridge assigned to them a note given by Spear J. Tipton to Cummings, and by Cummings assigned to Eldridge, for three thousand three hundred dollars, dated the 17th of April, 1838, with ten per cent. interest, amounting at the time of the assignment to three thousand, seven hundred and sixty-two dollars, in payment to the complainants in part of their debt. That to secure the payment of said note, Tipton executed to Cummings a mortgage on one hundred and sixty acres of land, in Cass county, Indiana. And the complainants allege that Eldridge represented that the said sum was justly due by the said Tipton. That Cummings assigned to them the mortgage, and that a credit for the amount of the note was entered in the account of Eldridge & Cummings. That in May term, 1840, Tipton confessed a judgment on the note, including interest, amounting to the sum of three thousand nine hundred seventy-five dollars and fifty cents. That on the complainants agreeing to give a stay on the judgment of two years, Tipton executed a mortgage on several tracts of land, to secure the payment of the judgment, with seven per cent. interest thereon. And the bill states that the time for payment has long since elapsed, but Tipton has not paid the judgment or any part of it. And the complainants pray that the said Tipton, and also his co-defendants Eldridge & Cummings, may answer under oath and show why the complainants should not have the relief for which they pray. They allege that Tipton pretends that the aforesaid note was given for an usurious consideration, and also the judgment and mortgages, all of which are, consequently, void; but the complainants aver that this pretence is untrue in point of fact: and they pray, if such a defence shall be set up and sustained, by the said Tipton, that then a decree shall be rendered against Eldridge & Cummings for the amount of the note and interest. Among other interrogatories put by the complainants, the defendant Tipton is called to answer, "whether said defendant did not make and execute to said defendant Cummings the said note and mortgage, or either, and which of them, as is in the bill in that behalf named; and, if yea, whether the same were not made and executed for a good and valuable consideration and as evidence of and security for a just and subsisting debt, or for what consideration and purpose were they made and executed." Also, "whether Tipton and wife did not make, execute and acknowledge the said deed of mortgage to the complainants in their bill named, and upon the consideration and agreement therein named, or upon some other and what consideration and agreement." And the bill prays that an account may be taken of the judgment, &c., and that unless payment shall be made in a reasonable time the mortgage may be foreclosed and the lands sold, &c., and that if the said Tipton shall set up a good and equitable defence, the said Eldridge & Cummings may be decreed to pay the judgment, &c. Eldridge & Cummings demur to the bill, and the defendant Tipton, in his answer, admits the judgment, and the execution of the mortgage to secure the payment of it, as stated in the complainants' bill. And he further states, that on the 1st of May, 1836, being in great

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

want of money he loaned from Cummings five hundred dollars for six months, for which he agreed to pay two hundred and fifty dollars interest. He accordingly executed his note for seven hundred and fifty dollars, payable in six months; and if payment should not be punctually made, ten per cent. interest, from the date of the note. When the note became due, being unable to pay it, the defendant loaned, in addition to the sum before borrowed, two hundred and fifty dollars; the former note being cancelled, he executed another note to the said Cummings for eighteen hundred dollars, payable in six months, and if not paid punctually, ten per cent. interest from the date. To obtain a further indulgence for a year, and on the cancelment of the note last given, the defendant executed another note for three thousand dollars, payable in twelve months, with ten per cent. interest, from the date of the note, if the payment should not be made punctually. When that note became due, not being able to pay it, the note was cancelled, and another note for three thousand three hundred dollars, payable in six months, was executed by the defendant, which, if not paid punctually, was to draw ten per cent. interest, from its date. To secure the payment of this last note the mortgage was executed first named in the complainants' bill, and which, after the mortgage was executed to secure the payment of the judgment to the complainants, was cancelled. And these facts are stated, as defendant alleges, in answer to the above interrogatory. The defendant having answered the bill, makes his answer in the nature of a cross bill, and the complainants, with his co-defendants, Eldridge & Cummings, are made defendants; and he prays that they may be required to answer the matters and things specified in his answers and he propounds several interrogatories. Eldridge & Cummings demur to the cross bill as set up in the answer; and the complainants answer the same.

The first question for consideration is, whether Eldridge & Cummings are proper parties to the bill. The demurrer which they have filed raises this question. They are not charged with fraud or combination to the injury of the complainants. On the contrary they allege that the charge of usury set up by Tipton is untrue. But they pray if they shall not obtain a decree against Tipton on the mortgage, that Eldridge & Cummings may be decreed to pay the judgment for which the mortgage was given. There is then nothing on the face of this bill, which might not be stated against the promisee and indorser of a note in every bill to foreclose a mortgage, given by the maker of the note. Unless there be some peculiar ground of equity stated, the remedy against these persons is a legal one, and this remedy cannot be invoked by the complainants until they shall have prosecuted the maker of the note to insolvency. Under the statute of Indiana the note is not negotiable as mercantile paper. Two years' indulgence was given on the judgment, on the defendants executing the mortgage in question. This would release from liability the prior indorser if the note be valid. Whether it would release Eldridge & Cummings from their original liability to the complainants, would depend upon the fact whether the note was assigned to them in payment of their account. If it were taken in payment, as from the statements in the bill would seem to be the fact, then the only recourse of the complainants would be on the indorsement of the note. And this recourse, as has been stated, is cut off by the indulgence given to the maker of the note. If the note were given for a fraudulent or usurious consideration, so as to render it void in the hands of the complainants, on that ground they would have recourse against the assignors. And this would be the case whether the liability was sought to be enforced at law or in equity. This ground is not only not taken in the bill, but it is expressly repudiated. There is then on the face of the bill no ground stated on which Eldridge & Cummings can be held liable, and their demurrer must, consequently, be sustained. Had the bill alleged a fraudulent combination between Cummings and Eldridge to assign to the complainants, in payment of a debt due to them, a valid note, the bill might have been sustained against them and Tipton also. The facts, that the note was given to one of the partners, by him assigned to the other, and by that other assigned to the complainants, in payment of the partnership debt, would require little, if any, additional proof, if the note be usurious, to establish a fraudulent intent. The demurrer being sustained to the original bill, necessarily disposes of the demurrer by Eldridge & Cummings, to the cross bill attempted to be set up in the answer. Now if there is nothing on the face of the original bill these defendants can be required to answer, they are not proper parties to the bill, and cannot be called to respond to the interrogatories propounded in Tipton's answer. But there is another ground equally fatal to this answer being treated as a cross bill. There is no such practice recognized in the courts of the United States. In Kentucky such a practice prevails; but the chancery procedure of the courts of the United States is governed by the English practice, which requires a defendant to file a cross bill, if he desire the answer under oath, of his co-defendant or the complainant. This proceeding is regulated by the rules lately adopted by the supreme court. In this view then, the defendant having no right to set up in his answer the matter of a cross bill, objection may be made to the proceeding on motion or by a demurrer.

Two questions remain to be considered: 1. Can Tipton avail himself of the usury, under the circumstances of this case? 2. If he can, has the usury been proved?

By the second section of the act of 1833, it is provided that no rate of interest exceeding ten per cent. shall be received; and by the third section, that any one who shall violate the second section, shall be liable to be indicted and fined. These sections are embodied in the revision of 1838. On the part of the complainants, it is contended, that the confession of the judgment and execution of the mortgage by Tipton, preclude him from setting up the usury as a defence. There is no evidence that the complainants had any notice of the usury when Eldridge assigned to them the note. But the proof is clear that they had notice, before the date of the judgment and mortgage. And it would seem that a knowledge of the fact of usury, as communicated to them by their counsel, induced them to indulge Tipton two years for the payment of the judgment. The confession of the judgment and the execution of the mortgage show a settled purpose by Tipton to pay the money. Acts of confirmation of a void contract could scarcely be stronger. Usury by the Indiana statute, as construed by the supreme court of that state, makes void the contract. Where A made an usurious note to B, who transferred it to C, for a valuable consideration, without notice of the usury, and thereupon A gave a bond to C for the amount, the bond was held not to be affected with the usury. 1 Term R. 390. A bona fide purchaser, without notice, under a sale duly made, pursuant to the statute (of New York), by virtue of a power of attorney contained in the mortgage, is not affected by usury in the original debt for which the bond and mortgage were given. 10 Johns. 195. An injunction will not be granted on the charge of usury, where the party seeks the discovery of the usury, and a return of the excess beyond the lawful interest, for the usury would have been a good defence at law, and no reason is given why the plaintiff did not make the defence at law. 1 Johns. Ch. 49. Where the plaintiff was sued at law on notes alleged by him to be usurious, and he suffered judgment to be had against him, without making a defence or applying to this court on a bill of discovery in due season, he was held concluded and not entitled to relief. These are the authorities relied on to show that Tipton is, by his acts, precluded from setting up as a defence usury in the note on which judgment was entered. That by giving the mortgage, he not only waived the usury, but procured a forbearance of two years, which of itself constitutes a valuable consideration. Whether the forbearance is a valuable consideration, must depend upon the validity of the demand. If that were void, by being usurious, it does not strengthen the cause of the complainants. The complainants had no notice when the note was assigned to them, but this, it seems, does not relieve them from the effect of the usury. In Lloyd v. Scott, 4 Pet. [29 U. S.] 228, it was held "that usurious securities are not only void, as between the original parties, but the illegality of their inception affects them, even in the hands of third persons who are entire strangers to the transaction." "A stranger must take heed to his assurance at his peril, and cannot insist on his ignorance of the contract, in support of his claim to recover upon a security which originated in usury." The same doctrine is laid down in the case of Lowe v. Waller, 2 Doug. 735, Cowles v. Woodruff, 8 Conn. 35; Wales v. Webb, 5 Conn. 154; Baldwin v. Norton, 2 Conn. 161. The note then in the hands of the complainants as assignees, if usurious, was void. It was not negotiable, though that fact is not noted as important in the cases cited. Do the judgment and mortgage purge the complainants' demand from the taint of usury?

In the case above cited from 10 Johns. 195, a sale under a mortgage was held good, and could not be affected by usury in the debt for which the mortgage was given. By the statute of New York such a sale was equivalent to a foreclosure by a decree in chancery. In the case under consideration there has been no sale, and this proceeding is on the mortgage and not on the judgment. In Lamme v. Saunders, 1 T. B. Mon. 266, it was held that to a scire facias on a judgment, obtained on an usurious contract, the party will not be permitted to plead the usury in avoidance of the judgment. The same doctrine is in Cro. Eliz. 585; Ord, Usury, 98. But in the same case the Kentucky court held that a note executed for the judgment, obtained on an usurious contract is void, and the usury may be pleaded, notwithstanding a judgment was rendered for the demand. In Wickes v. Gogerly, 1 Car. & P. 396, the court held that a security given in lieu of a former security, which was tainted by usury, is void, unless in the second security a deduction is made of all sums paid usuriously under the former security. And, Preston v. Jackson, 2 Starkie, 237, the court decided that a party cannot recover on a new instrument which operates as a security for any usurious interest, although it be founded upon a new settlement of the account between the borrower and the lender, and the original securities have been cancelled. That was a case between the assignee and maker of the note. In Roberts v. Goff, 4 Barn. & Ald. 92, the court set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest. There is no pretence that either on the confession of the judgment or the execution of the mortgage the usury was purged. And as before remarked, the complainants had notice of the usury before the date of the judgment and mortgage. The present bill is brought to foreclose the mortgage, an instrument infected with usury. In Lawless v. Blakey, 4 T. B. Mon. 488; 5 T. B. Mon. 394, 470, it was held the defendant may make his defence at law, or omit to do so and come into the court of chancery, either to enjoin the judgment, or to recover the money paid

usuriously on it. But he cannot avail himself of both jurisdictions. If he make a defence at law, he must abide by it. Where usury has been sufficiently pleaded in an action at law, and on demurrer the plea adjudged bad and judgment rendered, the matter cannot be set up again in equity. The cause should be taken to the court of errors. Lamme v. Saunders, 1 T. B. Mon. 267. Where an unsuccessful defence is made before a justice of the peace, and an appeal taken to the circuit court which is dismissed for some fault in the justice or clerk, the party may still have relief in chancery, and this is a just exception to the rule that when the party makes a defence in one court he shall not apply to the other. Cave v. Davis, 5 T. B. Mon. 394; Pearce v. Hedrick, 3 Litt. [Ky.] 109.

There is nothing then in the confession of the judgment, or in the execution of the mortgage, which precludes the defendant from setting up the usury in his defence. The remaining question is, whether the usury has been proved. Cummings has been examined as a witness in the case before he was a party, but to every interrogatory which required him to speak of the usury he refused to answer, on the ground that he could not do so without subjecting himself to a criminal prosecution under the statute. A witness who fears no disclosures will never shelter himself under such a principle, where his character is involved. If, with truth, he could have denied the charge of usury he would, by his own oath, have denied it. The other witnesses show that Tipton was embarrassed, and that he was liable to be imposed on by money lenders. But these do not conduce to establish the usury. The defendants' counsel insist that it is established by Tipton's answer. If the statements of this answer be true, in the creation of the debt demanded there was a shameless exorbitancy, as reckless of principle as of public opinion. By the advance of the sum of seven hundred and fifty dollars, disconnected with any other operation, in little more than two years, by renewing the loan, it was increased to the enormous sum of three thousand three hundred dollars. And the proof of this usury it is insisted is found in the answer of Tipton. So far as that answer is responsive to the bill, it is not only evidence, but evidence which can only be overcome by witnesses, or one witness and strong circumstances. The important inquiry then is, whether, in regard to the usury, the answer is responsive to the bill.

The first interrogatory above stated, and to which Tipton is especially called to answer, involves the consideration of the note and mortgage given by him to Cummings, and "whether the same were not made and executed for a good and valuable consideration, and as evidence of and security for a just and subsisting debt, or for what consideration were they made and executed." This inquiry is as broad as language could well make it. It would seem as if the draftsman of the bill was desirous of eliciting not only the facts in regard to the justice of the debt, but a full explanation of all the circumstances connected with it. For he asks, if the bond and mortgage were not executed as "evidence of and security for a just and subsisting debt, for what consideration and purpose were they executed." Now, in reference to this interrogatory, Tipton states that the above instruments were not given as evidence of and security for a just debt, and he goes on to explain the facts in support of this denial. The debt is shown to be unjust by the unconscionable and illegal exactions made by Cummings. And this is clearly within the scope of the interrogatory. In 1 Johns. 582, it is said, where the complainant in his bill inquired into the consideration of the assignment of a note, but asked nothing as to usury; and the defendant in his answer alleged usury, the indorsement of the note was held prima facie evidence of a full and adequate consideration, and the answer of the defendant not to be evidence of the usury which ought to be proved. If this be law, it does not apply to the case under consideration. For Tipton is not only called to answer as to the consideration of the note, but also as to the justice of such consideration. He answers it was unjust because it was usurious. Now, can it be pretended that the term usury is not responsive to the bill, because he was not specially called to answer whether or not the note was usurious. Might not Tipton, if such had been the fact, have answered that the note was unjust, because it was forged, or was given without any consideration, or was fraudulently obtained. This is as much a question of common sense as of law. In Woodcock v. Bennet, 1 Cow. 711, 742, the complainant prayed a specific performance under certain articles of agreement, which had come to the defendant's hands, and called on him to answer as to the making of the articles, how they were disposed of, and when, where, and under what pretences, he got possession of them. He answered admitting the articles, but alleged that by consent of the parties, the articles were rescinded, and the seals torn off; the court of errors held that the answer being responsive to the bill and within the discovery sought, was legal and competent evidence. To the same effect is Mason v. Roosevelt, 5 Johns. Ch. 534, 542, 543. In McCaw v. Blewit, 2 McCord, Eq. 90, 101, 102, the bill charged that certain advances had been made for the use of the defendant, who answered that he had given his note for all advancements, and though this was an affirmative fact in avoidance, yet it was held conclusive until disproved. Where an affirmative fact is set up in avoidance of an express allegation in the bill, it must be proved. But where such fact is within the discovery sought for, it is evi-

dence. Some decisions, it is admitted, have gone so far as to hold that the answer is not evidence where it asserts a right affirmatively, in opposition to the plaintiff's demand. 1 Munf. 395. In the nature of things there can be no fixed rule on this point. Its decision must depend upon the words of the bill and of the answer. If the bill requires the defendant to answer whether he did not execute a certain note or bond, and the defendant admits the execution of it, and alleges that he paid it, the payment, not being within the interrogatory, must be proved. But if the bill allege that the note was given on a valuable consideration, and for a just and subsisting debt, the answer must be as to the justness of the debt and the facts of the consideration. In Reeks v. Postlethwaite, Coop. Ch. 161, an explanation, essentially connected with the answer to the bill, is held to be evidence.

As the interrogatory in the case under consideration required the defendant to state what the consideration was, and whether the note and mortgage were not given to Cummings for a subsisting and just debt, no doubt is entertained that a full response by the defendant not only authorised but required him to state fully the nature of the consideration. This he has done, and there is no proof against the statement in the answer, consequently that statement, which establishes the usury, is evidence. The mortgage to the complainants, on which this bill is filed, was given to secure the payment of the judgment, which was founded on the note infected with usury, of which the complainants had full notice. As has been already stated the judgment included the usurious interest. That interest amounted to the sum of three thousand three hundred dollars, deducting therefrom the sum of seven hundred and fifty dollars, which was the amount advanced by Cummings. The two years' indulgence, and the confession of the judgment, and the execution of the mortgage, was manifestly a plan adopted to avoid the effect of the usury by the complainants. It was substantially the substitution of a new security for the usurious note, and as the security retains the usury it is as fatally infected with the vice as the original note. Under such circumstances Tipton would not be precluded from filing his bill against the complainants and the other parties to the note, to set aside the mortgage. And if he might have done this, it is clear that he may set up the usury on a bill to foreclose the mortgage. Where the usurer, by an action at law, attempts to enforce the obligation, which is usurious, the court will sustain the defence, and will not require the defendant to pay the amount loaned, with legal interest. But where the borrower seeks relief on the ground of usury, by filing his bill, the payment of the sum loaned, with legal interest, is made a condition of his relief. And here a question arises, whether in this case, the payment of the sum borrowed by Tipton, with ten per cent. interest, ought to be exacted of him. If this were a bill for relief by him, he would be required to state that he had offered to pay the principal and interest, and the court would require the money to be brought into court, before relief would be decreed. This is a salutary and just mode of proceeding; and I do not perceive why the same thing may not be done in the present case. In the case above cited, of Roberts v. Goff, 4 Barn. & Ald. 92, where judgment had been entered on a warrant of attorney, and where there had been an agreement to give time, it was contended that the execution and judgment ought to be set aside, if the court had no doubt as to the usury, until the defendant had paid the money advanced, with legal interest, and the case of Hindle v. O'Brien, 1 Taunt. 413, was cited in support of the position. But the court overruled the case cited, and held that the instrument being void, the practice of the court had been otherwise. That being a case at law, in regard to practice, is different from the one now under consideration. The answer of the defendant sets up the usury, and admits the sum loaned, there is no difficulty, therefore, as to the relief to which he is entitled. And the question is, whether in this suit the defendant shall be required to pay the sums loaned, with interest, or the bill shall be dismissed, and the complainants or Cummings left to seek recourse against him by an action at law. The mortgage being infected with usury is void, as also the note on which the judgment was entered; no action can be sustained on either instrument, but Tipton is bound to pay the sum loaned, with interest, in equity; and this equity, by the assignments, may be considered as vested in the complainants. To give them a recourse against Eldridge & Cummings, for the original consideration of the note assigned to them by Eldridge, it may not be necessary to prosecute this equity. Their recourse must be complete, from the fact that the note was void. But no doubt is entertained that the complainants, in equity, may recover from Tipton the sum he may be bound to pay to Cummings. Then why may not the defendant be required to make such payment to the complainants, in the present case? The specific prayer of the bill is, a foreclosure and sale of the mortgaged premises. But there is a general prayer, under which, any relief in the premises, to which the complainants may be entitled, can be given. By requiring Tipton, in this case, to pay the amount for which he is liable, a circuity of action is avoided, and this is a cogent reason why the power should be exercised. In addition to this consideration, it keeps clear of the statute of limitations and other defences, which do not go to the merits of the case.

Upon the whole, it is ordered and decreed, that the defendant, Tipton, do pay to the complainants, or into the clerk's office, by the

first day of the next term, the principal loaned by him from Cummings, with ten per cent. interest thereon. The interest to be calculated up to the time of giving each note, as stated in Tipton's answer, and to be added to the principal; and interest on the entire sum, to the next note, &c. Let the calculation be made by a master.

MORGAN (UNITED STATES v.). See Cases Nos. 15,808 and 15,809.

Case No. 9,810.

MORGAN v. VAN DYCK.

[7 Blatchf. 147;[1] 11 Int. Rev. Rec. 45.]

Circuit Court, S. D. New York. Feb., 1870.

UNITED STATES—MONEY FOR DISBURSEMENT TO ARMY—ACTION BY DISBURSING OFFICER AGAINST TREASURER.

1. Under the 5th, 6th and 10th sections of the act of August 6, 1846 (9 Stat. 59), and the act of March 3, 1857 (11 Stat. 249), and the two sets of circular instructions issued by the secretary of the treasury on the 27th of May, 1857, and the act of July 17, 1862 (12 Stat. 593), and the circular of the treasury department of October 27, 1862, and the act of May 2, 1866 (14 Stat. 41), and the act of June 14, 1866 (Id. 64), and the circular of the treasury department of November 10, 1866, moneys of the United States placed in the hands of an assistant quartermaster in the United States army, for disbursement by him as a disbursing officer of the United States, and deposited by him with an assistant treasurer of the United States, continue still to be moneys of the United States.

[Cited in U. S. v. Morgan, 28 Fed. 50.]

2. Such assistant treasurer is not liable in assumpsit to such depositor for such moneys.

[3. Cited in U. S. v. National Bank of Republic, 2 D. C. 293, to the point that the United States only can sue a bank which is a designated depository of public moneys for a balance due.]

This was an action of assumpsit [by Robert C. Morgan against Henry H. Van Dyck] tried before the court without a jury.

Horace M. Ruggles, for plaintiff.

Benjamin K. Phelps, Asst. Dist. Atty., for defendant.

BLATCHFORD, District Judge. This suit is brought to recover the sum of $2,321.33, which the plaintiff alleges to be due to him from the defendant, as the balance, in the hands of the defendant, of moneys deposited by the plaintiff with the defendant during the year 1867, subject to draft on demand. At the time of the deposit of the moneys in question, the plaintiff was an assistant quarter-master in the United States' army, and the defendant was assistant treasurer of the United States at the city of New York. The moneys deposited were moneys of the United States, entrusted to the plaintiff for disbursement, as such assistant quarter-master, in payment of claims against the United States. On the merits, the defendant claims that he paid out the $2,321.33 on drafts or cheques drawn on him by the plaintiff therefor, and the plaintiff claims that such drafts or cheques were some of them forgeries of his signature, and some of them altered to larger amounts than their true amounts. Independently of the merits, however, the defendant claims that there can be no recovery against him in this action.

The 5th section of the act of August 6, 1846 (9 Stat. 59), provides for the appointment of an assistant treasurer of the United States, to be located at the city of New York. The 6th section provides, that every assistant treasurer shall keep safely all the public money at any time placed in his possession and custody, till the same is ordered by the proper department or officer of the government to be transferred or paid out, and, when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties, as fiscal agent of the government, which may be imposed by that or any other act of congress, or by any regulation of the treasury department made in conformity to law. The 10th section provides, that it shall be lawful for the secretary of the treasury to transfer the moneys in the hands of any assistant treasurer to the treasury of the United States; and, also, to transfer moneys in the hands of any assistant treasurer to any other depositary constituted by the act, at his discretion, and as the safety of the public moneys and the convenience of the public service shall seem to him to require. The act of March 3, 1857 (11 Stat. 249), amends the act of August 6, 1846, by providing that every disbursing officer or agent of the United States, having any money of the United States entrusted to him for disbursement, shall deposit the same with the treasurer of the United States, or with some one of the assistant treasurers or public depositaries, and draw for the same only in favor of the persons to whom payment is to be made in pursuance of law and instructions, except when payments are to be made in sums under twenty dollars; and that, for a failure to safely keep all moneys deposited by any disbursing officer or disbursing agent of the United States, the treasurer of the United States, assistant treasurer and public depositaries shall be held guilty of the crime of embezzlement of said moneys. For the purpose of carrying into effect the provisions of this last-named act, the secretary of the treasury, on the 27th of May, 1857, issued two sets of circular instructions. One of them was addressed to the disbursing officers and disbursing agents employed under the direction of the treasury department, and directs those officers to deposit all public moneys advanced to them for disbursement, in their hands, or which may be remitted to them, with the nearest or most convenient public depositary, to their credit, to be paid out by such public

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

depositary only upon their drafts or cheques in favor of the persons to whom payment is to be made. It further directs, that drafts and cheques upon public depositaries, drawn by disbursing officers or disbursing agents, shall not be returned to them after payment, but be held by the depositary subject to the order of the treasury department, and that the disbursing officer or disbursing agent shall be furnished, on application to the depositary, but not more frequently than once a month, with an official statement of his deposit account. The other set of circular instructions was addressed to the assistant treasurers and other public depositaries, and directs, that whenever any money shall be offered for deposit with them by any disbursing officer or disbursing agent of the United States, they shall receive it, and place the amount to the credit of such officer or agent on their books, subject to the drafts or cheques of such officer or agent only in favor of the persons to whom payment is to be made. It also directs that, whenever any disbursing officer or disbursing agent shall die or resign, or be superseded or removed, further payment of his drafts or cheques shall be at once stopped, and states that specific instructions will be given in such cases as to the payment of outstanding cheques and the disposal of the balance deposited to the credit of such officer or agent. It also contains directions as to furnishing the disbursing officer or disbursing agent, on request, with statements in detail showing the sums received for his credit, and the amounts paid out on his drafts or cheques, and directions that the drafts or cheques shall not be returned to the disbursing officers or disbursing agents after payment, but shall be kept in such manner as to be accessible if required by the accounting officers in the adjustment of the accounts of such officers or agents. On the 17th of July, 1862, an act was passed (12 Stat. 593), providing, that any officer or agent of the United States who shall receive public money which he shall not be authorized to retain as salary, pay or emolument, shall render monthly accounts thereof to the proper accounting officer of the treasury, and shall, in default thereof, be deemed a defaulter, and be subject to all the penalties prescribed by the 16th section of the act of August 6, 1846. By a circular issued by the treasury department on the 27th of October, 1862, and addressed to the assistant treasurer at New York, the attention of that officer is called to the act of July 17, 1862, and a strict compliance by him with the requirements of that act is enjoined upon him. By the act of May 2, 1866 (14 Stat. 41), it is provided, that all moneys represented by cheques or drafts issued by any disbursing officer of any department of the government of the United States, upon any assistant treasurer, where such moneys are represented on the books of the assistant treasurer as standing to the credit of such disbursing officer, and such drafts shall have been dated before July 1st, 1863, and shall have been issued in liquidation of a debt due from the United States, and shall remain outstanding on the 1st of July, 1866, shall be deposited by the treasurer of the United States, to be covered into the treasury by warrant, and that the like course shall be pursued, at the close of every fiscal year, in respect to all drafts and cheques which shall then have remained outstanding for three years or more. The act of the 14th of June, 1866 (14 Stat. 64), provides, that it shall be the duty of every disbursing officer of the United States having any public money entrusted to him for disbursement, to deposit the same with the treasurer or some one of the assistant treasurers of the United States, and to draw for the same only as it may be required for payments to be made by him pursuant to law, subject to the power of the secretary of the treasury to specially authorize such public money to be deposited or kept otherwise, under certain circumstances. This act provides for the punishment, as a felony of a violation of its provisions. On the 10th of November, 1866, a circular was issued by the treasury department, amending the circular of May 27th, 1857, by providing, that cheques drawn by disbursing officers or disbursing agents, who may die, resign, or be superseded or removed, shall be paid from funds on hand to their credit, unless the same have been drawn more than four months before their presentation, or there are reasons for suspecting fraud, or circumstances which would lead a judicious officer to decline to pay the same.

It is quite apparent, from these provisions of law and these regulations made by the treasury department, that moneys of the United States which were placed in the hands of the plaintiff for disbursement by him as a disbursing officer of the United States, were not the less public moneys belonging to the government of the United States, after they came to the hands of the plaintiff, and after they were deposited by the plaintiff, as such disbursing officer, with the defendant, as assistant treasurer of the United States, than they were before they reached the hands of the plaintiff. The moneys were never the property of the plaintiff. He is bound, indeed, to account for them to his superior officer; but, if he shows that he has, in compliance with the laws and the regulations, deposited them with a designated depositary, and that he has not withdrawn them from the custody of such depositary, he does account for them. To an action brought against him by the United States for such moneys, it is a complete defence for him to show such a state of facts. If, as was suggested at the trial, the plaintiff has paid a second time into the treasury of the United States the moneys which he so deposited with the defendant, that circumstance alone cannot create in favor of the plaintiff against the defendant a right of action which did not otherwise exist. The

moneys were not voluntarily deposited by the plaintiff or voluntarily received by the defendant. There was nothing in the nature of a contract or agreement between the parties, which could be broken so as to lay a foundation for an action of assumpsit. For a breach of duty by the defendant in not paying genuine drafts by the plaintiff for moneys deposited, the defendant is responsible only to the common superior of both parties—the United States. The obligation of the defendant was created by law and not by contract and was an obligation to the United States and not to the plaintiff. I find for the defendant and direct a judgment to be entered in his favor, with costs.

Case No. 9,811.

MORGAN v. VOSS.

[1 Cranch, C. C. 109.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

CONTINUANCE — ISSUE NOT MADE — REQUEST OF DEFENDANT.

If at the last calling of a cause for trial, the issue be not made up, and no rule to plead has been laid, the court will continue the cause at the request of the defendant, although it be the fifth term after the appearance term.

This was the fifth term after the appearance term. A rule to declare had been laid on the plaintiff at the last term. The declaration was filed at this term. No rule to plead had been laid. The cause was now called for trial, it being the last time of calling the cause, according to the rule of the court. The plaintiff insisted upon plea and issue instanter. The defendant contended for a continuance.

THE COURT continued it. CRANCH, Circuit Judge, doubting; thinking the plaintiff ought to be nonsuit under the act of assembly of Maryland.

[See Case No. 9,812.]

Case No. 9,812.

MORGAN v. VOSS.

[1 Cranch, C. C. 134.] [1]

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

CONTINUANCE—DEPOSITION NOT RETURNED—AFFIDAVIT.

The court will not continue the cause because a commission to examine a witness is not returned, unless the materiality of the witness be shown by affidavit.

Commission to Virginia, issued March, 1802. New commission ordered July, 1802. Issued September, 1802. Interrogatories filed December, 1802.

Motion by P. B. Key, for the defendant, to continue the cause for want of a return of the commission. No affidavit of the materiality of the witness. Refused.

[See Case No. 9,811.]

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

MORGAN (WATERMAN v.). See Case No. 17,259.

MORGAN, The CHARLES. See Case No. 2,618.

MORGAN ENVELOPE CO. (CONE v.). See Case No. 3,096.

Case No. 9,813.

In re MORGANTHAL.

[1 N. B. R. 402 (Quarto, 98);[1] 25 Leg. Int. 92; 6 Phila. 468.]

District Court, D. Pennsylvania. March 14, 1868.

BANKRUPTCY—AMENDMENT TO SCHEDULES—CLOSE OF FIRST MEETING—CONDITIONS.

1. A bankrupt cannot amend his schedules, by adding other names to the list of creditors, as of course, after the warrant, and after the close of the business of the first meeting.

2. The register may report provisionally as to the conditions on which the amendments should be allowed.

[In the matter of John Morganthal, a bankrupt.]

CADWALADER, District Judge. The petition of this bankrupt returns, of unsecured debts, in Schedule A 3, eleven items for, together, about six hundred dollars. He now applies to amend by adding to the list twenty other debts, for amounts together exceeding that sum in a small amount. He proposes, at the same time, to add, by way of amendment, six items of outstanding credits, not in the original schedules of his estate, to the amount of, together, $314.25, which is not a small proportional addition to the property at first disclosed. The register seems to be of opinion that amendments of this kind should be allowed, as of course, after the warrant, and after the close of the business of the first meeting. This would be a very dangerous practice, where such culpable laxity is indicated as this case exhibits. The clerk will send to him a copy of the register's and court's opinions, in the Case of Ratcliffe [Case No. 11,578], 2d and 23d November, 1867. The amendments asked for in the present case cannot be allowed, except upon such conditions as may prevent injustice to creditors. What those conditions ought to be may be reported provisionally by the register. There certainly must be a new list of creditors made out and sent to every known creditor, with a notice of the amendment of the schedule of property. Whether a new warrant will be necessary, depends upon the question, whether a new general notice by publication will

[1] [Reprinted from 1 N. B. R. 402 (Quarto, 98), by permission.]

be requirable. On this point the register's report will furnish the materials for a decision.

MORIATY (YOUNG v.). See Case No. 18,167.

MORIN (UNITED STATES v.). See Case No. 15,810.

Case No. 9,814.

In re MORITZ et al.

[5 Law Rep. 325.]

District Court, S. D. New York. Aug., 1842.

VOLUNTARY PETITION BY PARTNERS — CONSTRUCTION OF THE 14TH SECTION OF THE ACT OF 1841.

[In the matter of Moritz and Pinner, bankrupts.]

Various objections were interposed by creditors to a decree of bankruptcy being rendered, only two of which were particularly pressed in this stage of the case. The petitioners, many years since, were bankers and partners in Germany, where it is charged, they became insolvent fraudulently, and afterwards absconded to the United States. Their partnership was dissolved before they left Germany, and was never renewed in this country, nor have they contracted any joint debts here. All their partnership debts were contracted in Europe, to foreign creditors. The petition was joint and several, praying a decree of bankruptcy in their favor as copartners, and also in behalf of each partner, individually.

James F. Brady, for petitioners.

P. J. Joachemssen and Charles Edwards, for creditors.

OPINION OF THE COURT. The court did not discuss the point, whether foreign partners could become voluntarily bankrupt here in respect to debts, creditors, and estate, entirely foreign, but decided, that partners, as such, could not by voluntary petition be declared bankrupts, except under the 14th section; that, if the provisions of that section are applicable at all to the case of voluntary bankruptcy, they are so only in the case of those who, at the time the petition is presented, are partners; that no number less than the whole of a firm can petition for a decree of voluntary bankruptcy under the 1st section, and that it is at least doubtful whether the application of that section is not limited to cases of compulsory bankruptcy in respect to copartnerships; that in case of compulsory bankruptcy, the same reasons would not exist for restricting proceedings to cases of existing partnerships, and, accordingly, the decision in this case is not to be considered as prejudging that point. The court further decided that proceedings in bankruptcy as at law, and in equity, could not be conducted in the united names of parties who have no common interest, and do not seek a common decree, that individuals cannot associate and make a joint and several petition, with a view to a separate decree, in favor of each applicant, and that accordingly the petition, in this case being disallowed as to the two petitioners conjointly, could not avail them individually; and it was dismissed with costs; with leave, however, to amend it, if that could be done without varying its essential structure and statements, so as to retain it as the sole petition of one of the parties, at their election, between themselves.

Case No. 9,815.

MORLOT v. LAWRENCE.

[1 Blatchf. 608.] [1]

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

CUSTOM DUTIES — MANUFACTURERS OF COTTON — LUSTRES — ARTICLES COMPOSED OF TWO OR MORE MATERIALS — STATUTES — REPEAL BY IMPLICATION.

1. Linen lustres, camlet lustres, toile du nord, and lustres, composed of linen and cotton, are, under the tariff act of July 30, 1846 (9 Stat. 42), chargeable with a duty of 25 per cent. ad valorem, under Schedule D, as "Manufactures composed wholly of cotton not otherwise provided for."

[Cited in U. S. v. United States Tel. Co., Case No. 16,603; Cohen v. Phelps, Id. 2,964.]

2. They are subject to this classification, under the provision of section 20 of the tariff act of August 30, 1842 (5 Stat. 565), that "on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable;" which section 20 is not repealed, either directly or by necessary implication, by the act of 1846.

[Cited in Lottimer v. Lawrence, Case No. 8,521; Barnard v. Morton, Id. 1,005; U. S. v. United States Tel. Co., Id. 16,603; Cohen v. Phelps, Id. 2,964.]

3. The effect of said section 20 is not to impose a duty on an article not provided for in the act of 1846, or a different duty from that act; but it simply gives a rule of construction, to determine under what schedule in the act of 1846 a given article shall be ranged for the purpose of charging the duty.

4. The act of 1846 is limited almost exclusively to establishing the rates of duty chargeable, leaving to laws then existing to provide for the assessment and collection.

5. A statute can be repealed only by an express provision of a subsequent law, or by necessary implication; the two must be so repugnant that they cannot stand together or be consistently reconciled, and then the later one will prevail.

[Cited in U. S. v. The Cuba, Case No. 14,898.]

[Cited in brief in State v. Dawson, 16 Ind. 43.]

This was an action [by Charles Morlot] against [Cornelius W. Lawrence] the col-

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

lector of the port of New York, to recover back an excess of duties paid by the plaintiffs, on certain goods known in trade and commerce as linen lustres, camlet lustres, toile du nord, and lustres, and composed of linen and cotton. They were charged with a duty of 25 per cent. ad valorem under Schedule D of the tariff act of July 30, 1846 (9 Stat. 46), on the ground that by section 20 of the tariff act of August 30, 1842 (5 Stat. 565), they were chargeable under said Schedule D as "manufactures composed wholly of cotton, not otherwise provided for." The plaintiffs claimed that they were liable to a duty of only 20 per cent. ad valorem, under section 3 of the act of 1846, as a non-enumerated article. A verdict was taken for the plaintiffs, subject to the opinion of the court on a case to be made.

Daniel Lord, for plaintiffs.
J. Prescott Hall, Dist. Atty., for defendant.

NELSON, Circuit Justice. It is admitted that, if the commercial designation is to govern, the articles in question in this case are not enumerated in any one of the schedules given in the act of 1846, and would of course fall within the third section of that act. But it is insisted, on the part of the defendant, that construing the act of 1846 in connection with the twentieth section of the act of 1842, the articles are chargeable with the highest rate of duty imposed by the former upon manufactures composed wholly of any one of the materials from which such articles are manufactured; and that, being composed of linen and cotton, they fall under Schedule D of the act of 1846, which charges a duty of twenty-five per cent. ad valorem upon manufactures of cotton.

That part of the twentieth section of the act of 1842 which is claimed to be still in force, is as follows: "And on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." This provision was first introduced in the tariff act of September 11, 1841 (5 Stat. 464, § 2), and reversed the general rule of construction adopted in favor of commerce, which was to rate the article according to that component part of it which was subject to the lowest duty.

It is insisted on the part of the plaintiff, that this twentieth section is either directly or by necessary implication repealed by the act of 1846, and must therefore be disregarded in expounding its provisions. The eleventh section of the latter act provides: "That all acts and parts of acts repugnant to the provisions of this act be, and the same are hereby repealed." The first section declares: "That from and after the first day of December next, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, and on such as may now be exempt from duty, there shall be levied, &c., the following rates of duty." Then follows a list of schedules, extending from letters A to I of the alphabet, containg an enumeration of all articles subject to duty, with the rate to be imposed, and also of the free list exempt from duty. The third section declares, that there shall be levied and collected on all articles not specially provided for in the act, a duty of twenty per cent. ad valorem.

It must be admitted, therefore, that every article imported into the country, which is chargeable with any duty to the government, is either specially enumerated in the several schedules in the act of 1846, or falls within the third section, as non-enumerated, and pays the duty there prescribed; and that, when it is claimed a duty is chargeable upon an article, as being particularly specified, that article must be found under some one or other of the schedules above mentioned. It was the policy of the act: 1. To enumerate all articles specially upon which different rates of duties were to be levied; and 2. To impose a uniform rate upon all articles not enumerated. This is quite obvious from a careful perusal of its several provisions.

But, admitting all this, it by no means necessarily follows that the clause referred to in the twentieth section of the act of 1842 is not still in force, or is repugnant to or inconsistent with the provisions or policy of the act of 1846. The effect of the clause is not to impose a duty upon an article which is not provided for in the act of 1846, or a duty different from the one there intended to be imposed. This was not the object or effect of it as applied to the act of 1842, in which it was incorporated. That clause enacts simply a principle or rule of construction, which, when applied to a dutiable article, determines within what class it should be rated. In other words, speaking with reference to the act of 1846, it determines under what schedule the article should be ranged for the purpose of charging the duty.

The article in question will illustrate our view. It is a manufacture of linen and cotton, and, as such, does not fall within any of the articles specially described in any of the schedules in the act of 1846. Of course, it would be charged, under the third section of that act, with a duty of twenty per cent. ad valorem, as a non-enumerated article. But, if we apply the rule of construction provided for in the twentieth section of the act of 1842, namely, that on articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable, then it is an article enumerated under Schedule D of the act of 1846, being classed, by reason of such construction, as a manufacture "composed wholly of cotton, not otherwise provided for." It is proper to remark, that the words "not otherwise pro-

vided for" mean, "not otherwise provided for among the enumerated articles"; for, if the words were also intended to include the residuary clause embraced in the third section, the duty of twenty-five per cent. could not be charged even upon manufactures composed wholly of cotton.

Suppose this clause of the twentieth section had been incorporated in the act of 1846; there surely would not have been anything in it repugnant to or even inconsistent with the provisions of that act. On the contrary, it would have been in aid of it, prescribing a rule by which to determine under what enumerated head to range an article of a given manufacture.

It is true that, in many instances, the manufactured article consisting of two or more component materials is specifically enumerated and provided for in the act of 1846; and it has been argued, that this implies an exclusion of any other mode of ascertaining the duty chargeable upon articles of this description. But it will be seen, on looking into the act of 1842, in which the clause was expressly incorporated, that articles of a similar description were frequently specially provided for there; notwithstanding which, the clause was deemed material. Instances of that kind are not as frequent in the act of 1842 as in that of 1846, but they are sufficiently so to afford a full answer to the argument.

There are, too, many other sections in the act of 1842 still in force besides the one in question; and which are among the most essential in providing for the levying and collecting of the proper amount of duties chargeable on the imported article—such as the sixteenth and seventeenth sections.

The act of 1846 is limited almost exclusively to the establishment of the rates of duty chargeable on the goods, leaving to the laws already in existence to provide for the assessment and collection of the same. We must, therefore, distinguish carefully between those provisions of former laws that are repealed, and those that are not, in order to carry out the intention of congress, and ensure a full and complete operation of the revenue system.

The general principle is, that a statute can be repealed only by an express provision of a subsequent law, or by necessary implication. The two acts must be repugnant to each other, so much so that they cannot stand together, or be consistently reconciled with each other; then, the latter, being the latest expression of the will of the law-maker, must prevail.

There being no necessary repugnancy here, but the contrary, we perceive no ground for holding that the clause referred to in the twentieth section of the act of 1842 has been repealed. Consequently, the proper rate of duty on the articles in question in this case was that imposed and paid. Judgment for defendant.

Case No. 9,816.

MORLOT v. LAWRENCE.

[3 Blatchf. 122.] [1]

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

CUSTOMS DUTIES—VALUE OF GOODS—APPRAISERS' VALUATION — TIME OF EXPORT — TIME OF PURCHASE.

Where, on an invoice of woollen goods from Paris, the appraisers took, as a guide to their valuation, the market price of the goods in the principal markets of France at the period of exportation, and, on their report, the value was raised 10 per cent. and more above the invoice value, and, for that cause, 50 per cent. on the amount of legal duties was added thereto, pursuant to section 17 of the act of August 30th, 1842 (5 Stat. 564), *held*, that under section 16 of the said act, the appraisers were required to appraise the goods at their value at the time of purchase, and that the appraisement was void, and that the duties on the increase in valuation, and the penalty, were illegally exacted.

[Cited in U. S. v. Doherty, 27 Fed. 733.]

This was an action brought in the supreme court of New York, to recover back an excess of duties, and a penalty imposed by the defendant [Cornelius W. Lawrence], as collector of the port of New York, on an invoice of fifteen cases of woollen goods, imported by the plaintiff [Charles Morlot]. It was removed into this court by certiorari.

The invoice was dated Paris, June 15th, 1845, and the entry was made at the custom-house, July 31st, 1845. On appraisement, the goods were valued at an average of 20¼ per cent. above the invoice prices, the appraisers, in valuing the various cases, putting the lowest difference at 10 $^{2}/_{10}$ per cent., and the highest at 35 $^{7}/_{10}$ per cent. They took the market price of the goods in the principal markets of France at the period of exportation to the United States, as a guide to their valuation. On the report of the appraisers, the value was raised 10 per cent. and more above the invoice value, and, for that cause, 50 per cent. on the amount of legal duties was added thereto, pursuant to section 17 of the act of August 30th, 1842 (5 Stat. 564). Against these charges a protest, with the proper distinctness and precision, was made in writing by the plaintiff, and he now sought to recover back all exacted of him beyond the legal duties on the invoice valuation.

BETTS, District Judge. The appraisement was void in law, and did not justify the defendant in imposing and exacting duties on a valuation higher than the invoice valuation, or in levying any additional duties thereto. The appraisers were required, by the 16th section of the act of August 30th, 1842 (5 Stat. 563), to appraise the goods at their value at the time of purchase, and the instructions of the secretary of the treasury did not authorize them to appraise the value at the time of exportation. The illegality having been specifically pointed out to the defendant by the

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

protest, he is liable for the exaction made under the appraisement.

Judgment for the plaintiff for the sum so paid, (the amount to be adjusted at the custom-house), together with interest.

MORNING GLORY, The (SCOTT v.). See Case No. 12,542.

Case No. 9,817.

The MORNING STAR.

[4 Biss. 62.] [1]

District Court, D. Indiana. May Term, 1866.

COLLISION—FOG—LOOKOUT—TOW-BOAT LICENSE—PASSENGER—DAMAGES—APPORTIONMENT—DETENTION—INTEREST.

1. What degree of care must be used on rivers in the navigation of steamboats, in order to avoid collisions?

2. Under the navigation laws of the United States requiring different licenses for passenger boats and tow-boats, a boat licensed as a tow-boat does not violate those laws by carrying a single passenger, and does not, for that cause, lose her redress for an injury done her by a collision.

3. A steam-tug is not within the rule prescribed by the board of supervising inspectors under the act of congress requiring a steamer when running in a fog to sound her fog whistle. But it may often be her duty to do so under general principles of admiralty law.

4. The rules prescribed by the board of supervising inspectors touching necessary care in navigation are not exclusive. Under the general maritime law there are many other rules equally imperative.

5. If the navigators of a vessel by their negligence directly contribute to her injury by a collision, her owner cannot recover the full amount of his loss. If both boats are in fault, the damage is apportioned.

6. It seems that, in navigating our rivers, a lookout at the stern of the vessel is not required, except when she is backing.

7. In measuring damages in a case of collision, all the direct and immediate consequences should be considered.

8. In settling the amount of the damages in a case of collision, the detention of the injured vessel while undergoing repairs ought to be regarded.

9. A steamer, while towing four barges laden with goods, suffered an injury by a collision with another steamer. The libel did not state to whom the barges and the goods they carried belonged. *Held*, that the libellant could not recover for the delay to the barges and their lading occasioned by the collision.

10. On damages sustained by a collision, interest should be allowed from the day on which the injury happened till the day when judgment is rendered for them.

In admiralty.

T. D. Lincoln, for libellant.

T. W. Gibson, for respondents.

McDONALD, District Judge. This is a proceeding to recover for a steamboat collision on the river Ohio. John Cobb, the libellant, charges that on the 31st of October, 1864, he was the owner of the steamer Crescent City engaged in the carrying trade on the rivers Ohio and Mississippi; that while in that business, and while his boat was being landed at Dixon's Bend, about three miles below the city of Evansville, the steamer Morning Star collided with the Crescent City, damaging her to the amount of eight thousand five hundred dollars; and that this collision was occasioned by the negligence of the managers of the Morning Star.

Zachariah Shirley, the president, and Joseph H. Bruce, the superintendent, of the Louisville and Evansville United States Mail Line Company, intervene for themselves and for the owners of the Morning Star, and answer, admitting the collision, but denying the negligence charged, and averring that the collision was caused solely by the negligence of the persons in charge of the Crescent City, and claiming that damage done to the Morning Star by that collision ought to be adjudged against the libellant.

The evidence in the cause is very voluminous, and, in several points, very conflicting. I gather from it the following facts:

On the night of October the 30th, 1864, both the boats lay at the Evansville wharf. Both were bound on voyages down the Ohio. The Crescent City had in tow four or five hay and coal boats. At about five and a half o'clock next morning, she pursued her way down the river about three miles into Dixon's Bend, where, discovering before her a heavy fog, she stopped her wheels preparatory to landing on the Kentucky side. She had been running about seven miles an hour.

Soon after her departure from Evansville, the Morning Star also followed, running about twelve miles an hour, and overtook the Crescent City about three miles below Evansville. The Crescent City was built for a tow-boat; the Morning Star was a very swift passenger boat. Each was duly licensed,—the one as a tow-boat, the other as a passenger boat.

From the time the boats left Evansville till the collision, no person on either boat saw the other boat till a moment before the accident. The morning was clear and fine. There was little fog on the river above the place of the collision. Both boats had a full complement of officers and men. Neither of them sounded a fog whistle before the collision. Neither of them had a stern lookout. On the Crescent City, Brasher, the pilot, was at his proper place, and Bush, the captain, was standing on the deck just before the pilot-house, both keeping a careful observation ahead. On the Morning Star, the pilot, Daulley, was the only lookout, and was at his proper place. It was at that hour the turn for Barr, the mate, to keep a lookout ahead; and on leaving Evansville he took his proper place for that purpose; but sometime before the collision he abandoned his post, went into the texas, and remained there till the accident happened.

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

The bank of fog in Dixon's Bend could plainly have been seen by the lookouts on each boat when they were from a quarter to a half mile above it. At the time of the collision, the Crescent City had been floating with her wheels stopped, in the upper edge of this bank of fog, about five minutes, and was in the usual channel, about one hundred feet from the Kentucky shore. At the moment of collision, the proper officer was just about to ring up the hands to land her. The river at that point was about a half mile wide, and the channel about three hundred yards wide. The Morning Star, without checking her speed, ran into this bank of fog; and at the moment of doing so, her pilot discovered the Crescent City just ahead, and instantly rang his bell to stop; but it was too late. The ringing and the collision were nearly simultaneous. The Morning Star struck the Crescent City with great force, five or six feet forward of the stern-post on the starboard side, carrying away the after-guard, staving in the hull a few inches above the water some twenty feet in length, carrying away the water-wheel beam, plummer block, gallows frame, and starboard wheel, and was checked up on the after end of the cylinder timbers. The disabled boat was immediately landed on the Kentucky shore, and the Morning Star, after pausing a few minutes, pursued her way down the river. Both boats were somewhat injured by the collision; but the injury to the Crescent City was far the greater.

I think that the evidence satisfactorily establishes all the foregoing facts. And from them two inquiries arise, namely: Did any fault on the part of the managers of the Morning Star directly contribute to the collision? Did any fault of those on board of the Crescent City directly contribute to it?

I. As to the Morning Star: We have seen that, though the Morning Star, in passing from Evansville to the place of the collision, must have been most of the time in sight of the Crescent City, and a part of the time very near her, yet no person on the former boat saw the latter that morning till a moment before the accident. How shall we account for this remarkable fact? The morning was bright. Daylight had dawned when the first boat rounded out from the Evansville wharf. There was scarcely any fog between that wharf and the place of the disaster. The river there is straight enough to give an unobstructed view in most places through a distance of a mile. At the sharpest bend there, the view of the channel is unobstructed for at least a quarter of a mile. The Crescent City was not in the fog over five minutes. The collision occurred about sunrise. In view of these facts, it seems to me certain that if any lookout on the Morning Star had diligently watched ahead, he must have seen the Crescent City nearly all the way down till she entered the fog bank. For a portion of the way, the boats, while yet both in a clear atmosphere, must have been in close proximity. To me it is evident that the only possible reason why the Crescent City was not seen, before she entered the fog, by the pilot of the Morning Star, is that he omitted properly to look ahead. If he had looked before him, he would undoubtedly have seen the Crescent City, and have avoided the disaster. The omission to do so was gross negligence, and contributed directly to the collision.

Now, it is clear that at the time of this collision, and for sometime before, the only lookout on the Morning Star was the pilot, Daulley. The captain, Bruce, was in bed, asleep. Barr, the mate, whose duty it was to be on the lookout, tells us himself that he "went into the texas when the boat got straightened down the river between the wharf-boat and the mouth of Pigeon creek." He "went in to change his boots." He left no one to watch in his place. He remained in the texas till the collision. He says he was in the texas before the accident while his boat ran half a mile; and I think the evidence shows it is a good deal more than half a mile from the mouth of Pigeon creek to the place of the collision; it is probably more than two miles. All this time he was neglecting his duty; and this neglect was manifestly a proximate cause of the disaster.

But even if Daulley and Barr had both been at their proper places and keeping a vigilant lookout, I think the Morning Star is chargeable with gross negligence in plunging into the fog bank at the speed at which she did, without giving any notice of her approach. The counsel for the respondents insists that the Crescent City was enveloped in dense, impenetrable fog; and so many of the witnesses swear. Is it careful navigation for any boat, even after she has sounded her whistle, to rush, as the Morning Star did, into an impenetrable fog bank at the rate of twelve miles an hour?

There is, indeed, much contradiction between the witnesses touching the density of the fog. But, so far as the duty of the Morning Star is concerned, I do not see how the truth on that point can make any difference. She was in fault whether the fog was dense or not. If it was very dense, she acted recklessly in running into it with such speed; if it was not dense, her managers, if they had kept a proper lookout, would have seen the Crescent City in time to have prevented the collision.

In taking this latter view, I do not consider as important the fact proved, that under an act of congress the proper board of supervising inspectors had promulgated a rule, then in force, to the effect that, "when a steamer is running in a fog or thick weather, it shall be the duty of the pilot to sound his steam whistle at intervals not exceeding two minutes." It is not important to inquire whether the Morning Star, at the time of this collision, was in a condition in which the spirit of this rule would reach her. For if no such special rule had existed, it would have been, on gen-

eral principles of maritime law, a reckless and unjustifiable act thus to plunge into such a fog, at the rate of twelve miles an hour, without sounding the steamer's whistle or giving any other warning of her approach.

I conclude, therefore, that the negligence of the managers of the Morning Star directly contributed to the disaster in question. Moreover, both by the evidence and the law of the land, nothing is clearer than that the pilot alone is not a sufficient lookout ahead on steamers. The evidence of several of the witnesses shows that this is true. And a high American authority declares that "in respect to a lookout, it is not enough that a person is stationed in the pilot-house for that purpose; but a vigilant watch should be placed in the forward part of the steamer, so situated as to be able to discern vessels at the earliest moment." Pars. Mar. Law, 198, 199. And this is settled law in the supreme court of the United States. St. John v. Paine, 10 How. [51 U. S.] 557; The Genessee Chief v. Fitzhugh, 12 How. [53 U. S.] 443. In the case of The Europa, 2 Eng. Law & Eq. 557, it was held that a steamer going at the rate of twelve and a half knots an hour, in a dense fog, seven hundred miles from land, must have the most complete lookout that can be adopted; and that merely one lookout on the bridge, a quartermaster on the top gallant forecastle, one at the wheel, and another at the con, was not a sufficient lookout. It may, indeed, be said that this last case differs from the one at bar, as being the case of a steamer navigating the ocean. But it may well be answered that there is more danger of collisions in navigating the Ohio amid a fog, where all passing boats must keep within a comparatively narrow channel, than on the ocean where the channel is as wide as the sea itself.

II. Did any fault of those on board of the Crescent City contribute to the accident? It appears by the evidence that this steamer was fully manned. Her captain was on the lookout before the pilot-house. Her pilot was at his post giving due attention. And her engineers were both at their places promptly responding to orders. The captain especially seems to have been acting with proper care. He swears that as they proceeded from Evansville "there was a light, misty fog on the river, but not so that we considered it dangerous to run. We could easily see either shore. When we got down into Dixon's Bend, there was a heavy bank of fog ahead of us about three quarters of a mile; and we ran close into the Kentucky shore, about seventy-five or one hundred feet from the shore, preparatory to landing. Our calculation was to stop and let her lose her headway, and then back her in. About a minute or a minute and a half after we rung our bell to stop, the Morning Star ran into us." This has the appearance of a simple, reasonable, truthful story. It is uncontradicted by any witness, and it challenges my belief. And indeed I cannot see that there is the slightest evidence of any fault on the part of the Crescent City, except in three particulars which are earnestly and ably urged by the respondents' counsel. To these we will now attend.

1. It is urged that at the time of the collision, the Crescent City was carrying passengers; that she was not licensed as a passenger boat according to the act of congress; that she was therefore unlawfully in the place where she was injured; and that, consequently, she has no legal right to demand redress for that injury.

If this boat was really a passenger boat within the meaning of the acts of congress on the subject of licensing steam vessels, it must, in view of the decision in the case of The Maverick [Case No. 9,316], be a very serious question whether the libellant can, under any circumstances, succeed in this cause.

But was the Crescent City "a carrier of passengers" within the purview of the acts of congress? It is certain that she was licensed merely as a tow-boat. It is in proof by Joseph C. Small, a witness for the libellant, that he was a passenger on her. He swears thus: "I was a passenger. I got on board at Louisville, and was going to Shawneetown. I had charge of the barges on the trip before." This is all the evidence touching passengers. Does it make the boat a passenger boat within the purview of the acts of congress? It does not appear that he paid for his passage. As he had been in charge of the barges on the last trip of the boat, it might be fair to infer that he was carried gratis. If what he relates makes the Crescent City a passenger boat, then every vessel, licensed merely as a freight or tow-boat, must at its peril see that no human being not an employé shall, under any circumstances, go a single mile on board of it. I have met with no authority on this point. But I think the act of congress should receive a more liberal construction. I think that no single individual passing on a tow-boat from one point to another on the line of its voyage, whether he goes gratis or not, would make it a passenger boat within the meaning of the law. "One swallow does not make a summer." I suppose the law, in mentioning boats "carrying passengers," means at least more than one passenger, and probably includes such vessels only as make the carrying of passengers a business, or at least hold themselves out to the public as such carriers. I think, therefore, that this objection ought not to prevail.

2. It is contended on the part of the defense that, under the circumstances, the Crescent City ought to have sounded her fog whistle. It seems pretty clear that the rules prescribed by the board of supervising inspectors under the act of congress which requires steamers when running in fog to sound their steam whistles, does not apply to tow-boats. See Act Aug. 30, 1852, § 43 (10 Stat. 61).

And if the act did apply to such vessels, it might be doubted whether the Crescent City, when she had stopped her wheels and was preparing to land, could be said to be running in fog within the meaning of said rule. Yet it may be urged with much reason that, without any special rule under said act, any vessel may be in such a condition as to make it her duty to give warning by sounding her steam whistle. Of this there can be no doubt. It were absurd to suppose that since the promulgation of the rules prescribed by the board of supervising inspectors, a due observance of all those rules includes every duty devolving on the navigators of steamers. When none of these special rules apply, the more general rules of admiralty law govern; and one of these rules is that "a plaintiff in a cause of collision must prove both care on his own part, and the want of it in the defendant." 1 Pars. Shipp. & Adm. 529. And it is clear that if the plaintiff by his negligence substantially contributes to the collision, he must at least bear half the loss. Sills v. Brown, 9 Car. & P. 601.

It is, then, a grave question whether the Crescent City, under the circumstances of the case, omitted the exercise of proper care by not sounding her whistle, and thereby substantially contributed to the collision. What is proper care, depends on the particular circumstances of each case. In the case at bar, it appears that when the captain of the Crescent City discovered ahead of her a fog bank, he determined to land, and was, with reasonable diligence, preparing to do so. He stopped the wheels, ran, as he swears, "close into the Kentucky shore, about seventy-five or one hundred feet from the shore, preparatory to landing," and was about to ring up the hands for that purpose when the collision occurred. All this seems to have been proper care. But his boat was in the usual channel, and was in a fog; ought then the whistle to have been sounded? This must, I think, depend, to a great extent, on the density of the fog, as the captain and pilot then saw and judged of it. There is no doubt that these two men were keeping a proper lookout; nor is there any question as to their skill. One of them thought and spoke about sounding the whistle; and he swears that he did not deem the fog so dense as to require it. A number of witnesses in the defense, indeed, testify that the fog was extremely dense. And so it may have seemed to them, and may have been, at the moment when, and the point from which, they observed it. But, on the other hand, the captain, the pilots, the first and second engineers, the carpenter, and several other witnesses, all of whom were on the Crescent City, and seem to have had fair opportunity to observe, swear that the fog in which they were was not very dense, that they could see plainly all around them, and that they could see even the shores on both sides of the river. Now as I have said in regard to the witnesses on the defense, I suppose I may justly say in relation to these witnesses, what they thus state may have seemed to be the fact, and may have been the fact, at the moment when, and at the point from which, they observed the fog. Under these circumstances, the captain and the pilot at the wheel say that they judged the sounding of the whistle to be unnecessary. It may be that they would have judged otherwise if they had seen things as the witnesses for the defense say they saw them. It may even be that they judged unwisely. It can hardly be believed that they intentionally erred. They acted, I think, on good motives and on their best judgment. I suppose, therefore, that, under the circumstance, they are not chargeable with any negligence in not sounding the fog whistle.

3. It is urged in defense, that the Crescent City was guilty of carelessness in not having a lookout at her stern at the time of the disaster. Excluding from consideration the depositions on this point, taken since the submission of this cause, I think the weight of the evidence is, that the omission of a stern lookout was not, under the circumstances of the case, want of due care. Such a lookout is certainly unusual; and it appears that experts deem it unnecessary, except when the steamer is backing or running astern. Nor do I see how, if there had been such a lookout, he could have prevented the collision. I think there is nothing in this point.

It remains only to settle the amount of damages in which the Morning Star ought to be condemned. In measuring damages in a case of collision all the direct and immediate consequences are to be taken into consideration. 1 Pars. Mar. Law, 204. Whether damages ought to be allowed for the detention of the injured vessel while undergoing repairs, was formerly much questioned. And the United States supreme court once ruled against the allowance. Smith v. Condry, 1 How. [42 U. S.] 28. But the contrary doctrine is now settled. Barrett v. Williamson [Case No. 1,051]; Williamson v. Barret, 13 How. [54 U. S.] 101; 1 Pars. Mar. Law, 204, note 2.

Whether, under the circumstances of the present case, anything ought to be allowed for the detention of the four boats which the Crescent City had in tow at the occurrence of the disaster, may be a question of doubt. The libel alleges that the libellant was the owner of the Crescent City; but it fails to tell us who owned the barges she had in tow. Its only averment on the point is, "that at the time of the said injury the said Crescent City had four barges in tow,—three loaded with hay, and one with coal,—which were being taken to Memphis to be delivered to the United States government there." From this language, I rather infer that these barges with their contents were the property of the government; and, if so, I think it clear that

the libellant can not recover for their detention. Therefore, I shall allow nothing for the detention of the barges.

As to the detention of the Crescent City for necessary repairs, I have no hesitation in allowing damages. To determine how much ought to be allowed for this is, however, a little difficult. On this point there are but two witnesses, Capt. Bush, and the pilot, Brashier, and they differ both as to charter value per day and the time of the detention.

As to the value per day, Bush puts it at one hundred and twenty-five dollars, and Brashier at one hundred. They appear to be equally competent to judge of that question. Under such circumstances, I deem it best to follow Lord Bacon's rule, namely, that, in a question of doubt as to value, the lowest sum shall be taken. I shall therefore allow one hundred dollars per day for the time of detention.

Touching the time during which the boat was necessarily detained for repairs, Bush says it was thirty days, and Brashier swears it was about twenty. Bush superintended the repairs every day but one, and kept the accounts, and paid the bills; and being captain of the boat, he would be more likely to know the exact time than the pilot Brashier. I think, therefore, he is the more reliable witness as to the time, and I shall follow him on this point, and allow for thirty days' detention for necessary repairs.

Then, the amount of damages for the detention, to effect the necessary repairs, will be three thousand dollars. On this sum I will allow interest from the 31st of October, 1864, to this day,—two hundred and seventy-one dollars and fifty cents.

As to the expense of repairs, including work, materials, loss of time and boarding of crew, &c., Capt. Bush, who kept the account and paid out these expenses, is the only witness. He gives the various items in his deposition, and being uncontradicted, and apparently fair, I allow them as they stand on his testimony, at thirty-seven hundred and seven dollars and twenty-six cents.

On this sum I allow interest from December 1, 1864, to this day,—three hundred and sixteen dollars and forty-four cents. The aggregate is seven thousand two hundred and ninety-five dollars and twenty cents. I therefore assess the libellant's damages at the sum of seven thousand two hundred and ninety-five dollars and twenty cents. And the proper judgment will be rendered in favor of John Cobb, the libellant, for this amount, and also for the costs of this suit.

NOTE. At common law, if both vessels are in fault, neither can recover in the case, though the fault be ever so unequal; while in admiralty the loss is equally divided. See 1 Pars. Shipp. & Adm. 525, 526, and note 1 et seq., for an exhaustive collection of authorities. If one of the colliding vessels is guilty of some fault, she must show fault in the other, and that her own negligence was not the cause of collision. Ward v. The Fashion [Case No. 17,154]; 1 Pars. Shipp. & Adm. 529, and note 2. The proper position of a lookout is generally forward, but reference must be had in all cases to the question whether the lookout could not see as well where he was as in any other position. The Morning Light, 2 Wall. [69 U. S.] 550, 558; 1 Pars. Shipp. & Adm. 576–578. Quaere, how far is a sailing vessel bound to keep a lookout for vessels coming up from astern? The Emma, Holt, Rule of Road, 209. If the collision was not owing to the absence of a watch the vessel will not be considered in fault. Mellon v. Smith, 2 E. D. Smith, 462. "Whether damages are to be allowed for the detention of the injured vessel while undergoing repairs, may not be certain; but the later, and we think the better, mode allows them." 1 Pars. Shipp. & Adm. 539, 540, and note 1, and cases there collected.

Case No. 9,818.

The MORNING STAR.

[6 Blatchf. 154.][1]

Circuit Court, S. D. New York. June 8, 1868.

SALVAGE — CORPORATION ORGANIZED TO PERFORM SALVAGE SERVICE—RATE OF COMPENSATION ALLOWED.

Where a corporation, having authority, by its charter, to own vessels to be employed in saving vessels wrecked or in distress, and to take all compensation and salvages which, by law and usage, enure to private persons, was employed by the owners of a vessel which had gone on shore in a fog, to relieve her from a situation of peril, and did so: *Held*, that compensation for the service ought to be allowed to the corporation on the principle of allowing a liberal compensation for the use of the apparatus furnished, and for the skill with which it was handled in the service performed, but not on the principles governing the rate of compensation in the case of a salvage service. In this case, the court allowed what it regarded as a reasonable compensation for the work and labor performed and the materials used.

[Cited in The J. F. Farlan, Case No. 7,313; The Stratton Audley, Id. 13,530. Cited, but not followed, in The Birdie, Id. 1,432. Cited in Baker v. Hemenway, Id. 770.]

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

This was a libel in rem, filed in the district court, to recover salvage for saving the steamship Morning Star, which ran aground on Deal Beach shore, New Jersey, about forty miles from the city of New York, on the 31st of July, 1863. The vessel was valued at $150,000, and her cargo at $200,000. The libellants were a corporation created under the laws of the state of New York, with authority to own vessels to be employed in "towing, aiding, protecting, and saving vessels and cargoes wrecked or in distress, wherever such wrecks occur, on the high seas, or in the various arms of the seas, rivers running to the same," &c. The act of incorporation also allowed the company, among other things, to "take all compensa-

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

tion, towages, and salvages which are customary and usual, and which, by law and usage, enure to private persons," &c. The district court awarded to the libellants $2,500, and interest, and the libellants appealed to this court.

Clifford A. Hand, for libellants.
Robert D. Benedict, for claimants.

NELSON, Circuit Justice. The libellants were employed by the owners of the Morning Star to go down from the city of New York and relieve her from her perilous situation on the beach. This was done with expedition and skill, by the use of appliances kept on hand by the company. The vessel had gone on the beach in a fog, and, although there was a considerable swell upon the sea, the wind was light, and very little difficulty was encountered in towing her from the sandbar on which she grounded and setting her afloat. She sustained no injury.

The court below allowed, as compensation to the company, for the service rendered, $2,500, and interest. There is evidence in the case that the owners of the vessel, when applied to by the company to perform the service, had inquired as to the expense; and that, although no definite answer was given, $2,000 or $2,500 was suggested as the probable amount. There is no proof in the case but that this would be a reasonable compensation, as for work and labor; that is, there is no evidence to the contrary. As a salvage service, I think the sum allowed was inadequate, upon the principles governing the rate of compensation in that class of cases.

The learned judge below appears to have been strongly inclined against regarding this company as a salvor, within the reasons and principles which govern the admiralty, in awarding compensation for admitted salvage service. All the persons representing the company, engaged in the service in question, receive no part of the salvage money. They are employed at a permanent salary, or, if temporarily, for the given service, at day's wages. All considerations, therefore, of personal sacrifice or gallantry, in encountering imminent perils in rescuing vessels in distress, are necessarily excluded, in fixing the rate of compensation. If allowed by the court, all beyond the salaries or wages enure to the benefit of the company. I agree that a liberal compensation should be allowed for the use of the apparatus furnished, which was ample and well adapted to the purposes intended, by the present company, and for the skill with which it was handled in the service performed; but, in the sense of the law governing salvage compensation, I have great difficulty in awarding it to the libellants. As at present advised, I must deny it; and as, for aught that appears, the compensation allowed by the court was reasonable for the work and labor and materials used, the decree below is affirmed.

Case No. 9,819.

MORRELL v. CRAEFE.

[2 Wash. C. C. 380.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

EJECTMENT—POSSESSION FOR SIX YEARS—PENNSYLVANIA ACT—SHERIFF'S DEED.

The act of assembly of Pennsylvania, passed the 26th of March 1785 [2 Smith's Laws Pa. p. 301], which declares that no sheriff's deed, made bona fide, and for a valuable consideration, where quiet and peaceable possession has been had for six years, shall be adjudged defective for not producing any writ of fieri facias, &c., is a full answer to any objections founded on the process and its execution, under which the party acquired the title.

This was an ejectment for a house and lot in Philadelphia. The lessor of the plaintiff claimed under a sheriff's deed, made in virtue of a judgment, fieri facias, and venditioni exponas, against one Doyle. At the sale, the property was purchased and paid for by Mr. Ball, but intended for the family of Doyle, who remained in possession by permission of Ball, from the time of the purchase in 1770. In 1784, Ball sold so much of the entire lot as repaid his advance, leaving the part for which this ejectment is brought, which he conveyed to one Stewart, (who married Doyle's daughter,) and his wife, remainder to the heirs of the wife. The title was objected to, the return to the fieri facias, the inquisition, and the venditioni exponas, not being produced; and the purchaser not having obtained actual possession of the property.

BY THE COURT. The act of assembly, passed on the 26th of March 1785, which declares that no sheriff's deed, made bona fide, and for a valuable consideration, where quiet and peaceable possession hath been had of the same for six years, shall be adjudged defective, for not producing in court any writ of fieri facias, &c., or any returns thereon, is a full answer to the objection. The issuing of the necessary writs in this case, is proved by the docket of the court, and the possession of Doyle was the possession of Ball, under whom he held.

The defendant offered a deed from Mrs. Stewart to a person under whom he claims, made during her husband's life, whilst he was in Ireland, and which was given in order to raise money for her support. The court refused to let it be read, unless the death of her husband was proved, because, as the deed of a feme covert it was void.

The defendant then read a deed from Stewart, of his life estate, and contended that it was not clearly proved that Stewart was dead. The evidence was that he had not been heard of for many years. His wife married again, and two of the witnesses de-

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

posed, that they had heard some years ago that he was dead.

WASHINGTON, Circuit Justice (charging jury). The whole cause turns upon the fact, whether Stewart is dead; because, if alive, the plaintiff who is only entitled to an estate in fee after his death, cannot recover. But the evidence in the cause, raises so strong a presumption of his death, that unless the contrary had been shown, the jury ought to consider the fact as proved

Verdict for the plaintiff.

MORREN v. KEEN. See Case No. 7,004.

Case No. 9,820.

In re MORRILL.

[1 Hask. 542.] [1]

District Court, D. Maine. April, 1874.

BANKRUPTCY — DISCHARGE — ASSENT OF MAJORITY OF CREDITORS.

A discharge should be granted to a bankrupt, under the bankrupt act of 1867 [14 Stat. 517], when a majority in number and value of the aggregate of both partnership and individual creditors, who have proved their debts, assent thereto, even though such majority of either class do not assent.

In bankruptcy. Petition by a bankrupt [Moses Morrill] for his discharge.

A creditor of the copartnership in which the bankrupt was a partner objected, because the assent of a majority in number and value of the firm creditors who had proved their debts had not been obtained, and the assets were not equal to fifty per cent. of the claims proved.

Moses M. Butler, for petitioner.

Tobias T. Snow, for objecting creditor.

FOX, District Judge. Morrill was adjudged bankrupt individually and as a member of the firm of Thrasher, Blanchard & Co., and now moves for a discharge from his liabilities as a member of this firm, as well as from his individual indebtedness. The discharge is opposed by one of the creditors of the firm. Various allegations are set forth in the specifications of objections, all of which were abandoned at the hearing, with but one exception, and that is, that a majority in number and value of the creditors of the firm who have proved their debts have not assented in writing to his discharge, and that the assets of the estate are not equal to fifty per cent. of the claims proved against the estate. The certificate of the register states the whole number of the claims proved, upon which the bankrupt is individually liable as principal debtor, as sixteen, amounting to $17,272.14, and that thirteen of these creditors, whose claims amount to $17,095.08, have duly assented in writing to his discharge; that seven claims amounting to $3,507.11 have been proved against Thrasher, Blanchard & Co. and that none of the firm creditors have filed their assent. The assent therefore, of a majority in number and value of the aggregate of both classes of creditors, has been duly filed, but not of the firm creditors considered independently of the individual creditors, and for this cause, the discharge from the firm debts is opposed by a firm creditor on the ground that the rights of one class of creditors is not to be controlled or affected by the other class, but that in order to be discharged from his firm debts the bankrupt's estate should either be equal to fifty per cent., or the assent of a majority in value and number of the firm creditors who have proved their claims should be obtained.

A somewhat diligent and careful examination of the bankrupt reports does not show that this precise question has ever been before the court for adjudication under our present bankrupt law, and yet it can hardly admit of question that it has frequently arisen in the administration of the law.

The language of the 33d section of the act as it now stands is, "no discharge shall be granted to a debtor whose assets shall not be equal to fifty percentum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as a principal debtor, and who shall have proved their claims be filed, &c."

That partnership liabilities may be proved against the estate of one member of a firm was decided at an early day by Blatchford, J., in Re Frear [Case No. 5,074], and I am not aware that the decision has been questioned; but whether the creditor receives any dividend from the individual estate must depend on the application of the rules established for marshalling the assets. The language of the discharge, as provided in the 32d section is, that the bankrupt is "discharged from all debts and claims, which by said act are made proveable against his estate;" and it therefore follows that a discharge when obtained would relieve the party from his copartnership, as well as his individual liabilities. Such was the operation given to a discharge under the insolvent law in Massachusetts in Lothrop v. Tilden, 8 Cush. 375.

In a note to Horsey's Case, 3 P. Wms. 25, it is stated to have been decided as early as 1721, that "if there are two partners and one of them becomes a bankrupt, and on a separate commission his certificate is allowed, this not only discharges the bankrupt of what he owed separately, but also of what he owed jointly and on the partnership account; because by the act of par-

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

liament, the bankrupt when making a full discovery and obtaining his certificate is to be discharged of all his debts. Now the debts he owed jointly with another are equally his debts, as what he owes on his separate account, consequently he is to be discharged of both his joint and separate debts." In Re Leland [Case No. 8,228], Judge Hall says, "It will hardly be claimed, that a discharge properly granted to a bankrupt upon his separate petition, would not bar a debt against him, for which he was jointly liable with another."

It is conceded that the bankrupt is entitled to be discharged from his individual liabilities, as he has the assent of a majority in number and value of such creditors, and if the court is correct in its conclusion that the effect of such a discharge without any restriction or qualification would be to exonerate him from existing joint liabilities, and there not being found anywhere in the act any authority for such limited discharge, it would seem to follow, that the act does not contemplate the distinction of classes of claims here contended for, and that the assent of a majority of each class was not requisite before a discharge from the several classes could be granted.

Debts due from a firm are the debts of each of the individual members of the firm; each member is liable for them in solido, and they are to all intents and purposes his debts. By the terms of the act each one of the firm is liable for them as a principal debtor, and the holders of them are his creditors to whom he has become liable as a principal debtor.

The argument of the counsel for the objecting creditor is, "that the rights of creditors to prove their claims, and the right of the debtor to claim his discharge, are co-extensive and commensurate;" and he insists that the partnership creditors have no right to prove their claims against the individual estate; but this is hardly a correct statement of the rights of the parties. Proceedings in bankruptcy constitute but a single cause, one warrant only is issued all the creditors of the firm and the separate creditors of each member are allowed to prove their debts in such proceedings, and the assets are ordinarily apportioned among them according to the nature of the liability; but whether an individual debt shall receive any portion of the partnership effects, or whether a copartnership debt shall share in the individual estate, does not depend entirely on the nature of the debt itself, whether it is joint or several, but it is subject to the rules established by the act and courts of equity for marshalling the effects among the claims so proved. If the copartnership has no assets, and there is no solvent partner, a copartnership claim is entitled to share in the individual assets equally with the private debts of the copartners; and if the copartnership assets are more than sufficient to discharge all claims against the copartnership, the interest of the bankrupt in the surplus would go in satisfaction of his private debts; the debts therefore, whether joint or several, are all proveable in the proceedings, subject to the contingencies of payment from the one estate or the other, as they shall arise in the settlement of the estates.

The 36th section of the act relating to proceedings against copartnerships declares, that "the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be, if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in like manner, as if they had been commenced and prosecuted against one person alone." This language confirms me in my view, that the present objection should not be sustained. The certificate of discharge is to be granted or refused, the same as if this proceeding was against Morrill alone. If upon the matter of his right to a discharge he is to be considered the only party to this proceeding, the effect of the proof of debts, whether joint or several, would seem to be, that they are to be all considered for this purpose as his debts, to form one common aggregate, to ascertain whether the requisite assent is obtained.

Partnership liabilities are as much debts of Morrill as his own individual debts; his whole estate has been taken from him by these proceedings, and whether the assets are applied to the payment of one claim or another should not affect his right to a discharge. The origin of the debt, or the joint liability of others for its payment, so far as respects the question here presented, are in my view of no importance. The assent of a majority of all who have legal claims upon him, and proved under the proceedings in bankruptcy, is requisite for his discharge; and when obtained, the court should not inquire whether some other party may or not be responsible for a portion of the demands from which a discharge is asked, it being always to be remembered that the liability of the other joint contractors can in no way be involved in such discharge. All the parties so assenting are creditors of the bankrupt. All have an equal interest in preventing his discharge, if he is not entitled to it; and the court does not perceive any sufficient reason for such a construction of the act, when it is clearly opposed both to its literal signification, and to the general purposes and design of the bankrupt law. Discharge granted.

Case No. 9,821.

In re MORRILL.

[2 Sawy. 356; [1] 8 N. B. R. 117.]

District Court, D. Nevada. March 17, 1873.

BANKRUPTCY—SURETY—SECTION 19 OF BANKRUPT ACT—CHATTEL MORTGAGE—POSSESSION IN MORTGAGOR.

1. A surety may pay the debt for which he is contingently liable, so as to satisfy the requirements of section nineteen of the bankrupt act [of 1867 (14 Stat. 525)], by giving his individual note, if such note is expressly received as payment.

2. A mortgage fraudulent and void as to creditors, is so as to the assignee in bankruptcy.

3. By statute in Nevada, a chattel mortgage is void as to creditors, unless immediate possession of the mortgaged property is taken and retained by the mortgagee.

4. Independent of the statute, a mortgage of goods is fraudulent and void as to creditors, if the mortgagor is allowed to remain in possession of and sell and traffic with them as his own.

Petition filed by John Piper, praying that a security proved by him may be adjudged a valid lien upon certain personal property now in the possession of, and about to be sold by, the assignee. The material facts are these: In the fall of 1866, the bankrupt was the owner of a drug store in Virginia City, and being indebted to Hostetter, Smith & Dean, of San Francisco, conveyed the whole stock and business to them, with a verbal understanding that when paid out of the business they should convey the property back to him. In January, 1867, [George P.] Morrill went back into possession of the store and goods, and carried on business as agent of Hostetter, Smith & Dean, and so continued until May 1 of that year, at which time one Van Voorhies, a brother-in-law of Morrill, at Morrill's request, advanced $4,000 to Hostetter, Smith & Dean, and took from them a bill of sale, absolute on its face, but accompanied with a verbal understanding between Morrill and himself, that when he was paid he should deed back to Morrill. There was no change of possession at this time. Morrill remained in the store conducting the business, as he says, as agent of Van Voorhies. This continued until May 31, 1870, Morrill, in the meantime, making some payments out of the proceeds of the business to Van Voorhies. On the last named date, Morrill induced Piper, the petitioner, to join him in making a joint and several note to one Drexler for $1,200. The money so raised, being the balance due him, was paid to Van Voorhies, and under Morrill's direction he made a bill of sale to Piper. This bill of sale was absolute on its face, and purported to convey to Piper the whole stock of drugs, property used in carrying on the business, and fixtures. It was, however, accompanied with this verbal understanding: That Morrill should remain in possession, and carry on the business in his own name, until such time as Piper should please to take possession; that when Piper did take possession he was not to "sell out the business," but conduct it until he was paid, or the note on which he was liable for Morrill had been paid out of the proceeds. After this bill of sale, Morrill remained in possession, put up a sign bearing his own name, and carried on the business in his own name, buying, selling and dealing with the property, in all respects, as owner. Piper never attempted to take possession until October, 1872, when Morrill, fearing other creditors of his would put him into bankruptcy, sent word to Piper, by one Kaneen, a mutual friend, that he had better take possession, whereupon a new bill of sale of everything in and about the store was made by Morrill to Piper, and possession taken by him about a month before the commencement of proceedings in bankruptcy against Morrill. Piper took possession, in the language of Morrill, with the understanding that he was to carry on the business until the receipts paid him; he was not to sell out the business; and after Piper was thus paid, he was to deed back to him, Morrill. Before proving his claim, Piper gave Drexler his individual note in payment of the joint one of himself and Morrill, taking a receipt from Drexler, which shows that the new note was received in full payment of the old one.

Mitchell & Stone, for petitioner.
David Bixler, for respondent.

HILLYER, District Judge. Piper being, as between himself and Morrill, a surety, the assignee objects that he has not paid the debt for which he was contingently liable, as he is required to do by section nineteen of the bankrupt act, before he is entitled to prove his claim. Piper's individual note having been received expressly as payment, satisfied the original contract. Drexler's remedy upon it is gone. Piper, therefore, has paid the debt. Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253; Downey v. Hicks, 14 How. [55 U. S.] 240; In re Ouimette [Case No. 10,622].

It was next argued very earnestly for Piper that, admitting the transfer to be fraudulent and void as to creditors, if it is good as between Morrill and Piper, the assignee in bankruptcy represents the bankrupt, takes the property subject to all equities existing at the time of commencement of proceedings in bankruptcy, and cannot avoid a transfer which the bankrupt could not. This is no longer an open question in this circuit since the decision of Sawyer, Circuit Judge, in Edmondson v. Hyde [Case No. 4,285], holding expressly that if a transfer of property is void as to creditors it is so as to the assignee; and since Judge Sawyer's decision the supreme court of the United States has upheld the same doctrine, saying that when a sale is fraudulent and void as to the

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

creditors of the bankrupt, the assignee is authorized by the express terms of the fourteenth section of the bankrupt act to pursue the property so attempted to be transferred. Allen v. Masey, 17 Wall. [84 U. S.] 352.

The principal question in the case remains. If the conveyance to Piper is to be regarded, as it was on the argument, as a mortgage, is it a valid security as against the creditors of Morrill? It is not, for two reasons:

Firstly—It is invalid, except between the parties, because Piper did not take and retain possession as required by law. Section sixty-six of an act of the state of Nevada concerning conveyances contains this provision: "No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee." This provision is copied word for word from a statute of California, and, at the time of its adoption, had been construed by the supreme court of that state, so that it may be presumed the language was used with reference to the interpretation given it by the courts of the state whence it was taken. State v. Parkinson, 5 Nev. 15. The construction given by the supreme court of California is, that the delivery of possession must be immediate, and that a mortgage, void at its inception for want of such delivery, is not made valid by a subsequent taking of possession before a creditor acquires his lien. Chenery v. Palmer, 6 Cal. 121; Woods v. Bugbey, 29 Cal. 471; Edmondson v. Hyde, supra.

This, it seems to me, is the true rule, and carries out effectually the intention of the legislature. The weight of authority in this country seems to be that in these cases, in the absence of any statute law to the contrary, fraud is a question of fact for a jury, and that the retention or possession by a vendor or mortgagor is not per se fraud. Warner v. Horton, 20 How. [61 U. S.] 448. And, also, that a delivery of possession before a creditor acquires a lien on the goods is sufficient. Clute v. Steele, 6 Nev. 335, and cases there cited. The section in question is, then, not merely declaratory of the common law; it is remedial. In the first place, since the statute, the retention of possession by the mortgagor is fraud, per se, as to all persons except the parties, and no longer a question of fact for the jury. In the second place there must be a change of possession at the time the mortgage is made, thus curing that defect in the common law which allowed the mortgagor to remain in possession of the mortgaged property, notwithstanding the mortgage, and enabled him to appear as owner of the goods, to those dealing with him, and obtain a false credit upon the strength of this possession and apparent ownership. To hold that the mortgagee, after permitting the mortgagor to retain possession of the mortgaged property more than two years, can, as is argued, by taking possession a short time before the bankruptcy proceedings are commenced, make his mortgage good as against those who have become creditors of the mortgagor during those two years, will strip of all remedial force and practically repeal this statute, and this I shall not be the first judge to do. The case of Clute v. Steele, supra, in which the supreme court of Nevada held, upon a sale of personal property not accompanied with an immediate change of possession, "that a delivery before the attachment of any lien of a creditor will satisfy the law and validate the sale," is not decisive in this case. The court was dealing with other sections of the statute, the language of which differs essentially from section sixty-six.

Secondly—This mortgage is fraudulent and void as to creditors, independent of the statute. Taking the bill of sale and accompanying agreement together, it appears that, notwithstanding the mortgage, the mortgagor was to remain in possession of the goods and continue to sell and traffic with them as his own, so long as the mortgagee pleased. This was, in fact, done for over two years with the knowledge and acquiescence of the mortgagee. There is, on this point, a direct conflict among the state courts not to be reconciled. In some, as in those of Massachusetts, Maine and Michigan, the fact that the mortgagor is left in possession with permission to sell and deal with the goods, is considered presumptive evidence of fraud only, which may be explained by proof that the mortgage was in fact bona fide. The weight of authority, however, in the state courts appears to be that the fraud in such case is an inference of law, and that as to creditors the mortgage is void. Such is the rule in New York, New Hampshire, Ohio, Illinois and some other states, and which is decisive here in the supreme court of the United States. In Leavenworth v. Hunt, 11 Wall. [78 U. S.] 391, the mortgagors remained in possession of the goods, and the testimony tended to show that they continued to sell the goods with the assent of the mortgagee, and the court says: "If the facts were found by the jury, which the testimony tended to establish, the mortgage was fraudulent and void as to creditors," citing Griswold v. Sheldon, 4 Comst. [4 N. Y.] 581; and Wood v. Lowry, 17 Wend. 492. See, also, Lukins v. Aird, 6 Wall. [73 U. S.] 78; Paul v. Crocker, 8 N. H. 288; Catlin v. Currier [Case No. 2,518].

The second bill of sale to Piper was so clearly a void transfer under the thirty-fifth section of the bankrupt act, that all claim under it was abandoned on the argument. So much of Piper's proof as sets up a security must be expunged from the assignee's record of claims. It is so ordered.

Case No. 9,822.

MORRILL v. ARMSTRONG.

[4 Am Law Rev. 194.]

District Court, D. West Virginia. 1869.[1]

GRANTS—LANDS INCLUDED—EJECTMENT—FORFEITURE FOR FAILURE TO REGISTER FOR TAXATION—RELEASE OF FORFEITURE—BAR.

[This was an action by Lott M. Morrill against James Armstrong and others to recover a trust of fifteen hundred acres of land.]

The instructions given to the jury in this case, by Judge Jackson, embraced the following important points: A grant from the commonwealth of Virginia for land, made in 1796, upon a survey in 1795, including within its limits prior claims of others, not specified otherwise than by the mention of the estimated quantity, excludes, by the purport of the grant, lands previously granted, as well as those entered but not granted, within the exterior boundaries of the later grant. Where a person had adverse possession of the lands of another, which was forfeited for the failure of the owner to have the same entered on the books of the commissioner of the revenue, and pay the taxes thereon, and became vested in the commonwealth in 1836, the adverse character of the possession ceased; and when the commonwealth afterwards, by a special act of the legislature, passed in 1844, upon a redemption which was made in 1845, released the title to individuals, neither the possession before the forfeiture, nor that continuing while the title was in the commonwealth, can be added to that after the release took effect, so as to bar an action for the lands.

[From the judgment in this case in favor of the plaintiff a writ of error was sued out by the defendants, from the supreme court, where the judgment of this court was affirmed, Mr. Justice Strong dissenting. 14 Wall. (81 U. S.) 120.]

MORRILL (McKAY v.). See Case No. 8,846.

Case No. 9,823.

Ex parte MORRIS.

In re FOYE.

[2 Lowell. 424;[2] 16 N. B. R. 572.]

District Court, D. Massachusetts. Aug., 1875.

BANKRUPTCY—EQUITY OF UNSECURED CREDITOR—DEFICIENCY—WAIVER.

1. If a mortgage, pledge, or lien be given by a principal debtor to secure his surety, and both principal and surety become insolvent, the creditors, whose claims the surety is bound for, have an equity to require the mortgaged property to be applied to the discharge of their debts specifically.

[Cited in Mathews v. Abbott, Case No. 9,275.]

2. This equity depends upon the equities between the parties to the mortgages, and if by negligence of the creditors the surety is discharged, or if the state of accounts between the parties is such that the surety has lost his lien, the creditors have no lien.

3. The creditors must first apply their security, and prove against either estate for the deficiency only.

4. If the holders of the claims secured by the mortgage to the surety prove in full, they waive their security.

5. Whether, if the estate of the surety will pay no dividend, the pledged property should not be surrendered to the assignee of the principal, quaere?

[Cited in Re Baxter, 12 Fed. 76.]

Doctrine of Ex parte Waring.[2]—In June, 1874, George F. Foye mortgaged his stock and fixtures to his brother, John W. Foye, to secure him for all liabilities he had assumed or might assume for the mortgagor. Within a few months both parties became bankrupt, and the petitioner was chosen assignee of both estates. He realized about $9,000 from the sale of the mortgaged property, and nothing of importance from any other assets in either case. Upon his petition, asking directions for the distribution of the assets, the register notified all creditors, and from his report and from the papers on file it appeared that John W. Foye had indorsed for his brother for more than $15,000, all of which debt was outstanding, and formed the bulk of the indebtedness of both estates; that the creditors, holding the notes, had proved against both estates, and most of them had voted for the assignee; that none of them had appeared before him at the hearing of this petition; that one general creditor of George F. Foye had appeared and filed a brief, which was sent to the court. The register reported that the money received for the stock and fixtures should be divided among the creditors of George F. Foye without distinction, because the holders of the notes had waived any equity they might have had, by proving in full, and voting under both bankruptcies; and because the assets of John W. Foye being insufficient to pay any dividend, his creditors had suffered and could suffer no injury from the indorsements, and therefore the mortgage had become inoperative.

LOWELL, District Judge. It is well settled that if a mortgage, pledge, or lien is given by a principal debtor to secure his indorsee or other surety, and both become insolvent, the holders of the notes or other debts for which the surety is bound have an equity to require the property to be applied to the discharge of their debts specifically. Many of the American cases upon this subject are reviewed by the late Judge Hall in Jaycox's Case [Case No. 7,242], and by the learned American editors in 1 Lead. Cas. Eq. (Ed. 1859) p. 163. The English decisions I have not seen fully collected, but have had occasion to examine them more than once.

[1] [Affirmed in 14 Wall. (81 U. S.) 120.]

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

[2] The peculiar equity discussed in this case is known in England by the name of the leading case, Ex parte Waring (19 Ves. 345).

Some of the more important of them are Ex parte Waring, reported in three places, 19 Ves. 345, 2 Rose, 182, 2 Glyn & J. 404; Powles v. Hargreaves, 3 De Gex, M. & G. 430; Ex parte Carrick, 2 De Gex & J. 208; Ex parte Copeland, 3 Deac. & C. 199; Ex parte Prescott, Id. 218; Inman v. Clare, Johns. Eng. Ch. 769; Bank of Ireland v. Perry, L. R. 7 Exch. 14; City Bank v. Luckie, 5 Ch. App. 773; Ex parte Dewhurst, 8 Ch. App. 965.

Under all these decisions, in both countries, the holders of the notes would prima facie have the equity which I have referred to. But this equity is obtained by subrogation, and depends upon the equities between the parties to the mortgage. Thus it has been held that if the surety has been discharged by the negligence of the creditors, or if the state of the accounts between the parties is such that the surety has lost his lien, the creditors have no equity: Hopewell v. Cumberland Bank of Alleghany, 10 Leigh, 206; Bibb v. Martin, 14 Smedes & M. 87; Vaughan v. Halliday, 9 Ch. App. 561; Ex parte Parr, Buck, 191.

It is further settled that the creditors must work out their equity, and apply their security so as to prove against either estate for the deficiency only: New Bedford Sav. Inst. v. Fairhaven Bank, 9 Allen, 175; Jaycox's Case [supra] per Hall, J.; Powles v. Hargreaves, 3 De Gex, M. & G. 430; Banner v. Johnston, L. R. 5 H. L. 157; Ex parte Joint-Stock Discount Co., L. R. 19 Eq. 1, 10 Ch. App. 198. There are many other cases, but none opposed to these. The reason is, that the equity is primarily that of the two estates, and the general creditors of each have a right to say that the security shall be applied before the debt is proved. Indeed, the decision of Ex parte Waring was put wholly upon the equities of the two estates, and several judges since have said that the secured or quasi secured creditors have no equity of their own; but this distinction has not been found useful, as the courts are bound to apply the equity, whoever may ask for the application, and they have found themselves obliged to apply it, in many of the cases, upon the petition of the secured creditors.

It results from this rule, that if the holders of the notes, or other privileged debts, prove in full, they waive their security: New Bedford Sav. Inst. v. Fairhaven Bank, 9 Allen, 175; Jaycox's Case [supra], per Hall, J. I desire, however, to make one or two remarks on those cases. In Jaycox's Case, Judge Hall said, very justly, that if the holders of the secured notes proved in full against the estate of the bankrupt principal, without the consent of the solvent surety, they would thereby release the surety to the extent of the value of the security, and at the same time abandon the security for the benefit of the estate of the principal. He had also said that the assent of the surety, or the fact that he was bankrupt, would probably make no difference, as it clearly would not, because the general creditors of the principal have a right to insist that full proof shall not be made against the principal's estate, except upon waiver of the security for their benefit. He, however, permitted the proofs in full against that estate to stand, apparently upon the ground that the resulting rights of the parties might be settled in another action, which is technically sound; but the bankrupt court has undoubted power, and it would sometimes be its duty to see that the property was actually surrendered, at least before dividends are paid upon the proofs. A court of law, in an action arising out of the very case before Judge Hall, refused to give the surety the benefit of such a supposed release: Merchants' Nat. Bank v. Comstock, 55 N. Y. 24.

In the case in 9 Allen, it was held, and very justly, that proof against both estates waived the security. The consequent equities were not considered, and no one appears to have asked for their determination. They would be that the surety's estate must surrender the security, and that the proofs against that estate must be reduced to the extent of the full value of the security.

In the present case, the proof having been made against both estates, the rule above indicated would be followed, but for the fact that there will be no dividend in the estate of John W. Foye, and therefore it is not worth while to go to the expense of reforming the proofs.

I am somewhat inclined to think the other reason given by the register for regarding the mortgage as valueless may be sound. The mortgage being for the indemnity of the surety, and the holders of the notes having no equity excepting through him, although it is perfectly clear that this equity does not depend on the surety's being personally damnified, or upon his having been damnified before his bankruptcy, yet I think it may be doubted whether the assignee of the principal has not a right to the security, when it is clear that no damage can possibly happen to the estate of the bankrupt surety. A doubt arises, on the other hand, from this consideration. Suppose the surety should not obtain his discharge, would he not have a right to say that the property ought to have been applied exclusively to his exoneration, and not to the general debts of his principal? This might be met, perhaps, by those creditors tendering him personally an indemnity, or, as they have a largely controlling voice in both bankruptcies, by procuring his discharge. It must be admitted too, that the American decisions seem to regard the equity as a positive one, subject only to the rights of the surety.

I place my decision, therefore, upon the ground that the creditors have proved in full, and acted as general creditors of the estate of George F. Foye, the principal, and thereby have waived the security.

The assignee is to divide the proceeds of sale, pro rata, among all the creditors of George F. Foye.

[See Case No. 5,021.]

Case No. 9,824.

In re MORRIS et al.

[19 N. B. R. 111; 19 Alb. Law J. 281; 36 Leg. Int. 215; 26 Pittsb. Leg. J. 121.] [1]

District Court, W. D. Pennsylvania. March 7, 1879.

BANKRUPTCY—DISCHARGE—BY DECREE OF COURT—COMPOSITION PROCEEDINGS—PECUNIARY CONSIDERATION TO CREDITOR.

No act done in composition proceedings, though of the description of the offence mentioned in the eighth clause of section 5110, Rev. St., can be set up against the discharge of a bankrupt by decree of the court.

Rule to show cause why the specifications of objections filed should not be stricken off as insufficient in law, and the said petitioners [Morris and Nathan Morganstern] be discharged.

Malcolm Hay, for opposing creditors.

S. Schayer, Jr., for bankrupts.

KETCHUM, District Judge. The specifications of objections to discharge in this case are filed under the eighth clause of section 29 of the act of March 2, 1867,—section 5110, Rev. St. [14 Stat. 531],—which reads as follows: "If the bankrupt, or any person in his behalf, has procured the assent of any creditor to his discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation, his discharge shall not be granted." It is charged that the petitioners, in proceedings in composition in this case, by pecuniary consideration or obligation, influenced certain creditors to contribute their votes to constitute the legal quorum to adopt the resolution. That the sum of eighteen hundred dollars was promised the said creditors on confirmation of the composition, and that said creditors voted for the composition. The composition failed for want of sufficient votes, and the bankrupts have gone through bankruptcy up to the application for discharge. Can the specifications, if true, defeat their discharge? Does the clause "at any stage of the proceedings" include the composition proceedings? Composition proceedings under the bankrupt law are, no doubt, proceedings in bankruptcy; but are they so to be considered with reference to the prohibitory clause denying the bankrupt his discharge for the causes therein set forth? Proceedings in composition constitute a mode of distributing pro rata the value of the estate of the debtor according to the estimate of a quorum of creditors, subject to the approval of the court. The proceedings are chiefly an amicable arrangement between the debtor and his creditors. The debtor has simply to pay what he has agreed to pay, and he is ipso facto discharged. No penalties are provided for punishing specified offences of the parties. The arrangement is left to the approval or non-approval of the court, looking only to the question: What is best for all concerned, according to equity and justice? If adopted and carried out, it ends the bankruptcy, and the bankrupt discharges himself.

Composition was not thought of when the section embracing the clause referred to was enacted. For more than seven years before composition was engrafted on our system of bankruptcy men were discharged by decree of the court; and all that time this section containing this clause was in force, and of course was only aimed at the offences specified as taking place in regular bankruptcy. There is nowhere in the law any provision extending this clause to things done in composition as if done in bankruptcy. It could not operate on discharge in composition if it were extended. Composition has its own discharge, which could not be reached by it. The clause is penal in its nature, and cannot be extended by mere implication.

Composition and bankruptcy are both complete systems looking to different modes of discharge. Neither requires the other, nor, after the original petition, is any part of the one proceedings in the other. The proceedings in bankruptcy of themselves alone, and excluding entirely the proceedings in composition, form the basis of the decree of discharge. Not without the most miscellaneous confusion of two entirely different proceedings can anything done at any time in composition proceedings be called "any stage of the proceedings" in bankruptcy resulting in a decree for a discharge. I do not think anything wrong done in composition proceedings, though of the description of the offence in this clause can be set up against the discharge of the bankrupts by decree of the court.

Rule absolute.

Case No. 9,825.

In re MORRIS.

[Crabbe, 70; 1 Law Rep. 354.] [1]

District Court, E. D. Pennsylvania. Feb. 3, 1837.

BANKRUPTCY—EFFECT OF SUPERSEDEAS—JURISDICTION OF DISTRICT JUDGE—DEBTS PROVEN—LACHES—PRESUMPTION OF PAYMENT—NOTICE.

1. The effect of a supersedeas, lawfully ordered, is to annihilate a commission of bankruptcy, and to place the bankrupt with his estate and effects in the same situation they would have been in had it never existed.

[1] [Reprinted from 19 N. B. R. 111, by permission. 19 Alb. Law J. 281, contains only a partial report.]

[1] [Reported by William H. Crabbe, Esq. 1 Law Rep. 354, contains only a partial report.]

2. In England, the chancellor's authority, in bankruptcy, is without any precise boundaries, and is exercised on very broad and general principles, for the purposes of justice and the protection of parties.

3. In England, the authority of chancery, in bankruptcy, is derived from the bankrupt laws, either by express grant or by construction or implication, and not from the general power of the chancellor.

4. A district judge of the United States has power to supersede a commission of bankruptcy, by construction or implication from the bankrupt law of the 4th April, 1800 (1 Story's Laws, 732 [1 Stat. 197]), and without the express grant of such power therein.

[Cited in Re Hamlin, Case No. 5,994; Re Thomas, Id. 13,891; Allen v. Thompson, 10 Fed. 123.]

5. It cannot be inferred from Lucas v. Morris [Case No. 8,587], that the district judges possess no powers, under the bankrupt law, that are not expressly given to them.

6. Neither the English chancellor nor a district judge of the United States has any jurisdiction, in bankruptcy, virtute officiorum, but only from the statutes.

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

7. A supersedeas may be issued after a bankrupt has obtained his certificate.

8. A decree, rightfully and deliberately made, and long acquiesced in by all parties interested, will not be revoked unless it be clearly shown that justice requires it.

9. The commissioners of a bankrupt's estate cannot allow a judgment debt, which has slept for thirty years, to be proved before them, unaccompanied by sufficient reasons for the neglect to prosecute it.

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

10. The presumption of payment from lapse of time may be rebutted by circumstances which are for the consideration of a jury; but when a petitioner seeks to have a supersedeas of a commission of bankruptcy revoked, in order to allow him to prove debts against which there is a primâ facie presumption of payment, he must satisfy the court that he has a fair and reasonable expectation of rebutting the presumption, if the opportunity is afforded him.

11. What effect the bankruptcy and death of a party will have to prevent the barring, by lapse of time, of a judgment against him, is a question of law for the court to decide; as, also, the difference between a bond and a judgment with reference to the presumption of payment arising from lapse of time.

12. The fact that any interest, however small, will profit thereby, is not sufficient ground to revoke a decree; the preponderance of equity on the whole case will be looked to.

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

13. There is nothing unusual, illegal, or improper, in the bonâ fide assignee of a judgment becoming the purchaser, at sheriff's sale thereon; or in his giving a credit on the judgment for the amount of the purchase-money. Neither is it illegal in such a holder of a judgment to purchase, in his own name, but for the use of the representatives of the original defendant, a portion of the property sold.

14. An order of supersedeas will annul a commission of bankruptcy without a formal writ being issued.

15. The fact of certain creditors of a bankrupt residing in the city where the legal proceedings are had, does not entitle them to any more special notice of the various steps taken than those who live at a distance. The only notice required is by Gazette.

16. R. M., a certified bankrupt, died during the continuance of the commission, having first devised to his wife all his property, real or personal, which he then possessed or might afterwards acquire. Subsequently, M. M., the wife, died, having first devised all her estate, real and personal, to N., a daughter, and making H. M., a son, her executor. Real property of R. M. being afterwards discovered, H. M. had sufficient interest therein to entitle him to petition for, and obtain, a supersedeas of the commission.

17. It is doubtful whether a certified bankrupt, pending the commission, has such a possibility coupled with an interest in property discovered after his death, as will enable such property to pass under a general devise by him.

18. Where a petitioner, subsequently to filing his petition, acquires a new right, which is matter of record, and does not affect the merits of the controversy, and the opposing parties do not, within a reasonable time, object to his original right, or require him to show that subsequently acquired, they lose their ability so to object or require.

19. The bankrupt law (of 4th April, 1800; 1 Story's Laws, 732 [1 Stat. 19]), requires extraordinary promptness on the part of the creditors to bring the proceedings to a close, and countenances no neglect or delay.

[Cited in Re Robinson, Case No. 11,941; Re Thomas, Id. 13,891.]

On the 28th of July, 1801, a commission of bankruptcy, under the act of 4th April, 1800 (1 Story's Laws, 732 [1 Stat. 19]), was issued from the district court for the district of Pennsylvania, against Robert Morris; after various preliminary proceedings, and the proof of sundry debts, amounting in the whole to about three millions of dollars, the commissioners executed an assignment to John R. Smith, John Craig, and Nathan Field, on the 8th December, 1801, they having been elected assignees by the creditors. All proceedings then ceased, and, up to the year 1825, no action of any kind was taken in the matter. On the 21st November, 1825, Henry Morris, a son of Robert Morris, petitioned Judge Peters, the then district judge, to vacate and supersede the commission of bankruptcy; stating that Robert Morris was then dead; that the large estate left by him was being wasted and misapplied by means of the neglect of the creditors and assignees; and that it was no benefit either to the creditors or to the bankrupt and his heirs. A rule to show cause was granted on this petition, returnable on the 26th December, 1825, and the time subsequently enlarged to the 13th January, 1826. But the petition was then no further prosecuted. On the 15th January, 1830, the application was renewed, on behalf of Henry Morris, to Judge Hopkinson, who had succeeded Judge Peters.

Mr. Williams, for petitioner.

The power of acting under the bankrupt law is given to the judge, and not to the court. Act 4th April, 1800 (1 Story's Laws, 732 [1 Stat. 19], §§ 2, 3, 14, 19, 28); Lucas v. Morris [Case No. 8,587]. And this power remains under the repealing act. Act 19th Dec., 1803 (2 Story's Laws, 909 [2 Stat. 248]), Lucas v. Morris [supra]. There is no fixed rule in

England or the United States as to the causes of superseding a commission of bankruptcy: it is an application to discretion. We do not mean to say that the district judge has in all cases the same power with the chancellor, but that he has in the case of a supersedeas. The commission of bankruptcy is considered, in England, as a species of execution, and, therefore, under the direction and control of the court by the authority of which it is issued. 2 Madd. 608, 609; Ex parte Poole, 2 Cox, Ch. 227; cited, 2 Madd. 616; Ex parte Donovan, 15 Ves. 8. After the length of time which has elapsed without any action on the part of the creditors, we are justified in supposing that they have abandoned the commission, or consented to its being superseded. Ex parte Duckworth, 16 Ves. 416. And see, also, Ex parte Proudfoot, 1 Atk. 252; Ex parte Lees, 16 Ves. 472; Troughton, v. Gitley, Amb. 630; Ex parte Wood, 1 Atk. 221; Ex parte Lavender, 18 Ves. 18.

No counsel appeared to oppose the petition.

On the 22d January, 1830, Judge HOPKINSON ordered that special notice of the application should be given to John H. Huston, the petitioning creditor; and a public notice, in the Gazette, to all creditors of the bankrupt, that the judge would proceed to hear and decide upon the petition on the 19th February. On that day proof was made that the notices, respectively, had been given in conformity with the order. The application then rested till the 17th September, 1830; and, on that day, no opposition having been made, it was ordered, "that the commission issued in the case be vacated and superseded, according to the prayer of the petitioner."

In March, 1791, a judgment was obtained by Joshua B. Bond against Robert Morris, and a testatum fi. fa. was issued thereon on the 1st February, 1798. Mr. Bond having died, his administrator issued a scire facias, to the use of William Rawle, against the representatives of Robert Morris, on the 1st April, 1830; and on the 6th December, 1830, judgment was confessed on the sci. fa. by the attorney of Robert Morris's representatives; a fieri facias was then issued and levied on certain lands, now in Schuylkill county, which were sold in October, 1831, under a venditione exponas to William Rawle, Jr., Esq., for $5,100.

On the 8th December, 1836, a petition was filed by William Sansom, praying that the supersedeas might be revoked. The petitioner set forth, that he was a creditor of Robert Morris, by a judgment, upon which there was due the sum of $9,484 12, with interest from the 23d December, 1805, and also by another judgment obtained by John Dunwoody, for a large amount. He recited the commission of bankruptcy against Mr. Morris, and his certificate of discharge, and said he had learned that a supersedeas had lately been granted, but that he had not been able to learn upon whose application, or upon what grounds. He represented that no notice was given to him, or, as far as he could learn, to any other creditor, of the application for the supersedeas; that he had a considerable interest in proceeding under the commission; and that he was advised, that if the power existed to take it away, it could not be exercised without due notice, and an opportunity to be heard. The affidavit verified the petition, particularly as to his having had no notice of the application for the supersedeas.

The case came on to be heard on the 30th December, 1836, before Judge HOPKINSON, and was argued by Mr. Wharton for the petitioner; and by Mr. Williams, who appeared for Henry Morris; Mr. Tilghman, who appeared for Wm. Rawle, Jr., Esq.; and J. S. Smith, who appeared for the representatives of Robert Morris, against the petition.

Mr. Wharton, for the petition.

There is no bona fide purchaser without notice, who has paid money for his purchase, whose rights will be affected by granting the prayer of the petitioner; but, if there was such a purchaser, as the proceeding of supersedeas was without the jurisdiction of the judge, the purchaser is not entitled to the same protection as if he had purchased under a judgment in a court of law, of which all must take notice. It may be urged that the petitioner is not entitled to be heard, because the debt on which he claims is to be presumed to be paid, on account of the time which has elapsed since it was last prosecuted. It is true, that after a certain period of time payment will be presumed on bonds, judgments, &c., but this is not a presumption overruling all objection, like that of cases within the statutes of limitation; it arises from circumstances, and may be repelled by other circumstances; and whether it is or is not so repelled is a matter for a jury to decide. 2 Starkie, Ev. 270, 824; Foulk v. Brown, 2 Watts, 209, 215; Summerville v. Holliday, 1 Watts, 507; Nickle v. McFarlane, 3 Watts, 165. And in this case the payment or non-payment is a question of fact for a jury under the 52d and 58th sections of the act of 4th April, 1800 (1 Story's Laws, 732; [2 Stat. 19]). The petitioner has four reasons to urge against the presumption;—the bankruptcy of Mr. Morris; his death; the difference between a judgment and a bond, non-payment of interest on a bond being strong ground for presuming the principal to have been paid; and the fact of the existence of property in Schuylkill county being unknown till recently. It may also be objected that the petitioner never proved his debt under the commission, but the objection is of no weight, as a creditor may prove at any time. Archb. Bankr. (5th Ed.) 124. We deny that such authority as is here claimed is vested in any judge exercising the powers given by the bankrupt law. All the power of this court, in bankruptcy, is derived either from the act of congress, or, by necessary inference, from the English system. The moment the party was declared a bankrupt the power to issue a

supersedeas was lost, and there is no hint in the act of any such authority as has been here exercised, to deprive the commissioners of the property vested in them. Act 4th April, 1800 (1 Story's Laws, 732 [2 Stat. 19] §§ 3, 5, 8, 10, 11, 36, 45); Act 19th Dec., 1803 (2 Story's Laws, 909 [2 Stat. 243]). There is not a syllable of authority in England or America to supersede the commission, under such circumstances, after the certificate of discharge. A bankrupt law is to be construed more favorably to a creditor than an insolvent law, yet there is no supersedeas under the insolvent law. Power v. Hollman, 2 Watts, 218. The district judge has not the same power to supersede as the English chancellor. Lucas v. Morris [Case No. 8,587]. The refusal of the assignees to act did not revest the property in the bankrupt, but it remained in the commissioners. Willis v. Row, 3 Yeates, 520; Gray v. Hill, 10 Serg. & R. 436; Wickersham v. Nicholson, 14 Serg. & R. 118; Cookson v. Turner, 2 Bin. 453. There can be no equity shown for issuing the supersedeas; and the petition of Henry Morris for that purpose, together with the reasons assigned in it, is totally unprecedented.

Mr. Williams, against the petition.

The property is not vested in the commissioners, but remains in the bankrupt until the assignment. Doe v. Mitchell, 2 Maule & S. 446; Carleton v. Leighton, 3 Mer. 667, 672. There never has been any assignment; the instrument remained with the clerk of the commissioners, and the property with the bankrupt. It would be inequitable to revoke the supersedeas now, when third parties have acted on the rights it gave them.

BY THE COURT.—If the property remained vested in the bankrupt and his heirs, how could the supersedeas affect it; or affect those who had acquired a right to it, under him or his heirs?

Mr. Williams.—Although the legal estate was in the bankrupt, the beneficial interest was in his creditors, and would pass to the assignees when duly appointed and accepting. It is now as much too late for this application as it is for a writ of error or a bill of revivor in the matter. The San Pedro, 2 Wheat. [15 U. S.] 132, 137; 9 Pet. [34 U. S.] Append. 771, 782; Ex parte Roffey, 19 Ves. 468. And Mr. Sansom, being neither a party nor a privy, has no right to make it. The debt on which the application is founded is barred by lapse of time, and could be resisted before a commission. Diemer v. Sechrist, 1 Pa. [1 Pen. & W.] 420; Power v. Hollman, 2 Watts, 218; Dewdney's Case, 15 Ves. 479; Cope v. Humphreys, 14 Serg. & R. 15; Nickle v. M'Farlane, 3 Watts, 167; Giles v. Baremore, 5 Johns. Ch. 545. As Mr. Sansom did not prove under the commission, he had no right whatever to any kind of notice. Ex parte Smith, 1 Glyn & J. 257; Alderman Backwell's Case, 1 Vern. 208; Ex parte Duckworth, 16 Ves. 416. The supreme court having adopted the English chancery rules, in the absence of others, the district judge should carry acts of congress into effect on the same rule and principle. Supposing Mr. Sansom had a right to be heard, has the judge exceeded his power in granting the supersedeas? If such a power did not exist, the difficulties would have been insurmountable, in the numerous cases and circumstances which would have arisen under the act, had it remained in force. In almost every case under the law, the district judge is put in the place of a chancellor with the same power that he has in bankruptcy, at least as to all powers necessary to carry the act into effect. A commission of bankruptcy is called here, as in England, a species of execution; and the authority which issues an execution has control over it and superintends it. No statute in England gave power to the chancellor to supersede a commission till the reign of Wm. IV.; it has always been an incidental power of the authority issuing the commission. Ex parte Freeman, 1 Ves. & B. 40, 41; Ex parte Matthews, 3 Atk. 816. All the books on bankruptcy show that the power to supersede a commission has never been doubted as an incidental power. When congress passed this act, they must have known of the construction which carried this power with it, and, using the same language, must have intended to allow the same construction. Lucas v. Morris [Case No. 8,587], decides that the district judge has not all the powers of the chancellor. To this we agree, but we contend that he has all the ordinary powers; he is continually exercising them; the petitioner himself asks an issue in this case, when an issue is only specifically allowed in three cases under the act of 4th April, 1800 (1 Story's Laws, 732, §§ 3, 28, 52 [2 Stat. 19]) and the petition does not come within one of the cases where an issue is allowed. Granting an issue, a supersedeas, or a bill of review, is an ordinary exercise of chancery power by the district judge, without express authority. There never has been a system of bankruptcy without a power of superseding, and, if it is not in the district judge, where is it? If there is no power of superseding the commission, the estate may be wasted and mismanaged to the end of time without any remedy.

It is objected that, even if the judge has the power, the fact of the bankrupt having obtained his certificate should have prevented the issuing a supersedeas. We can show cases where a supersedeas has been granted in England after certificate; and, as the objection concedes the power, this becomes merely a question of expediency. 2 Madd. 616; Ex parte Poole, 2 Cox, Ch. 227; Ex parte Moule, 14 Ves. 602. If the object of the commission has not been and cannot be answered, like an execution, it will not be permitted to stand. The debts originally proved against Mr. Morris amounted to three millions of dollars, but, by the neglect of the commission, they amount at this time to nine millions; a great injustice to the bankrupt, and an end

very different from that intended to be reached by the appointment of the commissioners. Laches alone is a sufficient ground for superseding a commission. Ex parte Proudfoot, 1 Atk. 252; Ex parte Lees, 16 Ves. 472; Troughton v. Gitley, Amb. 630. And commissions have been superseded for the benefit of the bankrupt. Ex parte Wood, 1 Atk. 221; Ex parte Lavender, 18 Ves. 18.

Mr. Tilghman, on the same side.

Mr. Sansom must be considered as having been present at the time of the application of Henry Morris, and as not objecting when the supersedeas was granted, for the whole system of notice in bankruptcy, both here and in England, is such as was followed by the judge. Notice in the Gazette is all that is required. The same sort of notice is given to creditors who have judgment or mortgage on land sold by the sheriff; if they do not come in on that notice they lose their priority, as is also the rule in the orphan's court. Mr. Rawle has acquired rights on the faith of the supersedeas, and we protest against its validity being questioned now, especially by a person in Mr Sansom's position. Cope v. Humphreys, 14 Serg. & R. 15. If no supersedeas had been ordered, the commission of bankruptcy, being but a statutory execution, and no proceedings having been had under it for so long a time, this torpidity would divest the commissioners and assignees of the property, and the commission with all rights under it would expire by the lapse of time. The heirs of Mr. Morris could have recovered their lands in England had there been no supersedeas. Mr. Sansom and all the other creditors are to be presumed to have been paid, from the lapse of time, and payment is a sufficient ground for supersedeas in all cases. The act of 4th April, 1800 (1 Story's Laws, 732 [2 Stat. 19]), using the same words, must have been intended to give the same powers as the English statute.

J. S. Smith, on the same side.

This petition is unprecedented and anomalous. It is an application to a judge to reverse his own decree because he had no power to make it. If the judge had no power to order the supersedeas, it is void, the commission still exists, and this application is unnecessary. All powers given to the judge by the bankrupt law are of a judicial character. The power to issue the commission is confined to a judicial officer, and judicial power to issue implies power to control, refuse, or supersede the commission, for it is in the nature of an execution; and when power is given to a judicial person to issue an execution, it is an incident to the power that he may set the execution aside. The power of the chancellor under St. 13 Eliz. c. 7, § 2, is given to him in the same words as the power given to the judge by the act of 4th April, 1800, § 2 (1 Story's Laws, 733 [2 Stat. 19]). There is no power to supersede given to the chancellor by the English acts which is not given to the judge by our act. The English statutes give an express power to supersede in but two cases. St. 5 Geo. II. c. 30, § 24; Act 4th April, 1800, §§ 3, 28 (1 Story's Laws, 733, 741 [2 Stat. 22, 28]). The chancellor has no power in bankruptcy but what is derived from the acts of parliament, and when he supersedes, it is by virtue of the discretionary or incidental power given to him by those acts, in other cases than are therein expressly mentioned. 2 Madd. 609; Ex parte Freeman, 1 Ves. & B. 40; Ex parte Lund, 6 Ves. 782; Phillips v. Shaw, 8 Ves. 250. If the judge can supersede only in the cases specially mentioned, the commission might be perpetual, though fraudulent or collusive, and though all parties consented to the supersedeas, or the debts had been all paid. Very many judicial powers are given by the statute and exercised by the judge. Act 4th April, 1800 (1 Story's Laws, 732 [2 Stat. 19], §§ 2, 3, 19, 36, 47, 51, 52); U. S. v. Lawrence, 3 Dall. [3 U. S.] 42. It can only be inferred from Lucas v. Morris [supra], that the district judge has not exclusive jurisdiction over the entire execution of the bankrupt law, as the chancellor has in England; and the only point positively decided by the case was that the judge could not call the assignees to account. See Ex parte Cowan, 3 Barn. & Ald. 123. If the district judge acts judicially in bankruptcy, and the chancellor has no greater power under the acts of parliament than the judge under the act of congress; we may take the acts of the chancellor as a precedent. The power of the chancellor to grant a supersedeas appears to be conceded, except where a certificate has been issued. But a supersedeas has been granted after certificate. Ex parte Poole, 2 Cox, Ch. 227; Ex parte Moule, 14 Ves. 602. Where it has been refused after certificate, it has been for the benefit of the bankrupt, in order that, after conforming to the law, he shall not be exposed to the effect of his debts by superseding the commission and all that has been done under it; Ex parte Leaverland, 1 Atk. 145. If the judge has power to supersede, and has superseded, why should he now revoke it? The whole argument and inquiry now is as to the effect of the supersedeas upon certain lands in Schuylkill county, since purchased by a third party. Mr. Sansom has no right to ask that the supersedeas shall be revoked merely to let him in to prove his debt after he has had nearly thirty years to come in and has not done so, although living in the city where the commission sat. His interest in the property now discovered is but one-ninth of one per cent.; so trifling a proportion that it cannot be supposed he will seriously prosecute his claim, even if the commission should be reopened. The petitioner denies the judge authority to order a supersedeas, but asks him for a procedendo, when both powers must come from the same source. If a procedendo should be ordered, justice requires that it should be upon terms, so as not to affect rights acquired under the supersedeas.

Mr. Wharton, in reply.

We deny that the judge had power to grant the supersedeas. Jurisdiction and power have different meanings: the first has a general scope or bearing, the second is something that exists within the first. A general jurisdiction implies the power necessary to execute it. If the judge had general jurisdiction in bankruptcy, all general powers would exist within that sphere; but if the jurisdiction is given by statute, and is limited, then no power can be implied. In England there is no statute giving power to the chancellor; the first rise of his authority is unknown, but it is now as large as the whole broad and sweeping chancery jurisdiction, and of it his authority in bankruptcy is part. Wright v. Simpson, 6 Ves. 732; Eden, 449, citing Anon., 14 Ves. 451. The English bankrupt laws are framed with a view to the authority of the chancellor in the exercise of his ordinary jurisdiction. Ex parte Bradley, 1 Rolle, 202. But no such power or jurisdiction is given to the district judge; the district court has no equity jurisdiction but in granting injunctions.

BY THE COURT.—In the cases in 14 Ves. and Rolle, just cited, the chancellor did not claim the power he then exercised by virtue of his chancery jurisdiction, but by the interpretation and construction of the statutes of bankruptcy. He derives all his authority from the statutes and the inferences from them.

Mr. Wharton.—By confiding the execution of the bankrupt laws to the chancellor it was a reasonable inference that it was intended he might use his powers as chancellor to carry the laws into effect. But if the execution of the statutes had been confided to a common law judge, no such inference could have been drawn. The district judge here has no such powers as the chancellor, and, of course, the act of congress in referring to the district judge, intended only to let him exercise the powers in bankruptcy that he had in his ordinary jurisdiction; Lucas v. Morris [supra]. It is true that the judge has certain judicial powers under the bankrupt law, but they are limited, and cannot be extended beyond those limits. Even if the power of the district judge is commensurate with that of the chancellor, the chancellor himself is without power to grant a supersedeas in a case like the present. The fact of its being without precedent in the innumerable English bankruptcy cases is proof that the power does not exist. The chancellor would require the express affirmative consent of the creditors, both those who had proved and those who had not, before he would supersede a commission. 1 Mont. Dig. Bankr. 366, 369. The assent is assumed here, but such consent can only be shown by a writing signed by the creditors, and praying for the supersedeas. And consent cannot be implied from the mere fact of publication. 2 Mont. Dig. Bankr. 313. The real ground assigned for the supersedeas is not the consent, but the neglect, of the creditors. A totally unprecedented ground. It is contended that the legal interest has never been out of the bankrupt; but our law is different in this respect from that of England. St. 34 & 35 Hen. VIII. c. 4, § 1; 13 Eliz. c. 7, § 2; 5 Geo. II. c. 30, § 37; Act 4th April, 1800 (1 Story's Laws, 732 [2 Stat. 19], §§ 5, 50). Both the legal and beneficial interests were in the commissioners, so continued if the assignees did not accept, and so continue, unless—inconsistently with law—they have been divested thereof by the supersedeas. It is not too late to make this application, as a bill of review will lie at any time within twenty years. 2 Smith, Pr. Eq. 50. It is alleged that there is a purchaser for a valuable consideration, on the faith of the supersedeas. The person claiming this position should show affirmatively that he has actually paid a valuable consideration in money, it not being sufficient if the judgment creditor has allowed a credit on the judgment for the amount of the purchase-money; and the party claiming as an innocent purchaser should also show that he had no connnexion with the petition for a supersedeas, and that he was ignorant of its invalidity. Harrison v. Southcote, 1 Atk. 538; Hardingham v. Nicholls, 3 Atk. 304.

HOPKINSON, District Judge. On the 28th day of July, 1801, a commission of bankruptcy was issued by the district judge for the Pennsylvania district, against Robert Morris, directed to John Hallowell, Joseph Hopkinson, and Thomas Cumpston, commissioners. The bankrupt being duly summoned, surrendered himself to the commissioners, and submitted himself to be examined; the commissioners having previously declared the said Robert Morris a bankrupt. On the 6th day of August the commissioners received proof of sundry debts. On the 26th of August proof of debts was received from about twenty-one creditors, and the choice of assignees postponed until the 12th day of September. On that day further proofs of debt were received from nearly forty of the creditors of the bankrupt. At several subsequent meetings of the commissioners proofs of debts were continued to be received, amounting in the whole to upwards of ninety, and whose aggregate amount of debt was about three millions of dollars. On the 8th day of December, 1801, the commissioners executed an assignment of all the estate and effects of the bankrupt to John R. Smith, Esquire, and John Craig, and Nathan Field, merchants, they being the assignees chosen by the creditors. Here the proceedings by and before the commissioners stop. The assignment still remains among the papers of the commission, never having been accepted by the assignees, nor any counterpart executed by them. No attempts were made by or on the part of the creditors to call upon the assignees to execute the trust, nor to have

other assignees appointed to supply their place and take charge of the estate and effects of the bankrupt. It may be here remarked that the petitioner now before me made no proof of his debt before the commissioners, or took any part in the proceedings under the commission. The estate and effects of the bankrupt, whatever they were, were thus abandoned by the creditors; not only by those who had proved their debts, and neglected or declined to use the rights they had under the commission, but by those also who by not proving, exhibited even more indifference to his affairs. It cannot be believed, indeed it is not pretended that the petitioner, being in the city where these proceedings were going on, was not acquainted with them. At all events, he had the notice which the law required, and which was given to the creditors of the bankrupt generally.

Things remained in this situation, in a state of absolute inaction, and without any symptom of a revival, until the month of November, 1825, that is twenty-four years, within a few days. In the mean time, that is, in the month of ——, 1806, Robert Morris, the bankrupt, died. On the 21st day of November, 1825, Henry Morris, one of the children of Robert Morris, presented his petition to the Honorable Richard Peters, then judge of the district court of the United States, for this district, the same who had issued the commission, in which he recites the proceedings under the commission, and alleges that the assignees do not appear ever to have accepted the trust; nor have they executed any counterpart of the assignment; nor has there been, as he believes, anything further done in the premises. He states that the said Robert Morris, died in 1807 (1806), leaving a widow and five children, whereof the petitioner is one. He then alleges and sets forth, "That at the time of the said bankruptcy, the said Robert Morris was seized and possessed of a large estate, real and personal, which, in consequence of the neglect of the said creditors and assignees, in not duly prosecuting the said commission, has been wasted and misapplied, without benefit to the creditors or to the bankrupt." This allegation has not been disproved, nor as I recollect, denied to be true, from that time to the present. It is the ground and reason on which the petitioner, Henry Morris, prayed the district judge "that the said commission of bankruptcy may be vacated and superseded." This petition, as appears by an endorsement on it, was read, filed, and a rule granted to show cause, &c., returnable on 26th December, 1825. On that day the rule was enlarged till 13th January, 1826. No further proceeding was then had, for reasons which do not appear, nor does it appear to whom the rule to show cause was directed, nor that any service of it was made. On the 15th of January, 1830, the application on behalf of Henry Morris, was renewed to me; and Mr. Williams was heard as the counsel for the petitioner. No counsel appeared to oppose it. On the 22d of the same month, I ordered, that notice of the application be specially given to John H. Huston, the petitioning creditor; and a public notice, in the National Gazette, three times a week for two weeks, to all the creditors of the bankrupt, that the judge will proceed to hear and decide upon the petition on Friday, the 19th of February, 1830. On that day proof was given that the notices, respectively, had been given in conformity with the order. The application then rested until the 17th of the following September, during the whole of which time it cannot be doubted, that any application or argument, in opposition to the petition, would have been attended to. On the 17th of September, no opposition being made, either by the creditors who had proved under the commission, or by any other person claiming to be a creditor, or to have any right or interest in the estate of the bankrupt—the order was made "That the commission issued in the case be vacated, and superseded, according to the prayer of the petitioner." How far these proceedings were known to the creditors of Mr. Morris by the public notice given to them, I cannot say; Mr. Sansom, in a way which has not been satisfactory to the opposite counsel, has denied a knowledge of them, or rather as they say. that he had notice of them; perhaps this criticism is rather too close and verbal, as it would involve Mr. Sansom in an equivocation equal to an untruth, under his solemn affirmation, which ought not to be imputed to him, without a more satisfactory demonstration. The proceeding on the petition of Henry Morris, was not hurried. It was pending nearly five years. If in that time it was known to Mr. Sansom or any other of the creditors of Robert Morris, it was also known to them in law if not in fact, for the petition was open to them, that the application for the supersedeas was made on the ground that Robert Morris was possessed of a large estate, which in consequence of the neglect of the creditors and assignees, was wasted and misapplied; and it was also clearly understood, for otherwise the supersedeas would be fruitless, that something remained to be redeemed from the neglect by which so much had been lost, and which, if redeemed, would enure to the benefit of the creditors, if they would look after it; or to the family of Mr. Morris, if the creditors by abandoning it would suffer it to return to the representatives of the bankrupt, by superseding the commission. The effect of the supersedeas, if lawfully ordered, was to annihilate the commission, and to place the bankrupt with his estate and effects in the same situation they would have been in, had it never existed. He, or, in this case, his representatives, were fully restored to all their rights over his property, and resumed the management, control, and disposition of it. So they remained, unquestioned and undisturbed, until the 8th day of December, 1836—a period of more than six

years. On that day the petition of William Sansom was filed, followed by his affidavit, on the 15th of the same month. The petitioner states that he was a creditor of R. Morris, by a judgment, upon which there are due the sum of $9,484.12, with interest from the 23d of December, 1805; and also by another judgment obtained by John Dunwoody, for a large amount. He sets out the commission of bankruptcy against Mr. Morris, and his certificate of discharge; says that he has learned that a supersedeas has lately been granted, but has not been able to learn upon whose application, or upon what grounds. He represents that no notice was given to him, or, as far as he can learn, to any other creditor, of the application for the supersedeas: that he has a considerable interest in proceeding under the commission, and is advised, that if the power exists to take it away, it cannot be exercised without due notice, and an opportunity to be heard: he therefore prays for a review of the proceedings, in reference to the alleged supersedeas, and that he may be heard by counsel in opposition to it. The affidavit verifies the petition, particularly as to his having no notice of the application for the supersedeas. I cannot forbear to remark that some of the allegations in this petition are rather singular, without meaning to say that they will have any weight in deciding upon it. The petitioner says, that although he has learned that a supersedeas has lately (six years before) been granted—he has not been able to learn upon whose application, nor upon what grounds it was done. He has not informed us how he learned that the supersedeas was granted, nor what means he took, after he was informed of it, to discover who was the applicant for it, or the grounds upon which it was granted. Certainly in the same office where he filed his petition, the petition of Henry Morris was filed six years before, and there remained, and that petition shows the ground of the application. The proceedings of the judge upon that application were filed in the same place, and were equally accessible to Mr. Sansom. It is true that he does not aver that he took any step or measure to obtain this information, unless such an averment may be inferred from his declaration that he had not been able to obtain it. The petitioner, as the ground, and, I may say, the only legal ground of his application to revoke the supersedeas, and restore the commission, alleges, "that he has a considerable interest in proceeding under the commission." It cannot be overlooked, that his interest in the commission was so inconsiderable in his own estimation, that although living in the city in which the commissioners sat, and where from time to time the creditors of the bankrupt were appearing and proving their debts, he never, for thirty years, during the pendency of the commission, thought it worth his while to give half an hour to the proof of his debt, or to the interest he had in the commission. How far an interest has since arisen which can assist him in this application, will be a subject of future consideration. At present I refer to these circumstances, not as impairing his legal rights, but as affecting his equity, if he shall be thrown upon that to support himself. This case is altogether one of the first impression here, and, in some of its features and aspects, without precedent in England, where so many volumes have been published upon their bankrupt laws. The counsel engaged in the argument on both sides, have given unwearied labor to their investigations, and although so many days have been appropriated to the hearing, my attention has been required and willingly afforded to every part of it. I may be tedious in developing my views of the leading matters and questions which have been discussed, but I would rather be so, than overlook what either party may deem to be important.

The first question which presents itself, is the jurisdiction or authority of the district judge of the United States over the subject-matter of the petition of Henry, Morris—that is—had he the power to grant the prayer of that petition, and to make the order to supersede the commission of bankruptcy, then in operation against Robert Morris. This question has been argued on the basis of the powers of the lord chancellor in England, under the British statutes of bankruptcy, and this inquiry was pursued in two divisions: (1) What are the powers of the lord chancellor, and from what source does he derive them? (2) Has the district judge the same powers in the execution of our act of congress, as are exercised by the chancellor? It is true that no case has been shown where the lord chancellor has superseded a commission of bankruptcy under circumstances like those of the present case; but these circumstances are really so extraordinary, that one may say they have never before occurred, and are not likely to occur again. We have here a commission taken out against a bankrupt, who was the possessor of an immense real and personal estate, laboring under incumbrances of unknown amounts. The commission proceeds so far, as that creditors having debts of three millions made the regular proofs before the commissioners. An election was duly held for assignees, and they were chosen—a large number of the creditors attending for that purpose. The assignees never accepted the trust—never executed a counterpart of the assignment, and the whole proceeding stopped. After the commissioners had executed their assignment, which was on the 8th of December, they met no more, nor was a movement made by any creditor of the bankrupt, who had, or had not, proved under the commission, to call the commissioners together, to have other assignees appointed, or to move one step further with the commission; and so it remained for five-and-twenty years, when the supersedeas was applied for; and

so that application remained for five years longer, without a stir on the part of any creditor to proceed with the commission. We cannot be surprised that no such a case has been found in England, and we must therefore look rather to the principles on which the chancellor has raised his power in cases of bankruptcy, than for any precedent like this,—creditors to the amount of three millions, taking such an interest in the commission as to go through the trouble and formality of proving their debts, attending afterwards to choose assignees to take charge of those interests, and then suddenly abandoning the whole concern, and never, to this hour, returning to it. To ascertain the nature and extent of the jurisdiction of the lord chancellor, over cases of bankruptcy, we must inquire what is the source from which he derives it, and how he has drawn his powers from that source. I think an examination of the authorities on this subject will show, that all his powers are derived from the statutes of bankruptcy; that he has none as a court of chancery—not one that he has not drawn either from the express authority of those statutes, or by the constructions and implications he has thought he might fairly make, being found necessary for the just and full execution of those statutes, to give to them all the benefit to the bankrupt and his creditors intended by the legislature, and to prevent any wrong and injustice by the abuse of them. Numerous cases have been cited, which show, that the authority to supersede a commission of bankruptcy, which is exercised without question by the lord chancellor, extends over a large field; indeed, no precise boundaries appear to be marked for it. The chancellor interferes in this way on very broad and general principles, for the purposes of justice, and to prevent an abuse of the bankrupt laws, to the prejudice of the bankrupt, as well as of the creditors. They are both under his protection, and he takes care that the true intentions of the legislature in making the statutes, as he understands them, shall be carried into effect, and shall not be perverted, either by the bankrupt, or by his creditors, to the work of injustice. This is the broad principle on which he acts, and. without any express words in the statutes, he assumes that his powers are commensurate with these objects. But as this extent of power is not expressly granted to him by the language of the statutes, it is argued that he exercises it by virtue of his general chancery jurisdiction; that he takes this authority to himself because he is the lord chancellor, and holds the great seal; and not because he is the person or officer designated in the bankrupt laws to issue the commission: in short, that he has the authority only to issue the commission, with certain other powers, by the express grant of the statute, and that his subsequent control over it, except in the cases designated, is by virtue of his office and jurisdiction as lord chancellor. I am not of this opinion; and a brief recurrence to some of the leading cases will show that it cannot be supported; on the contrary, that all and every power he exercises over bankruptcy, is derived, either expressly, or by construction and implication, from the statutes: that he has none as a chancery court, or by virtue of his office as chancellor; that the two jurisdictions are entirely separate and distinct. The jurisdiction of the lord chancellor in bankruptcy is distinct from that of chancery. 6 Ves. 782. The jurisdiction is under a special authority, distinct from that of the court of chancery. 8 Ves. 250. It is a legal and equitable jurisdiction. 15 Ves. 496. The case of Ex parte Cawkwell, 19 Ves. 233, was a petition for an order on the bankrupt to produce to the commissioners a deed of trust. The order was made by Lord Eldon, who says: "It is in many instances difficult to state precisely the principle on which the jurisdiction stands, in which a bankrupt is often ordered to do that for which there is no express authority." Now if it might have been referred to the general jurisdiction of the chancellor, there could have been no difficulty about it; nothing could be more simple; the want of an express authority would have created none. Lord Eldon then adverts to Lord Hardwicke's opinion in these terms: "It is well we have Lord Hardwicke's authority for it; who took a very large principle as to the jurisdiction in bankruptcy; thinking that the legislature having committed to the lord chancellor the jurisdiction in bankruptcy, he had all the authority that he had when sitting in the court of chancery." Well might Lord Eldon say that this was a large principle to act upon in such a case. This opinion of Lord Hardwicke has been much relied upon by the counsel for the petitioner in support of his doctrine, that the chancellor derives his extraordinary powers over cases of bankruptcy from and by his general chancery jurisdiction. I confess, it appears to me to admit of no such conclusion; on the contrary, it is the very strongest case we have, to show that he does nothing by his general jurisdiction, but that he obtains all his powers from the statutes, but has thought himself at liberty to use, very freely, his discretion in construing the statutes, in order to get, by implication, the authority he thought necessary for the purposes of justice, and the due execution of the statutes. This opinion of Lord Hardwicke is truly the most copious stream of power that the chancellor has drawn from the statutes, the acknowledged fountain of all his jurisdiction in bankruptcy; and it is so far from restricting that jurisdiction to the cases expressly granted, that it sets us an example in the use of construction and implication to obtain powers, which has no limits but the discretion of the chancellor or judge. To return to Lord Hardwicke—on what ground

does he assume the large principle which gives him so much power? Is it by his distinct independent jurisdiction as chancellor? By no means—he thought "that the legislature having committed to the chancellor the jurisdiction in bankruptcy, he had all the authority that he had in the court of chancery." This was his construction of the statute—his belief of the intention of the legislature—his inference from the language and objects of the statutes, and of consequence it is from them and from them only, that he assumes the jurisdiction. In the case in 14 Ves. 449, the question was, whether the commissioner could compel the bankrupt who had obtained his certificate to attend the commissioners. The chancellor said, "Without the existence of such a power, the mode of allowing certificates must be altered." He asserts that he has the power to compel the attendance of witnesses, admitting that there is no express authority given by the statute for that purpose. How then does he get it? Is it by his general chancery jurisdiction? By no means; but by implication; by construction of the meaning and intention of the bankrupt laws, which he says "were framed with a view to the authority with which the lord chancellor is intrusted in his ordinary jurisdiction." But the statutes do not say that they were framed with any such view, nor is there any reference in them to the general chancery jurisdiction for their execution. It is the mere inference or implication of the chancellor, as is the opinion of Lord Hardwicke, from the statutes themselves, from which, in some way, by construction more or less reasonable, the whole power of the chancellor in bankruptcy is derived. The case of Ex parte Smith, 19 Ves. 473, was a petition to supersede a commission of bankruptcy, because it was taken out by an attorney who was not a solicitor of chancery. No express power is given to supersede for this reason. The objection was overruled, not on the ground of a want of jurisdiction, but because "a commission of bankruptcy is a proceeding not in the court of chancery; and a solicitor in chancery has no more connexion with proceedings in bankruptcy, and is as much a stranger, as an attorney of king's bench or common pleas." And so is the chancellor as such. Eden, 449, quoting Mr. Christian, says, the jurisdiction of the lord chancellor in bankruptcy is "a subject involved in great obscurity and mystery." Why so, if it may be referred at once to the general chancery jurisdiction? He proceeds, "which can only be developed by attention to its history and progress, and to those general principles of the common law by which statutes are construed, and to those also which are applicable to every new commission emanating from the great seal by virtue of the authority of the legislature." The author then refers to the opinion of Lord Eldon in 14 Ves. 451, as "comprising everything necessary to be known upon the subject." In Ex parte Dufrayne, 1 Rolle, Abr. 333, it is said, the chancellor will supersede, if justice requires it, although the strict law would not.

The result of these authorities seems to be that the lord chancellor, taking the language of the statutes and the intention of the legislature for his premises, determines, by a process of reasoning and deductions from them, that he has certain powers in the execution of the bankrupt laws, which are not expressly given to him, but which he believes are incidental to the power given, and may be implied from the premises mentioned, that is, the language and intention of the legislature, and not from the great seal. Has the chancellor a broader discretion in the construction of a law, which he is called upon to execute, than the district judge in the same situation? They must both take the statute for their guide and authority as they conscientiously understand it. The British acts have named the chancellor as the person or officer who is to issue the commission and hold other expressed powers. Any other person or officer might have been named, and his powers would have been the same, provided the words of the statute would have afforded the same construction or implication. With us the district judge issues the commission, and has other express powers, and he has also all the powers which he may deduce by a fair and legal construction of the act of congress, and the intention of the legislature in framing that act. The sound and tenable reasoning on the subject appears to me to be this. Cases must occur in which justice to the bankrupt, justice to his creditors, the rights and interests of both, the whole scope and spirit of the bankrupt system, will require, that a commission issued ought to be revoked and superseded: that its continuance would afford a benefit to no one, would injure many, would countenance injustice, perhaps fraud. Can it be then that, because the act of congress has no enumeration of such cases, no special provision or grant of power, to prevent or arrest these evils, there is therefore no remedy for them, there is no authority over them? Such a presumption is insufferable. Where then should we look for the authority to perform this act of justice? To whom must we presume it was intended to be intrusted? Who is to recall the commission?—the authority which is thus abused, which every one must agree ought to be recalled by somebody? The answer would seem to be, that the jurisdiction which issued the commission ought to be, must be, in the absence of any other,—and no other exists,—that which shall revoke it. That the judge to whom the power is given to issue the commission has also the power to recall it, if, instead of answering the purposes for which it was issued, it is used as an instrument of fraud, of oppression, of injustice, for the destruction of the property and rights it was

intended to preserve, without producing one of the benefits expected from it. If the judge should supersede, where he ought not to have done so by a false or forced construction of the law, taking by such means a power which he was not entitled to, the act will be a nullity; and any party injured by it can obtain ample redress. But if he has no authority to supersede his commission, the mischief will go on; and I know of no remedy for it. To apply this remark to the present case: if, as has been contended on the part of the petitioner, the supersedeas was ordered without any authority,—if the judge exceeded his jurisdiction in making the order,—it is obviously a nullity; it does not stand in the way of the rights or remedies of Mr. Sansom, or any other person, creditor or not a creditor, having proved or not having proved under the commission; but the commission, and every right and remedy under it, now stand in as full life as on the first day of its existence. Why does not the petitioner proceed as if the supersedeas had no existence? If his judgments will avail him in any way, or to any purpose, the supersedeas opposes no impediment to their operation. If, by lapse of time, or other means, he can have no proceeding by his judgments against the lands, which now seem to be the object of his pursuit, or against any other property of the bankrupt, then the revocation of the supersedeas would afford him no aid against that difficulty; it would not better his situation in the smallest degree. The supersedeas, on his argument of its invalidity, does not stand between him and these lands, or impair his remedies against them. If he has lost them, it is not by a void supersedeas. What course may he take if the supersedeas were revoked, according to the prayer of his petition? He may proceed under the commission, have new commissioners appointed, assignees chosen, the property of the bankrupt, wherever found, taken possession of and distributed among his creditors. What hinders his doing all this now, on the supposition that the supersedeas was unauthorized and is void? On this view of the case, on this ground for revoking the supersedeas, he has no interest in revoking it, because it works no injury to him or his rights. Nor can the holders of the new warrants, which, it is said, have been laid on the lands, —a part of them in Schuylkill county,—derive the least advantage from the removal of the supersedeas, be it valid or invalid. They may bring their ejectments. If the supersedeas be good and valid, they will have to encounter the title of Robert Morris, and no other; for the lands were sold as his property, and the purchasers hold them only by his title. If the warrant-holders show a better one, they will recover. On the other hand, if the supersedeas be ineffectual and void, still, the warrant-holder must meet and overthrow the same title of Robert Morris, for his creditors will defend under that title. The result then is that, whether the petitioner intends to pursue these lands under his judgments, or by the new warrants, in which he denies having any interest, or by proceeding with the commission, the supersedeas—if, as he contends, invalid—will put no difficulty in his way; and he may have its validity tried by any court of competent jurisdiction he may select.

Before I leave the question of jurisdiction, I must not omit to notice the case of Lucas v. Morris [Case No. 8,587]. A bill was filed in the circuit court of the United States, calling upon the defendants, as trustees, to account, and to compel them to carry into execution the trust which they had assumed as assignees of a bankrupt. One of the defendants pleaded in abatement to the jurisdiction of the court, alleging that the matters and causes of complaint belonged exclusively to the judge of the district court. Judge Thompson, of the circuit court, said that, if the bill embraces any matter of which the circuit court had cognizance, the plea must be overruled; for it claims for the district judge the sole and exclusive jurisdiction of all matters comprised in the bill. The judge says that he cannot discover that the act of congress has given "exclusive jurisdiction to the district judge over the entire execution of the law." Certainly it does not; nothing can be more manifest; and it is equally clear that, in the matter in question before the court, the act of congress did not, either expressly or by any reasonable implication, give the jurisdiction to the district judge, much less a jurisdiction entirely independent of the ordinary powers of courts of justice. It was claimed on the broad ground that the district judges were the sole organs to administer the bankrupt law. Now, there is a wide difference between the powers of the lord chancellor and our judges in this very matter of control over the assignees. In England the choice of assignees is subject to a control, the largest, most general, and unqualified, of any of the authorities given to the lord chancellor in bankruptcy. By the thirty-first section of St. 5 Geo. II. c. 30, the chancellor may remove assignees and appoint new ones; and this control over them carries with it the authority to compel them to account;—a refusal would be a good ground for their removal. By the eighth section of our act of congress, the power of removing assignees, and appointing others, is expressly delegated to the creditors, and excludes every implication of that power, or of any power incidental to it, in the district judges. No inference, then, can be drawn from anything that was said or done by Judge Thompson in the case of Lucas v. Morris [supra], that the district judges possess no powers over the execution of the bankrupt laws but such as are expressly given to them; nor even that they have not the jurisdiction of the lord chancellor, except where it is clearly limited by the provisions of the act of congress. To revert for a moment to the "large principle" of Lord Hardwicke, sanctioned in a manner by Lord

Eldon, the argument (for it is but an argument), founded on the statutes, that, because the lord chancellor is named to issue the commission, &c., he may therefore bring his whole chancery jurisdiction into the execution of these statutes, is no better than to say that because the district judge is named in the act of congress for the same purposes, he may exercise all his judicial authority in the administration of that act; and then, by invoking the analogy, so often repeated, between commissions of bankruptcy and executions, the power of the judge will be ample enough. With great deference to such high authority, it appears to me that neither the chancellor nor the judge have any jurisdiction over bankruptcy, virtute officiorum, but obtain it directly from the statutes, by express grants, or by incidents to those grants drawn from the statutes "by those general principles of the common law by which statutes are construed." Eden, 449. Whether a district judge, in his discretion, would feel authorized to draw as largely on this fund as the lord chancellor has done, is another question. Whatever power they rightfully have is by virtue of the statutes, and not by virtue of their offices.

Some authorities have been cited to show that even in England it is too late for a supersedeas after the bankrupt has obtained his certificate. I think this principle has not been sustained. It is manifest that the power of the chancellor over the commission continues after the certificate, from the orders he has repeatedly made upon the bankrupt, witnesses, &c. It is true that Lord Eldon says, as quoted by Eden, 434, citing Ex parte Crowder, 2 Rolle, 324, "that he never knew an instance in which a bankruptcy was superseded after the bankrupt had obtained his certificate, on an objection to the debt, trading, or act of bankruptcy." This limitation of the objection to these objects affords some implication that it extends no farther; and we see a good reason why, after the proof of the debt of the petitioning creditor, the trading, and act of bankruptcy by the bankrupt, have been acquiesced in, until he has obtained his certificate, he shall not be deprived of it by objections to them. Eden, pursuing the subject, says that "it has been determined that a commission will not be superseded after the certificate allowed, unless the invalidity appear on the proceedings." For this he cites Ex parte Levi, Buck, 75. By turning to the case, it will be found that it is so far from changing the ground taken by Lord Eldon, that it is merely confirmatory of it, and by no means sustains this author in his general allegation that a commission will not be superseded after certificate allowed unless the invalidity appear on the proceedings. The case was, "a bankrupt had obtained his certificate, and then the petition to supersede the commission was presented, on the ground that he was not a trader within the meaning of the bankrupt laws; and that the commission was a concerted one." The vice chancellor decided that "unless it appears upon the face of the proceedings that the party declared a bankrupt is not a trader, the petition is precluded from going into evidence to disprove the fact of trading, without he can show that the commission was fraudulent." On this decision, being one of the special cases put by Lord Eldon, Mr. Eden has raised the general proposition, that "a commission will not be superseded unless the invalidity appear on the proceedings." In Ex parte Bass, 4 Madd. 270, the same doctrine is given in the same restricted terms. The bankrupt will not, after having obtained his certificate, be allowed to impeach the commission, upon the ground that he was no trader, but he was permitted to supersede the commission, after certificate, where the title of the assignees had been successfully opposed in an action, and the commission, therefore, becomes inoperative. In the same sweeping way, Eden lays it down, that "where a bankrupt has submitted to his commission for a considerable length of time, he cannot petition to supersede it." For this he cites Flower v. Herbert, 2 Ves. Sr. 326. This was not the case of a petition for a supersedeas, nor for anything that has any analogy to it. It was a motion for an injunction to stay proceedings in an action at law, brought by the bankrupt against his assignees. It was an action of trover. The bankrupt had surrendered; had submitted to an examination; he had himself petitioned for new assignees; and a year and a half after these admissions that the proceedings under the commission were right, he brought an action of trover against the assignees, denying that he was a bankrupt. The chancellor said, that no one would accept to be an assignee, if they were to be exposed to such suits by the bankrupt, notwithstanding his acquiescence. This was no petition for a supersedeas on behalf of the bankrupt, but a prayer for an injunction against him, in a suit he had brought, under such circumstances, against his assignee. It seems to me that the power and practice of the chancellor over bankruptcy, in all its stages, before and after the certificate, are not confined to any specified cases, but are exercised whenever, in his sound and judicial discretion, he finds his interference right and necessary, to carry into effect the due execution of the statutes, according to the intention of the legislature, and to prevent any abuse of them for the purposes of fraud, oppression, and injustice.

It is manifest from the course of my remarks, that if I were compelled to pronounce a decision upon the question of jurisdiction, I should, as now advised, sustain it as a necessary power for the just administration of the bankrupt law, according to the intention of the legislature, and to prevent great abuses and mischiefs which might exist if it could not be exercised. I think, however, that I am not now called upon to express any more

absolute opinion upon this point. Were I to yield to the argument against the power of the judge to order his supersedeas, it would, of itself, be a sufficient reason for refusing the prayer of the petition. Why should I do that which will be of no benefit to him; which will add nothing to his rights or remedies? Why should I oppose an inefficient, useless revocation, to an inefficient, powerless order? I should not have the reluctance or hesitation of a moment to recall an error which would restore to a suitor any right of which the error had deprived him; but I should be unwilling to spread upon my records contradictory decrees, for no beneficial purpose or end to anybody. The chance of the petitioner, so far as he considers the success of the prayer of his petition to be important, is better, by admitting the power of the judge to order the supersedeas, and showing that the case was not one in which the order ought to have been made, and probably would not have been made, with a knowledge of all the circumstances. I will, therefore, proceed to examine the case on the supposition that the judge had authority to order the supersedeas; and the question then will be, whether the petitioner has shown good cause for revoking it.

In this view of the case the petitioner must put himself upon his equity, as opposed to the equity of those who resist his application. At his first step he must meet and overcome the objection to his application in the character of a creditor of Robert Morris, after having forgotten or disregarded it for so many years. The peace of society, the settled condition of property, are cardinal objects of every government. To preserve them the legislature, in some instances, by positive enactments, and. in others, the courts, by their judicial discretion, have raised barriers against stale and neglected claims, which may not be passed, whatever the rights may be that are excluded by them. Such are the limitations of time upon writs of error, bills of review, &c. I shall not hold the petitioner in this case to be interdicted from a hearing, even by the extraordinary number of years that have passed away, before he made a movement for the assertion of his claim, but consider the delay only as it affects his equity under all the circumstances of the case: I do not speak of his inattention to the proceedings for obtaining the supersedeas—he says he had no notice of them—but of his inattention to the commission, of which he certainly had notice and knowledge, and to reinstate which is the object of his present application. For thirty years he thought the commission of no importance to him; he had no right of interest in it or under it which, in his opinion, was worthy of his attention; and now he seeks, on the ground of that right and interest, to bring back this commission to existence. We may certainly say, that he must be prepared to show strong reasons for such an indulgence. I do not say that this neglect of the claim he now urges upon me has shut him out from a fair consideration of his case. I have heard him—he has been faithfully and ably defended, and I shall endeavor faithfully, at least. to do him justice, not overlooking the justice that may be due to others. I must here recur to his conduct during the progress of the commission. He saw the whole proceeding entangled, and finally stopped, by impediments he could have removed at once, but he stirred not. Having securities which put him in a better situation than other creditors, he let them struggle in endeavors which he thought would be fruitless, while he declines to share the labor, or put one dollar at hazard in the attempt. After a lapse of many years, the family of the bankrupt discover some property, or some interest which he had in property, which was going to waste and ruin, because there was nobody to attend to it. The creditors, and the petitioner among them, had for five-and-twenty years abandoned the whole concern, and there was no power in the family of the bankrupt, or in anybody, to make them or him return to it. What was to be done? Was the property, whatever was its value, to be lost, for want of an owner? If the creditors would not have it, if Mr. Sansom rejected all interest in it, should it not revert to the party who had assigned or tendered it to them, provided there was a power in the law to return it to him? Why did Mr. Sansom disregard, for so many years, the commission he now thinks of so much value to him? It was known to him—he was called on again and again to appear with his claims as a creditor before the commissioners. He did not—he would not appear. Nobody knew, officially, that he was a creditor—that he had any claims upon the bankrupt, or his effects—any interest in what was doing under the commission, or what might finally be done with it. After a lapse of twenty-five years, he wakes up—he comes forth from his obscurity, and presents himself here as a creditor of Robert Morris, having an interest in the commission of bankruptcy, which entitles him to the favor of the judge, by the revocation of an order deliberately made, in relation to that commission. He asks that this order may be expunged or revoked, in order that he may be allowed to enrol himself under the commission as one of the creditors of Robert Morris, for no other creditor asks for it; he now wishes to prove his debt before the commissioners, and to reinstate the commission with all its legal rights and consequences. He seems to be either one of the sleepers for whom the law will not watch; or one of the watchers who look quietly upon the labors of others without sharing them, but keep themselves ready to seize upon any benefit that may result from them. What reasons has the petitioner offered to justify or explain his long inaction in relation to his rights and interests as a creditor of Robert Morris? I have no reference now to

any proceedings under his judgment, or to the validity of that judgment, as it may or may not be affected by time. He has offered some reasons which he thinks should rebut the presumption of satisfaction of his judgment by lapse of time, which may be hereafter adverted to. But that is a secondary question on this application, which is not for the revival of the judgment, or to authorize any proceeding under it. For my present object, I may consider that he has a debt, that might be proved under the commission. He asks that the commission may be reinstated, for the sole purpose of admitting him to that proof. He asks that an order which superseded that commission, and which in the present inquiry is assumed to have been authorized and valid, shall be revoked, that he may have the opportunity to present his claim to the commissioners, and make such proof there of the validity of his debt, as may be in his power. It is clear, then, that the delay, the neglect which he has to account for, is not of his judgment, but of the opportunities which were afforded to him, for thirty years, to do that which he now desires to do. I have no recollection that any explanation, legal or equitable, has been offered for Mr. Sansom's declining for so long a time to prove the debt he now wishes to prove. The four reasons for inaction were applied to his judgment—to his debt, to show that it was not lost by lapse of time. But none of these were used, or could be used, to explain his neglect of the commission, and his entire disregard of the rights under it which he would now recall and reassume. These reasons were—the bankruptcy—the death of Mr. Morris—the difference between a judgment and a bond—and his ignorance of the existence of the Schuylkill county lands. Granting that these may have been the motives for taking no proceeding under his judgment, and without anticipating how effectual they may be to preserve his debt from extinction under the pressure of thirty-five years, it is enough to say, that they do not account for, justify, or explain, his delay to prosecute his rights under the commission.

I will now suppose that this objection is removed or waived; still it is incumbent on the petitioner to satisfy me that he will gain some benefit—some substantial and adequate benefit—by obtaining the prayer of his petition. I will not revoke a decree rightfully and deliberately made, after so long an acquiescence by all interested in it, and most especially after rights have been acquired under it, unless it is clearly shown to me that justice to the petitioner requires it, and that justice will be measured, in part, by the advantage he is to gain by it. If it be clear he can gain nothing, he has no justice to support him—he will be a mere stranger intruding himself into a proceeding in which he has no interest. If his interest be but nominal, or so inconsiderable as not to be worthy of regard, the judge would not disturb a decree from a repose of six years, and, assuredly, will not put in jeopardy or doubt the interests of others, to gratify such an application. It is a maxim ever of the common law, that "de minimis non curat lex," and new trials have been refused, on the ground of the insignificance of the interest of the party, who otherwise would have been entitled to it. It is clear that, in this case, the petitioner can gain nothing by his petition and the order he prays for, but the opportunity to prove his debt under the commission, and to receive such a dividend of the Schuylkill county lands, which are all the property of the bankrupt known to us, as his debt will entitle him to. The inquiry, then, to which a judge, acting on a broad and equitable discretion, will turn, is, whether the petitioner can obtain this benefit by reopening the commission, and what will it be worth to him? The judgment, which is the evidence of his debt, is now nearly forty years old, almost double the period which the law allows to the existence of it as a debt. His last proceeding on it was in 1805—more than thirty years before his present application. Could the commissioners of the bankrupt admit such a debt to be proved, or such a creditor to participate in the distribution of the effects of the bankrupt? If it stood naked and alone, it is, in my opinion, most manifest, that either the bankrupt, if living—or his representatives, as he is dead,—or any of his creditors, objecting to the admission of such a debt, the commissioners would have no legal right to receive it; and if received, it would be expunged, as in the case in 15 Ves. 479. The examination of the numerous cases on this point has occupied a large portion of the argument of counsel on both sides. I forbear to examine them. The general effect of such a lapse of time upon a judgment is not denied; but it is alleged, that this effect, which is but a presumption of law, may be explained and rebutted by circumstances—by evidence, which, in the opinion of a court and jury, would keep the debt alive; and that the petitioner has a right to go before the commissioners, or to a jury, at his election, to satisfy them that he has such circumstances and evidence as would relieve him from this presumption—would account for his delay, in a manner to preserve his debt. This is true; but in order to induce me to grant his petition on this ground, it is incumbent upon him now, and here, to satisfy me that he has such evidence and such circumstances in his power, not as absolutely as might be required of him by the court, but sufficiently so to convince me that he has some fair and reasonable ground to go upon—some probable legal expectation of making out his case, if the opportunity is accorded to him. In an application to a common law court to open a judgment and let the party into a defence, the court will be well satisfied that he has an available defence, before they will disturb their judgment. It is not enough for him to say—give

me the opportunity, and I will try what I can do with it—he must show to the judge for whose interference he applies in his behalf, what his reasons are, and that he has a good case to exhibit. In the present case, I do not think that, as matter of law, the facts and circumstances relied upon by the petitioner could avail him to avoid the consequences of the lapse of time upon his debt. Should he go to a court, I must presume that the judges would take the decision of the law upon themselves; and as to the facts, taking them to be just as the petitioner has represented them, they are altogether insufficient to entitle him to relief. I do not again repeat them, or go into the detail of my reasons for this opinion. It appears to me to be obvious, that neither the bankruptcy and death of Mr. Morris, nor the alleged difference in the law between a bond and a judgment, nor the petitioner's ignorance of the lands in question, are sufficient apologies for his neglecting to take the prescribed and ordinary means of keeping his debt alive, for any contingency that might be beneficial to him. Why should I open a commission for such a claim, which, with my opinion of it, I must believe would not be received by the commissioners, or by any other tribunal to which the petitioner might carry it? If I should refuse the prayer of the petitioner, if no reason were offered for his inertness for five-and-thirty years, I may, and ought also to refuse it, when the reasons offered to remedy this defect, are to me clearly insufficient: and particularly when those reasons are of a character that would fall under the dominion of the court, rather than of a jury, consisting of undisputed facts, and leaving the legal inferences from them only to be determined. The effect of the bankruptcy and death of Mr. Morris upon the lapse of time, are, in my opinion, clearly questions of law for the decision of the court, and not of a jury; so also is the supposed difference between a bond and a judgment, in this respect. The fourth reason—that is, the ignorance of Mr. Sansom of the existence of the land in question—is more of a mixed question; but I cannot suppose that either a court or jury would consider it as a good reason for such laches, or as avoiding the legal effect of time upon the debt. If he meant to take the chance of the discovery of property, he should have kept his judgment in a situation to avail himself of it; otherwise, we should, I think, have had heretofore, and shall have hereafter, the same defence set up in very many cases. If it is enough for a plaintiff to say that he did nothing under his judgment, because he did not know of any property to levy it upon, it is obvious how easy it will be to defeat the wise provision of the law which requires diligence of him. The reason is good, perhaps, for not taking out an execution, but certainly it does not account for the neglect to keep the judgment alive, by the inconsiderable trouble and expense of issuing a sci. fa. once in every five years. It must be understood, that I do not put my ultimate decision of this case upon this ground. It may be that I am mistaken on it; it may be that the commissioners, or a court and jury, would admit the proof of the debt, notwithstanding the lapse of time against it; it may be that they would deem the reasons of the petitioner for his inactivity sufficient to rebut the presumption of law; but it will be seen that my argument against the present application, is independent of the existence or non-existence of the debt of the petitioner; although, indeed, if he has no debt, it is, of itself, a sufficient reason for rejecting his petition. But if the judgment had been duly kept alive—if it were now a good and subsisting debt—the objection remains, which I think is fatal to this application to the equity and discretion of the judge, that the petitioner has neglected the matter for thirty-five years, during the whole of which time it was in his power to do that which he now desires to do, and to allow which, he calls upon the judge to review a proceeding of six years' standing, and to revoke a decree under which valuable rights have been acquired. This is the radical defect of his claim. There is no equity in such a petition

There is another consideration, of no imposing weight, in the legal aspect of the case, but which bears strongly upon its equity. If it were certain that Mr. Sansom will take upon himself to proceed with this commission—to have new commissioners and new assignees, who will accept the trust, appointed; and that the commissioners will admit the proof of his debt, and all this must be done, or he has no object or interest in the success of his petition—then I may inquire whether he will have such an interest in revoking the supersedeas, and restoring the commission, whether he can derive such a benefit from it, as will justify me, in the exercise of a sound and equitable discretion, in annulling a decree made so deliberately and so long ago, and in taking the hazard of the wrongs and injuries which it may inflict upon others who have put their faith in the permanency of the decree;—can I hesitate to see on which side the strongest, the preponderating equity lies? It is hardly credible, that the petitioner would proceed with this commission, when, from any calculation I have been able to make on the facts now before me, he could never receive from it one-half of the amount of the expense of his first step. He could not obtain the first meeting of the commissioners for twice the sum he will, if his whole claim is allowed, receive from them. I will not presume that he is struggling to gratify his pride or his resentment by a barren victory, which he never intends to prosecute to any result, but, having succeeded in annulling the supersedeas, will leave the commission as he found it. I confess, that nothing in this case, from the beginning, has been so obscure to me, as

the object of the petitioner. It is admitted that his judgments cannot be aided, as their liens are certainly gone; and indeed no advantage is claimed or expected by him, but to prove his debt, under the bankruptcy, and I have shown what that is worth. It is no answer to say, that if he has any interest, however small, it is enough for this application. He addresses himself to the discretion of the judge, on the equity of his case, and it is the duty of the judge to look to other parties and their equities, which may be affected by his decision.

I might well stop here, but it will, perhaps, be more satisfactory and just to one of the parties who has opposed this petition to say a few words upon a part of the case which has occupied a considerable portion of the discussion, and excited much of its animation. I mean the interest of Mr. Rawle in the supersedeas, and in the lands he has purchased, since it was awarded. The facts are, that a certain judgment was rendered against Mr. Morris, at the suit of Joshua B. Bond, in March, 1797. On this judgment a testatum fi. fa. issued on the 1st February, 1798. Here it rested until April, 1830. In the mean time the plaintiff, J. B. Bond, died, and his administrator, for the use of William Rawle, on the 1st day of April, 1830, issued a scire facias against the representatives of Robert Morris, who was also dead, to revive the judgment. On the 6th of December, 1830, judgment was confessed on the scire facias, by Mr. Williams, who appeared as the attorney of the defendants. The original judgment being thus revived, a fi. fa. was issued which was levied on certain unimproved lands, now in Schuylkill county; they were sold under a venditioni exponas, in October, 1831, and William Rawle, Jun., Esq., was the purchaser for the consideration or sum of $5,100. It is evident that these proceedings, if they were objectionable, can have no direct operation or influence to help the petitioner if his case is defective in itself; so far, indeed, as he has been opposed by the claims of Mr. Rawle, as a bona fide purchaser on the faith of the supersedeas, he may inquire into the character and good faith of the purchase to resist the equity of that claim; beyond this it is of no importance what were the circumstances of that sale and purchase, or who are interested in them. But, in justice to Mr. Rawle, I ought not omit to take some notice of these proceedings. The allegations on the part of the petitioner are, that Mr. Rawle, in truth, paid no money for this purchase, and that the representatives of Mr. Morris are interested with him in the purchase, and that for part of it he is a trustee for them. Is there any force in these objections, either as they apply to the case before me, or for any purpose? If Mr. Rawle was a bona fide assignee, and holder of Mr. Bond's judgment, and that has not been questioned, there was nothing unusual, improper, or illegal, in his becoming the purchaser of the property at the sheriff's sale, nor in his being allowed to give a credit on his judgment for the purchase-money. If Mr. Sansom had any objection to this, legal or equitable, he might have called upon the sheriff to bring the money into court, and then the question would have been examined and decided by the proper tribunal, and not left for us on this petition. But he comes here to cure all his delays and delinquencies. It is clear that Mr. Sansom knew that this course was in his power, for the motion was made in the court of Schuylkill county, which refused to consider it for want of jurisdiction, as the process under which the sale was made, had issued from the supreme court. The motion then might have been renewed in the supreme court; and the right of Mr. Rawle to pay for the land in this way, with every other objection connected with it, would have been fully attended to and finally determined. I can see nothing in this objection; it does not impeach the legality or good faith of the sale and purchase. Nor is there anything more in the other objection, that Mr. Rawle is a trustee for the representatives of Mr. Morris as to part of the land. And why may he not be, for part or for the whole? Mr. Rawle appears at the sale, a good and lawful purchaser; he is the highest and best bidder; he is able and willing to comply with all the terms of the sale, and if he does so, is it any objection to his title, or the honesty of the whole transaction, that other persons, the representatives of the original defendant in the suit, are interested in the purchase, are to answer to him for a proportion of the purchase-money, and to share with him a portion of the land? I cannot see it; this is purely an affair between themselves, and is no more liable to objection than if Mr. Rawle, after his purchase, had sold a part of the land to the same persons. This trust, if it existed, had no effect upon the sale, for it is not pretended that it was known, and even now rests only on conjecture. If, however, it was an objection to the sale, it is now too late to make it; the occasion is gone by. "When the sheriff comes to acknowledge his deed, the court may, if there has been fraud or unfair practices, set aside the sale." Whart. Dig. 213. The interest which the representatives of Mr. Morris had in superseding the commission of bankruptcy, and that they expected to derive some benefit from the property which would be liberated by the supersedeas from the operation of the commission, has never been concealed. On the contrary, it was their open and avowed object; and their manner of obtaining it, if free from fraud and unfair practices, is of no moment. The supersedeas was ordered on the application of Henry Morris, one of the children of Robert Morris, and the ground of it was the waste and loss of property, which had taken place by locking it up under the commission, and the

hope of rescuing what might remain. It was known that the effect of the supersedeas would be to annul the commission and all that had been done by, and under it, and to restore to the representatives of the bankrupt the property which had not been legally disposed of. Why did the children of Mr. Morris move in the thing, if they did not expect some benefit from it? Now these representatives appear here as distinct parties, to support for themselves, the order that was made on their petition; and if Mr. Rawle's equity as a purchaser, subsequent to the supersedeas and on the faith of it, were really liable to objection, it cannot affect the rights of the representatives of Mr. Morris, nor the property which has accrued to them by virtue of the supersedeas. Whether the lands purchased by Mr. Rawle constitute the whole property that has reverted to the bankrupt, I do not know, nor, perhaps, can it be certainly known by the parties; but if the commission is reinstated, that, as well as any other that may exist, will be wrested from them and brought back to the power of the commission. If, in superseding this commission, I transcended the powers delegated to me by the law, it is my consolation that it was a null and powerless act, which can do no injury to the rights of the petitioner. On the other hand, if that order was an authorized exercise of my authority and jurisdiction, it is a satisfaction to me, of great value, that I have given a close and attentive hearing to an able and laborious argument on behalf of the petitioner, in which learning and ingenuity were equally displayed, and that in deciding the case, I have omitted no means in my power, of reflection and research, to come to a sound and just conclusion. I order that the petition be dismissed.

On the 30th March, 1838, a petition was presented by N. Potts and Samuel Clement, assignees of the estate of Jacob Clement; Charles W. Smith and Jacob R. Smith, executors of the estate of James Smith; and S. and T. G. Hollingsworth, for the heirs of Jehu Hollingsworth. The petition stated the facts of the issuing the commission, the certificate of discharge, and the cessation of all further proceedings; it set forth the discovery of property belonging to the bankrupt, the death or disqualification of the commissioners, and prayed the appointment of new ones and for further relief. On the same day the court ordered a rule to show cause, on short notice, "why the prayer of the petition should not be granted. Notice to be given to the heirs and representatives of Robert Morris, the bankrupt." The hearing of the parties on the rule was subsequently postponed to the 17th November, 1838.

On the 10th November, 1838, the assignees of the estate of Jacob Clement, deceased, William Thaw, one of the heirs of Benjamin Thaw, deceased, and T. G. Hollingsworth, one of the heirs of Jehu Hollingsworth, deceased, filed a petition, in which they stated themselves to be creditors of Robert Morris, and reciting the issuing of the commission of bankruptcy and the granting a certificate of discharge. They stated that no further steps had been taken to render the property of the bankrupt available to his creditors, owing, as they supposed, to the belief that the unincumbered property was not sufficient to pay more than the expenses of the proceeding. The petitioners then averred that they had recently learned that certain real estate had been discovered, which was alleged to have been the property of Mr. Morris at the time of his bankruptcy, and which ought, therefore, to be applied to the payment of his debts; that they had learned also that a supersedeas of the said commission had been granted, upon the application of Henry Morris, stating himself to be one of the children of the bankrupt, but not alleging himself to have any interest in the estate; that, in fact, the said Henry had no interest in the estate, as would more fully appear by reference to the wills of the said Robert Morris, and his widow, Mary Morris, copies of which were annexed to the petition; that they had no notice or knowledge of the said application, or of the granting of the supersedeas until within the last three years, and that they or either of them neither knew or suspected that any proceedings to supersede the said commission had been commenced or were in contemplation. For these reasons the petitioners prayed for a review of the proceedings in reference to the alleged supersedeas, that it might be vacated and commissioners be appointed, the original ones having died or become disqualified; and for further relief. On the same day the court granted a "rule to show cause, on the 17th November, why the prayer of the petition should not be granted." Notice of the rule was accepted by the attorney of Henry Morris, and also by the attorney of Wm. Rawle, Esq., who claimed an interest in the property.

On the 17th November, 1838, the rules came on for a hearing before HOPKINSON, District Judge, and were argued by Meredith for the petitioners, and by Williams, who appeared for Henry Morris, and Tilghman, who appeared for Wm. Rawle, Esq., against the petitioners.

Mr. Meredith, for the petitioners.

The present petitioners appear on different grounds from the former petitioner, Mr. Sansom. He had not proved his debts under the commission, while the present petitioners have done so. At the time of Mr. Sansom's petition, Henry Morris was supposed and assumed to have an interest in the estate, when, in fact, he had none, for all Robert Morris's property was left to his wife; and this court would not have ordered a supersedeas knowingly on the petition of a stranger in interest. In order to show that Henry Morris had no interest, we must ask whether Robert Morris

had a devisable interest in the lands recently discovered, and if not, whether he had a descendible interest in them. It is, however, sufficient for our purpose to show that he had a devisable interest, for which see Jones v. Perry, 3 Term R. 88; Fearne, Rem. 549; Ex parte Paddy, Buck, 235. The petitioners had no notice of the proceedings for the supersedeas. Sansom not being a known creditor —not having proved his debt—could have no notice but by publication; but these petitioners are known creditors, on record, and were entitled to personal notice. In a case like this there is a remedy in England without a supersedeas, as the commission of bankruptcy is a trust; in the first instance, for the creditors, and then for the bankrupt as to any surplus remaining after the creditors are paid. Lowndes v. Taylor, 2 Rose, 365; Hammond v. Attwood, 3 Madd. 158; Saxton v. Davis, 18 Ves. 81; Ex parte Wilson, 1 Atk. 218. It is an error to suppose that the commission is annihilated; it is not so. The judge has ordered that a supersedeas shall be issued, but it never has been issued, and the commission is now in full force, and will so remain till a writ of supersedeas be signed and sealed by the judge. Ex parte Freeman, 1 Ves. & B. 38; Ex parte Leicester, 6 Ves. 429; Ex parte Layton, 6 Ves. 439; 2 Madd. 612; Cooke, Bankr. Law, 536. A supersedeas could never have issued on Henry Morris's petition, as it would have been an order to the commissioners, who were not parties to the application, but were strangers out of court. The issuing of the supersedeas is necessary to give effect to the order for it, for the creditors can be acted upon by the judge only through the commissioners. If the commissioners are dead or disqualified, so that the supersedeas can not be served upon them, new commissioners should be appointed in order to make an effectual service on them, for there can be no supersedeas without the writ.

Mr. Williams, against the petition, commenced to answer the argument, urged on the other side, that a formal writ of supersedeas was necessary, but—

THE COURT stopped him, and desired that he would proceed to the other points, saying that no actual issuing of a writ of supersedeas was necessary here, the court doing by one act what the chancellor does by two; that it was entirely a question of practice which the court had a right to regulate; and that the clerk of the court had repeatedly issued certificates, under seal, of the order superseding the commission.

Mr. Williams continued—On the former hearing, the interest of Henry Morris was admitted, or not disputed, and it is now too late to disturb the proceedings on that ground. These petitioners swear they knew nothing of the proceedings until within the last three years, but admit that length of notice. They left the case on Mr. Sansom's petition, and neither made themselves parties to it, nor offered to do so, and the court having refused to reverse the order for a supersedeas on that petition, they come now, after the lapse of more than a year, to ask that the whole matter may be again reviewed. We are not bound to show title in Henry Morris now; it is at best a mere matter of form, and does not affect the merits of the case in any way whatever, and title will be presumed in him after this lapse of time without a denial. But if we are required to show his title, it is manifest—he was the son of the bankrupt, and he was the executor of the executrix of the bankrupt. The legal estate remained in the bankrupt till the assignment was perfected. Doe v. Mitchell, 2 Maule & S. 446. This right being in the bankrupt, if descendible and not devisable, it comes to Henry Morris as heir or one of the heirs; if devisable, then, as executor of his mother, he has sufficient interest in the estate to go into the orphans' court and ask an order of sale, &c., and to petition this court for a supersedeas. Cooper, Bankr. Law, 334; Attorney General v. Capell, 2 Show. 480. The estate remained in the bankrupt's possession over twenty years, and was thereby confirmed to him as against his creditors. Power v. Hollman, 2 Watts, 218; Diemer v. Sechrist, 1 Pa. [1 Pen. & W.] 420. The petitioners say that they were known creditors, but they were also to be presumed to be paid on account of the lapse of time. Peebles v. Reading, 8 Serg. & R. 484. And all Mr. Morris's property now remaining must be considered as surplus, for, from the lapse of time, all the debts must be treated as if paid by the bankrupt or released by the creditors.

Mr. Tilghman, on the same side.

It is now eight years since the supersedeas, during which time all things have been as if Robert Morris had never been a bankrupt. At the time of granting the supersedeas, personal notice was given to J. Huston, the petitioning creditor; and all other creditors were notified by advertisement. These petitioners are bound by this notice and by the decree of the judge precisely as though they had appeared and been heard against the supersedeas. Mr. Rawle became a purchaser, on the faith of the supersedeas; and, since the refusal of Mr. Sansom's petition, he has sold to other parties, who were present at the last hearing of this matter, and purchased on the faith of the decision then made thereon. Eighteen months after the rejection of Mr. Sansom's petition, the present petitioners come forward to disturb the security of these innocent purchasers. Fraud and falsehood in obtaining the supersedeas should be alleged and proved before it can be overthrown. Nothing new is pretended to be in the case now that has not been argued before, except that Henry Morris had no interest in the estate of the bankrupt. To this we answer: (1) The allegation comes too late, the subject has been passed upon; (2) Henry Morris was not alone interested in the

petition, but the whole of the heirs of Robert Morris were concerned; (3) it is immaterial whether he had any interest or not, the object was simply to bring forward the question whether a commission should be superseded or not, and it was the duty of the judge to look to every person who had an interest in the application; (4) he had an interest, he was the executor of Robert Morris's executrix. Kline v. Guthart, 2 Pa. [2 Pen. & W.] 490.

Mr. Meredith, in reply.

The former order was made on the supposition of a state of facts which did not exist; and no notice was given to those who were entitled to it. We cannot doubt that, on our showing the real state of facts, the order will be reversed. The petitioners have an interest in the estate; they are creditors who have proved their debts under the commission. The interested parties—the commissioners or assignees—were not made parties to the proceedings which produced the supersedeas; and no personal notice was given to the creditors residing in the city where the proceedings were held, when, from their local position, they were entitled to it. In the opinion of the court upon Mr. Sansom's petition, Henry Morris is spoken of and considered as the representative and heir of Robert Morris. It now clearly appears that he had no interest. This is a new fact and a new state of things. As the petitioner had no interest in the estate, it is never too late to come in and show it. The objection of there being a bona fide purchaser extends to part only of the property, and that part was bought with full knowledge of all the circumstances. Parties claiming to be protected in this right must show that they have paid the full consideration money. The former decision was on the grounds: (1) That Mr. Sansom had no interest; (2) that Henry Morris had. But now the whole thing is reversed; the present petitioners have interests, and Henry Morris has not. First or last, this thing will be set right. It began in injustice and must end in retribution. This princely estate cannot be withheld much longer from the creditors of the bankrupt.

On the 6th February, 1839, HOPKINSON, District Judge, delivered the following opinion in the case:

The petitioners in this case are, the assignees of the estate of Jacob Clement, deceased, William Thaw, one of the heirs of Benjamin Thaw, deceased, and T. G. Hollingsworth, one of the heirs of Jehu Hollingsworth, deceased. They state themselves to be creditors of Robert Morris, formerly of the city of Philadelphia. The petition recites the issuing of a commission of bankruptcy against Robert Morris in July, 1801, and the granting of his certificate of discharge on the 4th of December of the same year; but that no further steps were taken to render the property of the bankrupt available to his creditors, owing, as the petitioners suppose, to the belief that the unincumbered property was not sufficient to pay more than the expenses of the proceeding. The petitioners then aver that they have recently learned that certain real estate has been discovered, which is alleged to have been the property of Mr. Morris, at the time of his bankruptcy, and which ought therefore to be applied to the payment of his debts. They state that they have also learned that a supersedeas of the said commission has been granted, upon the application of Henry Morris, stating himself to be one of the children of the bankrupt, but not alleging himself to have any interest in the estate of the bankrupt. That in fact the said Henry had no interest in the estate, as will more fully appear by reference to the wills of the said Robert Morris and his widow Mary Morris, copies of which are annexed to the petition. The petitioners say they had no notice or knowledge of the said application of Henry Morris, or of the granting of the supersedeas, until within the last three years, nor did they or either of them, at any time previous, know or suspect that any proceedings to supersede the said commission had been commenced, or were in contemplation. For these reasons the petitioners pray for a review of the proceedings in reference to the alleged supersedeas, that it may be vacated, and that commissioners be appointed, the original ones being dead or disqualified, and for such further relief as may be right and just. This petition was filed on the 10th of November, 1838, and a rule granted to show cause, on the 17th, why the prayer of the petition should not be allowed. Notice was accepted by the counsel of Henry Morris, and also by the counsel for William Rawle, Esq., who claims an interest in the property. In the March preceding, a petition was presented by the same petitioners, with one other, also stating the facts of the issuing of the commission, of the certificate of discharge, and the cessation of all further proceedings. It also sets forth the discovery of property belonging to the bankrupt, and the death or disqualification of the commissioners, and merely prays for the appointment of new commissioners, and for further relief. No reference is made to the supersedeas. On this first petition a rule was granted for a hearing, on a short notice to the heirs and representatives of the bankrupt, but no further proceeding was had upon it, or in relation to the subject, until the 10th day of November following, when the second, or additional, petition was presented and proceeded upon.

On a careful review of the opinion I delivered, with great deliberation, and after a most learned and elaborate argument on both sides, on the petition of William San-

som for a revocation of the supersedeas, I see no reason to change that opinion, as the case was then presented. I now repeat what I then said, that the entire novelty of the case, and the importance of the principles involved in it, gave rise to difficulties of a serious and embarrassing nature. I did then hope, as I now do, that the final disposal of it would not rest on my judgment, but that some proceeding would be had, as was intimated by the counsel, to bring the case before another tribunal. No such steps have been taken. The inquiry now is, therefore, limited to the question whether any matter of law or fact has been shown which was not brought into my view at the former hearing, and which, if known, would have produced, or ought now to produce, a different result. The subject of the want of notice of the petition of Henry Morris, and the proceedings thereon, was fully discussed and decided at that hearing; and I find nothing in the situation of the present petitioners to distinguish them, in this respect, from the petitioner in that case. The same supineness, the same inattention to the affairs of the bankrupt for five-and-twenty years from the bankruptcy, when the petition of Henry Morris was filed; an entire disregard of that petition and all the proceedings upon it from 1825 to 1838, full thirteen years; not even roused to it by the movement of Mr. Sansom in 1836, when the discovery of property was publicly disclosed, having the same notice which Mr. Sansom had of the occurrences prior to his application—the same and the only notice which the law required, or indeed was practicable in the case. On this question of notice they stand in a worse situation than Mr. Sansom. The endeavor to distinguish this case from that decision on the similar petition of Mr. Sansom, in reference to the notice, is this. It is said that these petitioners, having proved their debts under the commission, which Mr. Sansom had not, were entitled to personal notice of the application of Henry Morris; and, as a further claim to this privilege, it was urged that they resided in the city where the proceedings were going on, some of them within a short distance of the court. No authority of the law was shown for any such distinction in the rights of creditors. Neither the statute, nor any judicial adjudication, nor any practice, was shown, or is known to me, to give countenance to this argument. One manner of notice—that is, in the public gazette—is provided for all; and all are bound to attend to it, or the estate of a bankrupt never would or could be settled. In the equity and reason of the thing, the creditors residing in the same city, in the very neighborhood, where the proceedings are going on and the papers published, are less entitled to this personal regard than those who are at a distance. The fact that the present petitioners proved their debts under the commission only puts in a stronger light their subsequent abandonment of the commission and of all their expectations from it.

The ground mainly relied on to support this application to revoke the supersedeas is, that Henry Morris, on whose petition it was ordered, had no right or interest in the estate of the bankrupt, and, therefore, there was no party before the judge on whose behalf any petition could be received, or any order made in relation to that estate. This objection must be considered and decided. It is well, in the first place, to remark, that Henry Morris, in his petition, makes no false allegation on the subject of his interest. He states the fact of his relationship to the bankrupt, and no more, leaving the question of his interest to those who might choose to deny it, and to the judge whose right it was to decide it. He cannot, therefore, be charged with deceiving or misleading the judge by a false allegation. His petition was filed in November, 1825, nearly twenty years after the death of his father, and a considerable time before the death of his mother, Mary Morris. The will of Robert Morris was proved and recorded in May, 1806, full thirty years before the argument of the motion for the supersedeas, and, of course, during all that time was in the power of Mr. Sansom, and of the present petitioners, and of all and any of the creditors of Robert Morris, to be used by them, had they chosen to use it, to defeat the application of Henry Morris. The will of Mary Morris had been proved and recorded for nearly ten years at the time of the hearing, but no notice was taken of it. The right of Henry Morris as a petitioner was not brought into question by denial or objection. If the petitioner against the supersedeas could waive the objection, he did so; and the present petitioners never appeared to make it. Under these circumstances, the incapacity of Henry Morris, as a party to a proceeding affecting the property of Robert Morris, is certainly urged at this time by these petitioners with no claim to favor. Nevertheless, if the law gives them the right, they must have it. If, by the law, they may demand the revocation of the supersedeas, no minister of the law can refuse it. The objection is that Henry Morris had no interest whatever in the estate of his father, Robert Morris, and, therefore, could be no party to a proceeding to affect that estate; that the order for the supersedeas was made in behalf of a person who could take nothing by it, and had no right to intermeddle with it. Was this strictly and truly the case? Had Henry Morris no interest, present or contingent, sufficient to give him a standing before the judge on that question? Was he so absolutely a stranger to it that he might not be heard upon it? It is clear that Henry Morris, as one of the children of the bankrupt, after his death, had an interest in his estate, whatever it might be, unless that interest had been taken away from him by

some legal act or instrument. The will of Robert Morris is relied upon for that purpose. But a preliminary inquiry is, whether Robert Morris, at the time of his death, had himself such a right and interest in this property as enabled him to devise it. The affirmative of this question is contended for by the petitioners; and it is argued that, if he had a descendible interest in the land, he had a devisable interest, and that if he had not a descendible interest, Henry Morris could derive none from him, and that, in either case, he had nothing to support his petition.

The case in which the principle relied upon by the counsel for the creditors is fully developed and reported is Jones v. Perry, 3 Term R. 88. The point decided is thus stated in the syllabus: "A possibility coupled with an interest is devisable." The case arose upon the construction of the statute of wills, which enables persons having an interest in lands, &c., to devise it. That a mere or bare possibility, unaccompanied by an interest, was not devisable, seems to have been admitted; and the question was as to the kind and degree of interest which, coupled with a possibility, may be the subject of a devise. It is not easy to fix a definite meaning to the word "interest," as here used. Some limitation is clearly intended to be put upon it, for it is said that that which an heir has from the courtesy of his ancestor is but a bare possibility, and has no such interest coupled with it as to be devisable. Yet, if a legal interest can be raised on a calculation of contingencies the most remote and impossible, as in the case before us, it can hardly be denied that the chance of an heir from the courtesy of his ancestor is something better than that of a stranger. I would say that his hope of succession is more rational, more likely to be fulfilled, than any that a bankrupt could have or entertain of the release of his property from the claims of his creditors, or of a return of it to him as amply as it left him, by a supersedeas of the commission which deprived him of it. From the argument of the judges, as well as the counsel, in the case of Jones v. Perry, we may consider that the principle now contended for was carried as far by the court as they would be willing to go with it. We shall see that the interest, the contingency, in that case, was by no means so remote or improbable as to bear any comparison with ours. It was this. A house and lot were devised to T., the brother of the testator, until his son John, or any of his younger sons, should attain the age of twenty-one years; if T. should have no younger son who should arrive at that age, but should have only one son living to that age, then until that son should attain that age. As soon as his said nephew John, or any other younger son of his brother T., should attain the said age, the testator gave the house, &c., to the said John, or such other younger son as for the time being should be a younger son of his said brother T.; and if the said T. should have but one son who should live to that age, then he devised the house, &c., to that son. The testator died, leaving his brother T. with two sons, the said John and Joseph. John died before his father, and before he was twenty-one years of age. Joseph attained that age, married, and died, having made his will, by which he devised, in the most broad and general terms, all his property and estate, &c., to his wife. The question was whether Joseph had such an interest in the house and lot mentioned in the will of his uncle as enabled him to devise it to his wife. It was decided that he had; and this is the possibility coupled wth an interest which is recognised to be devisable by that decision. Now, we clearly see in that case whence the interest of Joseph was derived, and what it was. It was given to him expressly, by the will of his uncle, the first testator, and not by a legal, uncertain, implication. The event on which the interest was to become vested, and the property his, was clearly described; and the event did actually happen. Nor was it so remote or improbable as to deserve to be called a mere possibility. It can hardly be said to have been improbable or unexpected. Thomas, the brother of the testator, had, so far as the case informs us, but two sons, John and Joseph, of whom John was the younger. If, then, John should die before attaining the age of twenty-one years, and Thomas, his father, should have no other younger son, the right of Joseph would be complete. This will was made in June, 1734, and John was not of age in 1751, when he died. Of course, he was but a child at the time of making the will, which lessened his chance of reaching twenty-one years. There was certainly nothing strange in the happening of the contingencies upon which the devise to Joseph would take effect, and, of course, his interest was neither remote or improbable; he had an interest in the estate, with a very fair chance of enjoying it. Can such a case be put in comparison with that under our consideration? Whence did Mr. Morris derive the interest in this property; and what was it which it is said he might dispose of by his will, when the commission of bankruptcy was in full force and operation? Not by any such condition, or contingency, or reservation, in the statute, nor in the assignment of the estate for the use of his creditors, as that by which it is now claimed for him,—not by anything that happened in his lifetime to bring back to him the rights he had wholly and absolutely lost by his bankruptcy. At the time of his death his estate, with all his rights in relation to it, all his interests in it, all his control over it, were entirely vested in others. In the case cited, both the grant and the condition on which it was to take effect were distinctly and expressly declared. Because there were in that case both a probability and an inter-

est, can we say that it is so in ours? If this be no more than doubtful, should I upon it say that Henry Morris has no interest? Shall I refuse to hear him? Shall I take from him the means and the opportunity of having that question deliberately tried and decided by a competent tribunal of law and fact? Why should he not have the opportunity to try this grave question on his father's will? But, while the commission is in his way, he cannot do so. Let him and the creditors meet fairly on that question. If the objection urged against him is good and valid, it will prevail against him; for it was intimated, both on this and the former argument, that the petitioners would not be concluded by my decision, but could have their rights examined and restored to them elsewhere. It is certain that, after his bankruptcy, Mr. Morris had no interest in his property, recognised by the law, which made any act or agreement on his part necessary to the transfer of the property, with a perfect and unquestionable title. The statute immediately vested all his estate in the commissioners; and no conveyance by him was called for. The commissioners afterwards assigned it to assignees chosen by the creditors; and they might afterwards sell to whom they pleased. In all these proceedings the bankrupt has neither lot nor part; he is treated as a stranger, as one who has forfeited all his rights of property by what, legally speaking, was a fraud or an intended fraud upon his creditors. Where is the ground of the suggestion that the legal estate remains in him? Can we believe that, at the time Mr. Morris made his will, he had any view to this property, or to the event which has taken it from his creditors? It is true, he devises all the property, real or personal, which he then possessed or might afterwards acquire; but has this description any application to property which he did not possess? If indeed the commission had been superseded before his death, the property restored to him would be property afterwards acquired; but, to the time of his death, he possessed nothing, he acquired nothing. If, therefore, his intention is to have any influence in the construction of his will, no one, I think, can seriously contend that he looked to an event which would give what is now called a "princely estate" to his wife, in exclusion of all his children. It may be remarked, too, that this probability, this interest (if it may be so called), which is said to be coupled with the possibility, has to pass through two wills with the force and effect of a legal devise, under the general words of all the property, real or personal, possessed by Mr. Morris at the time of his death; and, in the case of Mrs. Morris's will, of all her estate, real and personal; for, if her devise to her daughter, Mrs. Nixon, does not embrace it, then she died without disposing of it, and Henry Morris, either as the son of the testator, or of Mrs. Morris, will have his share in it. May we not confidently say, too, of Mrs. Morris, that she had no idea she was giving to one of her children, most abundantly and happily provided for, a great estate, in no part of which did she allow her other children, most especially Henry, who did want it, to participate? She had no such thing in her mind. In the case of Jones v. Perry, on the contrary, the testator had distinctly and expressly in his view the contingency by which the estate would vest in his nephew Joseph; and, certainly, he did expect that it might happen, and therefore provided for it.

I am aware that on this argument I must encounter a formidable difficulty. If Robert Morris had no right or interest in this property, how have his children or representatives any, for it is said that whatever is descendible is devisable? In the first place, this objection does not reach all the parties who appear here, and who appeared on the former occasion, to sustain the supersedeas. Some of them are purchasers at a sheriff's sale, under judgments regularly rendered and prosecuted to execution and sale against Robert Morris; and who can have no title if the commission of bankruptcy is restored. They do not claim from or through the children of the bankrupt. In the second place, I refer to what I said in my former opinion, that "the effect of the supersedeas is to annihilate the commission, and to place the bankrupt, with his estate, in the same situation they would have been had it never existed." But if the bankrupt is not in existence, at the time of the supersedeas, it can have no effect upon him; it cannot change his situation in regard to the property. In another place I observed, that "the effect of the supersedeas would be to anul the commission, and all that had been done by and under it, and to restore to the representatives of the bankrupt the property which had not been legally disposed of." The supersedeas in this case, for the reason given, could have no effect on the bankrupt or his personal rights; it could operate only on his estate, for the benefit of his representatives. I do not consider their right as descending from him, but as being cast upon them by the law by an event which, occurring after the death of the bankrupt, vested no rights or interests in him. The right arose by and from the supersedeas, and had no existence before or without it. It has been likened to a bankrupt's interest in a surplus. I grant that the bankrupt had what may be called an interest in the surplus, if any, of his estate; although I should rather say that such surplus would enure to his benefit—would return to him. But this is not a surplus. It does not come to the bankrupt by the same event that would entitle him to the surplus, nor by the same proceedings, nor by virtue of the same legal principles that would restore to him a surplus after the payment of the debts charged upon his estate. The debts for which the property was taken from him being satisfied, the surplus remains

without any claimant in law or equity but himself.

I have, perhaps with more labor than they deserved, given the views which occurred to me on this part of the case. I cannot say that they are altogether satisfactory to myself, nor that they have removed entirely the difficulties of the argument; I should hardly be content to rest a decision upon them. But I will nevertheless say, that I am still less satisfied with the argument to show that Mr. Morris had anything more than a bare possibility of getting back his property from his creditors by this, or any other, contingency; and that such a possibility gave him any right or interest in the property, which he could transmit to another, either by an assignment or a devise. Admitting the devise in the will of Robert Morris to be valid and effectual in relation to this property, has Henry Morris any interest in it, which will support him as a party in these proceedings? The objection raised against him is purely technical and formal, for the real and substantial questions upon the supersedeas, were as fully argued and considered with the creditors, or a creditor having the rights of others, on the one side and Henry Morris on the other, as they could have been with any other party. In such circumstances I shall look with a close and willing eye to discover enough of interest to give Henry Morris a standing before me, to give him a right to be heard on his application. "If the scale do turn but in the estimation of a hair," I shall be satisfied. It is by meting such a measure to him that his right is denied, and he may defend it in the same way. It should be recollected that the whole case was fully and ably argued and carefully examined; that the only creditor of Mr. Morris who appeared to assert any right to his property, chose to meet Henry Morris as a party to the cause, as his authorized adversary; that he made no objection to the original application for the supersedeas on the ground of a want of right or interest in Henry Morris to make it; that these petitioners, and all the other creditors of the bankrupt, had then an opportunity to appear and make this, or any other, objection to the supersedeas; but they left it all to the management of Mr. Sansom, and can we say now that this objection is entitled to any favor? If the hundred creditors of Robert Morris, who proved their debts under the commission, or the many hundreds who did not, may, year after year, or at intervals of many years, come forward singly, or in little parties of three or four, to start new objections to disturb and annul all that had before been solemnly and publicly done, it is impossible that this estate can ever be settled, or the rights of the family of the bankrupt, or of bona fide purchasers, be ever safe and at rest.

Without meaning to insist upon it as a substantial ground, but rather as a set-off, or equivalent, for the argument of the petitioners, we may ask whether Henry Morris had not something like an interest, something like a reasonable expectancy, under the will of his father? He gave all his property to his wife, Mary Morris, saying, that "no doubt she will make such distribution of it amongst our children as she may think proper." This is, at least, a strong recommendation, amounting almost to an injunction, that the property should be divided amongst the children. Henry Morris was one of them; and the probability of his obtaining a share under this recommendation, was not a right it is true, I will not say it was a legal interest, but it was a better contingency than that on which the petitioners rely. At the time Henry Morris filed his petition for the supersedeas, his mother was living, and he had no interest or expectation from his father's estate, but that which depended on the hope that his mother would carry out the recommendation of his father, by a distribution of it amongst their children. It would be enough for the present purpose if, as one of these children, he had a right to bring up the question whether the commission of bankruptcy against his father should continue in force, and whether the conduct of the creditors, and other circumstances of the case, did not warrant a supersedeas of the commission. But another claim, as a party to these proceedings, has been set up for him; to wit, as the executor of the mother, Mary Morris. His petition alleges "that the said Robert Morris, at the time of his bankruptcy, was seised and possessed of a large estate, real and personal, which, in consequence of the neglect of the said creditors and assignees in not duly prosecuting the said commission, has been wasted and misapplied." This allegation was neither disproved nor denied. Mary Morris, under the will of Robert Morris, was entitled to all the real and personal estate which belonged to him at the time of his death, and to whatever right and interest he had therein. Mary Morris died about the month of February, 1827, appointing her sons Thomas and Henry her executors. Can it be questioned that Henry Morris, as the executor of his mother, had an interest in the personal estate, at least, devised to her by her husband; and that he might be a party to any proceeding for the recovery or protection of that estate? Even in regard to the real estate, the laws of Pennsylvania, in certain circumstances and for certain purposes, give an executor an authority over the real estate of his testator. The answer given to this assertion of right is, that at the time Henry Morris filed his petition and commenced this proceeding, his mother was not dead, and, of course, he was not her executor. I see no force in this reply. A petition in a proceeding of this sort is not like a suit at common law, in which the party must have his right of action when he commences it. May not a person who acquires an interest in a suit depending in chancery, after its commencement, come in and be made a party?

Even to satisfy the most scrupulous form, it was only necessary that Henry Morris should file another petition, or in some way suggest to the judge, for there is no record, strictly speaking, of this proceeding, the new and additional capacity in which he presented his claim. The true questions or matters on which he prayed for a supersedeas of the commission were set forth in his petition, and the creditors had notice of it. No new matter of complaint was introduced, no surprise upon his adversaries, no new person as a party; but at the time of the hearing, a new right or interest had accrued to the petitioner, not in the least affecting the merits of the controversy—they remained the same. The creditors, or those of them who chose to appear on the notice, knew, for it was a matter of record and notoriety, of the death of Mary Morris, and the appointment of her executor. They go on to a hearing, without objection to the right or interest of the petitioner, without calling upon him to set out formally his claim in his new capacity, or inquiring in what right or capacity he was prosecuting it. Was not this a waiver of the form of filing a new petition? Did not they consent to meet his claim as it was in truth, and under any right he had to prosecute it? I think that, even if it were material, it has been waived. Such an objection could not be kept in reserve, to be resorted to if the petitioner should be successful. At the time of the hearing, and long before, Henry Morris had the right of a party in this proceeding, in fact and in law; his right was recognised by meeting and answering it without objection, and it would be a strange sort of equity if I were now to undo all that has been done on this ground. In answer to this objection the petitioner has urged that his petition was depending five years without any opposition or appearance by any creditor. The application of the petitioner was renewed in 1830, after the death of Mrs. Morris, and still no opposition to it from any quarter, and so it went on to the hearing and order thereupon, and so it continued for eight years after that order without objection; and so it was on the hearing of Mr. Sansom without any objection to Henry Morris as a party. Is it not obvious that if in Mr. Sansom's petition, in which he stood for the rights of all the creditors (for none came to join him), this objection had been taken, it would have been at once obviated by allowing Henry Morris to file a supplemental petition? It would be the grossest injustice to admit it now. Even in the more strict proceedings at common law, a waiver of an objection at the time it ought to have been made, will, in many instances stronger than this, preclude the party from a subsequent resort to it. Indeed, in the first petition filed by these petitioners, no suggestion is made of this objection, nor until eight months afterwards. Year after year, opportunity after opportunity, were afforded to these petitioners to oppose the petition of Henry Morris, on this or any other ground, but they do not move or speak, until more than ten years had elapsed from the date of the order of supersedeas, and then they appear, relying on the allegation that Henry Morris had no interest in the property when he filed his petition, not denying, for it could not be denied, that he had a clear interest at the time of the hearing and order. Is there any right that a man holds or enjoys by the law, that he may not lose by neglect; that he may not surrender by abandonment? Debts secured by the most solemn contracts, by official records; unquestioned titles to real estates, of any amount and value, even if they should be "princely," may be and have been irrecoverably lost solely and merely by the inattention of the owner. The peace and order of society, the security of the whole community require this, and no individual, who may suffer by it, has any just cause of complaint or reproach, except against himself. For seven-and-thirty years, not without warnings and notice, did these petitioners sleep over the rights they had acquired in the property of Mr. Morris, by his bankruptcy; and they now wake up and expect to find these rights fresh and unimpaired! Not much more than half of this time would have, with the same neglect, swallowed up their mortgages and judgments, their lands and tenements. I know not what there is in their right to a bankrupt's property that will preserve it from the destruction that would have buried their right to their own. The bankrupt law is so far from countenancing neglect and delay in the proceedings on the part of the creditors, that it requires extraordinary promptness to bring them to a close, that the bankrupt and his estate may not be wronged by an unreasonable delay. If the commission is not proceeded upon, in its preliminary proofs for declaring the party a bankrupt, in thirty days, the judge may supersede it. The assignees are directed to make a dividend of the effects within twelve months from the issuing of the commission; and the second dividend within eighteen months, which is to be the final dividend, unless there be a suit depending, or some part of the estate standing out, or other effects shall afterwards come to their hands. The whole proceeding is intended to be finished and closed in eighteen months.

As the counsel for these petitioners thinks that the proceedings by which the commission of bankruptcy against Robert Morris was superseded, "began in injustice, and must end in retribution," it is a consolation to me as well as to him, to know that, if I am mistaken in my views of the matter, "first or last they will be set right; and that the princely estate of the bankrupt cannot be much longer withheld from his creditors." I am by no means desirous that the grave questions which have arisen in the course of these proceedings, or any man's property, princely or mean, shall be finally disposed of by my judgment. It is, however, to be regretted, for it has produced

much trouble and expense, that these creditors never thought this great estate, as it is now supposed to be, worth looking after for seven-and-thirty years; that they should have abandoned it; that no one of them, or of the other numerous creditors of the bankrupt, would hazard the expenses of executing the commission, to put them in possession of this principality. The assignees appointed refused to take it into their care and management; would not accept the trust which all thought so worthless; nor did the creditors think it worth their time or money to appoint other assignees. I shall dismiss both the petitions.

MORRIS, In re. See Case No. 7,303.

Case No. 9,826.

MORRIS v. BARNEY.

[1 Cranch, C. C. 245.] [1]

Circuit Court, District of Columbia. July Term, 1805.

PLEADING AT LAW — AMENDMENT—MAKING NEW PARTIES.

The court will not permit an amendment making new parties.

Assumpsit by indorsees against the maker of a promissory note.

Mr. Caldwell, for plaintiff, moved to amend by adding the name of the payee of the note as plaintiff, for the use of Morris. This was done to avoid the allegation of the defendant that the words "or order" had been inserted by the payee after the note was made.

Refused by THE COURT; it being to make new parties.

Case No. 9,827.

MORRIS v. BARRETT et al.

[1 Fish. Pat. Cas. 461; 1 Bond, 254.] [2]

Circuit Court, S. D. Ohio. March, 1859.

PATENTS—CLAIM AND SPECIFICATIONS—TWO IMPROVEMENTS IN ONE PATENT—EVIDENCE—EXPERT—PRODUCTION OF MACHINE.

1. In the construction of a patent, the patentee is not to be confined to the summing-up or "claim," but the specification, the whole specification, and the drawings may be referred to, to ascertain the extent of the claim of the invention, or the proper meaning of expressions used in the "claim."

2. It is competent for the patentee to embrace two improvements on the same machine in the same patent, and if the defendant has used both or either of the improvements, there is infringement.

3. M. claimed "the clamps, 6 6, to prevent end-expansion, and the levers, 7 7, working on fixed fulcrums," to prevent the wood from twisting. *Held*, that this was not a claim for the combination of clamps and levers, but for two distinct improvements in the art of bending wood.

4. A kind of evidence which is entitled to the highest credibility, is the machines themselves, as shown by the models, which, like figures, can not lie.

[Cited in Seymour v. Osborne, Case No. 12,688.]

5. The law permits the opinion of men, called experts, to be given in evidence, to determine questions of mechanical difference; and when such men are qualified, and free from bias, their testimony is entitled to great respect.

6. If the same result is produced by the defendant as by the patentee, but by means substantially different, there is no infringement, for a patent is not granted for a mere result; but otherwise, if the defendant produces the result by contrivances substantially the same in principle.

[See Crompton v. Belknap Mills, Case No. 3,406.]

This was an action on the case [by John C. Morris against Silas M. Barrett and Jabez M. Waters] tried before LEAVITT, District Judge, and a jury, to recover damages for the alleged infringement of letters patent for an "improvement in wood-bending machines," granted to plaintiff March 11, 1856. The machine consisted of a stationary form, around which timber was bent, by means of two levers, turning upon fixed fulcrums, and applied near the end of the timber. The timber to be bent was laid upon a metallic strap, having clamps or abutments attached to each end, which embraced the ends of the wood, and prevented any stretching of the fibers during the act of bending. These clamps were made to slide upon the levers as the wood was brought around the form. The claims of the patent were as follows: "I claim the clamps, 6 6, to prevent end-expansion, and the levers, 7 7, working on fixed fulcrums, when in operation, all substantially as, and for the purposes, set forth in the foregoing specifications." The defendants substituted radial arms with rollers to press upon the back of the wood, and used clamps which permitted a partial relaxation or stretching of the fibers, at the commencement of the bending operation.

G. M. Lee and S. S. Fisher, for plaintiff.

Bates & Scarborough and W. B. Caldwell, for defendants.

LEAVITT, District Judge (charging jury). The plaintiff's patent is for an improvement in wood-bending machines, minutely described in the patent and specifications. In the conclusion or summing-up, he says: "I claim the clamps, 6 6, to prevent end-expansion, and the levers, 7 7, working on fixed fulcrums, when in operation, all substantially as, and for the purposes, set forth in the foregoing specifications." The practical purpose to be accomplished by these improvements he claims to be: 1. The clamps to prevent end-expansions; and 2. The levers working upon fixed fulcrums to prevent the wood from twisting. It was claimed in argument by defendants' counsel, that the plaintiff was confined, in construing his claim, to the summing-up; but the doctrine is well settled

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

[2] [Reported by Samuel S. Fisher, Esq.; reprinted in 1 Bond, 254; and here republished by permission.]

that the patent, the specifications, the whole specifications and the drawings, may be referred to in ascertaining the extent of the patentee's claim; and while it is true that we are to look at the summing-up to discover what parts of the machine he claims to have invented, still, if any thing is needed to enable us to determine the proper meaning of expressions used in the "claim," we must refer to the previous portion of the specifications for such explanations as may be necessary to understand the office and purpose of that which is claimed as new.

The plaintiff's claim is not for a combination but for two distinct improvements in the art of bending wood. It is, no doubt, competent for a patentee to embrace two improvements on the same machine in the same patent; and if, in the present case, the defendants have used both or either of the improvements of the plaintiff, they have infringed his patent.

On the subject of the identity of the two machines, it may be remarked, that we are not concluded by their mere form or appearance. The question is, are they the same in substance? Is the machine used by the defendants a mechanical equivalent for that patented by the plaintiff? In applying these principles to the facts of this case, the jury will remember that there is a kind of evidence which is entitled to the highest credibility, and that is the machines themselves, as shown by the models, and which, like figures, can not lie. In addition, as many persons would be unable, from a want of previous knowledge or experience, to determine these questions of mechanical difference, the law permits the opinions of men called experts, to be given in evidence; and, when such men are qualified and free from bias, their testimony is entitled to great respect. The following is a brief summary of the testimony of this class of witnesses in the present case:

Three experts were examined on behalf of each party. Those for the plaintiff testified in the order named: John Byrne says that he has been for several years engaged in the business of wood-bending. He describes the machines, and gives it as his opinion that they are substantially the same in principle. Finley Latta has been for twenty years a machinist. He thinks the fulcrums and cramps are substantially the same in both; and that the joint in defendant's lever is a mechanical equivalent for the sliding of plaintiff's clamp. Gardner Lathrop has devoted much attention to practical and theoretical machines. He thinks the machines are the same in principle; that the clamps are the same in both, and that the jointed lever is an equivalent for the sliding clamp.

On behalf of the defendants, the following experts testified: Orville Mathers says that the two structures are different in principle; that the defendants' have no fixed fulcrum, and that they do not prevent the expansion of the wood. The plaintiff insists that the statements of this witness should be received with caution, because of his interest in the subject-matter, as he is the inventor or constructor of the machine used by defendants. W. S. Rosecrans gives it as his opinion that the two machines are not the same in principle. He points out their difference of operation, and mentions the peculiarity of the defendants' machine, that it would bend non-elastic substances. He has had much experience as a teacher of mechanics, and testified with great intelligence. George H. Knight is a patent agent, and is acquainted with mechanics. He says, upon an examination of the plaintiff's specifications, that the machines are not the same in principle; that the most palpable difference between them is the entire absence of fixed fulcrums in the defendants' machine. He thinks the action of the clamps is substantially the same in both—that both are intended to prevent end-expansion.

This is the substance of the testimony of the experts on both sides. The jury will give to it such weight in their judgment as it is entitled to, and if, from the evidence, they believe that the same result as that claimed by the plaintiff is produced by the defendants, by contrivances substantially different, then there is no infringement, for a patent is not granted for a mere result; but if they find that the defendants produce this result by contrivances substantially the same in principle as those used by the patentee, they will find a verdict for the plaintiff. The object of the action is not so much to obtain damages as to sustain the patent. There is nothing in the case to call for exemplary damages, but if the jury find the plaintiff entitled to a verdict, it would be competent for them to give him an amount that would compensate him for the actual damage sustained by reason of the infringement.

The jury found a verdict for the plaintiff, with $125 damages.

[For another case involving this patent, see Morris v. Royer, Case No. 9,835.]

MORRIS (BARRON v.). See Case No. 9,828.

MORRIS (BOWDEN v.). See Case No. 1,715.

MORRIS (BOWERBANK v.). See Case No. 1,726.

Case No. 9,828.

MORRIS et al. v. BRUSH.

[2 Woods, 354; [1] 14 N. B. R. 371.]

Circuit Court, W. D. Texas. June Term, 1876.

BANKRUPTCY—APPEAL—ACTION TO SET ASIDE CLAIM OF CREDITOR—MOTION TO DISMISS APPEAL—TRANSCRIPT—TIME FOR FILING.

1. A proceeding in the district court in the nature of a suit in equity, brought by the as-

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

signee and creditors of a bankrupt to set aside the claim of an alleged creditor, and to abrogate the lien asserted by him on the bankrupt's property, is appealable to the circuit court under section 4980 of the Revised Statutes.

2. A compliance with general order in bankruptcy 26, in relation to the time of filing such appeal in the circuit court, is not necessary, to give the court jurisdiction.

3. But the order mentioned is a rule of practice in the circuit court, and if disregarded, the appellee has prima facie ground on which to move to dismiss the appeal.

4. A transcript of the proceedings of the district court is not required to be filed within the ten days prescribed for filing the appeal in the circuit court, but only a statement of appellant's claim and a brief account of what has been done in the district court and the grounds of appeal.

5. Where the decree of the district court disallowing a claim against a bankrupt estate was entered on January 21st, notice of appeal given January 27th, and the appeal bond filed in the clerk's office of the district court on January 28th; and before the next term of the circuit court, but not until May 22d, the declaration of appellant, setting forth his claim and the history of the proceedings was filed in the circuit court, at which time a transcript of the proceedings in the district court, was also filed, *held* that the circuit court had jurisdiction of the case and could hear it or not in its discretion, according as it might or might not be satisfied with the excuse offered for the delay in filing the papers.

6. A district judge sitting in the circuit court may in a proper case enlarge the time for filing an appeal in the circuit court.

This cause was heard upon the motion of plaintiffs, the appellees, to dismiss the appeal.

[2] [The appellee James B. Morris was duly elected assignee in bankruptcy of one Philip Dei, against whom a petition for adjudication of involuntary bankruptcy was filed on the 2d day of June, 1874. Among the debts proved against said estate was an alleged secured debt in favor of one S. B. Brush, who died pending the litigation, the appellants becoming his personal representatives. The assignee applied to the district court to have the proof of debt rejected, under Rev. St. § 5081, upon the following grounds: (1) Because of a fraudulent preference under Rev. St. § 5021. (2) Because of a fraudulent preference under Rev. St. §§ 5128, 5129. (3) Because both of said trust deeds were void, having been executed to defraud and delay the other creditors of the bankrupt. (4) Because of an alleged partnership between the bankrupt and Brush. (5) Because trust deed of March 12, 1874, was waiver of trust deed of May 12, 1873. Certain unsecured creditors also filed a like application, based upon the same grounds, and also because certain enumerated carriages, etc., of the alleged value of five thousand dollars and over, in the trust deed of May 12, 1873, were sold and removed by the bankrupt, with the consent of Brush, and, if not rejected, this amount should be charged to Brush on the secured claim. The assignee amended his application by setting up, as additional grounds for rejecting proof of debt: (1) That, from July 1, 1872, to March 12, 1874, the bankrupt was insolvent, and that Brush knew it, and also had reasonable cause to know it. (2) That the bankrupt retained full control of all the property covered by these deeds of trust. The answer of Brush's representatives set up: (1) A denial of any knowledge of any insolvency of the bankrupt on the part of Brush. (2) That most, if not all, the property described in the trust deed of 12th of May, 1873, was sold by Brush to the bankrupt, the trust deed being taken to reserve the purchase money. (3) That it was agreed, from the commencement of their dealings in 1872, that Brush was to be secured by deeds of trust on the bankrupt's property. (4) A denial of any partnership between Brush and the bankrupt. (5) That the trust deed of 1874 was a mere renewal of the trust deed of 1873, and did not affect the lien. (6) A further answer, in the nature of a cross action seeking to recover, from the assignee, the value of certain buggies, the property of Brush, and charged to have been converted, by the assignee, to the use of the estate. The assignee demurred to this last defense, as not a proper subject of inquiry in this proceeding. The cause was then tried, upon those issues, before the district judge, without a jury, and the following facts were proved: The bankrupt came to Austin in January, 1871, with little or no capital and credit, and commenced driving a hack, and bought carriages and harness from Brush, the latter always requiring security. He opened a livery and sale stable in April, 1873, and sold and traded as his own the property described in the trust deeds, Brush relinquishing the lien whenever a sale was made. The trust deed of 1873 covered about all the property of the bankrupt, as did also the deed of 1874, and the greater portion of it the bankrupt originally purchased from Brush. Brush knew nothing of the debts owing by the bankrupt in Missouri and Illinois, before coming to Texas. The Texas indebtedness was small. The bankrupt was making money when the bankruptcy proceedings were instituted, and Brush had no reason to suppose that the bankrupt would not be able to pay all his debts in time; but he knew that the bankrupt had made debts to the amount of several thousands of dollars since coming to Texas, and that the property representing the greater portion of this indebtedness was included in the trust deed of 1874. A good deal of the property in the trust deed of 1873 had been sold before the deed of 1874 was made. The latter covered the property in the deed of 1873 still undisposed of, and also such other property as the bankrupt had acquired from Brush and others since the deed of 1873 was made. The proceeds of sales were sometimes applied to the secured indebtedness, and sometimes used in making cash purchases from Brush. There was no partnership between Brush and the bankrupt. The trust deed of 1874 was intended as a renewal of the deed of 1873, under the original agreement as to security between the bank-

[2] [From 14 N. B. R. 371.]

rupt and Brush. The trust deed of 1873 was past due, and, on March 12, 1874, a settlement was had, and the bankrupt paid Brush in cash all he owed over the five thousand dollars, and made the deed of that date to secure that balance. The bankrupt valued his assets, at the time of the seizure by the marshal, at fifteen thousand dollars, and returned them in his schedules at about thirteen thousand dollars. The debts proved up against the estate, exclusive of Brush's secured claim, amounted to ten thousand five hundred dollars about. The amount realized by the assignee in disposing of the assets was eight thousand nine hundred and four dollars.

[On the 21st of January, 1875, a decree was entered sustaining the assignee's demurrer to the cross action of Brush's representatives, and disallowing and expunging the said debt, deeds of trust, and liens, and declaring them null and void. On the 27th of January, 1875, notice of an appeal from this decree to the clerk, the assignee, and the creditors mentioned in the application, was filed, and the service of notice was accepted on the same day. On the 28th of January, the appellants, J. B. Barron and W. B. Brush, executors of Brush, filed their petition for allowance of an appeal reciting the proceedings had in the cause, and praying for a transfer of the same "to the next circuit court of the United States for said Western district of Texas, at Austin, to be held on the first Monday in June, 1875," etc., etc. The district judge allowed the appeal on the same day, and required an appeal bond to be given in the sum of five hundred dollars. On the 28th day of January, 1875, citation was issued on said appeal, and service thereof was accepted by the assignee and creditors. The appeal bond was filed on the 29th of January, 1875. A transcript of the record of said cause was filed in the circuit court on the 22d of May, 1875, as well as a declaration on appeal setting forth the facts relied upon by the appellants, and giving a general history of the proceedings in the district court, and praying for the relief desired, and the same was served on the appellee. On the 26th of May, 1875, the appellee filed a motion to dismiss the appeal, based principally on the ground that the declaration on appeal was not filed within the ten days prescribed by rule 26 in bankruptcy. No circuit justice or circuit judge held the circuit court until the June term, 1876, when the motion to dismiss was submitted.] [2]

Wm. M. Walton and James B. Morris, for the motion.

C. S. West and W. F. North, contra, who cited and relied on sections 4981–4984, U. S. Rev. St.; Bump. Bankr. (8th Ed.) 345; Baldwin v. Raplee [Case No. 802].

BRADLEY, Circuit Justice. [This is an appeal from the district court. The decree appealed from was made on the 21st day of January, 1875, upon the following case: Philip Dei was declared a bankrupt, upon a petition filed against him on the 2d day of June, 1874. S. B. Brush filed against the estate proof of a claim represented by two promissory notes for two thousand five hundred dollars each, dated February 12th, 1874, payable in ninety days, with interest at one and one-half per cent. a month, and secured by a trust deed given to Charles W. White, trustee, dated the 12th of March, 1874, and recorded in the Travis county records on the same day; the said notes being given in renewal of previous notes of a like or greater amount, dated 12th of May, 1873; and the said deed of trust being executed in place, and in renewal of, a former deed of trust, dated May 12th, 1873, given to secure the notes of the same date. The assignee of Dei, the present appellee, filed a petition in the district court praying to have the said claim of Brush disallowed, and the lien of the trust deed set aside, on the several grounds, generally summed up in the allegation, that the deeds of trust were made in fraud of the bankrupt laws, in fraud of the other creditors, and by way of fraudulent preference. Some of the other creditors also filed a petition of the same purport, and praying like relief. Brush having died, in the meantime, his executors, the present appellants, filed an answer sustaining his claim, and alleging that it was bona fide and just; also complaining that the assignee had taken possession of certain property belonging to Brush, which the bankrupt had in custody for sale on commission, worth to the amount of one thousand six hundred and sixteen dollars and eighty-seven cents, and had sold the same, and refused to return or account for the property or proceeds, and praying a decree for payment.

[The district judge made a decree disallowing the claim last set up, and declared the deeds of trust of May 12th, 1873, and March 12th, 1874, to be fraudulent and void, and disallowed and expunged the claim of Brush from the list of claims upon the assignee's record.][2]

The nature of this proceeding was that of a suit in equity, brought by the assignee and creditors to set aside the claim of Brush and to abrogate the lien claimed by him on the bankrupt's property. In such a case an appeal clearly lies under section 4980 of the Revised Statutes. The motion now made is to set aside and dismiss the appeal, on the ground that the appeal was not filed in the clerk's office of this court within the ten days after taking the appeal in the district court as required by the general order in bankruptcy 26. It is not disputed that the appeal was claimed and notice thereof given to the clerk of the district court, and to the assignee and creditors, within ten days after the entry of the decree, and that a bond was duly filed as

[2] [From 14 N. B. R. 371.]

[2] [From 14 N. B. R. 371.]

required by section 4981 of the Revised Statutes. Nor is it disputed that the appeal was duly entered at the next term of this court, which was held after the appeal was taken, as required by section 4982 of the Revised Statutes. The facts are, that the decree was entered on the 21st of January, 1875, and notice of appeal taken on the 27th of January, and the appeal and bond were filed in the clerk's office of the district court on the 28th of the same month; but the declaration of the appellant, setting forth his claim and the history of the proceedings, was not filed in this court until the 22d of May, 1875, at which time the same was filed, together with a transcript of the proceedings before the district court, consisting of nearly two hundred pages. The next term of the circuit court was held on the first Monday of June, 1875, and after that, on the first Monday of January, 1876; but neither the circuit justice nor the circuit judge was present in the district from the time of taking the appeal until the present term, June, 1876.

The excuse offered by the appellant's counsel for not filing the appeal in this court until the 22d of May, 1875, is, that the proceedings were so voluminous that they could not obtain a transcript thereof at an earlier day; that they deemed the transcript a necessary part of the appeal; that no delay was occasioned in the progress of the case by their failure to file the appeal in January; and that the practice in this respect is uncertain. I think it clear that a compliance with general order 26, in relation to the time of filing the appeal in the circuit court, is not necessary to give this court jurisdiction. This was so held by Circuit Judge Woodruff in the case of Baldwin v. Rapplee [Case No. 802]. He considered the rule merely directory. As all the requirements of the statute were complied with in this case, the court has jurisdiction of the appeal, and can hear it or not in its discretion, according as it may or may not be satisfied with the excuse that has been offered for the delay. Although the rule is directory, merely, still it is the rule which governs the practice of this court, and if disregarded, the appellee has a prima facie ground of dismissal. And I think the counsel for the appellants is in error in supposing that the transcript of the proceedings in the district court is required to be filed within the ten days prescribed for filing the appeal in this court. It is not always in the appellant's power to compel an instant making out of the transcript. He may have to get orders from the circuit court as to what shall be certified, although it is the duty of the clerk of the district court to make it out with all convenient dispatch, when the proper conditions are complied with. What is required to be filed in the circuit court within ten days from the time of taking the appeal is the appeal, containing a statement of the appellant's claim, and a brief account of what has been done in the district court, and the ground of appeal. This is what is meant by the declaration in section 4984 of the Revised Statutes. This, in most cases, can easily be done within the ten days. But there has undoubtedly been some uncertainty in the practice. And, in view of this fact, and the fact that no injury could possibly arise from the delay in this case, as the court did not sit till June, and as there was no judge here who could hear the case; and as the delay does not seem to have proceeded from any desire to prolong the proceedings, I shall deny the motion to dismiss.

It is proper to observe, in conclusion, that I see no reason why the district judge, as judge of the circuit court, should not, in a proper case, enlarge the time for filing the appeal in the circuit court. This would be the better mode, when the parties are apprehensive that they will not have time sufficient to prepare the proper pleadings, as it would prevent applications to dismiss, and would restrain the attention of the parties to the merits.

[2][On June 17th, 1876, the cause was heard on its merits, before Hon. Joseph P. BRADLEY, and, after hearing the evidence, as above set forth, the opinion of the court was delivered orally, the judge observing that, in the absence of any actual fraud, the trust deed of May 12th, 1873, created a valid lien on the property described in it; that the fact that the bankrupt disposed of the property as his own did not vitiate the deed as to the other creditors, but was a matter that affected no one but Brush, and that the latter was not bound to apply the proceeds of the sales of the encumbered property to the secured debt; that the registration of the trust deed, in accordance with the laws governing chattel mortgages, took the place of delivery of possession, and took the case out of the statute of frauds; that the new notes and trust deed of March 12th, 1874, were not a satisfaction of the notes and trust deed of 1873, but merely a renewal of the same, and did not affect the validity of Brush's lien on the property embraced in the first deed of trust; that the deed of trust of March 12th, 1874, so far as it covered property not embraced in the former mortgage, was a prohibited preference, under the bankrupt law [of 1867 (14 Stat. 517)], but that the fact that this trust deed was void, so far as the original property was concerned, did not affect the lien on the property described in it, and also embraced in the valid deed of 1873; that there seemed to be a disposition on the part of district courts to consider all preferences and securities as contrary to the spirit of the bankrupt law, and to construe this branch of the law strictly rather than liberally; that this view of the law was not adopted by the supreme court of the United States; and that it had, in several recent cases, taken occasion to state that the object of the bankrupt law was not to dis-

[2] [From 14 N. B. R. 371.]

courage vigilance on the part of creditors, except in particular and enumerated cases; but that the preferences and liens (except in those enumerated cases) were as much entitled to protection from the bankrupt courts as any other legal rights.

[Thereupon a decree was made ordering the assignee to pay to the appellants the net proceeds of the sales, made by the former, of the property embraced in both deeds of trust, and which came into his hands as assignee; and that said amount so paid be credited on the appellants' proof of debt, and that the same be ranked, for the amount of such balance, with the other unsecured creditors of the estate; and that each party pay his own costs.][2]

MORRIS (COMMITTEE OF WEST NEW JERSEY SOCIETY v.). See Case No. 3,065.

Case No. 9,829.

MORRIS v. CORNELL.

[1 Spr. 62;[1] 6 Law Rep. 304.]

District Court, D. Massachusetts. Oct., 1843.

SEAMEN—MATE DISPLACED—ORDERED TO OTHER DUTY—REMOVAL TO FORECASTLE—RIGHT OF COMPLAINT TO CONSUL.

1. A second mate rightfully displaced from heading a boat in the whale fishery, is bound to perform other duty, and upon his refusal to do so, may be punished for disobedience.

2. The right given to seamen by statute of 1840 [5 Stat. 394], to lay their complaints before the American consul, in foreign ports, is one of great importance, which a court of admiralty will carefully guard.

3. A second mate, who contumaciously refuses to perform duty, may be removed from the cabin to the forecastle.

4. The second mate's being commanded by the master to desist from swearing, and retorting on the master, that he heard him swear, and stating the language, is no justification for the master's violently assaulting and inflicting a blow upon the second mate.

[See Backstack v. Banks, Case No. 711.]

The libellant, who was second mate of the brig Agate, on a whaling voyage, of which the respondent was master, alleged, that the respondent removed him from his office, confined him to his state-room for a long time, deprived him of proper and sufficient food, refused to permit him, at various times, to go on shore at different places, and communicate with the American consul—turned him into the forecastle, where his berth was unsuitable, and committed violent assaults upon his person. The answer denied some of these charges, and justified others. The facts in the case sufficiently appear in the opinion of the court.

E. Bassett, for libellant.

T. D. Elliot, for respondent.

SPRAGUE, District Judge. The most important inquiry in this case, relates to the removal of the libellant from office, or his refusal to do duty, which was the first difficulty, and probably the source of all the others. A material part of the duty of second mate is to head, that is command, one of the boats in taking whales. The master admits that he removed him from this part of his duty, and justifies it on the ground of incompetency.

The libellant insists that it was from malice, and without justifiable cause.

It appears that, after being out about six months, the captain on one occasion headed one of the boats, of which the libellant then acted as boat-steerer, and as such, it was his duty first to strike the whale, when the boat had been placed by the captain in a proper position for that purpose. After an unsuccessful attempt to capture a whale, they returned to the brig. The mate, in presence of the libellant, asked the captain the cause of the failure. The captain said in reply, that it was as good a chance as he wanted, to fasten to a whale's head. The libellant said he did not consider it any chance at all. This was repeated two or three times, and the captain then told him if he did not call that a chance, he should not go in the head of the boat again during the voyage. The libellant replied: "If I don't, I will not do any other duty." The captain then told him he would confine him to his state-room, and keep him on bread and water, till he did do his duty. The libellant replied: "Very well, do so." The captain then directed the mate to prepare a state-room, by clearing out certain articles, which being done, he ordered the libellant to go into it, and he did so.

It is urged, that this decision of the captain proceeded from passion, and not from any honest judgment as to the libellant's competency. It was certainly a very unfortunate and suspicious moment, in the midst of a contentious conversation, in which the parties had strongly expressed opposing opinions, for the exercise of so delicate and important a power. The manner and the occasion savor strongly of passion, and deprive the master of those presumptions in favor of the rightful exercise of authority which would arise, if it had been done with calmness and deliberation, and challenges the most jealous scrutiny into the justification alleged. That justification is the incompetency of the libellant, or at least the honest judgment of the master, that he was incompetent, after a fair trial.

Was he competent?

[2] [In May, both boats lowered for sperm whales, the larboard being headed by the mate, and the starboard by the libelant. The larboard boat struck and killed the

[2] [From 14 N. B. R. 371.]

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

[2] [From 6 Law Rep. 304.]

whale; the school, from seven to twelve brought to, and the mate testifies that the libelant had as good an opportunity as he had, but did not take any. Clow, who steered the larboard boat, testified that Morris had a chance to take one, if he pulled when he ought, and adds; "I thought the man was crazy, he hallooed so. I did not think he knew much about whaling."

[In June, the boats were lowered again. In sperm whaling, it appears that the boat, in order not to be discovered by the whale, must approach him either head and head, as it is called, that is, directly in front, or go directly after him. In this instance it is testified by the mate, that Morris was approaching head and head, and he thinks that if Morris had continued pulling with his oars, he would have struck the whale; instead of which he stopped pulling, hauled on to the wind with his sail; the fish saw the boat, was frightened and escaped. On his return to the brig, he said that he thought the mate would strike the fish, as he was after him, if he, Morris, hauled out on the wind. The captain asked him why he did not take the whale. The mate thinks that Morris, in reply, gave the captain to understand that he could not be expected to do as well as an experienced hand, or as well as the mate. The captain "found considerable fault with him."

[Weeks, who was the libelant's boat-steerer on this occasion, says, that he thinks they "had a chance to go on to a whale if they had kept on pulling," but were ordered by Morris to stop.

[Clow, who was in the larboard boat, says, that they were in pursuit just behind the whale. Morris came down on the whale's eye quartering; the whale slewed round a little, saw Morris's boat, and went down. Morris hove up when he was a little way from him. If Morris had not pulled so near the whale, he thinks they could have got him.

[In September, Morris struck a large whale, which stove the boat, and threw the men into the water. The other boat picked up the men, but the whale was lost. The mate says he thought Morris had a good opportunity to take the whale, but did not approach him properly. Weeks, who was Morris's boat-steerer, says, that they fastened to the whale, he stove the boat, and they cut clear; that the boat was too near the whale; it was Morris's fault, because he did not lay the boat off enough; that when the witness stood up to throw the iron, the flukes of the whale were under the boat.

[These are the only instances in which Morris headed the boat in pursuit of whales. There is evidence, that in attempting to take blackfish, he in one instance had his boat capsized, and in another cut the line after fastening to a fish, owing to some mismanagement or error on the part of Morris or his boat-steerer. During the time he headed the boat he took two blackfish, but not any whale. The mate took one whale which made about twenty barrels of oil, and several blackfish—how many does not appear. On two other occasions, the captain headed the boat, and Morris acted as boat-steerer. On the first the captain placed the boat in a good position to strike the whale, but Morris did not succeed in doing so. He afterwards admitted that he had a good chance, but made a "muss" of it, as he expressed it to the mate. The other was the time which has already been adverted to, and which ended in the master's displacing him from the head of the boat.

[These facts would seem to raise a pretty strong presumption of want of skill, and to require of Morris the production of evidence to control them by showing his experience and ability. But as whale fishing is a business of a very peculiar character, in which failures often occur, the court would be very reluctant to decide such a question without aid from the judgment of those whose experience or means of observation at the time entitle their opinions to respect. Now, in this case, we have the testimony of the mate and two boat-steerers, who were all the officers excepting the libelant and respondent, and also of five seamen and the steward. The mate thinks that Morris had not had sufficient experience in sperm whaling, and both the boat-steerers express opinions one strongly and the other faintly unfavorable to his competency. Two of the seamen express the same judgment. The others, whose testimony was produced, were not questioned on that point. But we have it in evidence from the mate and others, that the opinion was general among the crew that Morris was not competent to head a boat, and that some of his men were afraid to go with him. No one who was on board the vessel has given a different opinion. The only evidence produced by Morris to show his competency, is the deposition of Captain Shackley, who had previous to this voyage given him a certificate that he was qualified to head a boat. He testifies that he shipped Morris in New Zealand, as third mate and boat-steerer, on board the whale ship Two Brothers, commanded by himself: that he was on board six months, and did his duty as well as any one could, and he thinks him qualified to head a boat. But it is to be remarked, that Captain Shackley never saw him head a boat, or had any knowledge of his doing so. He performed only the duty of a boat-steerer, and as such struck three sperm whales. The libelant was apprized by the answer of the respondent, that his competency was to be put in issue, and has had full opportunity to show his previous experience. He declared to some of the crew that he had never been sperm whaling before, although he had struck sperm whales, which accords with Captain Shackley's testimony, as the Two Brothers was engaged in right whaling. I am constrained, therefore, to believe that the

only experience Morris had had in sperm whaling, was on board the Two Brothers.] [2]

By the shipping articles it was expressly agreed, that if any officer, after a fair trial of his ability, should be judged by the master to be incompetent, he might be displaced. It is unnecessary to inquire whether this varies the authority conferred by law, that is, whether it makes the judgment of the master, after a fair trial, conclusive, because, upon the evidence, the respondent had, I think, sufficient grounds for judging the libellant to be incompetent to head a boat, and that he is entitled to the benefit of that justification, notwithstanding the unfortunate time and manner in which that judgment was declared.

[Captain Gifford, an experienced master in the whale fishery, testifies that a competent master can very soon determine whether an officer has the requisite skill; that seeing him once attempt to catch a whale is sufficient, and that the opportunity afforded to Morris constitutes a fair trial. He further states, that from the facts testified to, he should think that Morris had not the requisite skill. No one has expressed a different opinion upon either of these points. The respondent had, I think, sufficient grounds for judging the libelant incompetent to head a boat, and that he is entitled to the benefit of that justification, notwithstanding the unfortunate time and manner in which that judgment was declared. It was not the first time he had expressed his dissatisfaction; and Morris's persisting in asserting that to be no chance to strike a whale, which the master himself saw and declared to be a good one, might go far to strengthen a conviction that he was not qualified to judge whether a boat was placed in proper position or not. The master had the inducement of personal convenience to retain Morris in the head of the boat, for by displacing him, he thereafter imposed that duty upon himself.] [2]

It is insisted that Morris was not bound to perform any other duty, even if rightly displaced; that he was thenceforth a "quasi passenger." To this doctrine I cannot accede. The services of every man on board are needed. Take the case of our merchant ships, to which the same law applies. The second mate is disrated for incapacity, and a foremast hand placed in his stead. Shall he by his own misrepresentations as to his qualifications, deprive the ship of the services of an important officer, and by making her shorthanded, increase the hazard and add to the labors of all others, while he eats the bread of idleness, and is only an incumbrance to the ship?

I have no doubt that Morris, when he shipped, thought he should be able to perform the duties of second mate. I acquit him of all designed deception. Still, it was obligatory on him to know his qualifications, and if in fact, found to be unfit for a portion of his duties, he was still bound to have performed others. In refusing all duty, therefore, he was wrong, and set an example of insubordination and disobedience, which the master had a right to punish. He had a right to coerce him to submission.

Was the punishment excessive? It was not sufficient to produce submission. Morris never performed or expressed a willingness to perform other duty. It is said he was confined to his state-room. It is true, he was not permitted to pass through the cabin, but there was a scuttle, through which he could, at any and all times go on deck, with little, if any, difficulty. The mate testifies, that on a former occasion, he occupied the same state-room, in the same manner for two months, on account of a sick man being in the cabin, and that he found no difficulty in passing through the scuttle. Morris was not allowed to go forward of the try-works. With this exception, his movements on deck were unrestricted. He was kept on bread and water for a week or a fortnight, and afterwards, without any submission or request on his part, he was allowed meat and a kind of pudding called "duff," as often as the officers in the cabin. Complaint is also made of the want of light in his state-room, on which point there is some conflict of testimony. His health did not suffer, and considered as a punishment for refusal of duty and continued resistance of authority, his confinement and privations were not excessive.

The next allegation against the respondent is, that he prevented the libellant at different ports, from laying his complaints before the American consul. This right is secured to every seaman by the statute of 1840 [Langtree's Ed.] c. 23 [5 Stat. 394, c. 48], and if the consul be an upright and independent officer, it may be of immeasurable value to the oppressed and friendless mariner in distant regions. It may be called the habeas corpus of the seaman, and the court will carefully and vigorously guard its inviolability. But in the present instance, there is not the slightest evidence that any request was made, or desire expressed, by the libellant to the respondent, to go on shore to see the consul, or to lay any complaint before him. The libellant not being in close confinement, had free intercourse, at his pleasure, with the mate and seamen. He could easily have communicated with the consul through them; and it appears that in one instance, he did without the captain's knowledge, write to the consul. The contents of that letter are not stated. But its existence, at least, was made known to the captain while on shore, and it is inferred that he made representations to the consul, which prevented his noticing it. That inference may be true, but there is no evidence that such was the fact.

[2] [From 6 Law Rep. 304.]

Another ground of complaint is, that the libellant was not allowed to go on shore, at any of the various ports visited by the brig after he was displaced. The first port which she afterwards entered, was the Isle of Sol. The respondent there granted him leave to go ashore, but discovering that he had put his clothes into the boat, the respondent ordered them to be taken out, and kept on board the brig, and thereupon the libellant refused to go. He had previously declared his intention to escape, and such was evidently his purpose. Once after this, at another port, he asked permission through the mate, to go ashore, and was refused. No reason for the request was assigned.

Considering that he was in a state of continued contumacy, and had manifested an intention to leave the vessel, I do not think he was entitled to the indulgence of going ashore for his gratification. As to his removal to the forecastle, it was a rightful exercise of authority by the master, after his refusal to do duty, and I do not think it shown that his berth there was such as to render it wrongful.

There remain to be considered, the two assaults upon the libellant. While Morris lived in his state-room, and was ordered not to go forward of the try-works, he, on one occasion, went to the galley to light his pipe. The captain ordered him aft, and laid hold of him. One witness testifies that he seized him by the throat, and pressed him over the lashing that went over the galley, then let go, and Morris went to the after part of the try-works, and sat on a barrel; that after some words between them, which are not stated, the captain seized Morris again by the throat, pressed him against the try-works, and Morris was red in the face. The other three witnesses who speak to this assault, did not see the captain take him by the throat, but say that he collared him, and pushed him along. On a subsequent occasion, Morris in an angry conversation with Clow, was using profane language; the captain told him not to swear; he replied that he had heard him (the captain) swear; the latter asked him what? He answered he had heard him "damn the men's eyes!" The captain then in a rage seized him violently—in what manner in the first instance, is left doubtful; but there is no doubt, that before leaving him, he had him by the hair, a little of which was torn out, and inflicted a blow which left a mark on the eye. Morris acted only on the defensive.

These assaults are without justification, and the only question is the amount of damages. The conduct of the captain toward his crew seems to have been in other respects unexceptionable; and the mate, who has manifested no leaning toward Morris, testifies to the latter's "good disposition." These outbreaks may be attributed, in a great degree, to the continued irritation in which the parties were kept, by the unfortunate relation in which they stood to each other. Of this, Morris was the blameworthy cause. In passing forward of the try-works to the galley, he transcended the limits assigned to him, and was in fault. When properly checked for swearing, he was wrong in retorting upon the captain—but the provocation was not great. There was no exigency—no emergency. The captain was bound to suppress his passion. If unable to control himself, he is unfit to command others. He is to set an example of calmness and self-possession. Violence begets violence. Hasty words and rash acts on shipboard, often produce deplorable consequences, which a little forbearance would have prevented.

The bodily injury to the libellant was not very great, but he was subject to the indignity of unjustifiable violence to his person, and his feelings are not to be disregarded.

I shall decree $50 damages and costs.

That an officer, when disrated, is bound to perform other duty, and what duty, see The Mentor [Case No. 9,427]; Smith v. Jordan [Id. 13,068].

Case No. 9,830.

MORRIS et al. v. GARDNER.

[1 Cranch, C. C. 213.] [1]

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

PRINCIPAL AND SURETY — INDORSER ON NOTE — NOTICE — DELAY — KNOWLEDGE OF MAKER'S INSOLVENCY.

1. Notice to an indorser is necessary, unless he knew the maker to be insolvent at the time of indorsement.

2. Where the parties live within two miles of each other, nine days' delay is fatal.

3. A subsequent promise by the defendant to pay, made with a full knowledge of his discharge, will bind him.

Assumpsit against the defendant [John Gardner] as indorser of a note of Anderson; and for goods sold and delivered; and for money had and received; and upon an assumpsit in writing to pay seventy dollars for Anderson. The evidence was that the defendant was indebted to the plaintiffs [B. W. Morris and others] for goods sold; and gave and indorsed to the plaintiffs Anderson's note for a smaller amount than the debt due for the goods, which note was to be collected by plaintiffs, and when received, the money was to be applied to the credit of the defendant. The note became payable 9 and 12 July, 1802. The plaintiffs received on the 21st of July, forty dollars in part. No notice was given to the defendant of non-payment, until after the receipt of the forty dollars. The defendant lived in Washington. The plaintiffs' agent, who held the note, lived in Georgetown. Afterwards, and after the note was payable, and after the payment of the forty dollars, to wit, at last term, the plaintiffs recovered judg-

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

ment against the defendant for the balance of the account of goods sold, after deducting the amount of the note. Gardner said, at the time of indorsing the note, that he expected that it would be difficult to get the money of Anderson, but the plaintiffs could get it better than he could.

Upon the first count, (which is on the note,) THE COURT gave the following instruction: That it is necessary for the plaintiffs to prove that a demand was made on Anderson, the maker, and notice of his refusal given to Gardner, the indorser, in due time, unless it should appear that Anderson was insolvent when the note was indorsed and delivered to the plaintiffs, and was known by Gardner to be so: That the defendant, Gardner, was discharged from his liability by the want of such demand and notice, but that his assumption would make him again liable, if made under a knowledge of the facts and of the law as to his being discharged: And, further, that if the jury should be of opinion, from the evidence, that the defendant lived in the city of Washington, and the plaintiffs' agent in Georgetown, the distance being about two miles, notice to the defendant, given nine days after the last day of grace, was not reasonable notice.

Verdict for plaintiffs.

Quaere. See De Berdt v. Atkinson, 2 H. Bl. 336, and Nicholson v. Gouthit, Id. 609, as to the necessity of notice in case of known insolvency.

MORRIS (HARMER v.). See Case No. 6,076.

Case No. 9,831.

MORRIS v. HUNTINGTON.

[1 Paine, 348; [1] 1 Robb, Pat. Cas. 448.]

Circuit Court, D. New York. April Term, 1824.

PATENTS — ACT OF 1793 — PREVIOUS KNOWLEDGE AND USE—NEW PATENTS—SURRENDER—OLD PATENT DECLARED VOID.

1. The first section of the patent law of 1793 [1 Stat. 318], construed in connexion with the other sections of the act, means that the invention should not be known or used as the invention of any other person than the patentee before the application for a patent.

[Cited in Whitney v. Emmett, Case No. 17,585; Reed v. Cutter, Id. 11,645.]

2. If the invention have got into use while the inventor was practising upon it with a view to improve it before applying for a patent, such use does not invalidate the patent; and the motive for the delay is a question for the jury.

[Cited in Treadwell v Bladen, Case No. 14,154; Shaw v. Cooper, 7 Pet. (32 U. S.) 317; Jones v. Sewall, Case No. 7,495.]

3. One who has patented his invention cannot take out a new patent for the same invention, until the first is surrendered, repealed, or declared void.

[Cited in brief in Treadwell v. Bladen, Case No. 14,154. Cited in Mathews v. Flower, 25 Fed. 830.]

4. The obstacle of an invalid patent may be removed by having it declared void after a verdict against it, or by having a vacatur entered ex parte in the department of state on a surrender of the patent. But the provisions of the 6th section of the act, do not enable a patentee to declare his own patent void, and a verdict in a suit on the second patent in favour of such patent, does not avoid the first patent.

5. It seems that on surrendering a patent and taking out a new one, the latter should be for only the unexpired part of the fourteen years since obtaining the first patent.

6. Whether a new patent can be taken out where a patent has been declared void under the 6th section of the act? Quere.

[7. Cited in Wilson v. Rousseau, Case No. 17,832, to the point that a defective specification renders letters patent absolutely void, no matter how innocent of fraudulent design is the inventor, nor how beneficent his invention.]

This was an action on the case, brought by the plaintiff against the defendant, for infringements by him of a patent issued to the plaintiff May [15], 1822, for an improvement in the stopcock. The specification of the patent contained a clear description of the instrument, so that artists could make it from such description, and at its close, the improvements claimed under the patent were particularized. Evidence was given by the plaintiff showing the time of the invention to be September, 1815; that the plaintiff was the inventor; that the invention was useful; and that the defendant had made and sold instruments which were infringements of the patent. On a cross-examination of the plaintiff's witnesses, it appeared that the plaintiff had taken out a patent in 1816, for an improved block-tin stopcock, the specification of which was proved by the witness to describe the same instrument as the one described in the specification of the patent of 1822, with this difference, that in the former the particular improvements claimed were not stated. It appeared in evidence on the part of the plaintiff, that certain parts of the instrument, described generally as part of the instrument in both patents, but not claimed in the patent of 1822, as improvements of the patentee, had been in use prior to the patent of 1815. Upon this evidence,

C. D. Colden, G. Griffen, and G. W. Strong, for defendant,

Moved for a nonsuit (opinion of Van Ness, J., No. 4 U. S. Law J.; Whittemore v. Cutter [Case No. 17,601]; Odiorne v. Amesbury Nail Factory [Id. 10,430]; Moody v. Fisk [Id. 9,745]; Coll. Pat. 70, 170; Gods. Pat. 200; Fessen. Pat. 50, 173), on two grounds: 1. That it appeared that the instrument had gone into use before the date of the patent of 1822; and 2. That the patentee had a prior patent for the same thing, which had not been repealed, surrendered, nor declared void.

Under the first point it was contended: That by the words of the first section of the patent act, the invention must not have been used before the application for a patent. That the other sections of the patent law, the phraseology of which was indefinite,

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

should be construed in subordination to the first section. That this construction was fortified by the words of the first section of the law of 1800 [2 Stat. 37], extending the patent act to aliens. That the instrument having gone into the use or knowledge of the public, the inventor had no secret to disclose as a consideration for the grant by the public. That in England the law was unquestionably settled to this effect—and that the English decisions should be adopted here, inasmuch as they were founded in the nature of the subject, and as our courts had adopted English decisions on English statutes as applicable to the construction of statutes in this country, where there was much more difference in the phraseology, than existed between our patent law and the English statute. That the point in question had never been decided in this country under our present patent, before the decision of Judge Van Ness, which was in point in their favour. That very injurious consequences would result, if inventors might lie by, and after the public had got into the use of a thing, claim it by a patent.

On the second point it was contended: That the patent of 1816 was an estoppel to the plaintiff to take out another patent for the same thing, before the repeal or surrender of such prior patent. That the prior patent was not on its face void, but was voidable only, and that not by the plaintiff himself, but only by third persons. That to allow the plaintiff to allege his first patent to be void, would be embarrassing the court with the trial of two issues, in which it would be inconsistently thrown on the defendant to prove that the first patent was good and the second bad. That at any rate the plaintiff should have surrendered the first patent before taking out the second—the course in England being so. He should also in such case have taken out the second patent, not for fourteen years from its date, but for the residue of the time, computing from the date of the first patent. That on the plaintiff's grounds, patentees would, by taking out patents, insidiously defective, secure to themselves a perpetuity. That the acts in favour of Oliver Evans were a legislative decision on the subject; and that the case of Odiorne v. Amesbury Nail Factory [supra] was in point and decisive.

T. A. Emmet, S. P. Staples, and D. Lord for plaintiff,

In reply (Barrett v. Hall [Case No. 1,047]; Goodyear v. Mathews [Id. 5,576]; Woodcock v. Parker [Id. 17,971]; Davies, Pat. 448; Evans v. Weiss [Case No. 4,572]), contended on the first objection: That the 6th, 7th and other sections of the act showed that reference was to be had to the time of invention in considering the question of prior use. That the general phraseology of the act was inconsistent with a literal construction of the first section. That a literal construction of that section was felo de se, and it must therefore be construed in subordination to the rest of the act. That the policy of the patent act in England and its words differed from our law. That in England it went on the ground of a bounty from the crown; in this country on the ground of protecting the common law right of the inventor to his invention. That the point in question had been directly decided in Evans v. Weiss [supra], and in the case of Goodyear v. Mathews [supra].

On the second point: That the doctrine of estoppel did not apply; the grant was void so as to prevent any right from vesting. That the prior patent, on the state of the evidence, was void, not voidable: voidable implies that the thing is capable of confirmation, which the first patent is not. That a surrender of the first patent could not be made, there being no provision in the law to authorize it; as is the case in England, by the inherent power of the chancellor. That as the patentee had enjoyed no legal protection under the first patent, it should not be computed against him as part of the fourteen years, at any rate that the question of an extra extension of time could not properly arise until the lapse of fourteen years from the date of the first patent.

THOMPSON, Circuit Justice (charging jury). The questions presented by the facts in this cause are of great importance, and not unattended with difficulty, and deserve a more deliberate consideration than can be given them in the course of a trial.

The first question is, whether the fact that the invention was introduced into use by the patentee himself, as his invention prior to the application for the patent, rendered the patent invalid. It appears to be settled law in England, that if an invention had been introduced into use by the patentee himself, and known and used by others before the date of the patent, such disclosure and use will destroy the patent. There is however a difference between the English law and the acts of congress on this subject. In the English statute it is stated precisely from what period the fourteen years are to commence: they are to run from the date of the patent. But there is no such phraseology in the act of congress. The English statute speaks of the invention to be patented, being such as others, before the date of the patent, shall not use; and consequently if a patentee in England have so disclosed his invention as that it be put in use before the date of the patent, he is not entitled to the patent. Our act does not contain these provisions. There is some incongruity in the phraseology of our patent law of 1793, and it is inartificially drawn in several parts. A correct interpretation of it requires that the general scope and object of the law and all its clauses should be taken into view together. Were no other part of the act than the first section to be

read, it would seem to preclude a patent for any invention used before the application for a patent. But taking a general view of the clauses of the act and of its object it seems to me that this section must be controlled by the other parts of the act. As it respects the patentee, the great object of the law is to secure to inventors the benefit of their invention for fourteen years. The third section, prescribing the oath to be taken, only speaks of the applicant's being the true inventor. It says nothing about the invention's not having been in use before the application. So also the sixth section which specifies the cause for which a patent may be declared void, shows the great object of inquiry to be whether there has been a prior use of the improvement: Prior to what? Prior to the invention of the patentee. The same remarks are applicable to the 10th section, and indeed such seems the fair import of all the sections of the act of 1793, but the first. I therefore think that the first section should be construed in connexion with the other parts of the act, to mean that the improvement or discovery should be unknown and not used as the invention of any other than the patentee, before the application for a patent.

The objection drawn by the defendant's counsel from the first section of the act of 1800, placing aliens on the same grounds, in certain respects, as citizens, is not a substantial one. This section first proceeds to extend the benefits of the patent law to aliens, equally as they are enjoyed by citizens, and under the same limitations. Aliens must take the same oath as to being the inventors, &c. Then comes the proviso requiring them to swear that the invention has not been known or used in this or any foreign country. This proviso is a limitation on the enacting clause according to the general rule of construction, and is to be construed as limiting and restraining the grant to which it is applied. It puts the alien on grounds somewhat different from those of a citizen, requiring an oath of something more than is required of a citizen: and this view strengthens the construction given above to the first section of the act of 1793. Then the close of the proviso goes on to state, that if it shall appear that the thing patented was known or used previous to the application for a patent, the patent shall be void. It seems reasonable to restrict an alien in this manner from taking out a patent, for what has been in use abroad, inasmuch as our own citizens cannot patent a foreign invention. Evils may undoubtedly exist under this construction of the law. Expensive machines may be made before a patent is taken out; and persons who have in this way innocently incurred expenses, may be stopped short in their undertakings. But I am inclined to think that under such circumstances, a patent should not be permitted to operate to the prejudice of persons thus situated, on the principle that innocent third persons are not to be injured by relation back, so as to deprive them of a right lawfully acquired. And if a person knowing of an invention proceeds to put it in use, the inventor not having secured his right by patent, the latter ought not to be permitted to take away that which was previously lawfully made. No man is to be permitted to lie by for years, and then take out a patent. If he has been practising his invention with a view of improving it, and thereby rendering it a greater benefit to the public before taking out a patent, that ought not to prejudice him. But it should always be a question submitted to the jury, what was the intent of the delay of the patent, and whether the allowing the invention to be used without a patent, should not be considered an abandonment or present of it to the public.

The next question is, whether it is not a valid objection to the second patent that the patentee has a prior patent for the same thing not surrendered, repealed, or declared void. I think this objection insurmountable. A prior patent must be got rid of before a second can be taken out. Why should a second patent be taken out before a prior one is avoided, although invalid, if the patentee is enjoying the full benefit of it? It is objected, that the patentee is in difficulty as to getting the first patent out of the way. But if the patentee should sue on the first patent, and the defendant should succeed in the suit, the patent could be declared void; and if the patentee had a right to the thing patented, the objection of a prior patent would be removed. Besides, I see no insuperable objection to entering a vacatur of the patent of record in the department of state, if taken out inadvertently and by mistake. All the proceedings in that department on the subject of patents are ex parte, except in the case of interfering applications. The department acts rather ministerially than judicially, and upon the representation of the applicant without entering into an examination of the question of right: and there seems to be no good reason why on a like ex parte application the patent may not be surrendered and cancelled of record, if no misconduct be imputable to the patentee in taking it out. And in such case as the exclusive right is not to exceed fourteen years, the second patent may be limited according to circumstances, and thereby secure both to the patentee and the public their respective rights. The only record evidence of the patent is that in the department of state, and in the letters patent in the hands of the patentee; and if the letters patent were surrendered and cancelled of record, the invention would be open to public use without hazard, so far as depends on such patent. And if the patentee does not choose to do this, he must have the patent made void in some other way by adversary

proceedings. The provisions of the 6th section of the act of 1793, do not apply here so as to enable the plaintiff to treat his patent as void. The proceedings under this section are the acts of the defendant only, and the plaintiff from this section has no right to set up a defect in his own patent. This court cannot enter a vacatur on the first patent, and that patent is not void on the face of it. The plaintiff's difficulty here is, that the prior patent is too broad. This is good ground for the defendant to take according to the decision of the supreme court of the United States. For the patentee must take his patent for the improvement only. But I do not see how the verdict of the jury in this suit on the second patent, can avoid the first: that must be a subject of litigation and proof in every case which is tried under the second patent.

It is objectionable on general principles to allow a patentee in a court of law, to show his own patent void. It being issued on his own representation and according to his own specification, as to the extent of the right claimed, he is estopped by his own act. He certainly is not to be permitted to allege, that he obtained his patent fraudulently, or that there was any concealment or addition with respect to his specification with a view to deceive the public, or to set up his own misconduct in any other respect. And should he allege, that he had innocently and in ignorance of the law, procured a patent broader than his invention, he is not without the answer, that he is chargeable with a knowledge of the law, and cannot set up his ignorance of it to avoid his own act. Whether, after the first patent has been declared void, after verdict under the sixth section in a case free of fraud, a new patent can be taken out, is a question which does not here arise. But I am inclined to think that a surrender of the prior patent might be made, and that the secretary of state might grant a new one, under a statement of the circumstances, although not for the period of fourteen years from the date of the second patent, as the patentee has enjoyed the exclusive right for a part of the fourteen years. This construction, as to the effect of a prior patent, seems necessary to prevent a patentee from enjoying his exclusive right for a period longer than fourteen years, and indeed for an indefinite period.

As to the argument that fourteen years from the date of the first patent have not yet expired, so that the objection cannot be made, it appears to me untenable. The second patent is for fourteen years, and that being within the time limited by the act of congress, it is good upon the face of it. And the objection, that the patentee has enjoyed the benefit of the invention for a part of the fourteen years under a prior patent, not being amongst any of the objections which by the acts of congress may be set up by third persons to avoid the patent, the objection cannot be made after the expiration of the fourteen years, and so in this case the patentee would have the benefit of his patent-right for twenty years instead of fourteen.

On the whole I am of opinion that the second objection is fatal, and that a nonsuit must be ordered.

But the counsel of the plaintiff suggesting that it had been doubted whether a writ of error returnable in the supreme court would lie on a judgment of nonsuit, and praying the court to charge the jury on the points discussed, THE COURT accordingly directed a verdict for the defendant, with liberty to the plaintiff to move for a new trial on the points of law.

Case No. 9,832.

MORRIS v. HURST.

[1 Wash. C. C. 433.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

ASSUMPSIT—ACCOUNT—DEBIT AND CREDIT ENTRIES—FOR WHOM EVIDENCE.

1. In an action of assumpsit, if one party relies upon an account delivered by the other party, without other proof to establish his demand; the party producing the account may discharge himself, by relying on the items of credit, on the other side of the account.

2. If the credit side of an account is taken to charge the person who delivered it, the items on the debit side must also be admitted as proved by the account.

This cause came on under a rule for a new trial, on the ground of surprise, and misdirection. The plaintiff, having delivered in an account before bringing the action, in which many years transactions between the parties were included, to a considerable amount; the plaintiff only proved one item, of a modern date, to the amount of about £230, being rents received by the defendant, which belonged to the plaintiff. The defendant attempted to meet this demand, by selecting out of the account, a credit to a larger amount, but without attempting to prove it; relying on it, as an admission by the plaintiff. The court informed the counsel, at the trial, that if he relied upon the credit side of that account, as evidence against the plaintiff, he must admit the debit side, unless he could falsify it by evidence. Upon this, the counsel let the jury go out, who found the £230, with interest, which had been established.

M. Levy, now contended, that after receiving the account, he expected the plaintiff would be obliged to go through the whole; and that he could not pick out one item, and

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

upon proving it, recover to that amount; that therefore he was surprised at the trial. (2) That though a defendant may, by his answer, charge himself, his answer is not always sufficient to discharge him; and therefore, the account rendered, was good evidence against; but not for the plaintiff. Gilb. Ev. 152; 2 Vern. 194.

BY THE COURT. If a man is called upon to render an account for the purpose of enabling the plaintiff to establish a demand aginst the defendant, if he is obliged to rely upon this statement to charge him; the defendant is entitled to be discharged by it. If he is called upon to state, whether a particular sum is not due, and the defendant states, that it was to be paid on a condition not performed, you must take the acknowledgment altogether. An account is composed of items, and they are placed on the debit and credit side. If the defendant produces the account, you can no more take the items on the credit side to charge him, and reject the debits; than, in the case first supposed, you can take the acknowledgment of what was agreed to be paid, and reject what he states, with respect to the condition. The verdict therefore was right. Rule discharged.

Case No. 9,833.

MORRIS et al. v. LOWELL MANUF'G CO.

[3 Fish. Pat. Cas. 67.] [1]

Circuit Court, D. Massachusetts. March, 1866.

INJUNCTION—PRELIMINARY—PATENT CASE—WHAT CONSIDERED — INJURY TO PLAINTIFF—TO DEFENDANT—USED IN GOOD FAITH—NOTICE.

1. In granting or refusing a preliminary injunction, the court will carefully consider the situation of the parties. Its important office is to preserve the rights of the patentee pending the litigation of his title.

2. If the title of the patentee has already been fully established, or is otherwise so clear that no reasonable doubt of its validity remains, a court of equity would, in many cases, grant a preliminary injunction notwithstanding the injury which might result to the defendant. But when there is no danger of loss to the plaintiff, and great loss will result to the defendant, the case must be substantially free from doubt to justify an injunction.

[Cited in New York Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. 837; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803; Whitcomb v. Girard Coal Co., 47 Fed. 318; Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 933.]

3. It is a material circumstance, upon a motion for a preliminary injunction, whether or not the defendant is fully responsible for any profits or damages which may be decreed against him.

[Cited in Kane v. Huggins Cracker & Candy Co., 44 Fed. 292.]

4. It is also a material circumstance that the defendant does not make or vend the patented machine, but only uses it, so that the injury to the plaintiff is the loss of his royalty and not a damaging and constantly increasing competition.

[Cited in Hoe v. Boston Daily Advertiser Corp. 14 Fed. 916; Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 47 Fed. 663.]

5. While an injunction is of great use in preventing multiplicity of suits or repeated actions for successive infringements, it is no part of its legitimate office to stop litigation in the suit in which it is granted, or to force the compromise of a disputed right.

6. There are cases so clear that a court of equity will not permit further litigation; and there are others in which, upon a balance of the equities, and of the danger of serious injury, the plaintiff's rights decidedly preponderate. In such cases the results which would indirectly follow the granting of an injunction, could not be regarded.

7. If there has been a decision in favor of the plaintiff, and a motion for new trial, exceptions or an appeal are taken or made, and there appear to be questions of some nicety or importance, so that the action taken by the defendant can not be thought to be intended merely for delay, a court of equity will often wait for the final result before awarding an injunction.

[Cited in Brown v. Deere, 6 Fed. 490.]

8. One who is known to the patentee to be using his improvement, in apparent good faith, is entitled to definite and early information of the patentee's construction of his own rights, and of his intention to enforce them.

This was a motion [by Francis Morris and others] for a provisional injunction to restrain the defendants from infringing the letters patent for "improvement in the machine for ginning cotton and wool," granted to Stephen R. Parkhurst, May 1, 1845, extended for seven years from May 1, 1859, reissued February 12, 1861, and assigned to complainants. The facts sufficiently appear in the opinion of the court.

George Gifford and B. R. Curtis, for complainants.

C. L. Woodbury, for defendants.

LOWELL, District Judge. This is a motion for a preliminary injunction to restrain the use, by the respondents, of the burring machine said to be invented by S. R. Parkhurst, and described in his reissued patent, dated February 12, 1861. The plaintiffs are assignees of that patent, and have obtained a decree in an equity suit in the circuit court for the Southern district of New York, before Mr. Justice Nelson, against Charles L. Goddard, the maker of the machine, for an injunction and account. The account has not yet been made up by the master, and it is said that Goddard intends to appeal from the final decree and carry the case to the supreme court. It appears that Goddard held an assignment of one-third of the machine, which it is admitted gave him a right to make and vend it during the existence of the original patent. That assignment was not before the court in the action against Goddard himself, and it is now contended by the respondents that by the true construction of its terms it grants a like interest for the renewed term. It further appears that the renewed patent will expire on the first day of May next, and that if the use of the burring machine is enjoined in this mill and the others in which

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

it is used in this district, the necessary changes can not be made in the carding machinery with which it is connected, much, if at all, before the first of May, and that in the meantime a large number of workmen will be thrown out of employment, and a considerable part of the defendants' machinery will be stopped.

In granting or refusing a preliminary injunction, the court will carefully consider the situation of the parties. Its important office is to preserve the rights of the patentee pending the litigation of his title. If the title has already been fully established, or is otherwise so clear that no reasonable doubt of its validity remains, a court of equity would, in many cases, grant such an injunction, as it would a final injunction, notwithstanding the injury which might result to the defendant. But where there is no danger of loss to the plaintiff, and a great loss will result to the defendant, the case must be substantially free from doubt to require such action. In the present case, the defendants are admitted to be fully responsible for any profits or damages that may be decreed against them. This is a material circumstance Newall v. Wilson, 2 De Gex, M. & G. 282; Day v. Boston Belting Co. [Case No. 3,674]. Another is that the defendants do not make or vend the patented machine, but only use it, so that the injury to the plaintiffs is the loss of their royalty and not a damaging and constantly increasing competition. Forbush v. Bradford [Id. 4,930]; Neilson v. Thompson, Webst. Pat. Cas. 278.

It is said that the royalty demanded is so moderate compared with the injury to the manufacturers which would follow an injunction, that the controversy would practically end now if the motion be granted, while the expense of further litigation might be a serious consideration for the plaintiffs.

These facts have been urged by both sides. They do not furnish a conclusive argument for either. On the one hand an injunction is of great use in preventing multiplicity of suits, repeated actions for successive infringements, but it is no part of its legitimate office to stop litigation in the suit in which it is granted, or to force the compromise of a disputed right. On the other hand, there are cases so clear that a court of equity will not permit further litigation; and there are others in which upon a balance of the equities, and of the danger of serious injury, the plaintiffs' rights decidedly preponderate. In such cases the results which would indirectly follow the granting of an injunction which equity called for, could not be regarded. So that upon this point we are brought back to the title of the plaintiffs and the situation of the parties.

So far as any danger of serious loss or irreparable mischief is concerned, the plaintiffs have shown no cause for the court to interfere. Nor am I sure that their title is so entirely clear as to make it a matter of course to issue the injunction without regard to the damage it might do the defendants. If we grant to the decision which has been made in the plaintiffs' favor all the faith and credit which would be due to a like decreee in this circuit, yet even in such a case an injunction would not always be granted. If a motion for a new trial, exceptions, or an appeal are taken or made, and there appear to be questions of some nicety or importance, so that the action taken by the defendant can not be thought to be intended merely for delay, a court of equity will often wait for the final result before awarding an injunction. Neilson v. Thompson, Webst. Pat. Cas. 278, 286; Forbush v. Bradford [supra.] And this, even though the judge who tried the cause has but little doubt of the correctness of the first decision. I am inclined to think some of the questions involved here are of the character above indicated. But the turning point with me is that the inconvenience which it appears the defendants would suffer is not counterbalanced by any corresponding advantage to the plaintiffs, coupled with the fact that by the time they had at great expense and loss to themselves and their workmen, adapted their works to carding without the plaintiffs' improvements, they would have the right to change them back again to their present condition. In an important case before Judge Sprague, in which the plaintiffs' patent was not disputed, and in which his own opinion appears to have been quite clear upon the question of infringement, he refused to grant the absolute injunction on the ground that this course would prevent the defendants from using their own improvements, which were combined with those of the plaintiffs, the patent having some six months to run. "Howe's patent," says the learned judge, "will expire on the 10th of September next. It may or may not be extended. It is stated that the defendant has an establishment in which he is making these machines. If all the rights of Howe can be protected, and indemnity can be secured to him without stopping this manufacture beween the present time and the 10th of September. I think the court ought to give him and the manufacturers of the Sloat machine, the benefit of the contingency, that at that time they may be allowed to go on without a permission from Howe, if his patent should not be extended." Howe v. Morton [Case No. 6,769]. That case was stronger for the plaintiffs than this in some respects. The defendants were manufacturers of the machine; the patent had a little longer time to run; and the contingency of a renewal was not very improbable. Here the patent can not be extended further without a special act of congress. A similar decision was made by Mr. Justice Grier in Parker v. Sears [Id. 10,748].

No doubt there might be circumstances in the conduct of an infringer which would induce the court to interfere at the very latest period to stop a fraudulent, or even willful, use of a patent right. I find no such cir-

cumstance here. The defendants bought their machines of the person of whom they had been accustomed to buy them. It does not appear whether they were aware that the patent had been extended, and that the patentee denied the right of Goddard to continue to make and sell the improvement under the original agreement. In the absence of express notice I ought not to look upon their conduct as either fraudulent or willful. Without going the length of some English cases and saying that the defendant must be sued very promptly if a special injunction is to be asked for, I still must think there is much good sense in the general doctrine that one who is known to the patentee to be using his improvement in apparent good faith, is entitled to definite and early information of the patentee's construction of his own rights and of his intention to enforce them. The absence of such authentic notice is one circumstance to be considered by the court.

Upon the whole, I must refuse this motion on the authority and the reasoning of Howe v. Morton [supra].

[For other cases involving this patent, see note to Parkhurst v. Kinsman, Case No. 10,757.]

MORRIS (LUCAS v.). See Case No. 8,587.

Case No. 9,834.

MORRIS v. MAXWELL.

[3 Blatchf. 143.][1]

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

CUSTOMS DUTIES—APPRAISEMENT—PERIOD OF VALUATION—PENALTY—UNDERVALUATION.

1. Under section 17, Act Aug. 30, 1842 (5 Stat. 564), and section 1, Act March 3, 1851 (9 Stat. 629), the appraisement of goods determines their dutiable value.

2. Act March 3, 1851, changes the period of valuation by appraisement, from the time of purchase to the time of exportation.

3. Section 8, Act July 30, 1846 (9 Stat. 43), construed, in reference to the imposition of 20 per cent. penalty for the undervaluation of imports.

4. The authority to impose such penalty is not limited to cases where an entry has been made of the imports, or where the importer, on entry, has added to the cost or value given by the invoice.

5. Section 1, Act March 3, 1851, varies the provisions of section 8, Act July 30, 1846, only so far as concerns the period of time in reference to which the valuation of imports is to be made, and does not affect the question of the imposition of extra duties because of undervaluation.

The plaintiff [Joseph Morris], in August, 1851, imported into the port of New York, an invoice of needles from Liverpool, purchased by him in England. The invoice prices were raised, by appraisement and reappraisement as of the time of exportation, more than ten per cent., and duties on the increase and a penalty were levied accordingly. Those imposts were paid under protest, by the agent of the plaintiff, and this action was brought against [Hugh Maxwell] the collector to recover them back. The protest was the printed form used in Goddard v. Maxwell [Case No. 5,492], including also a written clause, "that 20 per cent. penalty, section 8 of tariff act of 1846, cannot be exacted except where the importer has added to his invoice price on entry."

BETTS, District Judge. The appraisement determined the dutiable value of the goods, under the provisions of section 17 of the act of August 30, 1842 (5 Stat. 564), and of section 1 of the act of March 3, 1851 (9 Stat. 629). Accordingly, there is no ground for a recovery because of any excess of duties levied. The act of 1851 changed the period of valuation by appraisement, from the time of purchase to the time of exportation, and the appraisers, on this occasion, adopted the latter period, in making the appraisal.

Section 8 of the act of July 30, 1846 (9 Stat. 43), consists of two distinct provisions. One of them relates to the importing of purchased goods, with the privilege to the importer to make an addition, on his entry, to the invoice cost or value, for the purpose of raising it to the true market value of the goods. The other provision relates to the appraisal of such goods, and their liability to an additional duty or penalty of 20 per cent. The term "such imports," used in the second branch of the section, refers to the expression or description, "imports which have been actually purchased," employed in the antecedent branch, and is not limited to the circumstance or condition of an entry having been made of the imports, or of an addition, in the entry, by the importer, to the cost or value given by the invoice.

Section 1 of the act of March 3, 1851, varies the provisions of section 8 of the act of July 30, 1846, only in so far as concerns the period of time in reference to which the valuation of imports is to be made, and is not inconsistent with the imposition of extra duties, under that or any preceding act, because of an undervaluation of imports. And section 4 of the act of 1851, by implication, continues in force all anterior enactments to that end. Accordingly, the defendant was authorized to cause the extra duties in question to be levied in this case. Judgment for defendant.

MORRIS (NEW ORLEANS v.). See Cases Nos. 10,182 and 10,183.

MORRIS (PRICE v.). See Case No. 11,414.

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

Case No. 9,835.

MORRIS v. ROYER et al.

[3 Fish. Pat. Cas. 176; 2 Bond, 66.] [1]

Circuit Court, S. D. Ohio. March, 1867.

PATENTS — REISSUE — WOOD-BENDING MACHINE — COMBINATION.

1. A construction or mode of operating a machine, described or distinctly referred to, but not claimed, in an original patent, may be claimed in a reissue.

2. Morris' patent of March 11, 1856, and the reissue thereof, dated May 27, 1862, for "improvement in wood-bending machines," defined, construed, and sustained.

3. The first claim of said patent *held* to be for a combination of a stationary form, clamps, and levers, whether said levers do or do not work upon fixed fulcrums.

4. The third claim *held* to be for the elements named in the first claim, in combination with hooks, or hooks and pins, to hold the bent wood to the form.

5. The novelty of Morris' patent is not impeached by the inventions described in Thomas Blanchard's patent of December 18, 1849, for "improved method of bending wood."

6. A machine employing a stationary form, clamps, and levers, in which the levers did not work upon fixed fulcrums, *held* to be an infringement of Morris' patent.

This was a suit in equity, brought [against Theodore Royer, Samuel T. J. Coleman, and John Young] to restrain the infringement of letters patent [No. 14,405] for "improvement in wood-bending machines," granted to John C. Morris, March 11, 1856, and reissued May 27, 1862 [No. 1,312].

The invention of Morris consisted of a stationary form or mold, around which wood could be bent into any required shape. The bending was effected by placing the center of a piece of wood, previously steamed, against the center of the mold, and clamping them together. Levers then pressed against the ends of the wood, and gradually forced them around the form; the levers being drawn together by cords wound upon a drum. In bending the wood, the inner fibers were condensed and the outer ones stretched. But while wood may be greatly compressed without injury, a slight stretching tears the fibers. To obviate this difficulty, the wood, before being bent, was laid upon a strap of flexible iron, and the ends were confined between two blocks of solid iron, called clamps or abutments, which were attached to the flexible strap. By this means the stretching of the outer fiber was prevented, and the entire change in the length of the fiber, caused by the bending, took place, by compression, in the inside of the curve.

The principal defense upon the issue of novelty, was founded upon a patent granted to Thomas Blanchard, December 18, 1849 [Patent No. 6,951], in which the wood was bent by attaching one end of the stick to a form which was rolled over the wood toward the other end.

The material portions of the specification and claims of Morris' patent were as follows:

"The machines for bending wood may be divided into two principal groups or classes—the first including all the machines in which the bending process commences at one end of the wood, and is continued in the direction of the other; and the second including those in which the form or mold is first applied at or near the center of the piece to be bent, and the bending process is continued from that point toward each end, which I call bending outward. I regard machines of the latter class as superior, from the fact that the change of the fiber of the wood, in the act of bending, goes on from the center toward the ends, in two directions, equalizing the strain, and distributing the compressed fibers more evenly throughout the curve.

"My improvements relate to the second class of machines. In my original patent, of which this is a reissue, reference was made to a previous use of levers, 'for bringing the piece to the required shape, by connecting said levers with a strap at each end, the strap being placed at the back of the piece required to be bent, and then drawing the ends of the levers together, which bends the piece around the form.' This reference was solely to a use of such a method which had been made by myself within less than two years previous to the application for my original patent.

"My improvements consist of devices tending to adapt the machines of the second class, as stated above, to the performance of good work, in an expeditious manner, and with the least loss of material. They are applicable to bending wood, to be used for any purpose, such as ship timber, wheel felloes, plow handles, chair stuff, and other articles. In some cases, as for bending plow handles, but one lever will be required, when the bending process will begin at the inner end of the curve, next to the portion of the piece left unbent, and will extend toward the outer end, bending the wood first in a large curve, and gradually reducing it smaller, until it conforms to the curvature of the mold.

"In bending wood around a form the outer fibers are stretched, while the inner fibers are compressed; but while wood may be greatly compressed without injury, comparatively little stretching or expansion will break the fibers of the outer curve. To prevent undue expansion, it is necessary to confine the wood between abutments placed at the ends, so as to counteract end expansion, by what is called in the art 'end pressure.' These abutments or clamps may wholly prevent end expansion, or may prevent it before or after a certain degree of pressure is reached in the process of bending.

* * * * * * *

"k k, are levers or handles for guiding the bending operation. They may work upon the fulcrums m1, m2, m3, m4, or their equiv-

[1] [Reported by Samuel S. Fisher, Esq.; reprinted in 2 Bond, 66, and here republished by permission.]

alents. These handles or levers support the clamps and serve to draw them, with the strap and piece to be bent, around the form or mold. They are operated by the cords n n and drum o. When the levers are thus used, the clamps or abutments connected to the strap g are adjusted so as to slide upon the sides of the levers, to allow the piece to be bent to accommodate itself to the form. Another mode of using the handles is to dispense with the fulcrum pins, so that in the operation of bending, while power is applied as before to the end of the handle, and the resistance is the unbent wood, the point of support is no longer fixed, but shifting, being found in the bending strap or point of contact of the strap and wood with the mold. In this method, which was that originally used by me, the abutments do not slide upon the handle, but may be made a part thereof, or attached thereto. The principal advantage of the fixed fulcrum is, that it prevents the wood from twisting in the process of bending, by reason of one side of the wood, or one of two pieces bent at the same time, being harder than the other. In such cases, without some rigid point of support preventing the levers from twisting or turning, it is difficult to make true work.

* * * * * * *

"Having thus fully described my improvements, I do not wish to be understood as claiming them in connection with machines for bending wood where the bending is effected by the rotation of the form, but what I claim therein as new, and desire to secure by letters patent, is

"I. A wood-bending form, to which timbers are made to conform by bending them from the center or inner end of the desired curve outward, when used in combination with abutments or clamps to prevent or regulate end expansion, and levers, or handles, or their equivalents, to guide the bending, substantially as described.

"II. A stationary or poised wood-bending form in combination with the cords, levers, and drum, or their equivalents, and the eccentric clamp, or its equivalent, in the manner and for the purpose set forth.

"III. In combination with the stationary form, levers, and abutments, I claim the employment of hooks, or hooks and pins, or their equivalents, that shall embrace the ends of the wood, to restrain the wood in shape, and permit the removal of the abutments after the completion of each operation."

S. S. Fisher, for complainant.
George M. Lee, for defendants.

LEAVITT, District Judge. This is a bill in equity, charging, in the usual form, that the defendants have infringed the exclusive right of the complainant to certain improvements in a machine for bending wood, originally patented to him March 11, 1856, and for which he obtained a reissued patent dated May 27, 1862. The bill prays for an injunction and an account of profits.

In their answer, the defendants allege, as grounds of defense: First, that the reissued patent is fraudulent and void, as not being for the same invention claimed in the original patent; second, that complainant's patent is void for want of novelty in the invention; third, that defendants have not infringed the complainant's right under his patent.

I. As to the first ground of defense, namely, the invalidity of the reissued patent to the complainant, it is not alleged or claimed that there was actual fraud in obtaining it; but it is insisted that it is constructively fraudulent, as being an unwarranted modification or enlargement of the claim of the original patent. The argument is that the original patent provided only for fixed fulcrums for the levers used in the operation of wood bending; whereas, in the reissue, he provides for bending, not only by levers on fixed fulcrums, but also by straps connecting the ends of the levers, and bending the wood without fixed fulcrums. But a reference to the original patent will show clearly that both methods were in the contemplation of the invention, as suited to effect the object of his invention. He refers distinctly to the use of levers "for bringing the piece to the required shape, by connecting the levers with a strap at each end; the strap being placed at the back of the piece required to be bent, and then drawing the ends of the levers together, which bends the piece around the form." In the specification of the reissued patent, after referring to the patented machine as belonging to the class "in which the form or mold is first applied at or near the center of the piece to be bent, and the bending process is continued from that point toward each end, which I call bending outward," and describing minutely the devices by which the work may be effected by levers with fixed fulcrums, he says: "Another mode of using the handles (or levers) is to dispense with the fulcrum pins, so that in the operation of bending, while power is applied, as before, to the end of the handle, and the resistance is the unbent wood, the point of support is no longer fixed, but shifting, being found in the bending strap, or point of contact of the strap and wood with the mold." And this, he adds, "was the method originally used by me."

But without further reference to the claims and specifications of the two patents, in reference to the question whether the reissue is a departure from the original patent, in claiming the machine without the fixed fulcrums, I will refer briefly to the evidence, which is conclusive on this point. And it may be remarked here, that the identity of the invention claimed in the original patent and that claimed in the reissued patent, is a question to be decided by the evidence. If the case is at law, it is for the jury; if in chancery, for the court, as the facts proved may require. Now Mr. Clough, an expert wit-

ness for the complainant, in answer to an interrogatory put to him as to the claims of the original and the reissued patents, says: "The description of the apparatus described by Morris (referring to the original patent) is the same, and refers to the same drawings as are contained in the reissued letters patent." And in answer to another question, this witness says: "He (Morris) describes various modes of bending, including a mode in which the levers are not used on fixed fulcrums, but does not claim any mode except those in which fixed fulcrums to the levers are used." The same witness, in another part of his deposition, says: "In one mode described in Morris' specification, he dispenses with the fulcrum pin, so that the point of resistance is no longer fixed, but shifts in the bending strap or wood."

It is clear, then, as well by a comparison of the complainant's original and reissued patent, as by the testimony of the expert referred to, there is no such departure from, or expansion of, his invention as described in the original patent, as will invalidate the reissue on the ground of a constructive fraud. The complainant plainly describes the use of his bending machine without a fixed fulcrum, in his original specification, though he does not claim it as a part of his invention. In applying for a reissue, he distinctly claims this method of wood bending as a part of the combinations included in his patent. This he had an unquestioned right to do. The authorities on this point are numerous and explicit. O'Reilly v. Morse, 15 How. [56 U. S.] 112; Battin v. Taggart, 17 How. [58 U. S.] 83.

It is hardly necessary to add that the law is well settled by numerous adjudications, that there is always a strong legal presumption that a reissued patent is for the same invention described in the specification of the original patent. This presumption arises from the fact that upon the surrender of the original patent, and an application for a reissued patent with an amended specification, it is the duty of the commissioner of patents to see that the reissue is for the same invention described in the original patent, or if any part is not described, or inadvertently omitted, that, in fact, it was a part of the invention of the patentee. And in the latter case it is competent for the commissioner to receive testimony, and, on satisfactory proof, to treat it as a part of the invention, which may be properly claimed in the reissued patent. Allen v. Blunt [Cases Nos. 216 and 217]; [O'Reilly v. Morse] 15 How. [56 U. S.] 112. And it also seems to be well settled that the action of the commissioner of patents, in granting a reissue, cannot be questioned or impeached, unless on the ground of actual fraud in obtaining it, a palpable incongruity between the original and reissued patent, or an excess of authority on the part of the commissioner. [Battin v. Taggart] 17 How. [58 U. S.] 84; Law's Dig. p. 617, §§ 2–8. The exception to the complainant's reissued patent, on the ground of fraud, cannot therefore be sustained.

II. The objection to the complainant's claim in this suit, on the ground of the want of novelty in his patented invention, will now be briefly noticed. Evidence has been adduced by the defendant to prove the existence of several wood-bending machines, anterior to the date of the patent to the complainant, and which, it is insisted, embody all the elements of the several combinations claimed in his reissue. Models of several of these machines have been exhibited for the inspection of the court, and are referred to in the testimony of the experts. Among others, a patent to Thomas Blanchard, dated December 18, 1849, and reissued to him, November 15, 1859, for a wood-bending machine, is relied on as anticipating the invention patented to the complainant, Morris. I do not propose to describe the several machines relied on by the defendants to impeach the novelty of the complainant's combination. Whether they are substantially identical with the latter, is a question of fact, to be decided according to the evidence. And on this point, the testimony of several learned and reliable experts has been taken, which is remarkably harmonious, and entirely satisfactory to the court.

It is not necessary to refer minutely to the description of the complainant's machine, as set forth in his specification. It will be sufficient to refer to the first and third claims of his reissued patent, in order to a correct understanding of the testimony of the experts. No infringement of the second claim being alleged by the complainant, it is not necessary to refer to it.

The complainant, after describing his improvements, disclaims any connection with machines for bending wood by a rotating form. He claims: 1. "A wood-bending form, to which timbers are made to conform, by bending them from the center or inner end of the desired curve, outward, when used in combination with abutments, or clamps, to prevent or regulate end expansion, and levers or handles, or their equivalents, to guide the bending, substantially as described." 3. "In combination with the stationary form, levers, and abutments, I claim the employment of hooks, or hooks and pins, or their equivalents, that shall embrace the ends of the wood, to restrain the wood in shape, and permit the removal of the abutments, after the completion of each operation."

The first of these claims is, for the combination of a stationary form to which the wood is made to conform by bending from the center outward, with abutments and clamps to prevent or regulate end expansion, and levers or their equivalents to guide the bending. The third claim is a combination of the parts described in the first claim, with the addition of hooks, or hooks and pins, or their equivalents.

The witness, Renwick, an expert, examined

by the complainant in reference to the Blanchard patent, says: "That the improvements specified in the reissued letters patent to John C. Morris are not anticipated by anything that is described or specified in the said Blanchard patent; but, on the contrary, the improvements described and specified in the Blanchard patent are substantially different from those described and specified in the Morris patent." He then proceeds, very fully and intelligently, to define the points of difference between the two inventions.

The witness, Clough, another reliable expert, testifying as a witness for the complainant, concurs fully in the opinion of Renwick as to the substantial difference between the principle of the Blanchard and Morris machines. And his attention being specially called to the various other models and patents for machines, claimed by the defendants as embodying the different elements of the Morris combinations, he says: "In my opinion, the combination set forth in Morris' first and third claims are not found in any of the exhibits referred to in said question."

The witness, Knight, another expert, thoroughly versed in mechanics and mechanical philosophy, called by the defendants, on his cross-examination in reference to the various patents, models, and exhibits referred to, after describing the combinations claimed by the Morris patent, says he does not find in any of them the same combination. This witness also testifies that the rotating form for wood bending, described and claimed by Blanchard, is not a mechanical equivalent for the stationary form claimed by Morris.

Another witness, Cotton, also called by the defendants, says, the two machines, Blanchard's and Morris', are widely different in the principle of their operation.

The conclusion from this evidence is irresistible, that the combination patented to the complainant is not anticipated by the evidence of any wood-bending machine known prior to the date of this invention; and it follows that the defense of want of novelty in his invention is not sustained.

III. The only other inquiry is, whether the five machines, which it is admitted were used by these defendants, are substantially identical with that patented to the complainant.

The defendants, as already noticed, are licensees of the assignees of the Blanchard patent. Models, which it is admitted truly represent the five machines used by the defendants, and which, it is contended by the counsel of the complainant, infringe his patent, are exhibited to the court. They are referred to in the testimony of the experts as "Models I" and "Model X," and described in the Exhibit A. In form and appearance these machines are altogether unlike the machines constructed under the Blanchard patent, and very nearly resemble the Morris machine. The only material variation in these structures, insisted on by the defendant's counsel, is that in the machines used by them, there is no provision for working them with a fixed fulcrum for the levers, in the operation of bending, and that they have no such fixed fulcrum. It is claimed that, as this material element is omitted in the defendant's machines, they do not infringe the first or third claim of the Morris patent. It is insisted that the Morris claim is for a machine operated by fixed fulcrums, and does not embrace a machine working without a fixed fulcrum. In a previous part of this opinion, a construction has been given to the claim of the Morris patent, on the point now under consideration, and the conclusion stated, that his patent includes not only the use of a fixed fulcrum, but also the use of levers for bringing the wood to the required shape, by connecting them with a strap at each end, and drawing the ends of the levers together, thus bending the wood around the form or mold. If this construction of the Morris claim is correct, it follows necessarily that the defendants are not shielded from liability by omitting the fixed fulcrum in their machine.

The identity of the machine claimed in the Morris patent, and those used by defendants, is a question of fact, the solution of which depends on the evidence. I will refer, briefly, to this evidence, which is quite conclusive as to the substantial identity of the machines. And, I may add here, that this testimony most decisively sustains the views indicated by the court, as to the scope of the claim of the Morris patent. The very intelligent and scientific experts agree, in saying, the machines used by defendants, though operated without a fixed fulcrum, are substantially identical with the machine described and claimed by Morris.

The witness, E. S. Renwick, says the model marked "X," before referred to, "represents a machine which would embody the improvements recited in the first and third claims of the reissued letters patent of John C. Morris." He then proceeds, at great length and with great clearness, to state the reasons for this conclusion. He says, among other things, that "the lever handle, in the model (X) is operated without a fixed fulcrum, and in this respect varies from the levers represented in the drawing; but this variation does not, in my opinion, make the lever handle of the model substantially different from the lever handle which constitutes a member of the combination (Morris') above referred to, because the former operates substantially in the same manner as the latter, * * * and because the patent provides for the operation of a lever without a fixed fulcrum as an alternate mode of construction." There are other portions of the testimony of the witness on this point equally clear and explicit, which it is not necessary to recite.

William Clough, complainant's expert, says: "The machine marked 'A' (being that

used by the defendants) conforms in its principles and mode of operation to one of the modes described in the letters patent (Morris'), and includes all the elements of the combination in the first claim of said patent." And again: "In one mode described in Morris' specification, it dispenses with the fulcrum pin, so that the point of resistance is no longer fixed, but shifts in the bending strap or wood."

George H. Knight, another expert, called by the defendants, testifies that the claim of the reissued patent to Morris "describes a machine containing no fixed fulcrums. The machine represented by the model I is a substantial embodiment of said alleged modification."

And the witness, W. C. Hibberd, an expert witness for the defendants, being asked to point out the substantial difference between a machine constructed under Morris' claim, without the fixed fulcrum, and the machine used by the defendants, says: "I do not see that it (the latter machine) does differ materially" from the Morris machine. And adds: "I should judge that the language (referring to Morris' specification) was intended to cover just such a bending apparatus as is shown in model I."

The evidence as to the substantial identity of the machine used by defendants and that covered by the complainant's patent, is altogether conclusive; and the fact of infringement is therefore clearly made out.

All the issues made in the case being found in favor of the complainant, a decree may be entered accordingly, for a perpetual injunction, providing, if necessary, for a reference to a master, to ascertain the amount of damages to be awarded.

[For another case involving this patent, see Morris v. Barrett, Case No. 9,827.]

Case No. 9,836.

MORRIS et al. v. SHELBOURNE.

[8 Blatchf. 266; 4 Fish. Pat. Cas. 377.] [1]

Circuit Court, E. D. New York. Feb. 27, 1871.

INJUNCTION — PRELIMINARY — PATENT CASE — IN WHAT CASES AWARDED—SECURITY BY DEFENDANT.

On a motion for a preliminary injunction, to restrain the infringement of a patent for a dredging machine, the validity of the patent was denied, on the ground of a prior public use, it had never been adjudicated upon, and the general allegation of public acquiescence, in the bill, and which was the only proof thereof, was denied. The defendant was constructing for his own use a single machine: *Held*, that the injunction ought not to be granted, provided the defendant should give security sufficient to protect the plaintiff against all loss and damages by reason of the construction and use of the machine, and to pay any sum which might be awarded to the plaintiff in the suit.

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

[This was a bill in equity by Augustus T. Morris and James Cummings against Sidney F. Shelbourne to enjoin the infringement of letters patent No. 54,649 and 85,602, granted to Augustus T. Morris May 8, 1866, and January 5, 1869, respectively.]

George Gifford, for plaintiffs.
Keller & Blake, for defendant.

BENEDICT, District Judge. This is a motion for an injunction to restrain the defendant from completing and using a certain dredging machine, now in process of construction by the defendant, at the Continental Yard, in this city, upon the ground that it is an infringement of two patents belonging to the plaintiffs, one dated May 8th, 1866, and the other January 5th, 1869.

The use of the parts and combination claimed as patented is not denied, but the patents relied on are claimed to be void. These patents have never been adjudicated upon, the general allegation of public acquiescence contained in the bill, and which is the only proof thereof, is denied, and a prior public use and want of novelty is averred. There is no evidence showing the extent of the use of the plaintiff's patent, or the number of machines sold by them. The character of the machine, and the uses to which it is put, seem to indicate that the use has not been very extensive, while the affidavits contain some evidence of a prior public use of the patented parts, in connection with a former patent, which has expired. In view of the nature of the machine in question, and of the fact that it is not being constructed for sale, but is a single machine, which the defendant has constructed for employment in his own dredging operations, and for the use of which the plaintiffs can be fully compensated in the event of a decree in their favor, and it appearing that an injunction would be likely to cause serious loss to the defendant, without corresponding benefit to the plaintiffs, I am of the opinion, that a preliminary injunction should not be granted, provided the defendant, under the direction of the court, within five days, and on notice to the plaintiffs, gives security sufficient to protect the plaintiffs against all loss and damages by reason of the construction and use of the machine in question, and to pay any sum which may be awarded to the plaintiffs herein.

Case No. 9,837.

MORRIS v. SUMMERL.

[2 Wash. C. C. 203.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

PRINCIPAL AND AGENT—SECURING INSURANCE—NEGLECT—LIABILITY OF AGENT—PREMIUM.

If one merchant is in the habit of effecting insurances for another, and neglects to have the

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

same done, when ordered, he is himself answerable for the loss, as if he was the insurer, and he is entitled to the premium.

[Cited in Manny v. Dunlap, Case No. 9,047; Marquardt v. French, 53 Fed. 606.]

At law.

THE COURT charged the jury, in this case, that if one merchant is in the habit of effecting insurances for his correspondent, and is directed to make an insurance, and neglects to do so, he is himself answerable for the losses, as insurer, and is entitled to a premium, as such. That the amount of loss, for which an underwriter who had subscribed the policy, would have been answerable, is the only measure of damages against him. If he can excuse himself, for not having effected the insurance, he is answerable for nothing; if he cannot excuse himself, he is then answerable, for the whole.

Verdict for plaintiff.

An exception was taken to this charge, and a writ of error sued; but in February 1809, the judgment was affirmed in the supreme court. [Case unreported.]

MORRIS (UNITED STATES v.). See Cases Nos. 15,812–15,816.

Case No. 9,838.

The MORRISANIA.

[13 Blatchf. 512.] [1]

Circuit Court, E. D. New York. Aug. 16, 1876.

ADMIRALTY—MARITIME TORTS—DAMAGE FROM SWELL.

A vessel being properly and securely fastened to a pier in the East river, a steamboat passed by so near, and at such a rate of speed, that the swell she created threw the vessel against another one, and damaged the former: *Held*, that the steamboat was liable for the damage, because it was negligence in her to pass by so near, at such speed, the channel at the place being over one thousand feet wide, and open to her navigation, without obstruction, to that width.

[Cited in The Massachusetts, Case No. 9,258; The Southfield, 19 Fed. 842; The Drew, 22 Fed. 855; The Rhode Island, 24 Fed. 295; The Monmouth, 44 Fed. 812; The Majestic, Id. 814.]

Scudder & Carter, for libellants.

D. & T. McMahon, for claimant.

HUNT, Circuit Justice. On the 1st and 2d days of October, 1874, the bark A. J. Pope was moored at the end of the wharf between 10th and 11th streets, Long Island City, Long Island. She was fastened to the bulkhead by a chain cable from her bow, and by a chain cable from her stern, and, also, by a heavy hawser forward and aft. South of the pier at which her bow headed lay another vessel, and, outside of the pier, lapping both the Pope and this other vessel, lay another vessel, called the Hero. On the day first named, the steamer Morrisania, a passenger ferry-boat plying between Harlem and New York City, on her way to Harlem, passed by this dock where the Pope was moored. On the 2d of October, while going in an opposite direction, she again passed by this dock. By her swell and suction on each of these occasions, the Hero and the Pope were thrown against each other, and the latter vessel sustained damage. The channel of the river at this place is over a thousand feet in width, and was open to the navigation of the Morrisania, without obstruction, to that width. The Morrisania passed within a short distance of the shore—some of the witnesses say fifteen feet, others thirty feet, others, again, put the distance at three or four hundred feet—and at a speed of twelve or fourteen miles an hour. It is difficult to fix the precise distance, but I hold it to have been much nearer to the wharf and the vessels than care and prudence and good navigation on the part of the Morrisania justified. The bark Pope was properly and sufficiently secured to the pier and bulkhead, and there was no negligence in this respect.

In the case of The Daniel Drew [Case No. 3,565], I discuss at length the general principles applicable to this case. A reference to the opinion in that case is sufficient, without here repeating the argument. With the general principles on which the argument of the claimant's counsel is based, I agree. But, here, their application is modified by the negligence of the Morrisania. After a careful examination of the evidence, I see no reason to find fault with the manner in which the Pope was fastened, or the material with which it was done. Neither do I see cause to doubt that the swell which did the injury was caused by the Morrisania. In the first answer, it was averred that the swell was caused by the Sylvan Glen, which preceded the Morrisania. This was clearly disproved. The second answer then attributed it to the steamer City of Boston. Of this averment there is no reasonable evidence. The speed of the steamer is not seriously disputed. As to how near she passed to the wharf, there is great contrariety of evidence, and it is a matter upon which honest men might reasonably differ. The libellants' witnesses put the distance at from ten feet to forty or fifty feet. Some witnesses say she came very near, without specifying how near. The witnesses for the claimant put her distance at several hundred feet. They say that no serious damage would have been done by her passing within one hundred feet. The damage, however, was done, and, in my opinion, the Morrisania passed within much less than a hundred feet, but certainly near enough to do the injury. Her undoubted right to the navigation of the river is subject to the restriction that it must be exercised in a reasonable and careful manner, and do no injury to others that care and prudence may avoid. The judgment of the district court is affirmed.

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

MORRIS AQUEDUCT (HAIGHT v.). See Case No 5,902.

MORRIS, The DAVID. See Case No. 3,596.

MORRIS, The GALLOWAY C. See Case No. 5,204.

MORRIS, The ROBERT. See Case No. 8,896.

Case No. 9,839.

In re MORRISON.

[10 N. B. R. 105;[1] 6 Chi. Leg. News, 110.]

District Court, E. D. Missouri. Dec. 17, 1873.

BANKRUPTCY—BANK STOCK SECURITY FOR NOTE—RIGHT OF BANK THERETO—HOW CLAIM PROVEN.

1. A bank is entitled to certain shares of its capital stock, subscribed by the bankrupt as collateral security for his stock note, and also on his general indebtedness to the bank, and it has a right to hold such stock, although there is an indorser to the note.

2. The bank should prove its demand for the debt due as secured by the stock, and, by leave of court, have it sold, the proceeds to be applied to payment of the debt, and prove as a creditor of the estate for any balance that may remain.

In bankruptcy.

Slayback & Haeussler, for assignee.

Hitchcock, Lubke & Player, for the bank.

TREAT, District Judge. The question submitted to the court is, substantially, whether the West St. Louis Savings Bank is entitled to hold ten shares of its capital stock subscribed by bankrupt as collateral security for the bankrupt's indebtedness; first, on his stock note, and second, on his general indebtedness. The by-laws of the company provide that "no transfer of stock shall be made or assented to by the officers of the bank so long as the holder of the same is indebted to this bank for any balance unpaid on the stock, or otherwise, unless such indebtedness is satisfactorily secured." The certificate of stock recites that "no transfer shall be made without the consent of the corporation by any stockholder who shall be liable to the bank, either as principal, debtor, or otherwise." Independent of the bankrupt act [of 1867 (14 Stat. 517)], the question involved is settled in this state (9 Mo. 150; 45 Mo. 513,) and in the United States supreme court. [Union Bank of Georgetown v. Laird] 2 Wheat. [15 U. S.] 390, and [Brent v. Bank of Washington] 10 Pet. [35 U. S.] 610. The two latter cases are broad enough to cover assignments in bankruptcy. Although the bank may have indorsers to the paper, it still has the security on the stock, and may enforce the latter. But if the loan is made at a time when the stockholder is insolvent and the bank has reasonable cause so to believe, and it thereupon takes the security of an indorser, together with the pledge of stock, by force of the by-law, it has two sources to which to look. Money loaned with security taken in praesenti does not make the security taken a preference contrary to section 35 of the bankrupt act. It is not a security taken for past indebtedness, but for money advanced at the time. If, together with an indorser, the paper is secured by a collateral put up by the maker, equity would treat the collateral as for the benefit of the indorser—as against the person primarily liable for the demand. The bank has two resources, and if it should make the money out of the indorser, he would have an equitable right to the application of the collateral for his benefit, or he might require, in equity, that the collateral should be first applied. The rule established, independent of the bankrupt act, is this: that the bank has a right to hold the stock as collateral, despite the fact that there is also an indorser. Under the bankrupt act, when money is loaned and the security taken at the same time, no preference is given, then that security should, both in law and equity, be applied to the payment of the demand. Hence, in the case before the court, the bank should prove its demand for the debt due, as secured by the stock, and by leave of court have the stock sold, the proceeds to be applied to payment of the debt. If a balance then remains in favor of the bank, it can have that balance allowed as a creditor against the general estate.

[1] [Reprinted from 10 N. B. R. 105, by permission.]

Case No. 9,840.

MORRISON v. ALEXANDER.

[1 Hayw. & H. 68.][1]

Circuit Court, District of Columbia. April 6, 1842.

LANDLORD AND TENANT—TENANT DISPOSSESSED—ACTION AGAINST LANDLORD—INTENT—DAMAGES.

Where the lessor executes a lease, having made false representations to the lessee of ownership and seisin with intent to deceive and defraud the lessee, and the lessee is evicted by a third person claiming under the lessor, the lessee may recover damages rrom the lessor, and the question of intent is one to be determined by the jury upon consideration of all the circumstances of the case.

[This was an action at law by Alexander Morrison against Charles Alexander.]

The first count of the declaration stated that the defendant, representing that he owned and was seized of a certain tract with the buildings thereon, did lease the said premises to the plaintiff for the term of ten years from March 16, 1838, with the privilege of purchase by the plaintiff during the term for $200; that plaintiff entered into possession under his lease; that defendant had not the lawful right to make said demise, because he had theretofore and on the 29th of January, 1838, executed and delivered to a certain Henry Miller, a contract in writing whereby the said defendant bound himself to convey the said premises to the said Miller, &c.;

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

that said Miller had taken possession of said premises under said contract, and on the 16th of April, 1838, evicted the plaintiff therefrom. The second count sets up that during the four weeks the plaintiff occupied the premises $500 was by him (said plaintiff) expended in cultivating the said land; that the said defendant had concealed the fact from the knowledge of the plaintiff, that he had prior to the plaintiff's entry on said land delivered possession of the same land to said Miller, who was by reason of said contract entitled to the possession of said land as against this plaintiff, and afterward evicted the plaintiff therefrom, by reason of which he was otherwise injured and damaged to the amount of $2,500, &c.

A deposition read in evidence on the part of the plaintiff was as follows: "I prepared a lease for the parties to this suit at their request. It contained the agreement of both parties. It was never signed, because Alexander kept putting Morrison off, and at last sold the premises. I sent the plaintiff's goods and family down to the place described at the request of the defendant; that the said Alexander told me he had given the plaintiff and his family quiet possession of the place."

Brent & Brent, for plaintiff.

R. S. Coxe and Henry M. Morfit, for defendant.

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

On the part of the defendant THE COURT was asked to instruct the jury: That before the plaintiff can recover in this action it is necessary to prove to the satisfaction of the jury that the defendant represented to the plaintiff at the time of his negotiation with him that he had a good title and right to the premises stated in the declaration, and that when he made such representation he knew the same to be false, and made it with the intent to deceive and defraud the plaintiff, or that he had with such intent to defraud and deceive the plaintiff concealed from the plaintiff the fact that he had prior to the contract with him sold the said property to Miller,—which was given by THE COURT, with this addition: That the question of intent as aforesaid is a question for the consideration of the jury under all the circumstances given in evidence.

Verdict for the plaintiff and judgment on the verdict for $175.

Case No. 9,841.

MORRISON et al. v. AMERICAN POPULAR LIFE INS. CO.

[5 Ins. Law J. 752.]

Circuit Court, D. New Hampshire. May Term, 1876.

INSURANCE—LIFE—CONDITIONS OF POLICY—PAID-UP POLICY—RIGHT TO DEMAND.

The policy provided that on its delivery to the company, properly receipted and cancelled, a paid-up policy would be given, provided the last premium due should not have remained unpaid more than thirty days. The plaintiffs sent the sub-agent, who was not employed by the company, from whom the policy had been received, and to whom the premiums were paid, a notice of their desire to secure a paid-up policy, and to deliver, cancel, etc., the policy, with a request to forward the same to the company immediately for its action. The notice was delivered to the agent within about twenty days after the premium was due, and was answered by the company at the expiration of the thirty days, stating that the plaintiffs would perceive from their policy what was necessary to do, and when; whereupon a formal discharge of the policy was executed and delivered to the general agent, at the same time expressing a willingness to do whatever was necessary, and requesting a paid-up policy. *Held*, in equity, that the plaintiffs had sufficiently complied to entitle them to a paid-up policy.

This is a bill in equity brought by the complainants, who are residents of Manchester, New Hampshire, against the defendant corporation, which is established by the laws of the state of New York. The bill was originally filed in the state court, but subsequently was removed to the United States court by the defendant. The complainants set forth in their bill of complaint, that the company, on or about the 28th day of July, 1867, by their policy of insurance, in consideration of the representation made to it in the application for said policy; and the sum of one hundred and twenty-four dollars and twenty-two cents paid to the company by said Charles R. Morrison, and of the payment of a like amount to be made on or before the 26th day of July on every year, from and including the 26th day of July, 1867, during the life of said Charles, not exceeding ten annual payments in all, promised the plaintiffs to pay the sum of two thousand dollars to the said Susan F. Morrison in case she should survive her said husband. And in case she should not survive him, to his executors, etc., within ninety days after his decease, upon due notice and proof of the same; and the company also, in and by said policy, further promise, as expressed in said policy, that after payment of any of the premiums above mentioned, the said company will give to the assured a paid-up policy for an amount equal to its true value, as shall be estimated at that time by the actuary of the company, upon the delivery to it of the policy properly receipted and cancelled, provided the last payment of premium shall not have remained unpaid for more than thirty days. The plaintiffs further say that five of said annual premiums out of the ten were paid as required and provided by the policy, the last payment being on the 26th day of July, 1873, for one year from the 26th day of July, 1873, to the 26th day of July, 1874, and amounting in all to the sum of $621.10, and that on or about the 15th day of August, 1874, the plaintiffs sent to the "local" agent of said company, from whom said policy was in the first instance received, and to whom the said annual premium had been paid, one George Morrison, of Bath, N. H., a written notice that

they desired to receive a paid-up policy for the just proportional amount, and receipt, cancel and surrender the original policy as therein provided, with a request that said local agent would forward the same immediately to said company for its action thereon. They maintain that the local agent did forward the notice, and it was received by the company, at its office in New York, on or before the 19th day of August, 1874, and long before the expiration of thirty days from the 26th day of July, 1874, when the last unpaid premium became due. The company did not make any reply until by a letter dated Aug. 26, 1874, and received by the complainants on the 28th, in which the defendant stated that the complainants would perceive by their policy what it was necessary to do, and when, in order to receive a paid-up policy. On receipt of the letter, plaintiffs, on the 28th day of August, made and executed a formal discharge of this policy expressed to take effect when they should secure their paid-up policy, and delivered the same to the defendant's agent for the state of N. H., and requested a proportional paid-up policy, and at the same time informed him that they were ready to cancel and discharge the original policy in any proper manner in which the company might direct. The complainants also by a letter mailed at Manchester, 28th of August, to the company, informed the company of the leaving the policy and discharge with Gage, and of their readiness to cancel the original policy which they have ever since been ready to do, as well as all things to be by them done in order to receive such policy, but the defendant refused to make out and deliver the same. The prayer in the bill is that the defendant may be required to answer, and to be ordered, and decreed to execute and deliver a paid-up policy for the just sum, or to refund to the husband the sums by him paid, and interest thereon, and for other just relief. The answer of the defendant admits the execution of the policy, the five annual payments, the last of which was made on the 26th of July, 1873, and avers that another annual premium became due July 26, 1874, which the plaintiffs have not paid. They deny that George Morrison was an agent of the company, general or local, and claim that Gage et al. were the only agents who received from the company, and sent to the complainants, the policy; they deny that any notice to George Morrison was notice to the company, and deny that they intended to prevent complainant from surrendering the policy, etc., but gave him information of what he should do in order to obtain a paid-up policy. They assert that the failure of complainants' compliance with the requirements of the company, as contained in the policy, is not attributable to the fault of the company, but to the carelessness of the complainants in not consulting their policy, all the time in their possession, and it was the complainants' and not the company's fault that notice was given to George Morrison, when the complainants knew that the proper and legal agent of the company was Gage et al. upon whom notice could be properly served, etc. They contended that delivery of the policy, properly receipted and cancelled, to the company, and that within the thirty days specified, are conditions precedent which must be performed by the plaintiffs before the company can be required and bound to give them a paid-up policy, and that these conditions were not complied with, and deny the policy was ever delivered to the company properly receipted and canceled, but take exception to the wording of the cancellation. They maintain also that the receipt and discharge not being properly executed, in the event of the death of said Charles R., after a paid-up policy should be given him, his wife, or in event of her death, her heirs, would not be legally barred from claiming under the original policy, and that whatever was done upon the 28th of August, was too late in point of time to entitle the plaintiffs to any paid-up policy, whatever may have been its form, or whatever might have been its effect if seasonably made.

Charles R. Morrison, for complainants.
Sargent & Chase, for defendant.

SHEPLEY, Circuit Judge, after hearing the evidence printed with the case, decreed that the plaintiffs within thirty days from the 26th of July, 1874, had done sufficient to entitle them to an equitable paid-up policy, for an amount equal to its true value upon the basis of the payment of five annual premiums according to the terms of said policy, and that said company, within ten days from the date of the decree, shall make and execute to the complainants an equitable paid-up policy upon said basis, for an amount equal to its true value, to be estimated by the actuary of the company as of August 26, 1874. The case was referred to a master to report whether such policy as shall be produced by the company conforms to the decree, and has been duly executed and delivered; and further, that said complainants recover costs of suit.

Case No. 9,842.

MORRISON et al v. ARTHUR.

[13 Blatchf. 194;[1] 22 Int. Rev. Rec. 10.]

Circuit Court, S. D. New York. Nov. 15, 1875.[2]

CUSTOMS DUTIES—ACT 1864—SILK VEILS—CRAPE VEILS—TERMS USED IN TRADE.

1. The 8th section of the act of June 30th, 1864, (13 Stat. 210,) provides for a duty of 60 per cent. ad valorem on "silk veils," and for a duty of 50 per cent. ad valorem "on all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for." The term "silk veils," in the absence of any other language in the statute, includes all veils made of silk, and the presumption is that

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]
[2] [Affirmed in 96 U. S. 108.]

"crape veils," being manufactured of silk, are embraced within the term "silk veils."

2. But, if it be shown, that, in trade and commerce, "crape veils" are not "silk veils," that is, are contradistinguished from "silk veils," and are commercially known as different articles from "silk veils," and that the term "crape veil" is a distinctive term, which distinguishes the article called by that name from a "silk veil," then the term "silk veil" fails to designate a "crape veil," and "crape veils" are dutiable under the clause of the statute relating to manufactures of silk.

[This was a suit by George A. Morrison, John Herriman, and Joseph A. Alexander against Chester A. Arthur, to recover certain money paid for duties illegally exacted.]

Benjamin L. Ludington and George D. Lord, for plaintiffs.

Henry E. Tremain, Asst. Dist. Atty., for defendant.

SHIPMAN, District Judge. This is an action of assumpsit, to recover moneys paid under protest for duties which were exacted by the defendant, as collector of the port of New York, upon crape veils imported by the plaintiffs in the year 1871. The defendant pleaded specially, that the moneys alleged to have been paid were had and received by the defendant, as said collector, "in payment for duties due from plaintiffs to the United States on certain importations from a foreign country into the port of New York," and that said moneys "constitute a part of the lawful duty of sixty per cent. ad valorem then due and owing to the United States by plaintiffs, for the duty at said rate on silk veils then and there imported as aforesaid, which said silk veils were dutiable accordingly under section eight of the act of congress entitled, 'An act to increase duties on imports and for other purposes,' approved June 30th, 1864," and that the said amount of duty "was and is the true and lawful duty on the said silk veils." The replication of the plaintiffs averred, that they ought not to be barred, &c., because "they say, that the articles imported by the plaintiffs were not silk veils, and were not, at the time of the importation and entry thereof, liable to a duty of sixty per cent. ad valorem, but the same were a manufacture of silk, and were crape veils, and, at the time of the passage of said act, approved June 30th, 1864, and before and at the time of their importation, they were commercially known, among importers and dealers, and were bought and sold, as crape veils, and never otherwise, and were liable to a duty of fifty per cent. ad valorem, as a manufacture of silk." To this replication the defendant demurred generally.

The portion of the 8th section of the statute of June 30th, 1864 (13 Stat. 210), which is material, is as follows: "That, on and after the day and year aforesaid, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected and paid, on the goods, wares, and merchandise enumerated and provided for in this section, imported from foreign countries, the following duties and rates of duty, that is to say, * * * on silk vestings, pongees, shawls, scarfs, mantillas, pelerines, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch chains, webbing, braids, fringes, galloons, tassels, cords and trimmings, sixty per centum ad valorem; on all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty per centum ad valorem." The question of law which is presented by the pleadings is—are veils which are not silk veils, but are a manufacture of silk, and are known commercially as crape veils, and not otherwise, liable to a duty of sixty per cent.?

The eighth section of the act of June 30th, 1864, was intended to be a comprehensive section, and to include all articles made of silk, or of which silk is the component material of chief value, by whatever name the articles are known, or for whatever purpose they are used. Congress intended to embrace in one section all the manufactures of silk, and to provide that all the articles which are specifically enumerated in the first clause which has been quoted should pay sixty per cent., and that all articles which are not specifically enumerated in the section should pay fifty per cent. Smythe v. Fiske, 23 Wall. [90 U. S.] 374.

Bearing in mind that the main object of the section was to classify articles according to the material of which they are composed, it is first important to determine the construction which should be given to the term "silk veils," as used in this section of the statute. Two facts are to be noticed—first, that general terms only are used in this section; and next, that it is not claimed that the term "silk veils" is a commercial term, or that it is a commercial designation of any one kind of veils which are made of silk. It is a term which is used in the ordinary signification which belongs to the words of which the term is composed, and, in the absence of any other language in the statute, includes all veils made of silk. "When general terms are used, the terms are to be taken and applied in their ordinary and comprehensive meaning, unless it is shown, (as, I understand, it is not claimed to be shown in this instance,) that they have, in their commercial use, acquired a special and restricted meaning." Lottimer v. Smythe [Case No. 8,523]. It is to be presumed that these words include any veil which is made of silk, although such veil is styled by the importer by a particular name which designates the class or subdivision to which the particular veil belongs. Thus, if the different styles of silk veils are called by different names, such as "Honiton," or "Brussels," or "Point d'Alençon," and are exclusively called by such specific names, their different classes or

styles are still silk veils, and are included within the general term, which is used not for purposes of specific description, but as a comprehensive term to include all veils made of a particular material. Importers cannot withdraw their goods from the operation of the general terms of a statute, which classifies goods according to the material of which they are made, by imposing upon those goods specific names, which designate a particular kind or subdivision of the general class which is mentioned in the statute. "When the goods which are subjects of duty are designated by the material of which they are made or composed, the statute is to be construed as presumptively including such goods, by whatever subordinate or specific name they may be known, and though all in the commercial world are in the habit of using the specific name when they speak of the particular article in question. For example, if we have a tariff act which imposes a particular duty upon cotton goods, if that designation alone is used in the legislation pertaining to the subject of duty upon the importations, it presumably includes all cotton goods, even though importers, merchants, dealers and customers, all the country through, when they speak of a particular kind of goods made of cotton, always give the special name of the article; as, for example, under this attempted illustration, muslin, cambric muslin, cotton drilling, cotton shirting, cotton sheeting." Jaffray v. Murphy [Id. 7,172]. The presumption is, then, that crape veils, being manufactured of silk, are included in the general words of the statute, and are embraced within the term "silk veils," and that presumption will not be rebutted or weakened by proving, merely, that the term "crape veils" is used to discriminate between the kind of veils which is called by that name, and the various other kinds of veils which are made of silk, although it could be shown that the entire body of importers designated this particular article by no other name than crape veils. The mere name which is exclusively applied to the different species of veils is immaterial.

But there is another principle which is well settled in the construction of tariff acts, and which is, that congress must be understood, in the tariff laws, to class articles according to the general usages and known denominations of trade, and, generally, to recognize, in the tariff acts, the known commercial distinctions which are made in the usages of trade, unless congress has indicated, by the language of the statute, an intention to exclude any other classification than the one which it has adopted, or any modification of the classification which it has adopted. Inasmuch as this eighth section is a comprehensive section, intended to include all silk articles, if the first clause was the only clause of the statute which was applicable to veils, such an intention would perhaps be manifested. The statute would then be construed to impose a duty of sixty per cent. upon all veils which are made of silk. But, the statute also provides, that all manufactures of silk, not otherwise provided for, shall pay a duty of fifty per cent. The plaintiffs contend that their goods, being a manufacture of silk, have been, by commercial usage, expressly declared not to be silk veils, and that, in commercial language, they are not made of silk, and having been so declared, and the statute having provided that all other manufactures of silk shall pay a prescribed duty, that this case is brought within the principle which I have just stated. In this position they are sustained by the decisions which have been given both recently and formerly upon this subject.

In order to avail themselves of this principle, the plaintiffs aver, in their replication, that the goods which they imported were not silk veils, but were a manufacture of silk, known as crape veils, and not otherwise. If, under this replication, it is proved, that, in trade and commerce, crape veils are not silk veils, that is, are contradistinguished from silk veils, and are commercially known as different articles from silk veils, and that the term "crape veil" is a distinctive term, which distinguishes the article called by that name from a silk veil, then the term "silk veil" fails to designate a crape veil, and crape veils are dutiable under the clause of the statute which relates to manufactures of silk. If crape veils have thus, in commercial usage, been separated and set apart from the general class to which they presumptively belong, the law infers that congress did not intend to include them among the general class, there being another clause in the statute in which they may be placed. There is, then, a question of fact for the triers to determine, which is, whether these articles are known in trade and commerce as silk veils or not; in other words, are crape veils known in trade as a different article from a silk veil, and, commercially, are they regarded as forming a separate and distinct class of goods from silk veils, and, in commercial language, to be other than silk veils? Inasmuch as this issue of fact is directly presented by the replication, which avers that the veils are not silk veils, and is an issue which, if found in favor of the plaintiffs, is a successful answer to the defendant's plea, the demurrer should be overruled.

The principles which are involved in this case have recently been fully considered by the late circuit judge, in Lottimer v. Smythe [Case No. 8,523], and Jaffray v. Murphy [Id. 7,172], which cases also arose under the silk section of the act of June 30th, 1864. The general rule of law in regard to the effect of commercial usage and designations upon the construction of the tariff laws, is also declared in 200 Chests of Tea, 9 Wheat. [22 U. S.] 430; Elliott v. Swartwout, 10 Pet. [35 U. S.] 137; Curtis v. Martin, 3 How. [44 U. S.] 106; Maillard v. Laurence, 16 How. [57 U.

S.] 251; and U. S. v. Breed [Case No. 14,638].

The demurrer is overruled, with leave to the defendant to plead anew.

[On a writ of error the judgment of this court was affirmed. 96 U. S. 108.]

Case No. 9,843.

MORRISON v. BENNET et al.

[1 McLean, 330.] [1]

Circuit Court, D. Ohio. Dec. Term, 1838.

COURTS—FEDERAL JURISDICTION—CITIZENSHIP.

In this case the writ issued against Henry Bennet and one Stewart. It was returned served on Bennet; non est as to Stewart. The declaration averred that the plaintiff was a citizen of New York, and the defendant Bennet, a citizen of Ohio, and that the writ which had issued against Stewart was returned non est, &c., no averment being made in the declaration of his citizenship. A plea to the jurisdiction was filed. [The plea was overruled.]

[Cited in Doremas v. Bennet, Case No. 4,001.]

[This was an action by Hamilton Morrison against Bennet and others.]

Mr. Page, for plaintiff.

Mr. Powers, for defendant.

OPINION OF THE COURT. The limited nature of the jurisdiction of this court gives rise to a great number of questions on that point. It is a well settled principle, that the court can take no jurisdiction in a case where there are several plaintiffs or defendants, unless each individual as plaintiff or defendant has a right to bring his suit in the court, or is liable to its process. And it is also settled, that if the declaration do not contain averments, showing that the court has jurisdiction, it is defective, and advantage may be taken of the defect by demurrer, motion in arrest of judgment, or on a writ of error. Bingham v. Cabot, 3 Dall. [3 U. S.] 382; Emory v. Greenough, Id. 369; [Turner v. Eurille] 4 Dall. [4 U. S.] 7; Abercrombie v. Dupuis, 1 Cranch [5 U. S.] 343. In this case it is contended that there is no averment in the declaration showing that Stewart is a citizen of Ohio, which is necessary to give the court jurisdiction between him and the plaintiff. And the statute of the state is referred to, which authorizes the plaintiff to proceed to judgment against the defendant on whom the process has been served, and afterwards make the other persons named in the writ, who could not be found, parties to the judgment by a scire facias. And that in this proceeding, the burden of proof is thrown on the defendants, as they are called on to show why they should not be made a party to the judgment. It is clear that the court can take no jurisdiction as between the plaintiff and Stewart. He may be a citizen of the state of New York, or of some other state than the state of Ohio, and in such case, the court have no jurisdiction. One of the parties must be a citizen of the state where the suit is brought or the process must be served on him within the state. And the declaration should show the citizenship of the parties. This being the case, if the proceeding against Bennet, on whom the process has been served shall prejudice the rights of Stewart, the plea must be sustained. If the court have no jurisdiction as between the plaintiff and Stewart, no proceedings can be had against him, under the statute, to make him a party to the judgment. And if this cannot be done, will the judgment against Bennet, in any respect, affect the rights of Stewart? Will not the case be as open to him to contest the validity of the obligation on which the action is brought, after this judgment as before it? This will not be controverted. Under the statute, the proceeding against Bennet is authorized, but further than this the plaintiff cannot proceed. A question somewhat similar to this arose in the case of Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591, in which the court decided that "where M., a citizen of Kentucky, brought a suit in equity, in the circuit court of Kentucky, against C. stated to be a citizen of Virginia, and I. and E. without any designation of citizenship, all the defendants appeared and answered, and a decree was pronounced, in the circuit court of Kentucky, for the plaintiff. And the court held that if a joint interest vested in C. and the other defendants, the court had no jurisdiction in the case; but if a distinct interest vested in C., so that substantial justice, so far as he was concerned could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone. In the case of Craig v. Cummins [Case No. 3,331], Mr. Justice Washington decided, in a case situated in all respects like the present one, the jurisdiction could be sustained. And it is believed that the statute of Pennsylvania, under which the proceeding was had, was similar to the Ohio statute.

Upon the whole, the court think the jurisdiction may be sustained, as against the defendant Bennet, and the plea is overruled. Judgment for the plaintiff.

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

Case No. 9,844.

MORRISON v. BUCKNER.

[Hempst. 442.] [1]

Circuit Court, D. Arkansas. April, 1843.

MORTGAGE—BILL TO FORECLOSE AN ACTION AT LAW—RECEIVER BEFORE HEARING—DISCRETION.

1. A mortgagee may bring his ejectment and sue on the bond at law, and file his bill to foreclose in equity at the same time.

2. The general rule is, that receivers will not be appointed in mortgage cases, unless it clearly appears that the security is inadequate, or there is imminent danger of the waste, removal, or de-

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

struction of the mortgage property; or that the rents and profits have been expressly pledged for the debt.

[Cited in Allen v. Dallas & W. R. Co., Case No. 221.]

[Cited in Morris v. Branchaud, 52 Wis. 191, 8 N. W. 885.]

3. The exercise of this power depends upon sound discretion, and is governed to a great extent by the circumstances of each particular case.

[Cited in Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 196.]

[This was a suit by Daniel Morrison against Simeon Buckner.]

Chester Ashley and George C. Watkins, for complainant.

Albert Pike and F. W. Trapnall, for defendant.

JOHNSON, District Judge. This is a motion by the complainant to direct the marshal or a receiver to hire out the slaves mentioned in the bill and in the mortgage, on the ground that the mortgaged property is wholly insufficient to pay the debt due the complainant. Substantially the application is for the appointment of a receiver before the hearing; and in such cases the court always reluctantly interferes, and upon some pressing necessity, which does not appear to exist on the present occasion. It seems to be well settled by the English chancery practice, that in a case like this a receiver will not be appointed. Lord Chancellor Eldon, in Berney v. Sewell, 1 Jac. & W. 647, uses the following language: "The rule about receivers is very clear; if a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but take possession." And Chancellor Kent says, "the mortgagee may at any time enter and take possession of the land mortgaged, by ejectment or writ of entry." 4 Kent, Comm. 164. And Coote, in his treatise on Mortgages, 518, correctly asserts that a mortgagee may at the same time resort to and proceed on all his remedies at law and in equity; he may, for example, at the same moment bring his ejectment, file his bill to foreclose the mortgage, and proceed on the bond and other collateral securities. Doug. 417; 2 Ves. Sr. 678; 2 Atk. 343, 344. The English cases clearly sustain that doctrine; and to the same effect is the case of Jackson v. Hull, 10 Johns. 482. Coote, above referred to (18 Law Lib. 256), also says, that "if the mortgagee having the legal estate neglect to take the precaution of an agreement with the mortgagor for the appointment of a receiver, he cannot obtain such appointment by order of the court, but must proceed to eject the mortgagor." Now without adopting this rule to its fullest extent, it is proper to observe generally, that receivers in mortgage cases will never be appointed unless it is clearly shown that the security is inadequate, or that the rents and profits have been expressly pledged for the debt (Shotwell v. Smith, 3 Edw. Ch. 588), or that there is imminent danger of the waste, removal, or destruction of the property. There must be some very strong special reason for it. 16 Ves. 59; 1 Pow. Mortg. 295, 296, and cases there cited. The exercise of this power must depend upon sound discretion, and be governed to a great extent by the circumstances of each particular case (Verplank v. Caines, 1 Johns. Ch. 58); but I find no difficulty in saying that such an appointment should not be made where there is, as in this instance, another adequate remedy already pointed out, and where imperative reasons do not exist for this summary interference before the hearing of a cause. There is not such a showing here as would justify this sort of interference, and the motion is, therefore, denied.

Case No. 9,845.

MORRISON et al. v. CASE et al.

[9 Blatchf. 548; 2 O. G. 544; Cox, Manual Trade-Mark Cas. 220.] [1]

Circuit Court, D. Connecticut. April 23, 1872.

TRADE-MARK—MEN'S SHIRTS—DEVICE AND WORDS.

Under section 77, etc., of the act of July 8, 1870, (16 Stat. 210, etc.) the words, "The Star Shirt," and those words with the device of a six pointed star used in connection therewith, and the device and words, "The * Shirt," used as a trade-mark in connection with the manufacture and sale of men's and boys' shirts, and taken by dealers as designating the shirts made by a particular manufacturer, are a lawful trade-mark.

[Cited in Smith v. Reynolds, Case No. 13,098.]

[This was a bill by Thomas A. Morrison and others against Julius A. Case and others for an infringement.]

Calvin G. Child, for plaintiffs.

Charles E. Perkins, for defendants.

SHIPMAN, District Judge. This is a bill in equity praying for an injunction to restrain the defendants from using a certain trade-mark upon men's and boys' shirts. The parties are both of them shirt manufacturers, selling their goods in the general market. The plaintiffs and their immediate predecessors have been engaged in the manufacture and sale of this class of goods for many years, during which the business has grown to considerable magnitude. For twenty years they have used the trade-mark in question, by stamping or labeling the same upon the shirts manufactured and sold by them, and upon their packages and advertisements. In March, 1871, the plaintiffs caused this trade-mark to be registered in the patent office at Washington, under the act of congress approved July 8, 1870 (16 Stat. 210, etc., § 77, etc.)

The trade-mark in question, as appears by the certificate of the commissioner of pat-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Cox, Manual Trade-Mark Cas. 220, contains only a partial report.]

ents, and the fac-similes filed in his office in conformity to the act of congress, consists of the words, "The Star Shirt"; also, the words, "The Star Shirt," with the device of a six-pointed star used in connection therewith; and, also, the device and words, "The * Shirt"—either one, or all, being used, as convenience requires. Though this device or mark is in part arbitrary and, to that extent, would have no natural or necessary significance in connection with the article manufactured, apart from its use in that connection, yet, by such use of the plaintiffs, in connection with their manufacture and sale of these articles, it has become well known to the trade, and has come to be taken by dealers, as a peculiar designation by which the plaintiffs' goods are distinguished in the market. It is, therefore, both in its character and use, when taken together, a lawful trade-mark. It has long been employed by the plaintiffs and well understood, by dealers and the public, as designating such articles of their manufacture. They have complied with the requirements of the act of congress, and are entitled to protection. Their exclusive right to the use of this trade-mark is co-extensive with the limits of the United States.

The defendants have clearly infringed this right by using the words and device of the plaintiffs, both in the exact form, and in such near resemblance as is calculated to deceive. They have done this by so marking the shirts made by them, and by the labels used on their packages and packing boxes. A perpetual injunction must, therefore, issue, restraining them from any use of this trade-mark, either in the identical form in which it is registered in the patent office, or in any form in which it may be calculated to deceive, by confounding the goods manufactured and sold by the plaintiffs with shirts made and sold by the defendants.

Case No. 9,846.

MORRISON v. CLIFFORD.

[1 Cranch, C. C. 585.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.

SET-OFF—ACTION ON NOTE—DAMAGES FOR BREACH OF WARRANTIES—FRAUD.

Unliquidated damages for breach of warranty of the soundness of a horse, cannot be set off against a note given for the purchase of the horse. But fraud may be given in evidence; for it avoids the contract altogether.

Debt on a promissory note. Plea, owe nothing. The defendant offered evidence that the horse, for which the note was given, was not sound.

THE COURT said the defendant could not set off unliquidated damages for breach of the warranty, against the note, but the defendant might give evidence of fraud in obtaining the note. Fraud goes to the whole note; simple breach of warranty goes only to part of the consideration.

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

MORRISON (CRANE v.). See Case No. 3,355.

Case No. 9,847.

MORRISON et al. v. The JOHN L. STEPHENS.

[Hoff. Op. 473.]

District Court, N. D. California. April 3, 1861.

CARRIERS OF PASSENGERS—CONDITIONS ON TICKET—MISCONDUCT OF OFFICERS—PUNITIVE DAMAGES.

[1. The printed conditions of a ticket inconsistent with a valid oral contract of carriage are not conclusive against the passenger.]

[2. Punitive damages are recoverable from a carrier for forcing a husband and wife, who have contracted for the exclusive use of a stateroom, to receive another male passenger therein.]

[3. The disappointment and irritation of a husband, and the discomfort and suffering of his invalid wife, resulting from assigning them to separate staterooms, in violation of the contract of carriage, are elements of damage.]

[This was a libel by Robert F. Morrison and wife against the steamship John L. Stephens for breach of a passenger contract.]

Jas. T. Boyd, for libellant.
Hall McAllister, for claimants.

HOFFMAN, District Judge. It is alleged by the libellant R. F. Morrison that, being desirous to procure a passage from New York to San Francisco, he applied at the office of the company in the former city. That he was anxious to obtain for himself and wife the use of a stateroom exclusively for themselves, and inquired of the agent whether he could not secure it by paying the full amount of passage money for two persons, but he was informed that it would be necessary to pay the full fare for three persons. After some negotiation it was finally agreed that the libellant should have the use of the entire stateroom on payment of five hundred and twenty-five dollars, the price of a single passage being two hundred and twenty-five. On arriving at Panama, the libellant was informed that the third berth in the stateroom, assigned to himself and wife, was to be occupied by a male passenger. Against this arrangement he remonstrated with natural indignation, and presented his ticket to Messrs. Knight & Wood, the agents of the company, strenuously insisting that he had paid for an entire stateroom, that his ticket called for it, and that he was entitled to it. He also represented the extreme debilitated condition of his wife, which rendered his personal attendance upon her indispensable to her comfort, and perhaps to her safety. The agents positively declined to accede to his demand.

The next morning he went on shore to see Mr. McLean, the principal agent of the company. Mr. McLean admitted the genuineness of the ticket, and, it would seem, made no question as to the right of the libellant, under it, to the exclusive use of a stateroom, but stated that the way bill, by which alone he was required to be governed, was different, and that the latter showed that Mr. and Mrs. Morrison were entitled each to a berth in the same stateroom, and that a male passenger was entitled to the third berth. After some negotiation, the agents of the company—sensible, no doubt, of the impropriety as well as the gross breach of contract involved in putting a male passenger and a stranger in the same stateroom with a husband and wife—effected an arrangement by which Mrs. Morrison was assigned a berth in a room with two other females, and the libellant a berth in a room with two other male passengers. For this breach of contract the libellants bring suit.

The answer of the claimants alleged that the libellant in fact purchased three tickets, one for each berth in the stateroom, and himself sold the third ticket, which entitled the bearer to the third berth. But in support of this allegation no proofs whatsoever are adduced; on the contrary, the evidence of the terms of the contract made by libellant with the agent are conclusively proved by the testimony of a friend who accompanied him to the office, and who, in fact, conducted the negotiation. It is positively testified by this witness that Mr. Morrison insisted on having a stateroom to himself; that he stated he would have one if it cost him all he possessed, and that the condition of his wife's health rendered it absolutely indispensable; that the agent, himself, offered to let him have the room on the payment of one hundred and twenty-five dollars over and above the price of two passages, to which Mr. Morrison assented, and he (the agent) thereupon sold to a bystander, for one hundred dollars, a ticket for a passage, but without any berth. I have no doubt whatever that such was the true nature of the transaction. The ticket received by Mr. Morrison was presented to the agents at Panama, as the evidence of the justice of his claims and the nature of the contract. No doubt seems to have been expressed or entertained as to its genuineness, or as to its expressing, on its face, that Mr. M. was entitled to "all" the stateroom. It is exhibited in court, and though not formally proved by evidence of the hand-writing of the agent who signed it, it is stated by a witness to be the same as that presented by the libellant to the agents. The witness, however, is unable, positively, to swear to it, as there is no mark upon it, but he expresses his firm belief that it is the same. A copy of it is appended to the libel, which is sworn to by Mr. Morrison. This, though not strictly evidence of the cause, is not to be wholly disregarded, especially where, as in the present case, the character and high standing of the libellant are known to the court, and recognized by the community. But, independently of the ticket, the nature of the contract, the amount paid by the libellant, and the consideration agreed to be given for the extra sum paid by him, are proved beyond doubt. And if to this we add the extreme improbability that a person with the feelings and sentiments which the condition in life of the libellant justify us in attributing to him would have consented that a stranger, and a male, should share the stateroom of himself and his invalid wife, we may conclude with absolute certainty that the breach of contract has occurred precisely as alleged. If the arrangement proposed, and for some time insisted on by the agents, had been carried into effect, and the libellant and his wife had been compelled to submit to the intrusion of a male passenger into their stateroom during the entire voyage, it would not be easy to assign a limit to the damages which should be awarded for so gross and outrageous a breach of contract. Happily, however, an arrangement was made, which, at least, involved no violation of the common decencies of life. The stateroom assigned to Mrs. M., with two other females, was situated on the gangway or passage leading into the cabin. In some respects it seems to have been a desirable room, as it was in the center of the vessel, and near a windsail, which descended into the passage. But in other respects it was of an inferior kind. It was of somewhat less than the usual size, an angle or corner being cut off where the passage opened on the guards. The passageway, owing to the very crowded state of the vessel, was constantly thronged with passengers, especially about meal times; and a tier of standee berths was erected at night along the guards, just opposite to its door. These and some other inconveniences incidental to its position, such as a water tank constantly resorted to by second-class passengers, made the room probably far less comfortable than some others farther aft, though it may, notwithstanding, have been preferable to those which opened inside on the saloon. On the whole, the evidence, I think, shows that the room assigned to Mrs. M. was perhaps such as, if it had been given exclusively to her and her husband's use, would have satisfied the terms of the contract, although it was by no means one of the best in the ship; but, on the other hand, it is equally clear that the inconvenience and discomfort which arose from the failure to comply with the contract, which the libellant had taken so much pains to make, were not mitigated or compensated for by the size, the situation, or any other extraordinary advantages of the stateroom his wife was compelled to occupy. It is also shown, by the testimony of

the physician who attended her, that, at the time of her departure, Mrs. M. was suffering from painful chronic maladies. In fact, the voyage appears to have been recommended in the hope of benefiting her health, and with the same object her husband was induced to make extraordinary provision for her comfort by securing a stateroom for their use, where she might at all times command his services and society. It is testified by the passengers that during the voyage she seemed to be feeble and suffering, and that she very rarely left the stateroom, which, as has been stated, she shared with two other females.

It is not easy to measure by a pecuniary standard the damages which should be awarded to the libellants for the breach of contract which has been stated; nor is it possible to arrive at any precise estimate of the annoyance, the discomfort, and even the suffering Mrs. M. must, no doubt, have experienced from being compelled to make the voyage in a stateroom occupied by two other passengers, perhaps strangers, and necessarily deprived, except occasionally, of the society and services of her husband. To the husband, the mere personal inconvenience of having a stateroom assigned to him, with two other passengers, was not, of course, so great. But the disappointment and irritation at the failure to obtain the accommodations which he had been at such pains to provide for his wife, and the indignation naturally excited by the declared intention of the agents to place a male passenger in the same stateroom, constitute a grievance which our natural feelings will apprise us is of the most substantial kind. Dependent upon, and, so to speak, at the mercy of, the agents and officers of the steamers, as every passenger necessarily is, it is the duty of the courts, in cases like the present, of a clear breach of contract caused either by the grossest carelessness, or by reckless cupidity, to award such damages as will be an ample indemnity for the injury sustained. It is only by the firm and constant enforcement by the courts of the rights of passengers that the repetition of abuses like the present, wherein the cupidity of subordinate agents is stimulated by an unusual number of applications for tickets, can be prevented, and the serious consequences be averted which would be likely to follow, sooner or later, attempts on the part of the officers of the ships to compel, by force, a husband and wife, who have contracted and paid for a stateroom, to receive into it a male fellow passenger. A decree for damages must be entered in the sum of twenty-five hundred dollars.

MORRISON (NETTLETON v.). See Case No. 10,127.

MORRISON (PATAPSCO GUANO CO. v.). See Case No. 10,792.

Case No. 9,848.

MORRISON v. The PETALUMA.

[1 Sawy. 126.] [1]

District Court, D. California. April 13, 1870.

COLLISION — FOG — VESSEL AT ANCHOR — APPORTIONMENT.

Collision between a steamboat and vessel at anchor, in a fog. Damages apportioned, it appearing that the vessel had neither a bell nor a fog-horn, and that the steamer failed to moderate her speed.

[This was a libel by Daniel Morrison against the steamboat Petaluma, to recover damages sustained in a collision.]

McAllisters & Bergin, for libellant.

Sol. A. Sharp and Milton Andros, for claimant.

HOFFMAN, District Judge. The schooner William Hamilton, while on a voyage from Antioch to Oakland, on the third day of February, came to an anchor abreast the stone quarry near the southerly end of Angel Island. The tide was ebb, the weather very foggy, and there was no wind. She was obliged to anchor, as she had reached a point where she was liable to drift with the ebb tide towards the Heads.

She had on board a master and one man. They both admit that there was neither a bell or a fog-horn on board, but they state that at short intervals they endeavored to warn approaching vessels of their presence by shouting and by striking the brakes of the windlass with an iron bar.

About 5½ o'clock the steamboat Petaluma, bound from Petaluma to this city, collided with the schooner, inflicting such injury as to lead the men on board the latter to jump instantly upon the steamer to save their lives. The schooner was thereupon abandoned. She has since been recovered and is now on the beach at Sausalito.

It is not disputed that a dense fog prevailed at the moment of the collision. The schooner was first seen by the master, the pilot, the lookout of the steamer, and by several of the passengers, at a distance of from two hundred to three hundred feet; and as soon as under the circumstances she could possibly have been discovered, everything appears to have been done by the steamer which skill and diligence could suggest to avoid the collision.

On the part of the steamer it is urged that the schooner was in fault in not having and using a bell, or at least a fog-horn. Art. 10 of the "regulations for preventing collisions on the water," provides (Act April 29, 1864, 13 Stat. 60) as one of "rules governing fog signals," that "whenever there is a fog, whether by night or by day, the fog signals described below shall be carried and used, and shall be sounded at least every five minutes. Sailing ships under way shall use a fog-horn.

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

Steamships and sailing ships, when not under way, shall use a bell."

These provisions are positive and peremptory. There would seem to be more necessity for their observance by coasters and small craft navigating internal waters, frequented by steamers and other vessels, than by ships navigating the high seas. The schooner Hamilton was an enrolled vessel, and subject to the laws regulating the commercial marine of the United States.

She was, therefore, clearly in fault in not sounding a bell as required by law. It is not disputed that at the moment the schooner was discovered, the steamer was going at her usual rate of speed—probably with the ebb tide—from twelve to fifteen miles an hour. The 16th article of the regulations provides that "every steamship shall, when in a fog, go at a moderate rate of speed."

In excuse for non-compliance with this regulation, it is urged on the part of the steamer, that it is necessary in foggy weather to run by compass, and that the position of a steamboat can be known only by timing her, and thus estimating the distance, and that to do this it is necessary for her to run at her usual rate of speed. This excuse is but an attempt to justify a deliberate violation of the act of congress. A similar excuse was rejected, even before the passage of the act of 1864, by the supreme court, in the case of McCready v. Goldsmith, 18 How. [59 U. S.] 91. In that case the court observes: "A passenger on board who witnessed the collision, was struck with the impropriety of the rate of speed, and asked why they ran so fast in a fog, and was answered that it was necessary in order to enable them to keep their reckoning in going from place to place. And we learn also from the testimony of the pilot and some others, that they make no difference in the rate of speed in consequence of a fog; that they go slow when making land or a light, or in narrow passages, and when sounding the lead—as if the only precautions they were bound to observe, in the navigation, was as it respected the safety of their own vessel. We will only repeat what we said in the case of Newton v. Stebbins, 10 How. [51 U. S.] 606, 'that it may be matter of convenience that steam vessels should proceed with great rapidity—but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered.'"

A similar opinion to that referred to by the supreme court seems to be entertained by some of the steamboat captains in these waters. Captain Bromley, of the "Julia," in reply to a question of the court, says: "When I say it is safest to keep up the usual rate of speed—I mean for the steamboat. If we are going along looking out for vessels, of course we go slow; most of them have horns, and we have our steam whistles."

The latter course is precisely the one which the act of congress requires steamers to adopt. It is also urged that it is safer to go at a high rate of speed, because the course of a vessel can in that case be more suddenly deflected than if her rate of speed be low.

This, again, is an attempt to justify a deliberate violation of law; nor, though several witnesses have so sworn, does the reason assigned for maintaining a high rate of speed, appear to be well founded. Captain Bromley's testimony alone furnishes a sufficient answer to it, and the conduct of the Petaluma, as disclosed by the testimony in this case, shows that her officers did not act upon the theory that in a fog vessels can be avoided by a steamer more easily at a high than at a low rate of speed. The officers of the Petaluma testify that, when warned of the approach of the up-boats by their steam-whistles, they slowed down, and continued at a low rate of speed, until the boats were seen and passed; when their usual rate of speed was resumed.

I am satisfied that not only the law, but sound policy requires that all vessels should be held to an exact compliance with the regulations established for their governance by act of congress, and that their officers should be advised that for any violations of those regulations they will be held responsible, except in the cases contemplated by the 20th article of the regulations, and except that it appear by unquestionable proofs that the violation of the law in no degree contributed to the disaster.

Both vessels being thus found to be in fault, the damages must be apportioned. They will be ascertained by reference to the commissioner.

MORRISON (PHILADELPHIA & R. R. CO. v.). See Case No. 11,089.

MORRISON (STATE NAT. BANK OF MINNEAPOLIS v.). See Case No. 13,325.

Case No. 9,849.

MORRISON et al. v. The UNICORN.

[5 Hughes, 79; 3 Quart. Law J. 333.]

District Court, D. South Carolina. July Term, 1858.

WORDS AND PHRASES—LOSS—AVERAGE—SALVAGE.

The construction and legal effect of the terms, loss, average, and salvage in maritime contracts.

[This was a libel by R. Morrison & Co. against the cargo of the brig Unicorn.]

MAGRATH, District Judge. The argument in this case relates exclusively to the construction of certain words in a maritime contract, between the libellants and the master of the brig Unicorn, in the port of Havana. By the written obligation, the sum loaned was £1,622 17s., 8d., sterling, at a premium of twenty-five per centum; its payment secured by the block, the cargo and freight, of the brig. She sailed from Havana to a port of

discharge in the kingdom of Great Britain, calling at Queenstown for orders; put into the port of Charleston from stress of weather; was surveyed, ordered to be repaired, and then sold. The validity of the bond is conceded. The holders have libelled the cargo, which has been sold under a decree; and the proceeds of that sale, except so much as has been paid at the instance and with the consent of the proctors, the costs and other charges, now remain in the registry subject to the order of the court. That part of the contract submitted for construction, is the following clause: "In case of loss of said brig Unicorn, such an average as by custom shall have become due on the salvage." The amount in the registry is not sufficient to pay the principal and maritime interest due to the libellants. And it is now contended that the libellants are not entitled to receive the whole amount, but only a proportion; to be determined by the ratio which the loan (whether with or without maritime interest is not stated) bore to the value of the ship, cargo and freight, at the time of her departure from Havana. The argument is made to rest principally upon the opinion expressed in 2 Arn. Ins. p. 1203, in which he refers with approbation to the argument of Valin and the article 331 of the Code de Commercio, liv. 2, tit. 9.

There cannot be much doubt of what was the rule of the general maritime law. In the 18th article of the Ordonnance de la Marine, it is laid down: "S'il y a contrats a la grosse et assurance sur au meme changement le donneur sera preferé aux assureurs sur les effets sauvés du naufrage pour son capital seulement." 2 Valin, Comm. 20. The lender in such a maritime contract would recover in preference to the insurer, the principal sum; but not the maritime interest. And this rule is supported by Emerigon, who assigns as the motive of the preference, that the lender contributes directly and physically to the existence of the effects put at risk; whereas the insurer is a simple guarantor who inspires courage, it may be, but does not procure or furnish the thing itself. The lender, he adds, acquires, in the commencement, a lien on the thing put at risk; and it can not be annulled by the alienation, which an abandonment subsequently works towards the insurer. Emerig. Ins. c. 17, § 12. He is supported in this opinion by Pothier; but the rule is questioned by Valin. It is not necessary to enter upon that discussion which engaged these distinguished men. It was not directed, as this must be, to determine what is the law; a much wider field was opened in the consideration of what it should be. Valin tells us in his correspondence with Emerigon, that the latter submitted the question to the admiralty, and it considered his argument consistent with common rights; but that the maritime law followed the response of the Roman emperor: "Ego quidem mundi dominus, sed lex maris." 2 Comm. 30. Boulay Paty (3 tom., p. 229) says the admiralty of Marseilles was influenced by the argument of Valin; and the Code de Commerce adopted his opinion in the article which provides in such cases a division of the property saved, between the lender and assurer, in proportion to their several interests. The interest of the lender being the principal sum without the maritime interest; and that of the assurer, the amount which he has agreed to insure. In a question of maritime law, the Code de Commerce is regarded as a collection of regulations, municipal in their operation: but the Ordonnance de la Marine is described by Chief Justice Marshall, as compiled with great care by the first civilians of the nation, and with a view not only to all the ancient codes which are extant, but also to the customs and laws of all the maritime states of Europe. Selden v. Hendrickson [Case No. 12,639].

In this case I cannot discover the authority upon which, in the United States, that construction can be supported which maintains a division of the property saved, where it is insufficient to repay the lender the sum advanced. The terms in which the rule is recommended by Mr. Arnold plainly show that he did not understand it as adopted in Great Britain; and I think it equally clear that it never has been adopted in the United States. In [The Virgin v. Vyfhins] 8 Pet: [33 U. S.] 553, Judge Story, when he pronounced for the validity of the bond, added, as the legal consequence, that it must be upheld to the extent of the property pledged for its payment. The 18th admiralty rule provides that, in all suits on bottomry bonds, they shall be in rem only; unless the master has, without authority, given the bond, or by fraud or misconduct avoided it, or subtracted the property, or unless the owner, by his misconduct or wrong, has lost or subtracted the property; in which case the suit may be in personam. And this rule is declaratory of the rule of the general maritime law, as enforced in the United States. The nature of, and the obligation arising from, these bottomry contracts are well understood. In The Ann C. Pratt [Case No. 409], Judge Curtis says: "This is a contract of a peculiar character, distinguishable by very marked characteristics from an ordinary loan," and cites the language of Pothier that "it differs from all other contracts and forms a particular species by itself;" and that, also, of Boulay Paty, that "it is a contract having a specific name and character to itself." In Pope v. Nickerson [Id. 11,274], and in The Draco [Id. 4,057], Judge Story has thoroughly examined these contracts, and in the latter case, defines it, as a "contract for the loan of money on the bottom of a ship, at an extraordinary interest, upon maritime risk to be borne by the lender." And this definition is in accordance with Simonds v. Atlantic Ins. Co., 1 Pet [26 U. S.] 436, 3 Kent, Comm. 362. This contract is received as of great antiquity, varying in terms according to the laws or customs of the

places in which it is used, but having two great tests; the exclusion of the personal liability of the owner and the assumption by the lender of the risks of the voyage. The total exemption of the owner, except in the cases mentioned in the 18th admiralty rule, is illustrated in The Nostra Senora del Carmine, 29 Eng. Law & Eq. 572, where the cargo having been taken out on bail and the fund proving deficient because of certain claims which had been interposed, the court refused an application to cause the owners of the cargo to pay in a further sum, the amount of the bail being assumed as the value of the cargo.

If the rule of an exemption of personal liability be so positively enforced, it is not obvious why the protection of the lender should not be equally considered, so far as it can be accomplished, by the application of the property to the debt, which it has been pledged to secure. These contracts are not forbidden; and although, as we shall presently see, subjected by Valin to severe criticism, are, nevertheless, with the guards placed around them, considered as important agencies in the advancement of commerce. Their operations may be controlled by the parties in the introduction of stipulations which modify, or, perhaps, wholly change them. In this case, then, if the parties to this contract have introduced conditions which qualify or limit the rights they otherwise would have had, they must submit to that consequence; every contract, as a general rule, is a law for the parties to it. By this contract, the brig Unicorn, freight and cargo, are assigned over for the security of the loan taken, by the master, and shall be delivered to no other use or purpose whatever, until payment of the bond be first made with the premium which may be due thereon, the time of payment is specified, and then follows the condition, in case of loss of the said brig Unicorn, such an average as by custom shall become due on the salvage.

Before I proceed, however, to the consideration of that part of this clause, which has been argued, there is another which requires also consideration. What is to be understood by the words "in case of the loss of said brig?" The construction of the other parts of the sentence succeeds that, which is the proper understanding of these words. The case of The Elephanta, 9 Eng. Law & Eq. 553, is a leading case upon this point. In that case the bond provided that if the vessel and her cargo should be lost, miscarried, or cast away, the sum loaned and the interest should not be recovered. By stress of weather the ship was forced into Algoa Bay; was surveyed, and found to require considerable repairs. For these repairs advertisements were made; but the attempt was unsuccessful, and the vessel was abandoned for a total loss. Part of the cargo was sold, and the proceeds remitted to London, and part was re-shipped and reached England. Dr. Lushington, after commenting upon the little aid he had received from adjudicated cases, proceeds to examine the terms, lost and miscarry; cast away, of course, had no application to the case. The explanation of "loss" he derives chiefly from the case of Thomson v. Royal Exchange Assur. Co. 1 Maule & S. 30, in which Lord Ellenborough held, that while the ship existed in specie, she was not lost; and although the expense of repairing was ruinous, yet she was not lost within the meaning of the bond, if existing in specie and capable of receiving repair. Accordingly the bottomry holder was held to be entitled to the goods reshipped to England and the proceeds of those sold at Algoa Bay. In Joyce v. Williamson, referred to in Park, Ins. 463 (reported in 26 E. C. L. 164), the bottomry bond contained a clause, that if the vessel should be taken by the enemy, cast away, miscarry or be lost, before her safe arrival at New York, it should be void. The vessel was captured by a privateer, retaken, and carried into Halifax, where part of the cargo was sold for salvage and repairs, and she afterwards arrived at New York with the remainder of her cargo.

The vessel was worth the amount of the bond, but not that amount with the repairs added to it. Lord Mansfield held the taking, not a loss intended by the bond; and the lender not liable for average or salvage. In the Catherine, 1 Eng. Law & Eq. 679, the same rule is laid down; and the circumstances of the case are so similar to those in the case before me, that its decision would be sufficient authority to guide me to a conclusion. In Pope v. Nickerson [Case No. 11,274], the rule is laid down with great clearness. "The bottomry holders," says Judge Story, "undertake the risk of the voyage and that the schooner shall be able to perform it, notwithstanding the enumerated perils which in the present case were fire, enemies, pirates, and other dangers and casualties of the sea and rivers. But they do not undertake that the vessel shall be able to perform the voyage without any repairs, and without any retardation: but only that the dangers and casualties of the sea and rivers, and the other perils shall not of themselves defeat the voyage. They are to be paid their money unless the voyage is defeated by such dangers and casualties, or other perils, and these alone. The case is not like that of an insurer, where the underwriters are liable for a particular loss, or for a total loss, either in fact or in a technical sense. In cases of bottomry there can be no such thing as an abandonment by which a loss not strictly total can be turned into a technical total loss." In Simonds v. Hodgson, 3 Barn. & Adol. 51, 23 E. C. L. 32, it was held that the bond might provide for the arrival of the vessel to any port, if she was unable to reach the port of final destination.

In the argument here, the case was rested upon a ground which would be applicable to an insurer. But the claim made is that of an owner; and there is no proof of any insurance. If there had been, no proof is before

me of abandonment and acceptance. The argument of Valin is exclusively applicable to an insurer, and does not seem to have been considered by him as applicable to the case of the borrower. Recurring, then, to the construction of the "loss" in this case, it will be seen that the loan was made in Havana, in consequence of the damage which the brig had suffered. She was repaired, sailed from Havana, again experienced stress of weather, and came into the port of Charleston, where she was surveyed, and certain repairs recommended. She was not repaired; the estimates are said to have been too high. A sale was recommended in consequence of this; and it was made. I will not say how far these circumstances, as against an insurer, may be sufficient to make this constructively a total loss; but they do not constitute certainly a loss within the meaning of the bond. Pope v. Nickerson [supra]; 9 Eng. Law & Eq. 553. And I cannot find a better introduction to the reasons which support this conclusion, than in the language of Dr. Lushington: "If (says he) I should hold that the bottomry holder cannot recover under the existing circumstances, I apprehend that it must follow that no suit can be successfully maintained upon a bottomry bond where the ship was disabled from prosecuting her voyage; or the owners had a right and chose to abandon her; though the whole cargo may have been transhipped and brought in safety to the port of destination." 9 Eng. Law & Eq. 555.

The lender, in this case, had for his security an assignment of the brig, cargo and freight. If there is to be an apportionment as contended for, by the terms of the bond, it is confined to the loss of the brig. That a loss of the vessel, is not a loss of the cargo, so far as the security to the lender is concerned, is seen in The Elephanta. Here the vessel has been sold, and the proceeds are in the hands of the borrower or his agents. It is true that it is said, these proceeds have been applied to the payment of expenses. But I do not know anything of these expenses, and must hold them, therefore, to be such as affect the borrower. The cargo is not lost, or damaged, although the voyage is broken up. And the voyage is broken up, not because the cargo may not be transhipped, nor because the vessel may not be repaired; but because it is not profitable to the owner to do the one or the other. Can this, in any just sense, be termed "a loss?" If so, is it a loss from any of the perils or casualties which the lender in the bond consented to undertake? When the lender undertakes the risk of the voyage or the perils of the sea, it is a misapprehension to suppose that he does so for the benefit of the borrower. He is an insurer, not for the borrower, but for himself, to the extent of his loan. In fact, the borrower, to the extent of the loan, has no insurable interest; so perfect is the transfer, to the extent of the loan, that the lender may insure, but not the borrower. The personal liability of the owner is excluded, and the pledge of the thing, vessel or cargo, or both, substituted. If it is lost, the debt is not paid. But its arrival is not, if we speak with precision, the condition upon which the debt is to be paid; although it is a risk which, if it occurs, will defeat the payment. In contracts not of a maritime character, the lender may also bind himself to look to a certain security, and forego his personal action against his debtor; and if the security fails or is insufficient, his debt is lost, because he has no remedy.

In the same manner in these contracts, a loss of the thing pledged is a loss of the debt, because it is a loss of that to which the creditor agreed to look for payment. But this "loss" is the destruction of the property pledged, or its damage to a degree inconsistent with reparation. It is a loss, in fact, not by construction; and that loss occurring from the perils or casualties referred to in the bond. The obligation of this contract is as sacred as that of any other, and the general rule applies to this, that neither party can modify the terms or affect the rights of the other party, unless by consent. By this rule, as we have seen, Emerigon is guided in the denial of the right of the insurer to participate with the lender, because the abandonment by the insured, if it gives the insurer a share with the lender, is a variation of the contract, and affects the rights of the lender by circumstances occurring after the contract is executed, and for which no provision is made in the contract itself.

But open as is the argument for a participation in these proceeds, to this objection now stated; and which is an objection applicable to all contracts; yet perhaps to none would it be more productive of injury than the particular contract now before me. It begins by affirming a power in the borrower to deny the lender the benefit of his security, because it was constructively lost; although it actually existed in specie. This constructive loss results from the wishes and actions of the borrower, or his agents, and from it would arise benefit to the borrower and damage to the lender. He who before a constructive loss, was postponed to the lender, after he had made that loss, would participate with him. He who before that loss was entitled to the whole. Such a rule would involve a temptation to error, which in too many cases would be most urgent. In this case I have not any evidence, which suggests a suspicion of mala fides in the sale of the vessel; nor have I any evidence that its sale was necessary.

The repairs for which the bottomry bond was executed, had only been made within a recent period. The vessel had encountered heavy weather, but she was not disabled, and had not become unseaworthy. It may be true that the estimates for the repairs, which had been recommended, were high, and that the owners, if present, would have done precisely what the master did do. But, if so, I would

have to ask, with Judge Story, upon what grounds is the bottomry not to be paid? Shall it be held that in addition to all other perils assumed by the lender, that of the convenience or profit of the borrower shall also be assumed? "It was a duty (says Judge Story) which the owners owed the bottomry holders, if the schooner could have been repaired so as to perform the voyage, to have made the repairs." Pope v. Nickerson [supra]. I can only regard the sale of this vessel as an act terminating the voyage, dispensing with the time and place mentioned in it for its payment, and entitling the lender at once to proceed to recover the sum loaned. The Draco [Case No. 4,057]. But assuming it to be otherwise and that the vessel was in fact lost, the argument that the lender must divide with the borrower seems to me to be wholly untenable. If it is to be so in case of loss, by the terms of the bond it must be confined to the vessel. That sale was made by the master, and the proceeds are held by the agents of the owners. It has already been seen that even where the cargo was mentioned in the bond, and the ship was sold, the cargo was adjudged to the lender. The principle laid down by Emerigon, that "the borrower can claim nothing from the effects saved, until the lender be satisfied," and that "the creditor never comes into apportionment with his debtor on the thing which is the pledge for the payment of the debt," is of obvious force and universal application; and if any case has been decided in Great Britain or in the United States, which can be considered as sustaining the principle contended for in this case, I have not seen it. The right of an insurer to participate has been maintained with great zeal; but they who denied this right of the insurer, did so upon the ground that he represented only the rights of the borrower; and they who maintained his right, denied that he should be considered as representing the borrower, but insisted that he should be regarded to the extent of his insurance as having contributed to the enterprise. Indeed, the argument of Valin is addressed to a consideration of the superior claim of the insurer over the bottomry creditor as an efficient and indispensable instrument in developing the extension of commerce; and his argument in part is specially rested on the ground that the increase of maritime loans with the heavy rates of interest attached to them, would extinguish it. This argument, however, is wholly inapplicable to the case of the borrower; and I do not know that in the objection which he makes to a bottomry contract he is at all supported.

In adopting the conclusion, that in this case, there has been no loss within the meaning of the bond, I might omit all reference to the other part of the bond to which the argument was specially addressed. Perhaps, however, it is well that I should express my opinion of the proper construction. "Average," in this connection, means proportion; "salvage" here signifies the thing saved. The average of the salvage is the share or proportion of the property saved. Such an average as by custom shall be due on the salvage, is such a proportion as by the custom or law of a place, is due out of the property saved. And the intention is simply to declare, that in case of loss, the property saved shall be divided according to the law or custom of the country, if there shall be a law or custom prevailing upon the subject.

In this case if the vessel exists in specie, I would not hesitate, upon a proper application, to give the lender the benefit of it, as a part of his security. I entirely concur with Dr. Lushington, "that the general maritime law of the world is directly opposed to the sale of vessels in the manner in which this has been done, and to the consequences attempted to be engrafted upon it." Nor am I disposed to favor this summary proceeding to confer a title against owners, and extinguish all claims and liens which may exist against a vessel. When such consequences are to result, it is proper, if it is practicable, to obtain a decree of a court for the protection of the owner and creditor whose title and lien are sought to be extinguished.

MORRISON (UNITED STATES v.). See Cases Nos. 15,817 and 15,818.

MORRISON (WOODWARD v.). See Case No. 18,008.

Case No. 9,850.

Ex parte MORROW et al.

In re YOUNG.

[1 Lowell, 386; [1] 2 N. B. R. 665.]

District Court, D. Massachusetts. Nov., 1869.

LANDLORD AND TENANT—COVENANT AS TO FIXTURES—RIGHT TO REMOVE—FURNITURE—BANKRUPTCY—ASSIGNEE'S RIGHTS.

1. A stipulation in a lease that the premises should be occupied as a boot and shoe shop, and that all fixtures of every description should be put in by the lessee, and might be removed by him at the end of the term, provided he should have kept all his covenants, and not otherwise, and should not be removed during the term without the consent of the lessor, does not purport to give the lessor a lien on the mere furniture, though it should be fitted to the shop, if not annexed to the freehold.

2. It seems, that if such a stipulation did include furniture, it would not be valid against an assignee in bankruptcy before entry and possession taken by the lessor.

3. Such a stipulation creates a valid lien on trade fixtures annexed to the freehold, and the assignee can take them only on payment of the arrears of rent.

The bankrupt [J. B. Young] held a lease of a shop and cellar in Roxbury, rent payable

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

monthly, and owed several months' rent at the time this petition was filed. The assignees [J. H. Morrow and others] surrendered the premises to the lessor, without prejudice to their claim for certain gas fixtures, shelving, and sets of drawers, put in by the lessee, and to which the lessor asserted a title. These were sold by consent, and the dispute was submitted to the court on an agreed statement, by which it appeared that the lease provided that the premises should be "used as a boot and shoe store, and all fixtures of every description are to be put into said premises by said lessee, at his own expense," with the right to remove at the end of the term such as could be moved without injury to the premises, provided the lessee should have kept all his covenants, but otherwise not, and that none of them should be removed during the continuance of the term, without the consent of the lessor.

J. D. Ball, for assignees.

The terms of the lease are intended to secure the landlord, but they cannot have that effect, because they amount to neither a mortgage nor a pledge, and the chattels remained in the possession of the lessee.

J. C. Park, for petitioner.

The meaning of the covenant is that all the fixtures put in by the lessee shall be a security for the rent, and this is binding on the assignee in bankruptcy, and applies to every thing now in dispute.

LOWELL, District Judge. I do not find that this lease purports to give the petitioner a lien on the furniture, but on the fixtures only. No doubt the word "fixtures" may be often used in a broad sense to include all fittings, whether affixed to the realty or not, but I do not consider such a meaning attaches to it in this case. The parties are stipulating concerning the demised premises, and they agree that the lessee shall put in the trade fixtures, and may remove them at the end of the term, if he can do so without injury to the freehold, and if all his covenants have been kept, but not during the term. It is easy to see that the lease was not written by a lawyer, but this clause is very well calculated to express the contract that the tenant's right to remove the fixtures should depend on his compliance with the covenant to pay rent. Taken in its ordinary sense, and in connection with the proviso that in case of breach, the petitioner might enter and expel the lessee and remove his "effects," it must refer merely to fixtures strictly so called. If the parties intended to give the landlord a lien on those articles which were merely fitted to the room but not affixed, they ought to have made this intent clear, and to have regulated the matter more carefully. But it is very doubtful whether such a covenant would have created a lien that could have been enforced against the assignee. Distress for rent has no place in the law of Massachusetts, and an agreement that chattels on the premises shall be at the disposal of the lessor as security for rent is not valid against creditors of the lessee before entry. Butterfield v. Baker, 5 Pick. 522. The bankrupt law [of 1867 (14 Stat. 517)] preserves all liens, but it does not undertake to enforce a mere covenant of this kind which by the law of the place creates no valid lien.

So far as the fixtures are concerned, I see no objection to the lien. The act of affixing them to the freehold takes them out of the category of chattels, and is notice to creditors and to all the world, that the right of removal will depend on the contract between landlord and tenant. The right of the tenant to remove trade fixtures may well enough be called rather a privilege than a property, and it is one that he may lawfully waive or modify by the terms of the lease, without the form of either a pledge or a mortgage.

Applying these rules to the evidence, it is found that the sets of drawers, which were carefully fitted to the shop, but in no way fastened to it, are furniture, and belong to the assignee; the other things, which are trade fixtures, he can take only on payment of the arrears of rent. So ordered.

MORROW (UNITED STATES v.). See Case No. 15,819.

Case No. 9,851.

In re MORSE.

[17 Blatchf. 72.] [1]

Circuit Court, N. D. New York. August 28, 1879.

BANKRUPTCY—PETITIONING CREDITOR—NOTE DUE AFTER PETITION FILED—AMENDED PETITION—ANSWER TO PETITION—LEAVE TO FILE.

1. An amended petition in involuntary bankruptcy cannot set forth, as part of the indebtedness to the petitioning creditor, a promissory note, endorsed by the debtor, which did not fall due until after the original petition was filed.

2. The district court overruled a demurrer to an amended petition in involuntary bankruptcy, without prejudice to an application for leave to answer, on showing satisfactory cause therefor. Such application was promptly made, with the proposed answer duly verified, alleging defences which the debtor was entitled to try and prove, but the application was refused: *Held*, that, in analogy to the practice laid down in rule 34 in equity it ought to have beeen granted.

[In the matter of Harvey Morse, an alleged bankrupt.]

Kennedy & Tracy, for Morse.
James B. Brooks, opposed.

BLATCHFORD, Circuit Judge. This is a petition praying for the review and reversal of an order made by the district court, March 11th, 1879, overruling a demurrer to an

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

amended creditors' petition in bankruptcy, and ordering an adjudication in bankruptcy, and a reference of the case to a register. The original creditors' petition was filed by a single creditor, the Farmers' Bank of Fayetteville, August 9th, 1878. On the 5th of March, 1879, the district court made an order dismissing said original petition, with costs, unless an amended petition should be filed, within ten days from that date, by the said petitioning creditor and other creditors constituting the number and amount of creditors required by the bankruptcy act [of 1867 (14 Stat. 517)] to procure an adjudication in bankruptcy. On the 11th of March, 1879, the said petitioning creditor filed an amended petition, not joining any other creditor. The petition was verified March 10th, 1879. It sets forth, as the indebtedness to the petitioning creditor, three promissory noted endorsed by Morse, and alleges that Morse was duly charged as endorser on each of them. One of the notes, for $500, fell due June 14th, 1878; one, for $300, fell due July 14th, 1878; and the third, for $500, fell due August 14th 1878, which was after the original petition in bankruptcy was filed. The amended petition sets forth the filing of the original petition and the filing of an answer thereto by Morse, and alleges that it was held that the petitioner did not constitute the requisite amount to authorize an adjudication of bankruptcy, and that such amended petition is prepared as an amended petition. To said amended petition Morse interposed a demurrer, upon the grounds (1) that it appears that said petition is founded in part upon promissory notes endorsed by Morse, maturing and protested after the filing of the original petition in bankruptcy; (2) that said petition does not show or state an indebtedness upon which a petition in bankruptcy could be maintained at the time of filing the original petition in bankruptcy, or when the bankruptcy act was repealed. On the hearing, the district court made the said order of March 11th, 1879.

I have not been furnished with a copy of any decision giving the views of the district court, and am compelled to the conclusion that the order in question was erroneous and must be reversed. The statute in regard to involuntary bankruptcy (Act June 22, 1874, § 12; 18 Stat. 180) provides, that any person "owing debts, as aforesaid," who shall do so and so, "shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." The section goes on to provide for the filing, by the debtor, of a list of his creditors, with "the sums due them respectively." The expression, "owing debts, as aforesaid," refers to the words, in section 5014 of the Revised Statutes (Act March 2, 1867, § 11; 14 Stat. 521), "owing debts provable in bankruptcy)," or "owing debts provable under this act." The meaning of the statute is, not merely that the debts shall be of a provable character, or shall be at some time provable, but that they shall be debts provable at the time the petition is filed, and made provable at that time by the statute. The whole subject of provable debts is regulated and covered by sections 5067–5071 of the Revised Statutes. It was originally provided as follows, by section 19 of the act of March 2, 1867 (14 Stat. 525): "All debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing, but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt." It was held by judicial decisions, that the words, "at the time of the adjudication of bankruptcy," meant "at the time of the commencement of proceedings in bankruptcy;" and that time was the time of the filing of the petition. Act March 2, 1867, § 38 (14 Stat. 535); Rev. St. § 4991. Accordingly, in section 5067 of the Revised Statutes, the above provision of § 19 of the act of 1867 was re-enacted in these words: "All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing, but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt." The same section 19 of the act of 1867 went on to provide as follows: "If the bankrupt shall be bound as drawer, endorser, surety, bail or guarantor upon any bill, bond, note or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared." This provision was re-enacted as follows, in section 5069 of the Revised Statutes: "When the bankrupt is bound as drawer, indorser, surety, bail or guarantor, upon any bill, bond, note or any other specialty or contract or for any debt of another person but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared." It is declared, by section 5072, that "no debts other than those specified in the five preceding sections shall be proved or allowed against the estate." The present case does not fall within section 5070 or section 5071. It does not fall within section 5068, for, although an endorsement of a note by a bankrupt is a contingent liability contracted by him, it is "herein oth-

erwise provided for," that is, in section 5069. In section 19 of the act of 1867, what is now found in section 5069 of the Revised Statutes preceded what is now found in section 5068 of the Revised Statutes. The endorsement of a note falls distinctly within section 5069. It does not become a debt, within the meaning of section 5067, until the liability of the endorser by reason of it becomes absolute or fixed. Until then it is not a debt "due and payable from the bankrupt." If the liability of the endorser does not become absolute or fixed until after the commencement of proceedings in bankruptcy, the endorsement cannot be a debt "due and payable from the bankrupt at the time of the commencement of the proceedings in bankruptcy," nor can it be a debt "then existing but not payable until a future day," within the meaning of section 5067. The words, "the adjudication of bankruptcy," in section 5069, must be held to mean "the commencement of proceedings in bankruptcy," as was the case with the like words in the clause of section 19 of the act of 1867 which is now found in section 5067 of the Revised Statutes. The endorsement which matured in this case on the 14th of August, 1878, became a provable debt then, under section 5069, if the endorser was then properly charged, but it was not a provable debt when the proceedings in bankruptcy were commenced. They were commenced when the original petition was filed. The amended petition is the original petition amended. It has relation to the time of the filing of the original. A new bankruptcy proceeding was not commenced by the filing of the amended petition. The proceeding commenced by the filing of the original petition was continued and proceeded with by the amendments made to it by the amended petition.

It is entirely clear, therefore, that the demurrer to the amended petition ought to have been sustained, on the ground alleged in the demurrer, that such amended petition was founded in part upon a promissory note endorsed by the alleged bankrupt, maturing after the original petition in bankruptcy was filed. The averments in the amended petition are to the effect that the debts set forth, of which such note is one, are provable under the statute against Morse, and that it requires all the debts so set forth to make up one-third of the debts provable under the statute.

An order must be entered reversing said order of March 11th, 1879, with costs to Morse in this court; and directing the district court to enter an order allowing, with costs to Morse in that court, the demurrer to the amended petition, and vacating the adjudication in bankruptcy and the reference to the register, and all subsequent proceedings founded thereon; and also directing the district court to take such further proceedings in the matter as shall be proper.

There is, also, a petition for the review and reversal of an order made by the district court, April 1st, 1879, denying a motion by Morse for leave to withdraw said demurrer and to answer said amended petition. The order overruling the demurrer stated that it was made without prejudice to an application for leave to answer, upon showing satisfactory cause therefor. The application was promptly made. I think that it should have been granted, in analogy to the practice laid down in rule 34 in equity. The proposed answer, duly verified, was presented in connection with the application and is in the record. It alleges defences which Morse was entitled to try and prove. An order must be entered reversing the order of April 1st, 1879, with costs to Morse in this court.

Case No. 9,852.

In re MORSE.

[7 N. B. R. 56.] [1]

District Court, N. D. New York. June 29, 1872.

BANKRUPTCY — ASSIGNEE — NEGLECT TO SECURE PROPERTY—SALE FOR TAXES—PETITION FOR REMOVAL — COSTS.

1. A petition for the removal of an assignee alleged, among other things, that he had neglected to take proper measures to secure the bankrupt's property; had, under the advice of his counsel, refused to pay taxes on the bankrupt's real estate, and allowed it to be sold to pay the same. *Held*, that the allegations of the petition were duly proven, and gross neglect of duty on the part of the assignee shown.

2. Order entered removing the assignee, and directing him to pay out of his own funds within twenty days the cost of presenting and prosecuting the petition for his removal.

In bankruptcy.

HALL, District Judge. This is an application by a creditor of the bankrupt for the removal of Philetus R. Perry, the assignee appointed in these proceedings in February, eighteen hundred and seventy, after the resignation of Walter B. Beattie, the former assignee. From the papers used upon the hearing of the application, and the papers on file with the register in charge, it appears that the petition against the bankrupt was filed May twenty-sixth, eighteen hundred and sixty-eight, that he was adjudicated a bankrupt June fourth, eighteen hundred and sixty-eight, and that Walter B. Beattie was appointed his assignee on the ninth of the succeeding month. On the twenty-eighth of September, eighteen hundred and sixty-eight, a bill was filed in this court by said assignee, to set aside various judgments and executions against the bankrupt, and on the first day of September, eighteen hundred and seventy, the case was finally decided in favor of the assignee, after a hearing upon exceptions taken by the defendants to the report of the referee therein.

The opinion delivered by the court was soon

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thereafter published in the Commercial Advertiser of Buffalo, and again in Beattie v. Gardner [Case No. 1,195], in January, eighteen hundred and seventy-one; but it now appears that no decree was ever drawn up or entered in accordance with such opinion. In January, eighteen hundred and sixty-nine, it was stipulated by the parties to that suit, that the personal property of the bankrupt, which had been levied upon by the sheriff of Niagara county, by virtue of such executions, might be sold by the sheriff and the proceeds kept by him in the Erie County Savings Bank, subject to the further order or judgment of this court, which stipulation was sanctioned by this court, and such property sold as therein provided. On the twenty-first of February, eighteen hundred and seventy, a petition was filed by Walter B. Beattie, the assignee, stating that he was about to remove to the state of Iowa, and also stating the amount of his receipts and disbursements, and asking this court to accept his resignation as assignee. An order was made referring such petition to the register, with directions to report the name of a proper person for assignee, if in his opinion the resignation of such assignee should be accepted, and upon his report the resignation was accepted, and said Perry was appointed assignee. An order was then made referring the accounts and doings of said Beattie as assignee for examination and settlement. The assignee thus appointed accepted the trust, and assumed to act as assignee; but he has utterly failed to discharge his duties as such. I find no evidence that he ever made any effort to obtain possession of the bankrupt's estate which passed into the hands of the prior assignee, or which was in the hands of the sheriff of Niagara county, under attachments and executions issued in the suits in which the judgments declared void by this court were rendered, or the large amount of money which was realized by the sheriff upon the sale made under the stipulation hereinbefore referred to.

The neglect to take the proper measures to have a decree entered according to the decision of this court in the case hereinbefore referred to, and obtain the moneys in the hands of the sheriff for distribution among the creditors of the bankrupt, is without excuse, and would alone justify his removal; but the petition for his removal alleged in substance, that the said Perry had never made any inventory of the property which had come to his hands as assignee; that he had not made any dividend to the creditors of the bankrupt, and that he had grossly neglected his duty as assignee. It also alleged that the petitioner had obtained an order from the register requiring him to appear before the register on the twenty-ninth of April, eighteen hundred and seventy-two, to give an account of his stewardship in the premises, and that said Perry appeared according to such order and rendered his account showing that he had never received any money or property from said Beattie, his predecessor, but that he received possession of the bankrupt's real estate, and had leased the same, and had collected rents to the amount of four hundred and seventeen dollars and twenty-five cents, and that he had permitted the attorney for the petitioning creditors to collect and hold a part of the rents to the amount of two hundred and thirteen dollars. The petition also alleged that said Perry also stated that there were a lot of books of the bankrupt, and that he knew not where such books were, as he had taken no means to find them, nor had he taken any measures to ascertain what property and effects did belong to said estate in bankruptcy, except to take charge of the said real estate; that said real estate had been sold for taxes several times, and on being asked why he had not paid the taxes, he said his counsel advised him not to pay any taxes, and he therefore neglected to pay them. The petition also alleged that there was in the hands of the late sheriff of Niagara county, about one thousand four hundred dollars in cash, belonging to the creditors of the bankrupt who had proved their debts, besides the money in the hands of said Beattie and Perry's said attorney, and that the bankrupt had a life estate as tenant, by the courtesy to real estate, which was over three hundred dollars per year. The affidavit of the assignee in answer to the allegations of the petition is very unsatisfactory, and does not deny or avoid some of the most material allegations. He points out no specific inaccuracies in the statements in respect to the account which he gave before the register, except that he states that he did not then state that he did not know where the books then referred to were, but stated they were in the office of Wm. F. Farnell, although he says all of his statements were not taken down, and "there are inaccuracies therein in regard to some matters therein stated." He also stated in his affidavit that he understood that all of the property of the bankrupt which had been discovered, except the books mentioned in the petition, was involved in litigation, which was undetermined, though he states nothing in regard to the existence of any litigation, other than that which was finally decided in favor of the assignee more than twenty months before his affidavit was made, and he gave the pendency of such litigation and the advice of his counsel as his reason for not paying the taxes on the real estate of the bankrupt. In respect to the rents retained by his counsel, he says it was deemed proper that they should be so received with a view of their being so applied by way of a just and reasonable compensation for his attorney and counsel in conducting legal proceedings for the benefit of the estate; but he does not appear to have learned that in the account rendered by his predecessor it appeared that he had paid to said counsel and his partner one hundred and fifty dollars for

their services in the suit against the judgment creditors, hereinbefore referred to, or that he had also paid them, (without any order of the court therefor,) one hundred and thirty-two dollars and sixteen cents for services in the bankruptcy proceedings, and twelve dollars and forty cents for necessary fees and disbursements advanced by them, in addition to twenty dollars paid the petitioning creditors for fees advanced to the same attorney and counsel, and some sixty-six dollars for other expenses and disbursements of the petitioning creditors.

All, or nearly all, the papers in the case which bear upon the question of the alleged neglect of duty on the part of the assignee, tend to show such neglect, and also gross ignorance of what he should have known in respect to such estate. For example, his own affidavit states that the amount of the debts proved against the estate is over nineteen thousand dollars, while the list of debts subsequently furnished and admitted by his counsel to be correct, show that they amount to only ten thousand fifty-eight dollars and thirty-one cents. I cannot resist the conclusion that there has been gross and culpable neglect of duty on the part of the assignee in this case, and I fear that there is great need that examples should be made of assignees who neglect their duties. It is time that some of them should be made to feel that they are not appointed simply for their own profit, but that as trustee for the creditors they are bound to exercise due diligence in collecting and disposing of the property of the bankrupt, and in distributing its proceeds among his creditors.

It is to be hoped that this case is not a fair sample of the manner in which assignees in bankruptcy in this district neglect their duties; if it be, this court may be usefully employed in taking measures for their removal and the substitution of others who will faithfully discharge the duties of their trust. There will be an order removing the assignee, and directing him to pay out of his own funds to the creditor who has filed the petition for his removal, the taxed cost of such petition, or in presenting and prosecuting such petition, and of the proceedings taken under the same within twenty days after the same shall be taxed by the clerk on due notice, and a copy of this order and of such taxed bill shall be served upon him.

Case No. 9,853.

In re MORSE et al.

[11 N. B. R. (1875) 482.][1]

District Court, E. D. Missouri.

BANKRUPTCY—NOTE INDORSED—NOTE IMPROPERLY APPROPRIATED—DEBT TWICE DEMANDED.

1. The Sectional Dock Company held two acceptances which its financial agent, without consideration, converted to the use of the bankrupts, a partnership of which he was a member. To do this, he indorsed the acceptances, without consideration, to the bankrupts, who indorsed the same and had them discounted for their own use, at the St Louis Savings Institution. The savings institution proved the demand against the bankrupt estate as second indorser, and the dock company also proved a demand therefor. The assignee objects to this, that the bankrupt estate cannot be compelled to pay thereon twice as much as it pays on any other demand. *Held*, that the savings institution could prove against the bankrupt estate the entire demand as against its indorsement, and whatever it receives therein is so much credit to be given; if after suit it recovers the whole amount from the maker or acceptor, it will stand as trustee to this estate for so much as it has obtained therefrom.

2. The dock company is entitled to prove its demand so far as the acceptances are concerned for so much money had and received to its use by the bankrupt.

3. A second item in the demand of the dock company arose as follows: Its financial agent executed, as accommodation maker, a note payable to the bankrupts, which the latter indorsed to M., who then indorsed and had it discounted and paid the proceeds to the bankrupts. When the note fell due, M. paid it as last indorser, and proved the amount thus paid by him against the bankrupt's estate, and also obtained judgment for the same amount against the dock company. The latter has not yet paid any part of the judgment, but seeks to prove the whole amount against the bankrupt's estate. *Held*, that this demand cannot be twice proved, and therefore M. will hold whatever dividends he receives as so much paid on the note, for which he must give credit on the judgment against the dock company.

The Sectional Dock Company has filed its claim against the bankrupt estate of Morse & Co., which, as to items hereinafter stated, the assignee disputes.

Mr. Garesche, for Dock Co.

Geo. W. Taussig, for assignee.

TREAT, District Judge. The dock company held two acceptances, which its financial agent, without consideration, converted to the use of the bankrupts, a copartnership of which he was a member. To do so, he indorsed said acceptances, without consideration, to the bankrupts, and they having indorsed the same had them discounted by the North St. Louis Savings Association, and received the proceeds of said discount for their own use. The copartnership of Morse & Co. having been adjudged bankrupt, and said acceptances not having been paid, and the liability of the indorsers having been fixed by protest and notice, said savings association proved the demand against said bankrupt estate as second indorser, and the Sectional Dock Co., to whom the acceptances belonged originally, has also proved a demand therefor. The objection interposed is that said bankrupt estate cannot be compelled to pay thereon twice as much as it pays on any other demand.

If the established doctrine, in Re Ellerhorst [Case No. 4,381], is to prevail—and it has been affirmed by the circuit court here—then the case is easy of solution. The acceptances belonged exclusively to the Sec-

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tional Dock Co., and were converted or misappropriated for the benefit of Morse & Co., who received therefor the proceeds of discount. To that extent at least the value of the choses in action so converted would prima facie appear, and thus the measure of damages would be, subject to rebutting proof, sufficiently established. But when to that fact is added that the Sectional Dock Company is charged as indorser, Morse & Co. must be held liable as if for money had and received from the dock company, or as for their value, for the whole amount of said acceptances. The title to said acceptances is now in the savings association, and as the case is presented, it is a bona fide holder for value. It may recover of the drawer or acceptor ultimately; and if it proves its demand against Morse & Co. as the last indorsers, certainly the assignee of the latter should be credited to the extent of the percentage he pays out of the fund recovered from the drawer or acceptor, provided the whole sum is collected from those primarily liable.

The case as between the dock company and the bankrupt estate is peculiar. The latter is indebted for the value of the converted choses, and is also liable as indorser thereon. If the savings association proves its demand against the bankrupt estate, which it has a right to do, whatever dividend it received is applicable to its demand on the paper; and when the bankrupt estate, as indorser, pays any sum on the acceptances, it will not be entitled to prove that demand against the dock company as prior indorser, which owed Morse & Co. nothing. The true view of the matter is this. The savings association can prove against the bankrupt estate the entire demand as against its indorsement, and whatever it receives therein is so much credit to be given; but as it cannot split its demand, in suing the prior indorser and maker and acceptor, if it recovers the whole amount from maker or acceptor, it will stand as trustee to this estate for so much as it has obtained therefrom. The doctrine sometimes asserted, that original demand is merged in judgment, so that no other recovery can be in the acceptances themselves, has been exploded; and, if ever applicable to an ordinary case on acceptances of this kind, it could not have any force where proof is made in bankruptcy against an indorser to obtain some percentage thereon. Thus, an allowance of a demand against the bankrupt indorser might, if the latter's estate paid in full, entitle his assignee to sue the prior parties to the paper; and the obligation to the former holder becomes discharged. But as it cannot be known until the bankrupt's estate is settled, how much will be paid, is the holder to be held fully satisfied because his demand is proved, so that the bankrupt's assignee can sue antecedent parties on the acceptances?

Without pursuing that inquiry, however, it is apparent that the Sectional Dock Company is entitled to prove its demand, on the facts agree, so far as the acceptances are concerned, for so much money had and received to its use by the bankrupt waiving the tort. It may be that the bankrupts will have to pay as indorsers to the holder also. With that the dock company has nothing to do. Any indorser may be so placed when the acceptor or maker fails to pay. His remedy over is solely against the latter. If the indorser were not in bankruptcy, and had paid as last indorser, could the bankrupts sue the dock company as prior indorser under the facts stated? As between them, the dock company was under no legal obligation to pay anything; but the bankrupts were, on the other hand, liable for the conversion. The bankrupts received from the savings association the proceeds of paper which it is bound as indorser to pay. The paper then would be in the bankrupts' hands, to which they have no legal right. It must account for and pay the value to the dock company.

The second item in the dock company's demand is as follows: Its financial agent executed, as accommodation-maker, a note payable to the bankrupts, which the latter indorsed to Manion, and Manion then indorsed and had it discounted in bank, the proceeds of which he paid to bankrupts. When the note fell due, Manion, as the last indorser, paid the same, and had the amount thus paid by him proved up in his own name against the bankrupt estate, and also obtained judgment for the same amount against the dock company. The latter has not yet paid said judgment, or any part thereof, but seeks to prove the whole amount thereof against the bankrupts' estate. Whatever Manion obtains from the bankrupts' estate will be for the benefit of the dock company. Had not bankruptcy intervened, there would be no difficulty in working out, through the law, the respective interests of the parties. The payee, as indorser, owed the holder—that is, he was bound to pay the holder, and if he did so he had no recourse against the accommodation-maker; for he had paid only his own debt. If the maker paid, he had a right to recover from the payee. Now, the holder sues both, and obtains from the payee, who was indorser, a prescribed sum. True, he proves for the whole amount due on the note, and receives his pro rata on the whole. Thus the bankrupts' estate has paid on its obligation all for which it is liable. The demand cannot be twice proved, in whole or part, against the bankrupt estate. Under the decisions referred to, Manion will hold whatever dividends he receives as so much paid on the note for which he is bound to give credit on the judgment against the dock company. The amount received by the bankrupts on the discounted acceptances will be allowed. The item on the Manion note will be rejected.

Case No. 9,854.

In re MORSE.

[13 N. B. R. (1876) 376.] [1]

District Court, D. Massachusetts.

BANKRUPTCY—PARTNERSHIP—ONE OR MORE PROCEEDINGS—JOINT ASSETS—SEPARATE ASSETS.

1. It is of no consequence, excepting in the matter of expense, whether there are two proceedings by or against partners, or only one, for everything is conducted in the same way, and the rights of creditors and all others are precisely the same.

2. If a partner after a formal dissolution continues to carry on business under the firm name, with the consent of his co-partner, his trade assets should be treated as joint assets.

3. Where partners file separate petitions, the firm creditors must be postponed to the separate creditors, in the distribution of the separate estate, whether there are joint assets or not.

[In the matter of Edward P. Morse, a bankrupt.]

Perry & Creech, for assignees.

Bumpus & Johnson, for creditor.

LOWELL, District Judge. The question whether Jewett & Pitcher can prove a debt of eight thousand three hundred and eighty-three dollars and eighteen cents against the estate of Morse, is submitted upon an agreed statement of facts, which is somewhat meager. If I misunderstand the facts, there will be an opportunity to correct me. As I read the statement, Morse was a member of the firm of Morse & Haskell, lumber-dealers in Charlestown, and carried on, besides, a separate trade at Methuen. Both partners were made bankrupt, but by separate petitions, and the cases have been carried on together substantially as one.

It is of no consequence, excepting in the matter of expense, whether there are two proceedings by or against two partners, or only one; everything is conducted in the same way, and the rights of creditors and all others are precisely the same. It is agreed that at some time before bankruptcy the firm of Morse & Haskell was dissolved, but when this was done is not stated. It does appear, however, that no notice of dissolution was given, and that Haskell continued to trade as Morse & Haskell, and, I infer, with Morse's consent. Haskell has no separate creditors to any amount, and all the firm debts have been proved in his case, and a dividend has been paid.

Jewett & Pitcher hold a note of Morse & Haskell, which they have thus proved against Haskell's estate, and have received a dividend. They stand, therefore, like all the other joint creditors, and the question is whether they can share in the separate estate of Morse. It is said, in the agreement of facts, that there is no joint estate, and no solvent partner. If this were so, it would not, in my opinion, change the decision at all, for reasons I have given some years since, at large. But the fact is not so, or rather the inference from the other facts negatives this. If there was a formal dissolution as between the partners, and no notice given, and the name of Morse was continued with his consent, I think there was in law no dissolution, and that the creditors of the firm have the right, which it seems they have enjoyed, of proving against the goods which Haskell, so carrying on the business, had in that business. His trade assets have been treated as joint assets, and I think properly.

Joint creditors, then, on any interpretation of the law as applied to the marshaling of the assets, cannot share the separate estate of Morse until his separate creditors have been paid in full.

Proof suspended until separate costs have been paid in full.

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MORSE (BAIN v.). See Case No. 754.

MORSE v. BAIN. See Case No. 9,861.

Case No. 9,855.

MORSE v. DAVIS.

[5 Blatchf. 40.] [1]

Circuit Court, N. D. New York. May 2, 1862.

PATENTS — ACTION AT LAW — SPECIAL PLEA — AGENCY—HYPOTHETICAL PLEA—DEFENSE.

1. In an action at law for the infringement of letters patent, by selling to others to be used the patented improvement, a special plea set forth that the alleged selling, if any such was made by the defendant, was made by him solely as the agent of another person, and not for profit or on the account of the defendant, and that the defendant derived no profit or advantage whatever therefrom: *Held*, on special demurrer to the plea, that it was bad, because it was hypothetical and did not admit the cause of action set forth in the declaration, but sought to avoid, without admitting, the same; and that it was also bad, because it did not state the name of the person for whom the defendant claimed to have acted as agent.

2. Semble, that the facts set up in the plea would not constitute a defence.

This was an action on the case for the infringement of letters patent for an improvement in grass harvesters. The declaration alleged, that the defendant [George Davis] "unlawfully and wrongfully, and without the consent or allowance and against the will of the plaintiff [Albert W. Morse], did sell and vend to others to be used, the said improvement, in violation and infringement of the exclusive right so secured" to the plaintiff, &c. To this declaration the defendant pleaded the general issue and two special pleas. One of these special pleas set forth, "that the alleged selling and vending to others to be used, alleged in said declaration, if any such was made by the said defendant, was made by him solely as

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the agent of another person, and not for profit or on the account of the said defendant, and that the said defendant derived no profit or advantage whatever from the said alleged selling and vending," &c. To this plea the plaintiff demurred, and assigned as special causes of demurrer—1st. That said plea was hypothetical and did not admit the cause of action set forth in the declaration, but sought to avoid, without admitting, the same; 2d. That said plea did not state or show the name of the person for whom the defendant claimed to have acted as agent, in the selling and vending therein mentioned; 3d. That the facts stated in the plea did not constitute a defence to the cause of action set forth in the declaration. The defendant joined in demurrer.

HALL, District Judge. The plea is clearly bad, for the cause first assigned. Conger v. Johnston, 2 Denio, 96; Commercial Bank of Buffalo v. Sparrow, Id. 97, 105, 106; Arthur v. Brooks, 14 Barb. 533; Steph. Pl. 387, 388.

I am inclined to think that the plea is also bad for the cause secondly assigned. If the defendant is entitled to shield himself from prosecution on the ground that he was acting as the agent of another, the rules of pleading which require certainty, fulness, and precision in the statement of the facts in respect to which the issue is tendered, so as to enable the opposite party to make due preparation for the trial of the issue, would seem to require the statement of the name of the party in whose behalf the defendant acted. The plea gives the plaintiff no information which will enable him to take the proper measures to produce at the trial the proof necessary to rebut a prima facie case of agency which may be made by the defendant. The great objects to be obtained by special pleading—narrowing the controversy to a single and distinct issue, and apprising the opposite party of the precise character of the defence set up, in order that he may properly prepare for the trial of the issue—would be defeated, if this form of pleading should be allowed. The plea alleges the defendant's agency as the ground of the defence set up, and is, therefore, somewhat in the nature of the defence when the defendant justifies his act because he was acting under the rightful authority of another. It has some, though perhaps not a very close, analogy to the case of a defendant who makes cognizance and confesses the taking of goods or cattle, as the bailiff of another person, for rent in arrear. In making cognizance, in such a case, no skillful pleader would fail to state the name of the landlord under whose authority the seizure was made. Steph. Pl. 333; Gould, Pl. c. 4, §§ 23, 24, 28. In an action of trespass de bonis, when the defendant justifies the taking from the plaintiff's possession by the authority of the real owner of the property taken, would any special pleader suppose that a plea setting forth that the defendant took and carried away the property mentioned in the declaration, as the agent, and by the direction and authority, of the true and lawful owner thereof, and who had, at the time, the right to take possession, &c., would be good, even if it were not otherwise objectionable, without setting forth the name of the true and lawful owner? I think not; and though the cases are not parallel, it would seem that as much strictness as is required in those cases may properly be required in this; for, the plea in this case is much like a plea in abatement, and should, like such a plea, give the plaintiff a better writ, by distinctly stating the name of the party against whom the plaintiff's suit should have been brought. Aside from these considerations and authorities, it would seem that, on general principles of pleading and evidence, the name of the principal should be given. There can be no legal proof of agency which does not show that the agent has a principal; and, as the name of that principal must be known to the agent, he should be required to disclose it by his pleading, whenever he seeks immunity as having acted under the authority of such principal.

It is not strictly necessary to discuss the main question suggested by the cause of demurrer thirdly assigned, and I do not intend now to express any decided opinion upon that question. If the matters set up in the plea constitute a good defence, it must be taken upon the ground that a sale of patented articles or improvements by one person, as the mere agent of another, is not a selling or vending which renders the agent liable to an action for an infringement. The defence set up by this special plea can, therefore, if it be a legal defence, be given in evidence under the general issue. For this reason, I have examined the question, whether the facts alleged constitute a valid defence.

It is somewhat remarkable, that the researches of the counsel have not led to the discovery of any reported case, either in this country or in England, in which this question has been expressly adjudicated. It is, however, probable, that it has generally been deemed for the interest of patentees to proceed directly against the principal, in cases where sales of patented articles have been made by shopmen, clerks, and other agents; and this may be the reason that the question has not been authoritatively settled. The cases of Sawin v. Guild [Case No. 12,391], Sargent v. Larned [Id. 12,364], and Delano v. Scott [Id. 3,753], cited by the defendant's counsel, do not determine this question. In Sawin v. Guild [supra], the action was brought for the infringement of a patent right of the plaintiff's for machinery for cutting brad nails. The facts were stipulated by the parties, and they agreed that the defendant, as a deputy sheriff, by virtue of his office and of an execution against the plaintiffs, "seized and sold, on said execution, the materials of three of said patented machines, which were at the time complete and fit for operation, and be-

longed to the plaintiffs," and that the whole infringement of the patent consisted in such seizure and sale. Mr. Justice Story held, that a sale of a patented machine, within the prohibitions of the statute, must be a sale not of the materials of a machine, either separate or combined, but of a complete machine, with the right, express or implied, of using the same in the manner secured by the patent; that the officer had neither sold nor guaranteed a right to use the machine in the manner pointed out in the patent right; that he sold the materials as such, to be applied by the purchaser as he should by law have a right to apply them; and that there had been no infringement by the sale by the officer, under the circumstances of that case. The plea demurred to in this case, if good in form, would admit that the defendant, as agent, did sell and vend to others to be used the plaintiff's patented improvement; and, therefore, the case of Sawin v. Guild [supra], does not decide the present one. Nevertheless, the opinions there avowed by Mr. Justice Story will deserve consideration, whenever the principles upon which the question of infringement must be determined are brought under discussion. In Sargent v. Larned [supra], the bill was filed for an account. One of the defendants was merely a workman in the employment of another, and it was very properly held, that no decree for an account could be had against him, because he had had nothing to do with any profits. The case, therefore, does not decide this case, nor is it of much importance in reference to the principles upon which the question of infringement should be determined. The case of Delano v. Scott [supra], did not present the precise question now under consideration. The language of the able and eminent judge who decided that case is, nevertheless, strongly in favor of the position maintained by the defendant's counsel, and it is most probable that he would have decided, if the question had been distinctly presented, that one who sold as the mere agent or clerk of another would not, under the statute under which that action was brought, be liable to an action for the treble damages which that act gave in cases of infringement. There were certainly some reasons for the construction which Judge Hopkinson was disposed to put upon that statute, which do not apply to a case under our present statute, which gives, by the verdict of a jury, only actual damages, and authorizes the court, in its discretion, to treble them.

There are, certainly, other cases and authorities which seem very strongly to sustain the position taken by the plaintiff's counsel in respect to the defence set up by this plea. This action is an action of tort, against the defendant as a wrong doer, and, certainly, as a general rule, a party cannot claim that no action shall be sustained against him for a tort, on the ground that he committed the injury as the agent of another. There is also a class of cases, where the principle involved is to some extent the same, and in which the course of decision has been uniform, that a sale by the agent is a selling by him, within the meaning of a statute making such sale criminal; and, if such construction is warranted in a criminal case, it would seem to be required also in a case of this character. In cases of indictments for selling spirituous liquors without license, it has been held to be no defence, that the defendant was acting as the agent of another. State v. Matthis, 1 Hill [S. C.] 37; Britain v. State, 3 Humph. 203; Com. v. Gillespie, 7 Serg. & R. 479; Com. v. Major, 6 Dana, 293; State v. Bugbee, 22 Vt. 32; Com. v. Hadley, 11 Metc. [Mass.] 66; Roberts v. O'Connor, 33 Me. 496; French v. People, 3 Parker, Cr. R. 114; State v. Bryant, 14 Mo. 340; State v. Haines, 35 N. H. 207. I confess that I think the principle of these cases will apply to that now under consideration; but I shall not decide the case upon this ground, as I prefer to remain at liberty to adopt such a conclusion upon the question, when hereafter presented, as further reflection and a fuller examination of the authorities shall then appear to require.

MORSE (GASSETT v.). See Case No. 5,264.

Case No. 9,856.

MORSE v. GODFREY et al.

[3 Story, 364.] [1]

Circuit Court, D. Massachusetts. May Term, 1844.

BANKRUPTCY—FRAUDULENT PREFERENCE — MORTGAGE—ASSIGNMENT—NOTICE—BONA FIDE PURCHASER.

1. Where A mortgaged to B the whole of his stock in trade, and nearly all of his real estate, to secure a debt due from A to B, and on the same day, made oath to a petition for the benefit of the bankrupt act [of 1841 (5 Stat. 440)], and subsequently B assigned to the Cohannet Bank and others all his right, title and interest in the said stock and in the said real estate; it was *held*, that the mortgages were "in contemplation of bankruptcy," within the meaning of the bankrupt act of 1841, c. 9, and were therefore void.

[Cited in Clarke v. White, 12 Pet. (37 U. S.) 199; Everett v. Stone, Case No. 4,577; Ashby v. Steere, Id. 576; Rison v. Knapp, Id. 11,861.]

[Cited in Milton v. Boyd, 49 N. J. Eq. 154, 22 Atl. 1083; Work v. Jacobs, 35 Neb. 779, 53 N. W. 995.]

[See Ashby v. Steere, Case No. 576.]

2. It was immaterial whether B did or did not know that a fraudulent preference was intended in his favor, if it were actually given.

3. Inasmuch as the bank had notice at the time when the assignment was made that A had failed, and only took it as collateral security for old claims upon B, it was not a bona fide purchase for a valuable consideration, without notice.

[Cited in Gest v. Packwood, 34 Fed. 368.]

[Cited in Linnard's Appeal (Pa. Sup.) 3 Atl. 841.]

[1] [Reported by William W. Story, Esq.]

4. As the assignment by B was merely of his right, title, and interest, without covenant of title, the invalidity of his title destroyed all right of the bank.

[Cited in Rodgers v. Burchard, 34 Tex. 441.]

5. To constitute a bona fide purchaser for a valuable consideration, the sale must be for a new consideration; and the transfer of property merely as a new security for old debts and liabilities, without extinguishment or surrender of such debts, or of the old securities therefor, is not sufficient.

[Cited in Rison v. Knapp, Case No. 11,861; People's Sav. Bank v. Bates, 120 U. S. 565, 7 Sup. Ct. 683; Franklin Sav. Bank v. Taylor, 4 C. C. A. 55, 53 Fed. 863.]

[Cited in Busenbarke v. Ramsey, 53 Ind. 503; Linnard's Appeal (Pa. Sup.) 3 Atl. 841.]

6. The pendency of proceedings in bankruptcy is sufficient constructive notice to all grantees of property proceeding from the bankrupt.

[Cited in Re Wallace, Case No. 17,094.]

Bill in equity. The bill in substance stated: "That on the nineteenth day of March last, the said William Reed resided and did business in said Taunton, as a merchant or trader, and was then possessed of and entitled to certain real and personal estates of great value, and was indebted to sundry persons in large sums of money, exceeding in amount the value of his estates, and was insolvent, and in failing circumstances, and unable to meet his debts and engagements, as he the said William Reed then fully apprehended and knew; that the said William Reed was then indebted to the said Charles Godfrey in divers sums of money, and the said Godfrey was or pretended to be liable to pay as indorser, surety, or otherwise for the accommodation of said William Reed certain other sums of money; and that the said William Reed, on the said nineteenth day of March, being in contemplation of bankruptcy, and with the intent and for the purpose of giving to the said Godfrey a preference or priority over his general creditors, executed, acknowledged, and delivered to the said Godfrey, without any consideration, a certain deed, purporting to convey to him all the right, title, and interest which the said Reed had in and to any lands, buildings, and real estate in the county of Bristol, in said district, upon condition that the same should be void if the said William Reed, his heirs, executors, or administrators, should pay to the said Godfrey the amount justly due to him from said Reed on account, and should save him harmless and indemnified against all liabilities on account of his being indorser, surety, or acceptor for the accommodation of the said Reed; which said deed was recorded in the registry of deeds for the county of Bristol, on the same day. And on the same day, and at the same time, and with like intent and purpose, the said Reed made and executed to the said Godfrey a certain other deed, or bill of sale, purporting to sell and transfer to the said Godfrey all the goods, wares, and merchandise then being in the store occupied by him, on the southerly side of the Main street in said Taunton, upon a like condition, which said deed or bill of sale was on the same day recorded in the clerk's office of the said town of Taunton. That on the same nineteenth day of March, the said William Reed filed his petition in bankruptcy, and was afterwards declared to be bankrupt, and the plaintiff [Lovett Morse] was appointed assignee of his estates. That on the twenty-first day of March last, the said Godfrey made and executed a certain deed, or bill of sale purporting to transfer unto the said president, directors, and company of the Cohannet Bank, all his right, title, and interest in and to the said goods, wares, and merchandise so pretended to have been transferred to him by the said William Reed, conditioned to be void upon payment by the said Godfrey or Reed to the said president, directors, and company, of the principal and interest due and to accrue upon certain promissory notes described therein, made and signed by the said Reed, and indorsed by said Godfrey, which was, on the twenty-second day of March last, recorded in the clerk's office of said town of Taunton. That on the twenty-sixth day of May last, the said Godfrey made and executed a certain other deed, purporting to sell, assign, and transfer, unto the president, directors, and company, the said Institution for Savings, Samuel Blake, Samuel Caswell, Benjamin Caswell, Charles Johnson, Abigail Leonard, and Walter Leonard, all his right, title, and interest in and to the said goods, wares, and merchandise mentioned in said deed of mortgage, and the proceeds thereof, and all claims and demands, or causes of action which he had at law, or in equity, against the said William Reed, and one John Reed, or either of them, and all claims and demands which might accrue to him by reason of any liabilities he was under for them, or either of them, and appointed the said grantees his attornies to collect the same; and on the same twenty-sixth day of May the said Godfrey executed and delivered to the same corporaations and persons, a certain other deed, purporting to grant and convey unto them, all the right, title, interest, and estate, which he acquired in and to all and singular, the lands, tenements, and real estate of the same William Reed, by virtue of the deed of mortgage bearing date the said nineteenth day of March, hereinbefore referred to, which deed was acknowledged by said Godfrey on the thirtieth day of May last, and on the same day recorded in the registry of deeds for said county of Bristol. That the said defendants, or some of them, have taken possession of all the goods, wares, and merchandise, being in the store of the said William Reed at the time of the making of the said deeds of mortgage by him, the same being of great value, and have, as your orator is informed, sold and disposed of the same to divers persons to him unknown, and at prices greatly below its cost and actual value, and have received the proceeds thereof, without any right or authority on their

part to make any sale or disposal thereof; and that on the seventh day of June last, the said corporations, and the said Blake, Caswell, Caswell, Johnson, Leonard, and Leonard, took possession of all the lands and tenements, and real estate of the said William Reed, situate in said county of Bristol, and have since been in receipt of the rents and profits thereof, and have received large sums of money as such, the said defendants claiming title to the said real and personal estates under and by virtue of the said deeds of mortgage made by said Reed, and of the assignments thereof made by the said Godfrey as aforesaid. That when the said William Reed made and delivered the said deeds of mortgage, on the nineteenth day of March last, he was insolvent, and unable to meet his debts and engagements, and that he was fully aware thereof; and that the said Godfrey knew thereof, or had reasonable cause to believe the same; and that the said William Reed contemplated bankruptcy; and that said deeds of mortgage were made and delivered in contemplation of bankruptcy, and for the purpose of giving the said Godfrey a preference or priority over the general creditors of the said William Reed, and that the said deeds are, and each of them is void, and frauds upon the said act of congress. That he has been informed, and believes it to be true, that no consideration was paid to the said Godfrey upon the execution and delivery of the said several deeds of assignment hereinbefore mentioned, by the grantees therein named, or any of them, and that the same were, and each of them was made without consideration; and that the said grantees knew that the said William Reed had, before the execution and delivery thereof, filed his petition to be declared a bankrupt, and knew, or might have known, the time when, and the circumstances under which the said deeds of mortgage were made and executed, and that the same were made in contemplation of bankruptcy, and for the sake of giving a preference or priority, and were void and frauds upon said act of congress. That if the said deeds of mortgage were valid and effectual to convey and transfer to the said Godfrey the real and personal estates therein mentioned, that the plaintiff is entitled to redeem the same, and perform the conditions therein contained, and is entitled to receive of the said Godfrey, or his assigns, a true account of all the sums of money due or owing to him from said William Reed, intended to be secured by said deeds of mortgage, and of all the liabilities under which the said Godfrey labored in behalf of said Reed, and against which he was to be indemnified thereby, remaining unpaid or unextinguished, and of all sums of money paid by said Godfrey on account thereof—and of all sums of money received by him or his assigns, being rents and profits of the said real estates, and to have the said personal estates transferred or delivered to him, or their actual value in money paid to him, and to have the said mortgage upon the real estates cancelled and delivered up upon performance by him of the conditions in said deeds of mortgage expressed. And the plaintiff hoped, that when, by virtue of his appointment as aforesaid, all the property, and rights of property, of the said bankrupt were vested in him, the said defendants would relinquish all claim to the said real estates, and cancel the mortgage thereon, and account for the rents and profits thereof, and deliver over the said personal estates, or their equivalent in money. But that the said defendants, though requested, refuse so to do, and claim an adverse interest in the said real and personal estates of the said bankrupt, which are by law now vested in your orator. Whereupon the plaintiff respectfully prays your honors to decree, that the said pretended deeds of mortgage are null and void, and a fraud upon the said act of congress, and wholly ineffectual to pass to the said Charles Godfrey any title or interest in or to all or any of the real or personal estates therein mentioned or referred to, and that the other persons named as defendants herein, have no title or interest therein by virtue of the said deeds of assignment, and that the plaintiff is entitled to receive from all of the said defendants a deed of release of all their interest in and to said real estates, or to have a discharge of the said deed of mortgage entered upon the record thereof in the said registry of deeds, and to an account and payment of all and singular the sums of money received by them as the rents and profits thereof, and to the payment by the said defendants to him of the sum of six thousand seven hundred and thirty-three dollars and four cents, being the actual value of the said personal estates mentioned or referred to in said other deed of mortgage, and sold or disposed of by said defendants as aforesaid."

Godfrey, in his answer, states as follows: "That on the nineteenth day of March last past, William Reed, of said Taunton, trader, was indebted to him in the sum of sixty dollars and eighty-three cents, as nearly as he can ascertain,—and he had before that time been and become indorser, surety, and otherwise liable for said Reed, in and upon certain promissory notes then held by his several co-defendants in the complainant's said bill named. That on or about the first day of January next preceding, the said William Reed had, as he informed the defendant, taken an account of his stock in trade, and property, personal and real, and of his indebtedness and liabilities of every description, and ascertained that his said property was more than sufficient to pay all his said debts and liabilities, and the defendant relied thereon. And the defendant further answering says, that a short time prior to said nineteenth day of March, he was advised to endeavor to protect or secure himself against loss from the indebtedness of said Reed to him, and from

his liabilities for said Reed; and thereupon, to avoid all possible loss that might thereafter arise to him, by reason of the said indebtedness of said Reed to him, and his said liabilities for said Reed, he did, on said nineteenth day of March, call upon said Reed, in company with counsel learned in the law, and demand and require of the said Reed to secure him from any eventual loss by reason of his said claim and liabilities, by a mortgage upon his stock in trade and real estate; and said Reed did then and there, after some hesitation and delay, yield to said demand and requisition. Whereupon a deed of mortgage of said Reed's stock in trade, and another deed of mortgage of the lands and tenements of said Reed, were, on said nineteenth day of March, duly made and executed by said Reed to the defendant. That the sum named in said deeds as the consideration therefor, was, as he believes, inserted therein by the counsel who drew said deeds, as being about the supposed amount of the debt due the defendant and of his said liabilities for said Reed; but neither said sum, nor any other sum of money, was paid by the defendant to said Reed on the execution and delivery of said deeds as the consideration therefor, but that the sole consideration therefor was the said indebtedness of said Reed to the defendant, and the defendant's liabilities for said Reed as aforesaid. That at the time of his demanding security of said Reed in manner aforesaid, he was led to fear that said Reed was, or would be troubled, and unable to meet and pay the sums due from him from time to time as the same fell due, but this defendant did believe that unless the said Reed should be compelled to submit to a sale of his stock in trade at a less than its prime cost, and to a sale of his interest in said real estate at less than what had theretofore been considered its true value, he, said Reed, would not prove, ultimately, unable to pay his debts. And this defendant denies that when said deeds of mortgage were so made to him as aforesaid, said Reed, so far as he knows, is informed or believes, contemplated stopping his said trade or business, or filing a petition in bankruptcy,—on the contrary, the defendant, at the time of the execution of said mortgages, expressly understood and believed that said Reed did not intend to stop his said business or to be declared a bankrupt. That he is informed, and believes it to be true, that said Reed, after the execution and delivery of said mortgages on the same nineteenth day of March, was informed that his property, real and personal, had been attached by several of his creditors, and then and thereupon, and by reason thereof, said Reed was induced to believe that he would not be able to prosecute his said business, and did, in consequence thereof, apply to counsel to draw a petition pursuant to said act, that he, the said Reed, might be declared bankrupt, which said petition the defendant has been informed and believes was signed and sworn to by said Reed on said nineteenth day of March, and that thereafterwards the same was, as this defendant is informed, duly filed in court on the twenty-first day of said March, and said Reed declared bankrupt, and said complainant duly appointed assignee of his estate and effects at the time and in the manner in said bill set forth, and that said complainant accepted and now exercises said trust. And this defendant further says, that on the twenty-first day of said March, the president, and company of the Cohannet Bank, one of the defendants to this bill, being the proprietors and holders of six several promissory notes of said Reed indorsed by the defendant, to indemnify the defendant against which, and all loss thereon, said mortgages of said Reed to the defendant were given as aforesaid, he, the defendant, did, on said twenty-first day of March, duly assign and convey to said bank in mortgage, all his right and interest in said mortgage of goods and chattels so made to him by said Reed, to be held by said bank as security for this defendant's liability on said notes to said bank. That on the twenty-sixth day of May, in the same year, the Institution for Savings in the town of Taunton and its vicinity, Samuel Blake, Samuel Caswell, Benjamin Caswell, Charles Johnson, Walter Leonard, and Abigail Leonard, who are made defendants to complainant's bill, were the proprietors and holders of the residue of said promissory notes, and the property of the defendant having been attached by several of said persons in suits founded on the defendant's liability on said notes, and at the request of said bank and of said other parties, defendants hereto, and as security for the defendant's said liabilities to them on said notes, the defendant did, on the said twenty-sixth day of May, make and execute and deliver to all said parties, a conveyance of all his interest in said real estate so mortgaged by said Reed to this defendant, and for the same purpose and at the same time did assign all his interest in the said personal property so conveyed to him in mortgage by said Reed, (and by this defendant theretofore conveyed in mortgage to said bank as aforesaid), and did also by the same instrument assign to said parties all his rights and claims against said William Reed, and against one John Reed. And said parties, on the same day, and as part of the same transaction, did execute with this defendant a written agreement, in and by which agreement said mortgage of said goods and chattels so assigned to said bank and the proceeds thereof, was declared and agreed to be held by said bank,—and also said mortgage of said real estate, and said claims and the proceeds thereof as security, and to be applied and distributed to and among said bank and said other parties equally and in proportion to their respective claims aforesaid against this defendant. And that neither said bank nor said other persons nor corporations, grantees in said

deeds at the time of the execution and delivery of said deeds respectively, or at any other time, paid to this defendant any sum or sums of money as a consideration therefor. And that he is informed and believes that said bank, on or about the twenty-first day of March, did take possession of said goods and chattels, and that the same have been sold and disposed of; and as to the places where and times when the same were so sold, and as to prices and manner of such disposition and sales, and the proceeds thereof, this defendant says that he has seen and read, or heard, the answer of said bank filed in this case, and that the same is, so far as this defendant knows and is informed, correctly and fully set forth therein. That he is informed and believes that the said bank and the said other defendants, on or about the seventh day of June last, did enter upon and take possession of said real estate for condition broken, and that they have received certain rents and profits therefrom. And although this defendant cannot answer as to his personal knowledge, yet he has read or heard the answers of said bank and of said other defendants, filed in this case, and the statement therein contained in relation to said rents and profits, and in relation to the use and application of the same, and of the proceeds of said goods and chattels, is, according to his best knowledge and belief, true. And the defendant further says, that he has not, nor has ever had, any securities or means of payment and discharge of his said claims and liabilities for said Reed, furnished to him by said Reed, other than said mortgages so made and executed to him on said nineteenth day of March; and that he, this defendant, has paid on account of his said liabilities for said Reed, no other sum than the sum of eighty-two dollars and thirty cents, paid by this defendant for costs of certain suits brought against him, founded on his said liabilities for said Reed, saving and excepting such sums as have been realized by said other defendants out of the mortgages by this defendant assigned to them as aforesaid. And this defendant further answering says, that said assignment so made by him to said bank on said twenty-first day of March, is, by this defendant, supposed to be still in force and effect. And this defendant further answering says, that neither at the time of the execution and delivery of said other deeds of assignment bearing date said twenty-sixth day of May, by this defendant to said other defendants, nor at any other time, was it agreed or understood that said assignment so made by this defendant to said bank, should be, or was, revoked. or annulled; nor was any agreement or writing ever made or executed by this defendant, nor by said other defendants, so far as he knows, or is informed to that effect."

The answer also of the Cohannet Bank was as follows:

"That on the twenty-first day of March, now last past, one Charles Godfrey, of Taunton, in said district, trader, was, or pretended to be, the proprietor, and possessed of said goods, in mortgage, under and by virtue of a certain deed of conveyance thereof theretofore executed to said Godfrey, by one William Reed, of said Taunton, trader, bearing date the nineteenth day of the same month of March, which deed of conveyance had been theretofore, on said nineteenth day of March, duly recorded in the office and records of the town clerk of said Taunton, where the said Reed then, and has ever since, resided, pursuant to the laws of said commonwealth of Massachusetts regulating mortgages of personal property in said commonwealth. And the said Godfrey then and there held, or pretended to hold, in good faith, said goods and chattels in mortgage, and said conveyance thereof, free from all fraud or impeachment whatever. And said Godfrey was on the same twenty-first day of March, indebted or liable to this defendant, as indorser of certain promissory notes, signed by said William Reed, amounting together to the sum of three thousand two hundred and ninety-five dollars. And this defendant, believing that the said Godfrey was in good faith the owner and holder of said goods and chattels, in mortgage, and that said recorded conveyance thereof was made fairly and without fraud of any kind, on the same twenty-first day of March, agreed with said Godfrey to take and receive an assignment and conveyance of said mortgage, and of said goods and chattels, in mortgage, and as security for the debts and liabilities of said Godfrey to said defendant, as indorser of said promissory notes,—which assignment was accordingly made and executed and delivered on said twenty-first day of March, by said Godfrey, to this defendant. That at the time said conveyance of said Godfrey to this defendant bears date, and was executed and delivered, said promissory notes, so indorsed by said Godfrey, were wholly unpaid. And this defendant doth also aver, that at or before the execution and delivery of said conveyance by said Godfrey to said defendant, this defendant had no notice whatever, that said deed of mortgage, so made by said Reed to said Godfrey, was made by said Reed in contemplation of bankruptcy, and for the sake of giving a preference or priority to said Godfrey, or that the same was void, or a fraud on the act of congress entitled an 'Act to establish a uniform system of bankruptcy throughout the United States,' or that the same was, or was believed to be, in any other manner or for any other cause, fraudulent, voidable, or void. And the defendant insists, that it is a bona fide purchase of said goods and chattels, in mortgage, as aforesaid, for a good and valuable consideration, and without any notice that the same had been conveyed in mortgage to said Godfrey, in contemplation of bankruptcy, and for the sake of giving a priority to said Godfrey, or that the same can

or could in any manner be deemed a fraud on said act of congress, or voidable or void on any ground. And the defendant admits, that at the time of the execution and delivery of said conveyance by said Godfrey to this defendant, this defendant paid said Godfrey no sum or sums of money as the consideration therefor. And the defendant denies that said conveyance, so made by said Godfrey to this defendant, was without consideration, or that this defendant, at the time of the execution or delivery thereof, knew that said Reed had before that time filed his petition to be declared a bankrupt. And the defendant admits, that he knew, from the date of said deed of mortgage by said William Reed to said Godfrey, and from the time of recording the same, as appeared on said deed and record, that the same was made, executed, and delivered on or prior to said nineteenth day of March; and was also informed, and believes, that the same was so executed on said nineteenth day of March; and this defendant denies that it knew or was informed, at or before the said assignment thereof to this defendant, of the circumstances under which the same was made and executed by said Reed to said Godfrey, except that the same was given to the said Godfrey as security for his said claims against, and liabilities for, said Reed. That on the twenty-sixth day of May, now last past, the said Godfrey was or pretended to be, seized in fee and in mortgage of and in all and singular said lands and tenements in said bill mentioned and described, under and by virtue of a certain conveyance thereof, theretofore executed by the said William Reed, bearing date the said nineteenth day of March last past. And the said Godfrey pretended to hold, in good faith, said lands and tenements in fee and in mortgage, free from all fraud and impeachment whatever. And the said Godfrey, on said twenty-sixth day of May, was indebted or liable to this defendant, as indorser of said promissory notes, signed by said Reed; and said Godfrey was, as this defendant was informed, and believed, and still believes, justly indebted or liable to said other defendants, as indorser or joint promissor with said Reed of sundry promissory notes, signed by said Reed, amounting together to the sum of four thousand nine hundred and fifty-five dollars. And this defendant, believing that said Godfrey was in good faith seized of said lands and tenements, in fee and in mortgage, and that said recorded conveyance thereof, so appearing to be made by said Reed to said Godfrey, was made fairly and without fraud of any description, nor subject to any impeachment or suspicion thereof, thereafterwards, on the said twenty-sixth day of May, did together with said other defendants, creditors of said Godfrey as aforesaid, agree to take and receive of said Godfrey an assignment and conveyance of said mortgage lands and tenements and of the said Godfrey's rights therein, and thereby secured as aforesaid, as security for the said debts and liabilities of said Godfrey to this defendant, and to said other defendants in said bill of complaint mentioned. And thereupon a certain deed of conveyance of said lands and tenements, bearing date the said twenty-sixth day of May, was duly made and executed and delivered on the said twenty-sixth day of May, by said Godfrey to this defendant, and said other defendants, whereby said Godfrey did convey to this defendant and said other defendants all the right, title, and interest that he, said Godfrey, had in and to said real estate, lands, and tenements, under and by virtue of the said deed of said William Reed, to him, said Godfrey, so executed, on said nineteenth day of said March, and in and by said deed or conveyance the said Godfrey did covenant with this defendant, and said other defendants, their heirs, successors, executors, administrators, and assigns, that he had good right to transfer and convey said premises and property to all said grantees, in manner as aforesaid. And on the same day, for the same consideration, and as a part of the same transaction, the said Godfrey did, by his certain other deed, bearing date the said twenty-sixth day of May, assign and transfer to the same grantees, all his interest in and to the said goods and chattels, theretofore by said Reed conveyed to him in mortgage, and by him assigned and conveyed to this defendant as aforesaid, and in and to all claims and demands which he had or might have against the said William Reed, and one John Reed, of said Taunton, or either of them, arising out of his liabilities or indorsements for or on account of said John and William Reed, or either of them. And on the same twenty-sixth day of May, a certain agreement, bearing date the said twenty-sixth day of May, was duly executed and delivered under the hands and seals of Godfrey and this defendant, and said other defendants, wherein and whereby, among other things, the said mortgage of said lands and tenements, real estate, and property, and the interest of said Godfrey in and to said goods and chattels, are conveyed to said grantees as security for the said debts and liabilities of said Godfrey to said grantees, and that the same were to be sold and applied accordingly, whereby this defendant also covenanted and agreed, that said goods and chattels and mortgage to this defendant, theretofore assigned and conveyed, on said twenty-first day of March, as aforesaid, and the proceeds thereof, should be held, applied, and distributed equally among and between this defendant and said other defendants, in proportion to their respective demands and claims, as aforesaid. And that at the time of the date, execution, and delivery of said conveyance, by said Godfrey to this defendant and said other defendants, of said real estate, lands, and tenements, said promissory notes, so held by this defendant, were wholly unpaid, and as this defendant is informed and believes, said

amount, so due to said other defendants, was wholly unpaid; and this defendant doth also aver, that at or before the execution and delivery of said conveyance by said Godfrey to this defendant, and said other defendants, this defendant had not, nor had said other defendants, or either of them, so far as this defendant knew, was informed, or believed, or as he now knows, is informed, or believes, any notice whatsoever, that said conveyance or mortgage of said estate and lands, so made by said William Reed to said Godfrey, on said nineteenth day of March, was made by said Reed in contemplation of bankruptcy, and for the sake of giving a preference or priority to said Godfrey, or that the same was void. And this defendant submits, that it is, together with said other defendants, a bona fide purchaser of said mortgage of said real estate, lands, and tenements, for a good and valuable consideration, and without any notice that the said mortgage was voidable, or void, on any ground.

"And this defendant admits, that at the time of the execution and delivery of said conveyance of said real estate, neither this defendant nor said other defendants, as far as this defendant knows, is informed, or believes, paid said Godfrey any sum or sums of money as the consideration therefor; but this defendant avers the same to have been made on good and valuable consideration, as hereinbefore set forth. And this defendant admits, that at the time of the execution and delivery of said conveyance by said Godfrey to this and said other defendants, it was informed and believed, that said William Reed had before that time filed his petition to be declared a bankrupt. And this defendant, further answering, admits that it knew and believes the said other defendants knew, at the time of the assignment and conveyance of said mortgage to it and said other defendants, as well from the date of said instrument, and of the record thereof, as from other information, that the same was made and executed on said nineteenth day of March. But this defendant denies, that at or before the assignment and conveyance of said mortgage to this and said other defendants, it knew or was informed, or that said other defendants knew or were informed, so far as this defendant is informed, or believes, the circumstances under which said mortgage was made by said Reed to said Godfrey, except that the same was given to said Godfrey as security for his said claims against, and liabilities for, said Reed. That said deeds of mortgage, so made by said William Reed to said Godfrey, were expressed therein to be, and were made for the purpose of securing to said Godfrey whatever was due from said Reed to said Godfrey on account, and to indemnify and save harmless the said Godfrey from all damage, cost, charge, and trouble, for and on account of the liabilities of said Godfrey, as surety or indorser for said Reed; and on all acceptances made theretofore by said Godfrey for the accommodation of said Reed. That on said nineteenth day of March, said Reed was, as this defendant is informed, and believes, indebted to said Godfrey on account in the sum of sixty dollars and eighty-three cents, and the said Godfrey was then and there under liabilities to this defendant for and on account of the said Reed, as indorser of his, said Reed's, promissory notes, in the sum of three thousand two hundred and ninety-five dollars. And said Godfrey was also then and there, as this defendant is informed and believes, under liabilities to said other defendants, as indorser, joint promissor, surety, or otherwise, for said Reed, in the respective sums, and upon the respective contracts. That on the said twenty-first day of March, one of the said notes, so indorsed by said Godfrey for the said Reed, bearing date the seventeenth day of January, last past, for the sum of eight hundred and fifty dollars, became due and payable, which said note was then and there the property of this defendant; and payment was duly demanded by this defendant of said Reed, who declined to pay the same; and thereupon due notice was on the same day given by this defendant to said Godfrey, and said Godfrey requested to pay the same, and suits had been instituted against said Godfrey, founded on his said liabilities for said Reed; and thereupon and after the said assignment and conveyance by said Godfrey to this defendant of said mortgage of goods and chattels, so made to said Godfrey by said Reed, on said nineteenth day of March, as aforesaid, this defendant took possession of said goods and chattels; and this defendant, with the consent of said Reed, in order to avoid the loss and injury that might otherwise arise from keeping said goods, and the depreciation thereof, did empower said Reed to sell said goods and chattels by retail, and at private sale, for the benefit, and as agent of, this defendant, as the holder of said mortgage so made thereof by said Reed, this defendant agreeing to allow said Reed a reasonable sum for his services and expenses therein. And said Reed did thenceforth, until on or about the first day of June then next, proceed to sell and dispose of said goods as aforesaid, and did receive therefor for this defendant the sum of one thousand and sixty-five dollars and forty-one cents, being on the average the prime cost of said goods, as this defendant is informed and believes. And this defendant did allow and pay said Reed for his said services and expenses during said period, the sum of one hundred and eighty dollars, and after the said first day of June then next, and after the expiration of more than sixty days from the period when said suits had been brought against said Godfrey, founded on said liabilities; and when said note of said Reed, indorsed by said Godfrey, for the sum of eight hundred and fifty dollars, became due, and payment thereof was declined and refused by said Reed, this defend-

ant, with the consent of said other defendants, for whose benefit, as well as its own, said mortgage was then held by this defendant, did in the belief, as well that the residue of said stock would be most advantageously disposed of at public auction, and with least pecuniary loss, as in the exercise of what it considered, and now considers, its legal rights, proceed to sell and dispose of said stock at public auction, and in different parcels, in the towns of Taunton, Fall River, and New Bedford, in said district; and did receive, as the net proceeds of said sales, the sum of three thousand five hundred dollars and eighty-seven cents. And the defendant further says, that on the seventh day of said June, this defendant and said other defendants, did enter on, and take possession of, said real estate for condition broken, and that the sums received by this defendant, and said other defendants, as rents and profits of the real estate, since possession was so taken, amounted to forty-seven dollars and thirty-three cents, and no more. And that the sums thus received by this defendant, and said other defendants, from out the sales of said personal property, and from the rents and profits of said real estate, have been paid over and distributed, after deducting the sum of forty-two dollars and seventy-seven cents, actually expended in the sale and collections aforesaid, to and among this defendant, and all said defendants, in proportion to their respective claims aforesaid, except a small portion thereof, which amounts to less than the sum of one hundred dollars, all which sums, thus paid over and distributed among said creditors and this defendant, have been indorsed and applied towards the payment and discharge of said notes, so held by this defendant, and said other defendants, respectively. And that neither of the said liabilities of said Godfrey for said Reed, so held by this defendant, has been wholly extinguished and satisfied. Nor, as this defendant is informed and believes, has either of the liabilities of said Godfrey for said Reed, held by said other defendants, been wholly extinguished or satisfied. Nor has any part of the said liabilities, thus held by this defendant, or by said other defendants, so far as this defendant is informed, or believes, ever been diminished or paid, in part or in whole, except by the application of the said proceeds of said personal property, and rents and profits of said real estate, as aforesaid; nor has said Godfrey, so far as this defendant knows, is informed, or believes, any other securities or means given or furnished him by said Reed, for discharging said debts and liabilities. And that the said assignment and conveyance, so made to this defendant of said personal property on said twenty-first day of March, is by this defendant supposed to be in force and effect; and that it was not, as far as this defendant knows, is informed, or believes, ever supposed, understood, or agreed, that upon the execution of said deeds or assignments, bearing date the said twenty-sixth day of May, the said former assignment bearing date the twenty-first day of March, was revoked or annulled; nor was any assignment to that effect ever signed, sealed, or executed by this defendant, nor, so far as this defendant knows, is informed, or believes, by said other defendants."

The answer of the Institution for Savings was substantially the same. Afterwards Godfrey became bankrupt, and his assignee was made a party to the bill. The general replication was filed, and the cause came on for hearing upon the pleadings and evidence, and was argued by—

F. G. Loring, for plaintiff.

Mr. Bartlett, for respondents.

STORY, Circuit Justice. On the 19th of March, 1842, William Reed (the bankrupt) made the two deeds of conveyance on mortgage to Godfrey, which are now sought to be set aside as fraudulent and void, under the bankrupt act of 1841, c. 9. On the same day, Reed signed and swore to a petition for the benefit of the bankrupt act, as a voluntary bankrupt; and his petition was filed in the district court on the succeeding Monday, (the 21st of March), and has been acted upon in the district court, and Reed has since, under the same, been declared a bankrupt. One of these deeds purported to convey to Godfrey "all the right, title and interest" which he (Reed) then had "in and to any lands, buildings and real estate," in the county of Bristol. The other deed purported to convey to Godfrey, "all the goods, wares and merchandise, consisting of woollen, cotton, linen, and other cloths, silks, ribbons, laces and handkerchiefs, hose, carpetings and rugs, and various other articles of dry goods merchandise, now in the store occupied by me," and situate in Taunton. In point of fact, the last deed comprehended all his stock in trade, and the other deed nearly all his real estate, leaving him in the possession and ownership only of his furniture and some other personal property, not included in the mortgage to Godfrey. Godfrey on the same 21st of March conveyed to the Cohannet Bank, in mortgage, "all the right, title and interest," which he then had "in and to all and singular the goods, wares, and merchandise, of every name and description in the store," etc., which he derived from the mortgage to him by Reed of the 19th of March. By subsequent deeds, on the 26th of May following, Godfrey conveyed "all his right, title and interest," as well in the goods aforesaid, as in the real estate aforesaid, so conveyed to him by Reed, to the Cohannet Bank, the Institution for Savings, and to Samuel Blake, and five other persons, who were his creditors in fee, as security for their debts; and thereby on, and in consideration thereof, the said creditors on the same day by their deed agreed to withdraw and discharge their at-

tachments upon the property of Godfrey. Godfrey afterwards became a bankrupt and his assignee is made a party to the bill. The second section of the bankrupt act of 1841, c. 9, provides "that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety or other person any preference or priority over the general creditors of such bankrupt; and all other payments, securities, conveyances or transfers of property, or agreements made or given by any such bankrupt, in contemplation of bankruptcy, to any person whatsoever, not being a bona fide creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act."

The first and main question is, whether the conveyances so made by Reed to Godfrey come within the reach of this enactment. If they do, then another question will remain, whether the defendants claiming under Godfrey are entitled to protection, as being bonâ fide purchasers of the same for a valuable consideration, without notice. It does not strike me, that there is any substantial doubt upon the facts and circumstances resting on either point.

In the first place, nothing can be clearer than that Reed intended by the deeds in controversy to give a preference to Godfrey over all his other creditors. He conveyed to him all his stock in trade, and nearly all his real estate, leaving but a small residue, either of personal or real estate. Godfrey well knew of his embarrassments; and Reed himself admits that his whole property was about $24,000, and his debts and liabilities amounted to about the same sum. So it is plain beyond controversy, that a preference was intended to be given to Godfrey over the other creditors, in case of any deficiency; and Reed states, that he did not at the time suppose that he was able to meet all his engagements at their maturity. If it were necessary under such circumstances to rely upon authorities in confirmation of this doctrine, the cases of Harman v. Fishar, 1 Cowp. 117, 123; Thornton v. Hargreaves, 7 East, 544; Compton v. Bedford, 1 W. Bl. 362; Hooper v. Smith, Id. 441,—will be found to support it. Then, as to the conveyances being made in contemplation of bankruptcy, in the sense in which these words are used in the bankrupt act of 1841, c. 9, § 2, I have already had occasion to consider this subject in former cases, and especially in the case of Arnold v. Maynard [Case No. 561], and Hutchins v. Taylor [Id. 6,953]. In these cases, it was expressly decided that the words "in contemplation of bankruptcy," in the act, were not limited to, and did not mean the contemplation on the part of the bankrupt of committing an act of bankruptcy within the terms of the act, for which his creditors might proceed against him in invitum, or his own contemplation of voluntarily taking the benefit of the act; but that they properly meant the contemplation of a state of bankruptcy, or known insolvency and inability to carry on his business, and a stoppage of his business. In other words, that he contemplated a breaking up and failure and stoppage of his trade or business, and thus to become, in the sense of the old law, a bankrupt, or one whose trade and business is broken up, his counter or table being, in a figurative sense, bankus-ruptus. 2 Bl. Comm. 471, note e. In addition to the English cases cited in suport of this doctrine in the case of Arnold v. Maynard [supra], I might add the more recent case of Gibson v. Muskett, 4 Man. & G. 160, where Lord Chief Justice Tindal said, "Then the question is, whether this was not money paid in contemplation of bankruptcy, that is, under such circumstances that any prudent man, taking a reasonable view of his situation and the surrounding circumstances at the time, might fairly expect bankruptcy to follow." But I did not found myself on the cases of Arnold v. Maynard and Hutchins v. Taylor [supra], nor do I in the present case found myself, upon the construction of the words, as applied to the English bankrupt statute, but upon their true meaning and objects as used in our own act of 1841, c. 9. Reed must be presumed to have known the natural consequences of his acts in making these conveyances. He could not but have known, that these conveyances, transferring the bulk of his property, did give a preference to Godfrey, which was a fraud upon the bankrupt act, entitling his other creditors to proceed against him therefor in invitum, under the first section of the act. It was an attempt, on his own part, to divide his property among his creditors in a manner prohibited by the bankrupt act, at the very moment when he was about to fail in business, and when he knew that he must by those very conveyances break up and stop his whole trade and means of carrying it on. Nay, the present case demonstrates that he must at the time have had it in contemplation to take the benefit of the bankrupt act, as a voluntary bankrupt; for on the same day, and at most at a few hours after he had made these conveyances, he actually signed and swore to a petition to be filed for the benefit of the act, and that petition was immediately proceeded in, and he has been since declared a bankrupt accordingly. Such acts cannot be overcome or gainsaid by any declarations,—even if Reed had made them,—that he did not, at the moment of executing these conveyances, contemplate taking the benefit of the bankrupt act; but that it was an after-thought. The law will not tolerate such evasions of its obligations, nor permit any man to set up his own private and secret intentions to subvert the just conclusions to be drawn from his overt acts and notorious embarrassments, and stoppage

of his business. The language of Lord Ellenborough in Thornton v. Hargreaves, 7 East, 544, 547, is very significant upon this subject; and in its circumstances it approaches very nearly to the present. See, also, Newton v. Chanter, Id. 138, 143. It would make no difference in the present case, that Godfrey was not aware, that the conveyances were made with an intention to give him an unlawful preference over the other creditors, and in contemplation of bankruptcy; for the act makes such conveyances under such circumstances utterly void, whether the grantee has such knowledge or not. But, in fact, it is not susceptible of any reasonable doubt, that Godfrey at the time was aware of the desperate circumstances of Reed, and he could not but know, that these conveyances, embracing the bulk of his property, necessarily amounted to a failure and stoppage in his business, and reduced him to a state of positive and immediate inability to pay his other debts. Without, therefore, going farther into the details of the case, it appears to me that the conveyances to Godfrey were fraudulent in the sense of the bankrupt act of 1841, having been made in contemplation of bankruptcy, and with intent to give Godfrey a preference over the other creditors.

In the next place, how stands the case as to the Cohannet Bank, upon the transfer to them, on the 21st of March, 1842, by Godfrey? It is suggested, that they are bona fide purchasers, without notice of the invalidity of the conveyances to Godfrey. Now, the answer of the bank does, in part, deny that at the time when the transfer was made to the bank by Godfrey, the bank knew, that the deed of conveyance of the same property by Reed to Godfrey was given in contemplation of bankruptcy, and to give Godfrey a preference over other creditors. But I do not find, that the bank denies, that at the time, that the transfer was so made to the bank, they did not know, that Reed had actually failed in business, and stopped payment, and broken up his business, and that the property therein stated was his whole stock in trade. Indeed, I should infer, that the bank must well have known all these facts, for the transfer was made to the bank solely, as the deed shows, as security for certain notes of Reed, indorsed by Godfrey; so that the apparent object was to get security for the payment of the notes of Reed, and not for any debts of Godfrey, due from him personally. If so, the bank was certainly put upon inquiry, and was bound to inquire into and to ascertain the true nature of the transaction between Reed and Godfrey.

And this leads me to remark, that the bank does not stand within the predicament of being a bonâ fide purchaser, for a valuable consideration, without notice, in the sense of the rule upon this subject. The bank did not pay any consideration therefor, nor did it surrender any securities, or release any debt due, either from Reed or Godfrey, to it. The transfer from Godfrey was a simple collateral security, taken as additional security, for the old indebtment and liability of the parties to the notes described in the instrument of transfer. It is true, that, as between Godfrey, and Reed, and the bank, the latter was a debtor for value, and the transfer was valid. But the protection is not given by the rules of law, to a party in such a predicament merely. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money, or other property, or by a surrender of existing debts or securities, held for the debts and liabilities. See Story, Eq. Pl. §§ 604a, 662, 805; Boone v. Chiles, 10 Pet. [35 U. S.] 177, 210–212; Stanhope v. Earl Verney, 2 Eden, 81; Mr. Butler's note to Co. Litt. 290–296, note 1, § 13; Willoughby v. Willoughby, 1 Term R. 763, 767; Maundrell v. Maundrell, 10 Ves. 246, 261. But here the bank has merely possessed itself of the property transferred, as auxiliary security for the old debts and liabilities. It has paid or given no new consideration upon the faith of it. It is, therefore, in truth no purchaser for value in the sense of the rule. Mr. Chancellor Walworth in Dickerson v. Tillinghast, 4 Paige, 215, seems to have gone somewhat farther, and to have held, that a transfer to a grantee in payment of a pre-existing debt, without giving up any security, or divesting himself of any right, or placing himself in a worse situation than he was in before, of an estate, upon which there was a prior unrecorded mortgage, of which the grantee had no notice, did not make him a purchaser, in the sense of the rule, for a valuable consideration; but that there must be some new consideration, in order to entitle him to a preference over the prior mortgagee. I do not say, that I am prepared to go quite to that length, seeing, that by securing the estate as payment, the pre-existing debt is surrendered and extinguished thereby. But here, there was no such surrender or extinguishment or payment; and the general principle adopted by the learned chancellor is certainly correct, that there must be some new consideration, moving between the parties, and not merely a new security given for the old debts or liabilities, without any surrender or extinguishment of the old debts and liabilities, or the old securities therefor. See, also, Coddington v. Bay, 20 Johns. 637. So that upon this ground alone the title of the bank would fail. The case of Swift v. Tysen, 16 Pet. [41 U. S.] 1, does not apply. In the first place, there the bill was taken in payment or discharge of a pre-existing debt. In the next place, it was a case arising upon negotiable paper, and who was to be deemed a bonâ fide holder thereof, to whom equities between other parties should not apply. Such a case is not necessarily governed by the same considerations, as those applicable to purchasers of

real or personal property, under the rule adopted by courts of equity for their protection.

But there is another ground, independent of this, and quite decisive against the bank. It is this, that the very deed of transfer, by its terms, purports to "sell, assign, transfer, and set over" to the bank, all the right, title, and interest of Godfrey, in and to the stock in the store, derived from the mortgage of Reed; and it contains no covenants whatsoever, as to the title or otherwise. So that it is a mere naked conveyance to the bank, of the very right, title, and interest, which Godfrey derived from the mortgage of Reed, and nothing more. The bank, therefore, took nothing but the "right, title, and interest," of Godfrey, subject to all its original infirmities, and can now claim under it nothing, which Godfrey himself could not claim against the assignee. This view of the matter ends the case, so far as respects the title of the bank under this deed.

The same objections, for the most part, apply to the deeds executed by Godfrey to the Cohannet Bank, and others, on the 26th of May, 1842. Each of them is a conveyance of all the "right, title, and interest" of Godfrey, derived under the mortgage deeds executed to him by Reed, on the preceding 19th day of March. There is this farther most important fact, that Reed had signed a petition on the same day (19th of March), for the benefit of the bankrupt act, that it was filed and acted on in the district court forthwith, and that Reed has under the proceedings been declared a bankrupt. The exact time when he was declared a bankrupt, does not appear; but I presume it was before the execution of those deeds, on the 26th of May. Now the pendency of these proceedings in the district court, at the time, would be constructive notice thereof, to all the grantees under those deeds. But they admit, that they had in fact actual notice thereof, at the time of the execution of the deeds. They were, therefore, put upon inquiry, and bound to know, that the very deeds under which Godfrey claimed, and the very "right, title, and interest," which he conveyed to them, were executed on the same day, that he signed his petition for the benefit of the bankrupt act. Under such circumstances, it is impossible for them justly to insist upon the defence, that the conveyances executed by Reed, on the eve of bankruptcy, conveying the bulk of all his property, real, and personal, to a single creditor, were not acts done in contemplation of bankruptcy, and with a view to give that creditor a preference over all others. It is true, that they surrendered their attachments upon Godfrey's property, and made other arrangements, by which the Cohannet Bank agreed to put the whole rights acquired by it, in the stock of Reed, by the deed of the 21st of March, into a common fund, and share, pro rata, with the other creditors, who were parties to those conveyances. But still, they bargained only for all the "right, title, and interest" of Godfrey, derived under the deed from Reed. Godfrey, by the same deed, assigned to the same grantee all his claims against William Reed the bankrupt, and also against John Reed, and "against the estates, or assignees, of the said William, and John." The surrender of their attachments might be a valuable consideration for the deeds of Godfrey to them, under certain circumstances, but not under circumstances like the present, where they had notice of the time and circumstances of the bankruptcy of Reed. And besides; they purchased, if, indeed, they could be called purchasers at all, only the "right, title, and interest" of Godfrey, in the premises, with all the infirmities, and subject to all the equities, belonging thereto. So that the case, as to these grantees, also falls back upon the validity of the conveyances to Godfrey by Reed, and must be treated as if Godfrey now claimed the property under those conveyances.

I am, therefore, of opinion, that it ought to be declared, that the said deeds made by Reed to Godfrey, and by Godfrey to the other defendants, ought to be declared void, as against the assignee of Reed; that the said Cohannet Bank, and the other defendants, be decreed to execute a release of all their right, title, and interest in, and to the real estate of the said Reed described therein, in such form as shall be settled by the master; and that the said defendants be required to account for, and pay over to the said assignee, the rents, and profits thereof, received by them; and also, that the said Cohannet Bank, and the other defendants, be required to account for, and pay over to the said assignee, all the proceeds of the said stock in trade, conveyed by the said Reed, to the said Godfrey, by the deed of the 19th of March, 1842, so far as the same shall have been sold, or otherwise disposed of, by the said bank and the other defendants respectively. And that it be referred to the same master, to take an account thereof, and to report to the court upon all the matters aforesaid. And all further orders are reserved until the coming in of the master's report, or the further order of the court in the premises.

MORSE (KELLOGG v.). See Case No. 7,665.

Case No. 9,857.

MORSE et al. v. MASSACHUSETTS NAT. BANK.

FISKE v. SAME.

[1 Holmes, 209.] [1]

Circuit Court, D. Massachusetts. March, 1873.

STATUTE OF FRAUDS—DEBT OF ANOTHER—PROMISE OF BANK TO PAY CHECK.

A verbal agreement by a bank, made with the payee, on presentment of a check on the bank, the bank then having no funds of the drawer on deposit, to pay the check if the payee will deposit it in another bank, so that it shall be presented for payment through the clearing-house, is within the statute of frauds.

Actions at law by [Stephen Morse, Jr., and others, and Frank S. Fiske] the payees of certain checks drawn by one Beal on the defendant bank. The defendant demurred to the declarations, and the cases were heard on the demurrers.

George S. Hale and George S. Hillard, for plaintiffs.

Preston & Kimball and Converse & Kelley, for defendant.

SHEPLEY, Circuit Judge. The declaration in each of these cases alleges that the plaintiff, on the twenty-ninth day of August, 1866, was the owner and possessor of a check drawn and signed by one B. Franklin Beal, whereby Beal directed the Massachusetts National Bank to pay to the order of the plaintiff the sum of ten thousand two hundred and ninety dollars; that the plaintiff on the same day presented the check for payment; and the defendants, in consideration that the plaintiff would deposit said check for collection in some other bank in the city of Boston, so that the same should be presented for payment through an association called and known as the Clearing-House Association, promised and agreed with the plaintiff, that, upon such presentation, they, the said defendants, would pay the same; and the plaintiff alleges that, in consideration thereof and in pursuance of the said request, he did agree to deposit said check in some other bank in Boston, that the same should be transmitted from said bank through the clearing-house for payment; and accordingly did deposit it in the First National Bank; and the check was, by the First National Bank, through the Clearing-House Association, duly presented to defendants for payment, and defendants refused to pay the same. Defendants demur to the declaration, and plaintiffs join in the demurrer.

There is no averment that, at the time of presentation of the check, the drawer had any funds on deposit in the defendant bank, or that defendant at that time was under any obligation to honor his checks.

The suit is brought by the original payee of the check, and not by an indorsee or subsequent assignee or bona fide holder for value. The question presented is, whether, when a check is drawn upon a bank by a drawer who has no funds on deposit to pay the check, the bank is liable upon its verbal promise to pay, if the holder would deposit the check in another bank and have it presented through the Clearing-House Association; in case the holder agrees to deposit, and does so deposit, the check in another bank, and have it presented.

The contract of a bank with a depositor is to pay his checks when presented for payment, if, at the time of presentment of the check, he has funds on deposit sufficient to pay the check. Cashiers of banks are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by the bank; and their acts, within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 70; Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 604. To this extent the liability of the bank for the acts of its officers is recognized in the opinions of the dissenting justices, as well as in the opinion of the court in the case last cited. And in that case, where a cashier had certified as "good," checks of a drawer having no funds on deposit to pay the checks, it was held that it should have been left to the jury to determine whether from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that the cashier had authority to bind the bank by such certificate. The certificate of the cashier of a bank that a check is "good," is a representation of a present existing fact, within his knowledge as cashier; and if that certificate be made by him in the course of his ordinary business as cashier, it will bind the bank in favor of innocent third persons, upon the principle of estoppel in pais, even if the certificate be not true and the drawer of the check has no funds on deposit in the bank. The ordinary duties of a cashier are well known. They are to keep the funds, notes, bills, and other choses in action, of the bank, to be used from time to time for the exigencies of the bank; to receive directly, and through subordinate officers, all moneys and notes of the bank; to surrender notes and securities upon payment; to draw checks; to withdraw funds of the bank on deposit; and, generally, to transact, as the executive officer of the bank the ordinary routine of business. But the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money without an express authority from the directors, unless

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

it be such as relates to the usual and customary transactions of the bank. Bank of U. S. v. Dunn, 6 Pet. [31 U. S.] 59; U. S. v. Bank of Columbus, 21 How. [62 U. S.] 364.

Defendant contends that it was not in the power of any cashier or other officer of a national bank to make a valid promise to pay a check not drawn against funds deposited in the bank, simply in consideration that the holder of the check will present it through some other bank, and have it pass through the clearing-house. If this point in relation to the authority of the cashier or teller, or other officer of the bank as such cashier, teller, or other officer merely, were open on the state of pleadings in this case, I should not find much difficulty in deciding that such a promise was wholly outside of the ordinary duties of a cashier or other officer of the bank, and would not bind the bank in the absence of proof of express delegation from the board of directors of power to make the contract. But the declaration in this case avers that the promise was made by the bank, not by the cashier or any other officer, and the demurrer admits the averment. Willets v. Phenix Bank, 2 Duer, 129. The case must, therefore, on the pleadings, be considered as presenting the question of the liability of the bank upon the promise declared upon as the promise of the bank.

There was no representation made in this case by any officer of the bank that the drawer had any funds in the bank when the check was presented. If such was the case, the bank was bound to pay the check on presentation. The refusal of the bank to do so, although accompanied with a promise to pay it at a future time, was in fact information to the holder of the check that the bank had no funds of the drawer on deposit at that time wherewith to pay the check. The case does not, therefore, fall within that class of cases like Pope v. Bank of Albion, 59 Barb. 226, in which it has been held that any language, whether verbal or written, employed by an officer of a banking institution whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good, and will be paid, estops the bank from thereafter denying, as against a bona fide holder of the check, the want of funds to pay the same. Nor do the plaintiffs in these cases represent bona fide holders of the checks, who have purchased the same upon the strength of such representations. There does not appear to be any thing in this case to take the promise declared on out of the operation of the statute of frauds.

A check is merely evidence of a debt due from the drawer. Whether it shall operate as payment or not, depends on two facts: first, that the drawer has funds to his credit in the bank upon which it is drawn; and, second, that the bank is solvent, or in other words, pays its bills and the checks duly drawn upon it, on demand. Taylor v. Wilson, 11 Metc. [Mass.] 51.

There being no funds of the drawers of these checks in the bank, the bank received no benefit or advantage from the promise of the holder to deposit the checks in the other bank, and that the same should be presented through the clearing-house. The promisors lost nothing by such promise. They had seasonably presented the checks; were guilty of no laches; were not even obliged to notify the drawers of the non-payment, the drawee having no funds. They did not disable themselves from enforcing their debt against Beal, or promise to delay enforcing or collecting it. They were as much at liberty to collect their debts of Beal, while the unpaid checks were in the banks, or clearing-house, for collection, as if they were in fact, as they were in law, in their own possession.

The debt remained the debt of Beal. The promise of the bank to pay it was a promise to pay the debt of another, and void under the statute of frauds. This is not a case where the guaranty or promise which is collateral to the principal contract is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor. In this case, the collateral undertaking of the bank was subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability was the ground of the promise. There must, to sustain the promise and take it out of the operation of the statute, be some other and further consideration shown; for the consideration for the original debt will not attach to this subsequent promise. Wain v. Warlters, 5 East, 20; Leonard v. Vredenburg, 8 Johns. 31. The promise of the payees of these checks, as set out in the declaration, does not amount to such further and new consideration as to take the case out of the operation of the statute. It is contended that it amounts to a parol acceptance of the checks, and that a parol acceptance of a check is good. Authority may be found in many text-books of writers of high authority upon commercial law, for the proposition stated, without qualification or exception, that a parol acceptance of a bill is good. Vide 1 Pars. Notes & B. 285. But it is believed that an examination of the cases cited in support of this proposition will not sustain its application to the case of a parol accommodation acceptance of a bank check. A verbal acceptance of, or a verbal promise to accept, a check when the acceptor has funds of the drawer in his hands, is entirely without the operation of the statute, from the consideration that the drawee's engagement is, in fact, to pay his own debt to the drawer, the owner of the funds. But it is not perceived how any sound reason can be given why a verbal acceptance, or promise to accept, for the mere accommodation of the

drawer, without funds or value received, should not be treated as within the statute. Browne, St. Frauds, §§ 172, 174; Quin v. Hanford, 1 Hill, 82; Pike v. Irwin, 1 Sandf. 14; Pillans v. Van Mierop, Burrows, 1663; Johnson v. Collings, 1 East, 98; Curtis v. Brown, 5 Cush. 488, and cases cited; Dexter v. Blanchard, 11 Allen, 365. Courts have frequently expressed their dissatisfaction that the rule with regard to implied as well as parol acceptances of bills has been carried as far as it has, and their regret, as stated in Boyce v. Edwards, 4 Pet. [29 U. S.] 122, "that any other act than a written acceptance of the bill had ever been deemed an acceptance." In Townsley v. Sumrall, 2 Pet. [27 U. S.] 170, which decides that a verbal accommodation acceptance is taken out of the statute by the circumstance that the party to whom the promise was made paid money on the strength of it, the whole opinion on this point in the case proceeds upon the assumption, that, without some new and original consideration moving between the parties to the collateral undertaking, a verbal accommodation acceptance is within the statute. The mischief of the rule holding parol acceptances of bills to be good was so apparent, that the subject has been regulated by statute in several of the states, requiring the acceptance to be in writing; and in England, by the statute 1 & 2 Geo. IV. c. 78, an acceptance of an inland bill must be in writing, and on the bill itself. But the reasons given for holding good a parol accommodation acceptance of a bill of exchange do not apply to the case of a bank check. The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are, that they are always drawn upon a bank or a banker; that they are payable immediately on presentment without the allowance of any days of grace; and that they are never presentable for acceptance, but only for payment. Story, Prom. Notes, § 489, and cases cited in note. The promise declared on does not amount to an acceptance. If it be treated either as a promise to accept or a promise to pay, it cannot avail the plaintiffs. No consideration to support the promise is stated, or appears. The checks were not taken on the faith of such promise. The holder gave nothing, and relinquished no advantage for the promise. All the cases, including those before cited, which hold that a promise to accept amounts to an acceptance, put the doctrine on the ground that the holder has taken the bill on the faith of the promise. Coolidge v. Payson, 2 Wheat. [15 U. S.] 66; Schimmepennich v. Bayard, 1 Pet. [26 U. S.] 284; Adams v. Jones, 12 Pet. [37 U. S.] 207; Russell v. Wiggin [Case No. 12,165]. The promise declared on must be considered as one without consideration, and therefore nudum pactum. Overman v. Hoboken City Bank, 1 Vroom [30 N. J. Law] 61, 68. Demurrers sustained.

Case No. 9,858.

MORSE et al. v. O'REILLY.

[4 Pa. Law J. Rep. 75; 6 Pa. Law J. 501.]

Circuit Court, E. D. Pennsylvania. Sept., 1847.

CONTRACTS — VIOLATION — IMPOSSIBLE OF EXECUTION—FORFEITURE—PRACTICE IN EQUITY —PATENTS.

1. The process of a court of equity will not be afforded for the purpose of enforcing a forfeiture.

2. When a contract has been violated in its essential terms, or when it has been made impossible of execution, equity will relieve, if it can do so without prejudice; but it never enforces anything in the nature of a forfeiture whether stipulated in the contract or implied from circumstances.

3. While the exclusive rights of a patentee are specially guarded from intrusion, the contracts which he makes to share them with third persons are interpreted and enforced in the same manner as other legal engagements.

[Cited in May v. Chaffee, Case No. 9,332.]

4. An injunction will not be granted against waste, where the title of the complainant is denied by the answer, and it is refused before answer, unless the defendant has had notice of the motion so as to enable him to make denial by affidavits.

This was an application for a special injunction. The bill was filed January 5, 1847. Upon the hearing, it appeared from the bill and affidavits read by the complainants, and the counter affidavits suffered by the court to be read on the part of the respondents, that on the 13th June, 1845, the complainants, who were patentees of Morse's electro-magnetic telegraph, entered into a contract with the respondent, Henry O'Reilly, in which he stipulated at his own expense to use his best endeavors to raise capital for the construction of a line of Morse's electro-magnetic telegraph to connect the great sea-board line at Philadelphia or at such other convenient point on said line as may approach nearer to Harrisburg in Pennsylvania, etc., etc., to Pittsburgh, St. Louis, and the principal towns on the lakes. In consideration whereof it was agreed on the part of the complainants, that when the said O'Reilly shall have procured a fund sufficient to build a line of one wire from the connecting point aforesaid to Harrisburg, or any point farther west, to convey the patent right to said line so covered by capital in trust for themselves, and the said O'Reilly and his associates on the terms and conditions set forth in the articles of agreement and association constituting the "Magnetic Telegraph Company," and providing for the government thereof with the following alterations viz: "The amount of stock or other interest in the lines to be constructed, reserved to the grantors and assigns, shall be one-fourth part only, and not one-half of the whole, on so much capital as shall be required to construct a line of two wires, but in all cases of a third wire, or any greater number, the stock issued on the capital employed for such additional wire or wires shall be equally divided between the subscribers of

such capital and the grantors of the patent right or their assigns. No preference is to be given to the party of the first part and his associates in the construction of connecting lines, nor shall anything herein be construed to prevent an extension, by the parties of the second part, of a line from Buffalo, to connect with the lake towns at Erie; nor to prevent the construction of a line from New Orleans to connect the Western towns directly with that city; but such line shall not be used to connect any Western cities or towns with each other which may have been already connected by said O'Reilly." In case of a sale of the entire patent right to the government, the grantors shall be bound to pay the actual reasonable cost of the lines constructed under this agreement, with twenty per cent. thereon, and no more, to vest the government with the entire ownership of such lines; provided, as specified in the articles of agreement of the "Magnetic Telegraph Company," the purchase be made or provided for by congress before the 4th of March, 1847 (eighteen hundred and forty-seven.) "The tariff of charges on the lines so constructed, shall conform substantially to the tariff of charges on the great seaboard line before named, and in no case to be so arranged as to render the lines unequal in this respect, to the prejudice of either. Unless the line from the point of connection with the sea-board route shall be constructed within six months from date to Harrisburg, and capital provided for its extension to Pittsburgh within said time, then this agreement, and any conveyance in trust that may have been made in pursuance thereof, shall be null and void thereafter, unless it shall satisfactorily appear that unforeseen difficulties are experienced by said O'Reilly and his associates in obtaining from the state officers of Pennsylvania the right of way along the public works, and in that event the conditional annulment aforesaid shall take effect at the end of six months after such permission shall be given or refused. And any section beyond said last point, embraced within the provision of this agreement, which shall not be constructed by said O'Reilly and his associates, within six months after said parties of second part shall request said O'Reilly to cause such lines to be constructed, so as to extend the connection at least one hundred and fifty miles beyond said last point, and in like ratio during each succeeding six months thereafter; then, in relation to all such sections of the line, this agreement shall be null and void, provided that such request shall not be made prior to the 1st day of April next, 1846." "And the party of the second part shall convey said patent right, on any line beyond Pittsburgh to any point of commercial magnitude, when the necessary capital for the construction of the same shall have been subscribed within the period contemplated by this agreement, by reasonable persons, and not otherwise."

The following is the preamble to the articles of association referred to in Mr. O'Reilly's contract, and made a part thereof, viz.: "Whereas, Samuel F. B. Morse, Leonard D. Gale and Alfred Vail, by their attorney, Amos Kendall, and Francis O. J. Smith, in his own right, sole proprietors under the letters patent of the United States, of the right to construct and use Morse's electro-magnetic telegraph, on the main line of communication from the city of New York, through Philadelphia and Baltimore, to the city of Washington, have by deed of trust, bearing even date herewith, conveyed the same exclusive right to W. W. Corcoran and B. B. French, in trust, for the use of the said proprietors and the subscribers to the stock of the Magnetic Telegraph Company, with the limitations, under the conditions and in the manner set forth in said deed and in these articles of association, whose names are hereunto affixed, do hereby constitute ourselves into a joint stock company to be called the 'Magnetic Telegraph Company,' for the purpose of constructing and carrying on a line of said telegraph from New York to Washington, as aforesaid, according to the following principles and regulations."

The following are a portion of the powers vested in the trustees by those articles, viz.: "Article 9. The trustees shall have the power, and it shall be their duty forthwith to appoint the necessary agents, and take steps to secure the right of way to construct a line of telegraph, consisting of one or two wires, from New York to Philadelphia, and from time to time to call in such instalments of the capital stock as may be requisite for that purpose. After the company shall provide a treasurer, all moneys collected for or belonging to the company, shall be paid to the treasurer for the time being, who shall pay out the same only upon the written order of a majority of the trustees. But until a treasurer shall be appointed, the trustees shall perform the duties of treasurer. Article 10. They shall prepare forms of certificates and regulate transfers of stock, and audit all accounts for expenditures made in the construction or management of the telegraph, and generally to superintend the financial interests of the company. Article 11. They shall prepare a tariff of charges and a system of regulations for the management of the telegraph, which they shall submit to a meeting of the stockholders, to be called in due time before the line from New York to Philadelphia shall be ready to go into operation."

The only mode by which a board of directors could be constituted, is described in the following article, viz: "Article 17. Regular meetings shall be held annually or semi-annually, as the company may hereafter decide. At any regularly called meeting of this company it shall be competent for the company, in the manner of deciding any

other proposition, to divest the trustees of all the powers herein vested, excepting the trust of the title of said letters patent, and the issuing of certificates of stock, and to transfer the same to and invest them in a board of directors, to consist of not less than five persons, to be thereafter elected at each annual meeting of the company, and to continue in office until new directors shall be elected; and thereafter such directors shall do and perform all the duties otherwise devolved upon the trustees as herein provided and generally superintend the administrative concerns of the company; and all officers and agents not herein specially provided and instructed, shall be subject to the direction of the directors."

It further appeared from an affidavit produced upon the call of the court after the argument had closed, that the complainants, on the 21st of December, 1846, before the filing of the bill, had formally conveyed to Eliphalet Case all their right of constructing and using the magnetic telegraph, with all its incidents, on the line embraced in Mr. O'Reilly's contract, and the assignment was recorded in the patent office two days after.

The complainants prayed for an injunction, upon the ground that the contract had become forfeited by a breach of its provisions, upon the part of the respondents, who had organized three several and distinct companies, appointed directors and other officers, and issued certificates of stock, without the consent and knowledge of the patentees, and without having first complied with the terms of the contract by having the property vested in trustees. It was also contended that O'Reilly had not, within the six months conditioned by the contract, provided funds for the extension of the line to Pittsburgh.

The respondents' affidavits did not deny the complainants' title, but asserted rights under it by force of the contract, which the respondents alleged they had substantially complied with.

Cadwallader, Miles & Williams, for the motion.

The respondents in this issue cannot question the title of the complainants, and the only ground, they have to stand on is the license they have obtained from the latter as patentees. See Baird v. Neilson, 8 Clark & F. 726. Such a license however does not protect them unless they are acting strictly under its terms. If they have failed to comply with any of its requisitions in point of time, which it is conceded on all sides they have, they cannot set it up in bar of this application. Withy v. Cottle, 1 Turn. & R. 78: Doloret v. Rothschild, 1 Sim. & S. 590; Coslake v. Till, 1 Russ. 376; Hagedon v. Laing, 1 Marsh. 514–518; M'Crelish v. Churchman, 4 Rawle, 26; Sparks v. Liverpool Water-Works, 13 Ves. 428; Benedict v. Lynch, 1 Johns. Ch. 374, 375; Payne v. Banner, 7 Jur. 1051. Time is particularly of the essence of this contract, seeing that the rights under it, by the provisions of the patent law are running out by time. A patentee has a peculiar right to call upon a court of equity for immediate relief when his patent right, during the limited period for which he is entitled to its exclusive benefit, has been invaded by a stranger. So far has this principle been carried that a court will grant an injunction, even though it may doubt the validity of the patent right. Boulton v. Bull, 3 Ves. 140; Harmer v. Plane, 14 Ves. 136; 6 Ves. 707; 3 P. Wms. 225, in note; Bonaparte v. Camden & A. R. Co. [Case No. 1,617].

Neither of the respondents, or any party claiming through them, can be here considered as an innocent purchaser without notice, since the legal title has throughout remained in the complainants. It was to be conveyed to the trustees under the article of agreement, until the completion of certain conditions. The title was never to be alienated from the trustees, and no stock could be created or certificate issued without them. The title being thus in the patentees, no right or title as purchasers could exist without notice to or inquiry of them. The governing principle is that a purchaser of an equitable interest must take notice of the outstanding legal interest, and of the equities arising from it. Shirey v. Kagg, 7 Cranch [11 U. S.] 48; Vatier v. Hime, 7 Pet. [32 U. S.] 271, 272; Boon v. Chilles, 10 Pet. [35 U. S.] 210–212.

If a party by his own act disables himself from performing his contract in the same manner and plight as that in which he has engaged to perform it, the other party may annul the contract within a reasonable time, after being fully apprised of what has been done, although the contract may have been partially executed. Litt. Ten. §§ 355, 358; Co. Litt. 228 a, b.; 10 Coke, 49b.; 3 Com. Dig. "Covenant," E. 2; 1 Sid. 48; Robinson v. Ant, Ld. Raym. 25; Rolle, Abr. "Condition." A, pl. 1; 5 Vin. Abr. 221, 224; Robson v. Drummond, 2 Barn. & Adol. 303; Smith v. Packhurst, 3 Atk. 141; Skilleen v. May, 4 Cranch [8 U. S.] 137; Ong v. Campbell, 6 Watts, 392; 1 Atk. 171.

Watts & Meredith, for respondents.

First. As to non-performance within the time specified. The complainants in order to avail themselves of this ground, must show a strict performance on their side of the agreement. The complainants themselves failed in establishing what was a condition precedent on their part, a point of connection at Lancaster. But, in effect, the condition on part of the respondents was substantially complied with by them within the proper period. Second. The organization of the Atlantic & Ohio Company is not in violation of the agreement between the parties. That agreement contemplates directly a general association, but it does not negative sectional associations. Such sectional associations were constantly instituted by complainants,

and had become part of the general management of the patent. But the erection of such a subordinate association is nothing more than must necessarily take place under any general company of the character of that under the respondents' control. There must always be book-keepers, clerks and collectors, and it makes no matter what name may be given them. Third. As to the gratuitous issue of stock. There could be no injury to complainants by such gratuitous issue. They are entitled to just the same profits and same interest and same proportion in the capital, whatsoever be the issue of stock to others. Fourth. As to excessive cost. Such expenditures do not injure the patentees. On the contrary, if it is bona fide, it is beneficial to the patentees in proportion to its amount. But, generally, if this contract has been forfeited the forfeiture has been waived by the parties and the subsequent procedure of the respondents under it, ratified by the complainants.

KANE, District Judge. This case came before me, and has been discussed, as a motion for a special injunction at the instance of the proprietors of a patent right. The defendants' affidavits do not controvert the complainants' title, but they assert rights under it by force of a contract. The complainants, on the other hand, do not deny the contract, but allege that it has become forfeited by a breach of its provisions. This is the state of the case, as it appears upon the record, and substantially as it has been argued by the counsel on both sides. Essentially, therefore, the application is for the aid of the summary process of the court to enforce a forfeiture. I am not aware that such an application has been sustained by a court of equity in any case; and though called on by me, the counsel for the complainants have not found one. I am warranted in assuming, therefore, that the uniform chancery practice has been against such an exercise of jurisdiction, and this is certainly not a case of which the merits are so obvious as to invite innovations in its favor.

To escape from this, it has been contended that the defendants have incapacitated themselves from performing their contract or compensating for their default. This, however, is only another, and, as it seems to me, a less forcible form of alleging that they have forfeited it. Whether the contract has been violated in its essential terms, or whether it has been made impossible of execution; equity will relieve, if it can do so without prejudice; but it never enforces anything in the nature of a forfeiture, whether stipulated in the contract or implied from circumstances. Of course I do not refer to conditions precedent. It is a mistake of terms to speak of such conditions as affecting at this time the rights of these parties. Such conditions are at an end, when the right has become vested. They precede the operations of the grant; and the very reason why equity never relieves against them, is that it can only control the exercise of rights, and cannot confer them. The rights of Mr. O'Reilly vested to a certain extent on the execution of the written agreement of the 13th June, 1845; and they were absolutely fixed when he had "procured a fund sufficient to build a line of one wire from connecting point," with the seaboard line "to Harrisburg." From that time the condition precedent had performed its office, and his rights could be divested only by a forfeiture.

It did not vary the effect of his agreement, that the subject matter of it regarded a patent right. The exclusive rights of a patentee are specially guarded from intrusion; but the contracts which he makes to share them with third persons are interpreted and enforced just as other legal engagements. Nor is anything gained to the complainants, by assimilating the case to one of waste. An injunction is not granted against waste, where the title of the complainant is denied by the answer; and it is refused before answer unless the defendant has had notice of the motion, so as to enable him to make the denial by affidavits. 19 Ves. 147; 17 Ves. 110. In the case before me, the defendants assert that they are in possession under title, and the very issue is whether they are so or not.

I have thus considered the arguments of the counsel, as if the case were really between the proprietors of a patent right on the one side and the defendants on the other. But it is not so. The exhibit referred to in Mr. Kendall's affidavit which was produced upon the call of the court after the argument had closed, shows that the complainants have not, and had not at the time of filing their bill, any title to that character, so far as regards the subject of contest here. On the 21st of December, 1846, they formally conveyed to Eliphalet Case all their right of construction and using the magnetic telegraph, with all its incidents on the lines embraced in Mr. O'Reilly's contract and the assignment was recorded in the patent office two days after. The bill was filed on the 5th day of January, 1847. I need hardly say that this fact destroys the basis of the complainants' case. An injunction cannot be awarded at the instance of a stranger, and a patentee, who has assigned away his interest is nothing more.

For these reasons, the motion is refused. I may add, as the request has been made that I should express an opinion upon the merits of the controversy, that I have seen nothing in the facts that have been developed to call for a different conclusion from that to which abstract principles have directed me. Injunction refused.

See Goesele v. Bimeler [Case No. 5,503]; Burr v. Duryea [Id. 2,190]; Perry v. Parker [Id. 11,010].

Case No. 9,859.

MORSE et al. v. O'REILLY et al.

[6 West. Law. J. 102.]

Circuit Court, D. Kentucky. Sept., 1848.[1]

PATENTS—VALIDITY AND INFRINGEMENT—INJUNCTION.

[1. The Morse telegraphic patents, both original and reissued, construed, and *held* valid, as covering the result as well as the process, and an injunction granted against defendant as an infringer.]

[2. Where complainants have shown a possession acquiesced in for a long time by the public at large, and for some time by the defendant himself, they are entitled to an injunction, and under such circumstances it is not proper to permit defendants to continue the use of the infringing machine upon giving bond and security to account for the profits.]

This was an action by Morse and others against O'Reilly and others for infringement of the Morse patents for an electric telegraph. On motion for an absolute injunction.

The motion was made upon the bill of Morse, &c., exhibited, accompanied by copies of his patents, original and reissued, and sundry affidavits, as well to show the period of the invention as the infringement of his patent right by the defendants. Notice being given of the motion, the defendant, O'Reilly, appeared by his counsel, Hon. Henry Pirtle, Wm. Y. Gholson, Esq., of Cincinnati, and M. C. Johnson, Esq., attorney general of Kentucky, and produced his answer to the bill of complainants, accompanied by an additional affidavit, incorporating sundry documents, extracts from scientific periodicals, newspapers, and affidavits; all of which were read and considered without objection as to their competency. The motion was made on the 24th August, and a decision thereon given on the 9th September. The complainants were represented by P. S. Loughborough, Esq., district attorney, Hon. A. K. Woolley, and Hon. Ben. Monroe. The reading of the pleadings, and exhibits, and affidavits, &c., occupied seven days, and the discussion eight days. The utmost range of objection was taken by the defendants' counsel. It was contended that Morse was not the inventor of the telegraph; that Professor Steinheil, of Munich, in Germany, had, prior to Morse's application for a patent, invented and put in operation an electric telegraph; that the combined circuits which appear in Morse's first patent were not invented by him; that Edward Davy, of London, had obtained a patent in England for an electric telegraph, operating by combined circuits, and that Morse had obtained the idea from Davy, and on his return from Europe in 1839 had interpolated the principle of the combined circuit in his specification made under his application filed in the patent office in 1838, before he went to Europe, and upon which altered specification his first patent issued in June, 1840. Various objections were taken to the validity of Morse's first patent, and to reissues thereof in 1846 and 1848, as well as to his patent for an improvement upon his original invention issued in April, 1846, and the reissue thereof in June, 1848.

Among the objections urged to the main patent were—1. The alleged alteration of the specification. 2. The effect of Morse's having obtained a patent in France for the same invention in August, 1838. 3. That his specification claimed a monopoly of the use of the galvanic current for recording at a distance by machinery, other than specified in his patent. 4. That Morse claimed as part of his patented rights a system of signs for an alphabet, not properly the subject-matter of a patent.

In regard to the patent for the improvements, it was, among other things, objected, 1. That they covered a part of the subjects included in the first patents, being, in that view, an attempt to extend the period of the monopoly. 2. That the new patents did not sufficiently distinguish what was the improvement from what was embraced in the main patent. 3. That no patent could issue to a patentee for an improvement upon his own invention. 4. That some part of the improvement had been in public use, prior to the application for a patent, with the consent of the patentee. Many other objections were urged by defendants' counsel.

In reference to the infringement, it was contended by the defendants that the Columbian Telegraph used by them, said to have been the invention of Barnes & Zook, was a distinct, independent invention, and its use no violation of Morse's patented rights. On the part of the complainants it was insisted that the evidence showed that Morse invented the telegraph as early as 1832, and perfected and exhibited it in January, 1836; that he invented and put in operation early in 1837 the combined circuit; that Steinheil's telegraph invention was not published until September, 1838; and that there was no evidence that it was invented prior to that of Morse, and, whenever invented, it is not the telegraph which was patented to Morse; that, as to the combined circuit, embraced in the patent of Davy, under which his specifications were enrolled on the 4th of January, 1839, they were embraced in Morse's patent from the French government, granted in August, 1838, from which Davy might have obtained the idea. As to the validity of the patents, it was insisted that none of the objections taken by the defendants were available. And as to the infringement, it was contended by complainants that the machine used by the defendants was a violation both of the principle and process embraced in Morse's patent. The apparatus of Morse and that claimed as the invention of Barnes & Zook, called the "Columbian Telegraph," were exhibited before the judge, and fully examined, and the affidavits of scientific men read.

[1] [Affirmed in 15 How. (56 U. S.) 62.]

Explanations were also made by Mr. Barnes and Professor Morse.

Before MONROE, District Judge.

The judge occupied several hours in delivering his opinion, in which he stated the different points made by counsel, as well on behalf of the claim to an injunction as the objections of the defendants' counsel. As to the invention, he decided that the evidence was satisfactory to his mind that Morse was the true and original inventor of the telegraph; that the only evidence in regard to Steinheil's invention, (without considering whether it was the same as Morse's or not,) was a publication upon his authority, in September, 1838, in which he stated that he had built his line of telegraph from Munich to Bourgehausen, a distance of six miles, which had been in operation without repairs for more than one year. In regard to the principle of the combined circuit, he was also satisfied that it was invented by him early in 1837; Davy's specification of his invention not being enrolled earlier than January, 1839, after the issue of Morse's French patent, in which the principle was disclosed. As to the alleged alteration in the specification in Morse's first patent, though alleged by defendant in his answer, the evidence failed to establish it; and any question as to the effect of such alteration did not therefore arise, and, if proved, he was not prepared to say that it would vitiate the patent. As to the supposed effect of the patent issued in France upon the patent subsequently issued in this country, none could be perceived, unless the position contended for by defendants' counsel that the application for the patent in this country was altered, and that it should take the date of the alleged alterations, or of the request of Morse to issue the patent on his return from Europe, could be sustained. But if these positions could be sustained, the question would then arise, what would be the effect upon the patent issued for fourteen years, and whether its effect would not be only to limit the operation of the patent to the period of fourteen years from the date of the French patent. As to the general claim in the main patent of Morse, he did not consider the objections of the defendants well grounded; and even if it were too broad, it did not seem to him that the effect upon the validity of the patent would be such as the counsel for defendants contended. Other objections taken by defendants' counsel to the validity of the patents were noticed, and each overruled.

Upon the question of infringement, the judge expressed himself as fully satisfied that the instrument exhibited by the defendants, in its structure and mode of operation, violated the principle of Morse's patent, and the process and means described by Morse in his specifications, and, if the general claim of Morse was invalid, still he was of opinion that infringement was made out. As to the alleged prior use of some things in Morse's second series of patents, he did not find in the evidence any thing to warrant the conclusion that it had been of such character as to affect the validity of the patents. As to the propriety of granting the injunction, it seemed to him upon the whole case that the complainants had shown such ground as required that it should be awarded: first, because they had shown a possession acquiesced in for a long time by the public at large, and for some time recognised and acquiesced in by the defendant, O'Reilly, himself; and that it would be as unjust to refuse an injunction on a case clearly showing a right, as it would be to grant it in a case where no right was shown. The judge said that in some cases he had given to the defendants leave to continue the use of the machine, which was alleged to be used in violation of a patented right of a complainant, upon giving bond and security to account for the profit of the use; but that in this cause he did not deem it proper to do so, and that an absolute injunction would be awarded upon complainants' giving bond and security in the penalty of $5,000, with condition to indemnify defendants against any injury that might accrue to them in case complainant should fail to have the injunction perpetuated.

Injunction absolute awarded.

Remarks on the above case, from the National Intelligencer:

In another portion of this paper will be found an abstract of the decision recently made by the United States district judge in Kentucky, in the case of Morse against O'Reilly for an alleged violation of Morse's patents. More clearly to illustrate the scope of this decision, we have been furnished with the following additional information, viz.:

Morse's first patent, after describing the machinery by which he arrives at his result, concludes as follows, viz.: "I do not propose to limit myself to the specific machinery, or parts of machinery, described in the foregoing specification and claims, the essence of my invention being the use of the motive power of the electric or galvanic current, which I call 'electro-magnetism,' however developed, for making or printing intelligible characters, signs, or letters, at any distances, being a new application of that power of which I claim to be the first inventor or discoverer."

On behalf of Prof. Morse it was maintained that there are two distinct, general classes of patents—

1. Where an inventor has accomplished a result entirely new by any means whatsoever, his patent may secure to him that result, as well as his means of arriving at it. The result in such cases is, in truth, the invention; and if another person can step in and by other means arrive at the same result, he may deprive the inventor of the entire benefit of his study and labor. This is more likely

to happen from the notorious fact, that the best system to accomplish a given result is seldom devised at once; and if the result could not be secured by patent, the original inventor would in almost every case be deprived of the benefit from his invention by those who have no other merit but that of devising some improvement in his machinery.

2. The second general class of patents is for new modes of arriving at the old results, in which the result forms no part of the invention. In such cases, patents are for machinery only, or for other processes for arriving at results already well known; and whoever invents a new and improved process may take out a patent for it, and supersede all prior patents for machinery or processes conducive to the same result.

Morse's patents embrace both the result and the process, both being entirely new; and although other persons may invent and patent improved processes or machinery, they cannot use them during the existence of Morse's patent, to produce the same result by the same power, without license from Professor Morse or his assigns. On the other hand, it was maintained that results are not patentable directly or indirectly; that all the patents, to be valid, must be for processes or machinery only. Very numerous authorities, both American and British, were adduced on both sides to sustain their respective positions. The injunction is upon the express ground that Morse's patent covers the result as well as the process, and is nevertheless valid.

[NOTE. The case was taken, on appeal, to the supreme court, where the decree of the circuit court was affirmed, except so much as decreed that the complainants recover costs from the defendants. Accordingly, it was ordered that each party pay his own costs, both in the supreme and circuit courts. Justices Wayne, Nelson, and Grier dissented to the judgment of the court on the question of costs. 15 How. (56 U. S.) 62.]

MORSE (O'REILLY v.). See Case No. 10,564.

Case No. 9,860.

MORSE v. REED.

Circuit Court, D. New York. 1796.

PATENTS FOR INVENTIONS—INFRINGEMENT—PENALTY AND FORFEITURE—INJUNCTION.

[In a suit to recover the forfeiture and pecuniary penalty imposed by Act Feb. 21, 1793, § 5 (1 Stat. 322), for infringement of patent, the circuit court will also grant a perpetual injunction.]

[Cited in Livingston v. Van Ingen, 9 Johns. 537; Motte v. Bennett, Case No. 9,884; and, sub nom. Morse v. Reed, in Binns v. Woodruff, Id. 1,424.]

[Before Ellsworth, Circuit Justice.

[Nowhere reported; opinion not now accessible.]

MORSE (TILGHMAN v.). See Case No. 14,044.

MORSE (UNITED STATES v.). See Case No. 15,820.

Case No. 9,861.

MORSE & BAIN TEL. CASE.

[9 West. Law J. 106.]

Circuit Court, E. D. Pennsylvania. 1851.

PATENTS—REISSUES—ENLARGEMENT OF CLAIMS—INVENTION—INFRINGEMENT—THE MORSE TELEGRAPHIC PATENTS.

[1. As the act of 1836 (5 Stat. 117), authorizes the amendment and reissue of a patent with the "same effect and operation in law" as if the specifications had been filed at first in the form taken in the reissue, there is no reason why a second reissue may not be granted.]

[2. While the claims of a reissue cannot embrace a different subject-matter from that sought to be patented originally, yet it is competent for the patent office to grant a reissue with claims broader than in the original.]

[3. The Morse patent of 1840, relating to the electric telegraph, in all its changes, asserts his title to two distinct patentable subjects, the first founded on the discovery of a new art, the second on the invention of means for practicing it.]

[4. The Morse electrical telegraphic patents,—the first as reissued on June 13, 1848, for a magnetic telegraph; the second, as also reissued June 13, 1848, and known as the "local circuit patent"; and the third, dated May 1, 1849, known as the "chemical patent,"—*held* valid, and infringed.]

In equity.

KANE, District Judge. This case is before us on final hearing upon the pleading and proofs. Professor Morse, under whom the complainants hold, has three patents: The first dated 20th June, 1840 [No. 1,647], reissued on the 25th January, 1846 [No. 79], and again reissued on the 13th June, 1848 [No. 117]. It is called the "Magnetic Telegraph Patent." The second, dated 11th April, 1846 [No. 4,453], re-issued on the 13th June, 1848 [No. 118], referred to as the "Local Circuit Patent." The third, dated 1st May, 1849 [No. 6,420], referred to as the "Chemical Patent." The bill charges that the respondents have infringed all three of these patents; the answer denies the infringements, and controverts the validity of the patents.

The objections to the validity of the first patent, are stated in the defendants' brief, as follows: "(1) That it does not run from the date of Morse's French patent. (2) That the commissioner had no authority in law to re-issue a second time. (3) That the claims set out in the first re-issue are broader than the claims in the original patent; and the claims in the second re-issue broader than those of either of the former; and are not for the same invention."

1. The first of these objections founds itself upon the fact that Mr. Morse had obtained a patent in France for this same invention twenty-two months before his patent issued

here; and it asserts, that under the 2d proviso of the 6th section of the act of 1839 [5 Stat. 353], his American patent should in consequence have been limited to the term of fourteen years from the date of the French patent; and that being otherwise it is void. Mr. Morse's application for a patent in this country was made in April, 1838, and was filed and acted on in the patent office before the 10th of that month. His French patent bears date the 18th of August following. There is therefore no room for questions, which were argued so elaborately, of the proper interpretation of this proviso in the 6th section of the act of 1839, and the 8th section, 2d clause, of the act of 1836, which was also invoked, in any possible bearing upon the case of Mr. Morse.

2. The second objection to the patent is that the act of congress makes no provision for a second surrender and re-issue. The 13th section of the act of 1836, which provides in certain cases for the surrender of a defective patent, and its re-issue in an amended form, regards the new patent as substituted for the old one, with just the "same effect and operations in law" as if the specification had been filed at first in the form which it takes in the re-issue. It is difficult to see why, if the original patent could be amended, its substitute, having all the legal attributes of the original, cannot be amended also.

3. We pass to the third objection, the supposed variance in the re-issue. It is not the meaning of the law that the patentee who applies for a re-issue must at his peril describe and claim in his new specification, either in words or idea, just what was described and claimed in his old one. His new specification must be of the same invention, and his claim can not embrace a different subject-matter from that which he sought to patent originally. But, unless we narrow down the connection which the statute contemplates till it becomes a mere disclaimer, it is not possible in any case to frame a corrected specification which shall not be broader than the one originally filed. To supply a defect, to repair an insufficiency, is to add—either directly or by modifying or striking out a limitation—in either form the effect is to amplify the proposition; in the case of a specification under the patent laws it is to amplify the description and enlarge the claim.

After a repeated and careful examination of the three specifications, with their respective claims, fully aided by the acumen of highly ingenious counsel, the court has not found any material difference of import between them. Mr. Morse's patent of 1840, in all its changes, asserts his title to two distinct patentable subjects,—the first, founded on the discovery of a new art; the second, on the invention of the means of practicing it.

1. That he was the first to devise and practice the art of recording language at telegraphic distances by the dynamic force of the electro-magnet, or, indeed by any agency whatever, is, to our minds, plain upon all the evidence. Mr. Morse's patent of 1846, as re-issued in 1848, claims the local or independent circuit in these words: "The employment in a certain telegraphic circuit, of a device or contrivance called the 'receiving magnet,' in combination with a short local independent circuit or circuits, each having a register and registering magnet, or other magnetic contrivances for registering, and sustaining such a relation to the registering magnet or other contrivances for registering, and to the length of circuit of telegraphic line as will enable me to obtain, with the aid of a main galvanic battery and circuit, and the intervention of a local battery and circuit, such motion or power for registering as could not be obtained otherwise without the use of a much larger galvanic battery, if at all."

It is beyond controversy that the local circuit patent has been infringed upon at some of the stations of the respondents' line; and it is the opinion of the court that it is also violated whenever the branch circuit of Mr. Rogers is employed. We have not been able to see the asserted difference in principle between the two devices. Both are equally well described as branch or as local circuits. They have the same purpose; they effect it by the same instrumentality, even in appearance to great degree; and they seem to vary only in this: that the one derives its electric fluid from a battery placed within a line of the main circuit; the other from a battery placed without it. The change may be for the better; or it may not; if it be, it is patentable as an improvement; but it can not be used without Mr. Morse's license, until after his patent has expired.

The third patent is for the chemical telegraph. The subject of it is clearly within the original patent of Mr. Morse, if we have correctly apprehended the legal interpretation and effect of that instrument. We will only say that we do not hold it to have been invalidated by the decision of the learned chief justice of the District of Columbia on the question of interference. The forms of the two machines before were not the same; and the leading principle of both having been already appropriated and secured by the magnetic telegraph patent of 1840, nothing remained but form to be the subject of interference.

[See Cases Nos. 9,858, 9,859, 13,036, 13,034, 13,104, 5,103, 2,909, and 13,027; 15 How. (56 U. S.) 62, 109, 137; 21 How. (62 U. S.) 456, 460.]

Case No. 9,862.

MORSE FOUNTAIN PEN CO. v. ESTERBROOK STEEL PEN MANUF'G CO.

[3 Fish. Pat. Cas. 515.] [1]

Circuit Court, D. New Jersey. March, 1869.

INJUNCTION — PRELIMINARY — ADMISSION BY DEFENDANT—PATENTS—INFRINGEMENT—ESTOPPEL.

1. A verbal admission of infringement, and a promise to desist, is a strong circumstance against the defendant upon a motion for a preliminary injunction.

2. In the case of simple mechanism, a bare inspection is sufficient upon the question of infringement presented upon a motion for preliminary injunction.

3. The grant of a subsequent patent serves merely to indicate the opinion which highly respectable officers had formed on an ex parte examination of the subject. If the infringement be clear, an injunction should be granted, notwithstanding such patent.

4. Where defendants were making a pen which was afterward patented, and which, in their answer, they declared to be a new and useful improvement in the art of making pens known or existing at and prior to the invention thereof by the patentee, and where the complainant's pen and the defendants' pen were substantially the same: *Held*, that the defendants were estopped by their answer from averring by affidavits that pens substantially the same as their own or the complainants', had been made before the invention of either.

In equity. This was a motion for a provisional injunction to restrain the defendants from infringing letters patent [No. 73,255] for an "improvement in pens," granted to William A. Morse, January 14, 1868, and assigned to complainants. The invention consists in making the pen in two parts, consisting of a shank to fit the pen-holder, with a projecting tongue which unites it with the other portion of the pen containing the point. The union is formed by passing the tongue of the first part through a loop in the second, and then curving the end so as to form a chamber for the retention of a supply of ink. The claim of the patent was as follows: "I claim a fountain union pen made of two parts, A C and F, the same being adjustable and connected substantially as described and shown for the purpose specified."

J. B. Dayton and Henry Baldwin, Jr., for complainants.

Jonathan Marshall and George Harding, for defendants.

FIELD, District Judge. This is an application for a preliminary injunction to restrain the infringement of a patent for an improved fountain pen. The bill is in the usual form, setting forth the issuing of the patent, use and exclusive possession; and the infringement. It is sworn to by William A. Morse and Semmy Rosenthal, who compose the Morse Fountain Pen Company. Morse being the original patentee, and Rosenthal having acquired an interest in the patent to the extent of one-half, by assignment. Two affidavits have also been produced and read on the part of the complainants, in support of the application. One is by William A. Morse, the patentee. He states, among other things, that when he applied for his patent, he was familiar with the various kinds of steel pens in the market, and that there was not to his knowledge any such thing as a fountain pen amongst them. That when he put his pen into the market, he found the usual difficulty in introducing a novelty, but had gradually overcome it, and that now the demand for his pens was large and steadily increasing, and they had become a regularly recognized article in the stationers' trade. That in July, 1868, he first encountered a pen which he plainly saw to be a mere imitation of his patented pen; that upon inquiry he learned that it came from the Esterbrook Factory, at Camden, New Jersey. That he promptly wrote to them that the pen they were manufacturing was an infringement upon his patent, and unless they desisted from making it he would commence suit against them; that thereupon Mr. Richard Esterbrook, Sen., came over to Philadelphia to see him, and after examining his letters patent said it was plain to him that the pens they were making were an infringement of that patent, and that they would make no more of them unless Mr. Goodspeed, for whom they made them, would obtain a license from him, and that they would write to Mr. Goodspeed to that effect; that after this interview the defendants ceased making these pens; that it was not until November, 1868, that deponent became aware they had resumed the manufacture of them; that he again wrote to them to the same effect that he had done in July, and that the only answer he received was one stating that they were manufacturing those pens for Mr. Goodspeed, of New York, and that he had indemnified them, and that the question of infringement, therefore, was one with which they had nothing whatever to do. The other affidavit is by John Turner. He says he is one of the firm of Warrington & Co., steel pen manufacturers, Philadelphia; that he has been a pen-maker in England and in this country for about thirty years; that he has examined the letters patent granted to William A. Morse, January 14, 1868, for an improvement in pens, and believes he understands the invention therein described and specified; that he has also examined the two pens annexed to his affidavit and marked "Goodspeed's Fountain, No. 1 Patent," and "Goodspeed's Fountain, No. 2 Patent," and is of opinion that these two pens embody the improvement described and specified in Morse's said patent, each of them being a fountain pen, consisting of two parts, one of which parts is an ordinary pen, provided with slots or perforations, and raised edges to such slots so as to hold and retain the other part, which other part serves to retain the ink, or acts as a fountain, and is adjusta-

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

ble in the slots, all substantially as described in said letters patent; that his firm was at one time employed in manufacturing Goodspeed's pens, but being notified that such pens were an infringement of Morse's patent, and that they were liable to prosecution therefor, they examined the matter, and being satisfied that such pens did infringe Morse's patent, they advised Mr. Goodspeed, that they could not make any more of them, and discontinued making them accordingly.

Thus a very clear and strong case for an injunction has been made by the complainants. Has this been overcome by the affidavits which have been produced upon the part of the defendants? It has first been attempted to neutralize the effect of the affidavits of Morse and Turner, to which I have referred. For this purpose an affidavit of Richard Esterbrook, Senior, has been offered. He does not deny any of the statements made by Morse, in his affidavit, but says, when he expressed the opinion that the pen the defendants were making for Goodspeed, was an infringement of the Morse patent, he was under the impression that the complainants had a patent for the pen which was exhibited to him by Morse, and marked "Morse Fountain Pen Co., Patented January 14, 1868," but he has since "learned that the complainants have no patent for such pen." How or when he learned this fact he does not say; nor does he explain how or in what respect the pen so exhibited to him, differs from the pen patented by Morse. He also states, that at the time when this conversation with Morse took place, the pen, which he was manufacturing for Goodspeed, and to which reference was made, was marked "Goodspeed's Golden Pen, No. 1," and was like the one attached to his affidavit. Now does he mean to say that the pen which he is now making for Goodspeed, differs materially from the one he was then making, and that although the former was an infringement of the complainants' patent, the latter is not? He does not say so expressly, but this would seem to be a fair inference from his language. Unless he means this, I do not see the force or bearing of this part of his affidavit. But if this be his meaning, where is the evidence that the pens he was then making for Goodspeed, differ in any essential respect from those he is now making. And if this is what he means to say now, why was no reference to this fact made in his letter to the complainants of the 12th of February, 1869. It would have been so easy and so natural for him to have said, "the pens I am now making for Goodspeed are not the same as those I formerly made, and I do not consider them an infringement of your patent." But instead of saying this, or anything like it, he puts himself entirely upon the ground that as the defendants were manufacturing for Goodspeed, and were indemnified by him, they had no interest in the question of infringement.

The fact then sworn to by Morse stands uncontradicted, that Esterbrook, in July last, after examining Morse's letters patent, did admit that the pens that the defendants were then manufacturing for Goodspeed, were an infringement of that patent, and that he promised to desist from making them. And the attempt he now makes to break the force of this admission is certainly not a very successful one. When he made this admission, he was manufacturing pens for Goodspeed, and his interest would have made him desire to reach a different conclusion. At that time he could have had no doubt whatever upon the subject. His attention was particularly called to the matter; he examined the letters patent of Morse, and said it was clear the pens he was making were an infringement of that patent. Had his opinion undergone any change as late as the 12th of February, when he wrote the letter annexed to Morse's affidavit, and after he had resumed the manufacture of pens for Goodspeed? Certainly, if it had, he would have said so. The only reason he assigned for making these pens, after he had promised he would discontinue to do so, was that Goodspeed had indemnified him. It is but fair to presume he had no other.

Then we have another affidavit of John Turner, the same witness whose affidavit of February 24, 1869, was produced by the complainant. His first affidavit, as we have seen, was very full and explicit. He not only expresses a decided opinion that Goodspeed's pens are an infringement of the Morse patent, but he assigns such reasons for that opinion, that it is manifest he perfectly understood the nature and extent of Morse's patent, and the invention therein described, and that Goodspeed's pens did embody the same improvement therein specified. Now, he says that the pen referred to in his former affidavit, and which he concluded infringed Morse's patent, was a pen similar to the one attached to his second affidavit, and marked Goodspeed's pen. The same remark that was made as to Esterbrook's affidavit applies to this. If it means anything to the purpose, it means that the pens which the defendants are now making for Goodspeed, are essentially different from those which the firm of Warrington & Co., of which Turner was a member, were making at the time referred to in his affidavit. But there is no evidence to show that this is the case. At all events, he has not attempted to explain wherein that difference consists. There is, I think, therefore, in this affidavit nothing to weaken the force of the clear and positive statement made by him in his former one.

A number of other affidavits have been read on the part of the defendants; it is not necessary to go into a detailed examination of them. One of them is by Goodspeed, who although not nominally a party to this suit, yet is virtually the defendant. The others are by men who represent themselves to be

penmakers, and who certainly express the opinion that the pens which the defendants are manufacturing for Goodspeed, are no infringement of Morse's patent. Edward Smith, for instance, says, that he has read a certified copy of the letters-patent granted to Morse; that he has also examined the pen marked "Goodspeed's Fountain, No. 1 Patent," and is of opinion that this pen does not embody the improvements described and specified in said letters-patent. And yet this witness is one of the firm of Warrington & Co., who were at one time employed in making pens for Goodspeed, but who, as Turner states, upon being satisfied that these pens were an infringement of Morse's patent, advised Mr. Goodspeed that they could not make any more of them. But the answer to all these affidavits is, that we have the pens before us, and can examine and compare them. And, although no doubt there are cases where such a comparison would involve more than the usual amount of mechanical knowledge, and might not therefore be satisfactory, yet it appears to me that in a matter so simple as this, a bare inspection of the pens patented by the complainants, and made by them, and the pens manufactured by the defendants, must be sufficient to satisfy any one that they are substantially the same pens. They may vary in form. The pen made by the defendants may in some respects be a better pen than that made by the complainants, but it embodies the same improvement as that described and specified in Morse's patent. What is this improvement? It is a fountain pen, which will hold a larger quantity of ink than pens formerly in use. It consists of two parts, one of which is an ordinary pen, provided with slots or perforations, and raised edges to such slots so as to hold the other part, which other part serves to retain the ink and acts as a fountain, and is adjustable in the slots. The invention, as described in the specifications, is not confined to this particular form of connecting the two parts, but it consists of a fountain union pen, made in two parts, the same being adjustable, and connected substantially as therein specified. Now where is the difference between the pen patented by the complainants, and described in the specification, and that made by the defendants? I can see none. Whether the fountain part or reservoir attachment is applied to the inside of the pen or to the back of it, can make no essential difference; for, as we have seen, the invention is not confined to any particular form of connecting the two parts. The variations between them are in form only, and not in substance. The improvement embodied in both is the same.

But it is said that Goodspeed has applied for a patent for his pen, and we have the affidavit of Mr. Frazer, who states that he has been employed by Goodspeed to obtain letters patent for his improvement on fountain pens; that the application was filed in the patent office on the 10th of June, 1868; that it was partially allowed on the 24th of that month; that it has since been pending in appeal until the 25th of February, when the patent was fully allowed, and went to issue; and that he is informed by the proper official clerk of the patent office, that the said patent will issue and bear date on the 9th day of March, instant. But suppose the patent had already been issued to Goodspeed; as said by Judge Kane, in case of Wilson v. Barnum [Case No. 17,787], the grant of a subsequent patent serves merely to indicate the opinion which highly respectable officers had formed on an ex parte examination of the subject, but was not conclusive, or even prima facie evidence. In that case, the judge being well satisfied of the fact of infringement, granted an interlocutory injunction, although a majority of the experts examined thought there was no infringement.

Let an injunction issue until the further order of the court.

A motion to dissolve the injunction was subsequently argued, which was denied in July, 1869. The opinion of the court was in substance as follows:

FIELD, District Judge. In the case of Morse Pen Co. v. Esterbrook Steel Pen Manufacturing Co., the motion to dissolve the injunction is denied. I have decided the case upon this point. In granting the injunction, I hold, that the pen patented by Morse was substantially the same pen with that which the defendants were manufacturing for Goodspeed. I may have been mistaken in that opinion, but I still adhere to it. If that opinion be correct, of course the motion to dissolve must be denied. For the answer of the defendants avers that Goodspeed has obtained a patent for the pens which the defendants were manufacturing for him, and that such pens were a new and useful improvement in the art of making pens, known or existing at and prior to the invention thereof by Goodspeed. If this be so, then the Goodspeed pen is a substantially different pen from that referred to in the affidavits read upon the part of the defendants. If the pen then patented by Morse be substantially the same pen as that which the defendants were making for Goodspeed, and for which he has obtained a patent, the defendants are precluded from averring that it is the pen referred to in the affidavits.

MORTE (ALICE v.). See Case No. 198.

MORTE (SAWYER v.). See Case No. 12,401.

MORTEE (POWERS v.). See Case No. 11,362.

Case No. 9,863.

MORTIMER v. ROSSTEUSCHER.

[This was a decision by one of the courts of Dakota Territory. See 1 West. Jur. 359.]

MORTIMER (UNITED STATES v.). See Case No. 15,821.

Case No. 9,864.

The MORTON.

[1 Brown's Adm. (1876) 137.] [1]

Circuit Court, E. D. Michigan.

COLLISION—DUTY OF TUGS IN THE ARRANGEMENT AND MANAGEMENT OF TOWS—PLEADINGS—AMENDMENTS.

1. A tug is bound to the exercise of ordinary care in taking up, arranging and managing the tow.

2. Having full control of the vessels towed, she must direct as to the length of their lines, the order in which they shall be towed, and prudence requires that the heavier draft vessels should be placed behind those of lighter draft.

[Cited in Orhanovich v. The America, 4 Fed. 340.]

3. The tug is bound to know the channel, and to keep the tow in the deepest water.

4. If the ordinary lights or landmarks are obscured, the tug should provide for the emergency by slowing or stopping the engine, and sounding the channel.

[Cited in The Armstrong, Case No. 540.]

5. The vessel towed is bound to prevent a collision, if she can, or to make the damages as light as possible.

6. The allegations and proofs must coincide; and the court cannot consider evidence not in accordance with the issues made by the parties.

7. The court will allow amendments upon terms even on the hearing of an appeal.

Libel for collision. On the 30th of June, 1863, the tug Morton, Kimball master, was coming down St. Clair river, having in tow the four following vessels in their order: Superior, drawing 11 ft. 4 in., Chase master; Vanguard, 10 ft. 4 in., Davis master; Yankee and Bermuda. At sundown, they passed Jerry's Ranch and the range lights on the flats just after they were lighted. Before passing the lights, the Superior and Vanguard, which were carrying part of their sails, took all the sails in. The depth of water on the flats at the time and during the season was 12 ft. 6 in. or more, and vessels of that draft constantly went through in safety. The deepest water was to the westward of the range. The tug, before reaching the end of the dredged channel, got too far to the eastward and stranded the Superior. The master of the Superior sang out to the Vanguard an order to starboard and then to port. The latter order was immediately obeyed by the Vanguard. The tow line from the Superior to the Vanguard was about thirty fathoms long or the usual length. The Vanguard swung slowly, and struck the starboard quarter of the Superior with the bluff of her port bow, and drove her over the shallow place into deep water, and caused the injury complained of. The tug gave the vessel no warning and did not sound the channel or slow, stop or back her engine. The captain, mate and wheelsman were attending to the navigation of the tug. She had no lookout stationed forward. On the trial in the district court, the libel was dismissed, and the case appealed.

J. S. Newberry, for appellant.
W. A. Moore, for appellee.

SWAYNE, Circuit Justice (orally). In this case it is alleged on the part of the libellants: That there is no issue tendered by the pleadings as to any fault committed by the Vanguard, and no fault charged upon the Superior as to her conduct; that the proofs taken in regard to an issue not tendered by the pleadings are inadmissible, and should not be considered by the court.

The rule is well settled, that the allegations and proofs must coincide, and that the court cannot look outside of the pleadings to consider evidence not in accordance with the issues made by the parties. 2 Conk. Adm. 245–250; McKinley v. Morrish, 21 How. [62 U. S.] 343; The Rhode Island [Case No. 11,745]; Soule v. Rodocanachi [Id. 13,178]; The Boston [Id. 1,673]; The Sarah Ann [Id. 12,342]. It is equally well settled, that in order that substantial justice may be done, the court will allow amendments to be made, even at the hearing of an appeal, taking care that no injury be done to either party. And in case injury should be likely to ensue from allowing amendments, the case would be continued, to allow the party to take such evidence as he might deem material on the new issue. Id.; The Boston [supra].

In the view I shall take of this case, however, it will not be necessary to continue the case, but I shall consider the evidence precisely as if the amendments that the party might make were already made. In regard to the responsibility of tugs, when taking other vessels in tow, we hold that they are bound to use ordinary care and diligence in taking up, arranging and managing the tow, according to the exigencies of the business. That while engaged in such business, tugs, as well as passenger steamboats, are bound to have a competent lookout properly stationed and vigilantly employed. That in this case it is not certain that the collision was occasioned by the absence of such lookout. That the tug has the full government and care of the vessels towed; she must direct as to length of lines; the order in which they shall be towed; that good management and common prudence require that the heaviest draft vessel should be placed aft of those of lighter draft; and had that precaution been observed in the present case, the present collision would not have taken place. That ordinary care on the part of the tug requires them to know the channels through which they undertake to tow vessels, and where it appears there was a good draft of water, the tug is bound to keep in it. In this case there

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

was 12 ft. 5 in., while the Superior was drawing only 11 ft. 6 in. Vessels drawing 12 ft. 4 in. went through that channel in safety the same day. It is clear that the tug got too far to the eastward, and thereby stranded the Superior, and was in fault therefor. Again, if for any reason the ordinary ranges, lights or landmarks are obscured, it is clearly the duty of the tug to take such other precautions as may be necessary, either by slowing, stopping or backing the engine, or sounding the channel. She has no right to dash blindly ahead, and rush into dangers she neither knows nor can avoid. The Rose, 2 W. Rob. Adm. 3; The Birkenhead, 3 W. Rob. Adm. 76, 81; The Perth, 3 Hagg. Adm. 414; Chamberlain v. Ward, 21 How. [62 U. S.] 548.

Upon these considerations we hold the tug in fault, and grossly so. But this would not necessarily make the tug liable for the entire damages, for the Superior may also be in fault. The vessel in tow had also duties to perform. She is bound to prevent the collision if she can; and if she cannot, then she is bound to make the damages as light as possible. This is a rule of universal law. Abb. Shipp. 154, 341; Heckscher v. McCrea, 24 Wend. 304; Taylor v. Read, 4 Paige, 571; Emerson v. Howland [Case No. 4,441]; Miller v. Mariner's Church, 7 Greenl. 51. It is alleged that the master of the Superior gave the order first "starboard," then "port," and that the master of the Vanguard repeated the orders in the same way. The experts show very clearly that the proper order in this case was "port," and that the contradictory orders would probably lead to confusion. Yet Davis, the master of the Vanguard, and others, swear that the orders were given in instantaneous succession, and that the only order obeyed on his vessel was the order to "port;" that the helm was immediately put to port.

In considering the weight of evidence, it is a well settled and sound principle of construction that the direct evidence of what was done on one vessel is of much greater weight than the hypothetical evidence of experts or others giving their opinions as to what was done. Even if it was shown that a wrong order was given and obeyed, either on the Superior or Vanguard (which is not shown, however), under the exigency of the circumstances and light of authority, it could not be considered a fault. The Genesee Chief, 12 How. [53 U. S.] 461. We can find no fault on the part of the Superior or the Vanguard. But even in this case, were there fault on the part of the Vanguard, it would not prevent a recovery on the part of the owners of the Superior. The New Philadelphia, 1 Black [66 U. S.] 62. The decree below must be reversed, and the cause referred to a commissioner to compute the damages.

Decree reversed.

MORTON (ATHON v.). See Case No. 599.

MORTON (BARNARD v.). See Case No. 1,005.

MORTON (COOTS v.). See Case No. 3,205.

MORTON (HOWE v.). See Case No. 6,769.

MORTON (KRIESLER v.). See Cases Nos. 7,933 and 7,934.

Case No. 9,865.

MORTON v. NEW YORK EYE INFIRMARY.

[2 Fish. Pat. Cas. 320; 5 Blatchf. 116; 2 Am. Law Reg. (N. S.) 672; Merw. Pat. Inv. 589.] [1]

Circuit Court, S. D. New York. Dec. 1, 1862.

PATENTS—PATENTABILITY—DISCOVERY—MEANS OF USING—INVENTION—NATURAL ANIMAL FUNCTIONS.

1. At common law, an inventor has no exclusive right to his invention or discovery. Such right is the creature of the statute, to which he must look, to see if the right, claimed in a given case, is within its terms.

2. In its naked ordinary sense, a discovery is not patentable. A discovery of a new principle, force, or law, operating or which can be made to operate on matter, will not entitle the discoverer to a patent.

[Cited in Celluloid Manuf'g Co. v. Frederick Crane Chemical Co., 36 Fed. 113.]

3. It is only when the explorer has gone beyond the mere domain of discovery, and has laid hold of the new principle, force, or law, and connected it with some particular medium or mechanical contrivance, by which, or through which, it acts on the material world, that he can secure the exclusive control of it under the patent laws.

[Cited in Burke v. Partridge, 58 N. H. 352.]

4. He controls the discovery through the means by which he has brought it into practical action or their equivalent. It is then an invention although it embraces a discovery.

5. A discovery may be the soul of an invention, but it can not be the subject of the exclusive control of the patentee, or the patent law, until it inhabits a body, no more than can a disembodied spirit be subjected to the control of human laws.

6. The application of ether to surgical purposes was an effect produced by old agents operating by old means upon old subjects. The effect alone was new, and was a mere discovery; which, however novel and important, is not patentable.

7. The principles upon which the law of patents are founded are fixed, and uninfluenced by shades and degrees of comparative merit. They secure to the inventor a monopoly in the manufacture, use, and sale of very humble contrivances, of limited usefulness, the fruits of indifferent skill and trifling ingenuity, as well as those grander products of his genius which confer renown on himself and extensive and lasting benefits on society. But they are inadequate to the protection of every discovery, by securing its exclusive control to the explorer to whose eye it may be first disclosed.

8. Neither the natural functions of an animal upon which, or through which, the new force or

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[1] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. Merw. Pat. Inv. 589, contains only a partial report.]

principle may be designed to operate, nor any of the useful purposes to which it may be applied, can form any essential parts of a patentable combination with it, however they may illustrate and establish its usefulness.

[9. Cited in De la Vergne Refrigerating Mach. Co. v. Featherstone, 49 Fed. 917, to the point that the power of the commissioner of patents to issue patents, and the effect of them, are carefully defined by statute. By defining the conditions under which the power it confers shall be exercised, it necessarily excludes all others, except perhaps the correction of its own clerical errors.]

This was a motion for a new trial. An action on the case to recover damages for an infringement of letters patent [No. 4,848] for an "improvement in surgical operations," granted to plaintiff as assignee of Charles T. Jackson and William T. G. Morton, November 12, 1846, tried before Judge Shipman and a jury, had resulted, under the instructions of the court, in a verdict for the defendants. The patent was for the well-known and valuable discovery of the effect of sulphuric ether in producing nervous quiet and insensibility to pain, especially during surgical operations. The questions arising upon this patent, and discussed in the opinion of the court, are so important that the specification is given in full: "Be it known that we, Charles T. Jackson and William T. G. Morton, of Boston, in the county of Suffolk, and state of Massachusetts, have invented or discovered a new and useful improvement in surgical operations on animals, whereby we are enabled to accomplish many, if not all, operations such as are usually attended with more or less pain and suffering, without any, or with very little pain to, or muscular action of, persons who undergo the same; and we do hereby declare that the following is a full and exact description of our said invention or discovery: It is well known to chemists that when alcohol is submitted to distillation with certain acids, peculiar compounds, termed 'ethers,' are formed, each of which is usually distinguished by the name of the acid employed in its preparation. It has, also, been known that the vapors of some, if not all of these chemical distillations, particularly those of sulphuric ether, when breathed or introduced into the lungs of an animal, have produced a peculiar effect upon its nervous system; one which has been supposed to be analogous to what is termed intoxication. It has never (to our knowledge) been known until our discovery, that the inhalation of such vapors (particularly those of sulphuric ether) would produce insensibility to pain, or such a state of quiet of nervous action as to render a person or animal incapable, to a great extent, if not entirely, of experiencing pain while under the action of the knife, or other instrument of operation of a surgeon calculated to produce pain. This is our discovery; and the combining it with, or applying it to, any operation of surgery, for the purpose of alleviating animal suffering, as well as of enabling a surgeon to conduct his operation with little or no struggling, or muscular action of the patient, and with more certainty of success, constitutes our invention. The nervous quiet and insensibility to pain produced on a person is generally of short duration; the degree or extent of it, or time which it lasts, depends on the amount of etherial vapor received into the system, and the constitutional character of the person to whom it is administered. Practice will soon acquaint an experienced surgeon with the amount of etheric vapor to be administered to persons for the accomplishment of the surgical operation or operations required in their respective cases. For the extraction of a tooth, the individual may be thrown into the insensible state, generally speaking, only a few minutes. For the removal of a tumor, or the performance of the amputation of a limb, it is necessary to regulate the amount of vapor inhaled to the time required to complete the operation. Various modes may be adopted for conveying the etheric vapor into the lungs. A very simple one is to saturate a piece of cloth or sponge with sulphuric ether, and place it to the nostrils or mouth, so that the person may inhale the vapors. A more effective one is to take a glass, or other proper vessel, like a common bottle or flask. Place in it a sponge saturated with sulphuric ether. Let there be a hole made through the side of the vessel for the admission of atmospheric air (which hole may or may not be provided with a valve opening downward, or so as to allow air to pass into the vessel), a valve on the outside of the neck opening upward, and another valve in the neck and between the last mentioned and the body of the vessel or flask, which latter valve in the neck should open toward the mouth of the neck or bottle. The extremity of the neck is to be placed in the mouth of the patient, and his nostrils stopped or closed in such a manner as to cause him to inhale air through the bottle, and to exhale it through the neck and out of the valve on the outside of the neck. The air thus breathed, by passing in contact with the sponge, will be charged with the etheric vapors, which will be conveyed by it into the lungs of the patient. This will soon produce the state of insensibility or nervous quiet required. In order to render the ether agreeable to various persons, we often combine it with one or more essential oils having pleasant perfumes. This may be effected by mixing the ether and essential oil, and washing the mixture in water. The impurities will subside, and the ether, impregnated with the perfume, will rise to the top of the water. We sometimes combine a narcotic preparation, such as opium or morphine, with the ether. This may be done by any ways known to chemists by which a combination of etheric and narcotic vapors may be produced. After a person has been put into the state of insensibility as above described, a surgical operation may be performed upon him without, so far as repeated experiments have proved, giv-

ing to him any apparent or real pain, or so little in comparison to that produced by the usual process of conducting surgical operations, as to be scarcely noticeable. There is very nearly, if not entire, absence of all pain. Immediately or soon after the operation is completed, a restoration of the patient to his usual feeling takes place, without, generally speaking, his having been sensible of the performance of the operation. From the experiments we have made, we are led to prefer the vapors of sulphuric ether to those of muriatic or other kind of ether, but any such may be employed which will properly produce the state of insensibility without any injurious consequences to the patient. We are fully aware that narcotics have been administered to patients undergoing surgical operations, as we believe, always by introducing them into the stomach. This we consider in no respect to embody our invention, as we operate through the lungs and air passages, and the effects produced upon the patient are entirely, or so far different as to render the one of very little, while the other is of immense, utility. The consequences of the change are very considerable, as an immense amount of human or animal suffering can be prevented by the application of our discovery. What we claim as our invention is the hereinbefore described means by which we are enabled to effect the above highly important improvement in surgical operations, viz.: by combining therewith the application of ether, or the vapor thereof, substantially as above specified. In testimony whereof, we have hereto set our signatures, this twenty-seventh day of October, A. D. 1846. Charles T. Jackson. William T. G. Morton. Witnesses: R. H. Eddy, W. H. Leighton."

S. D. Cozzens and C. M. Keller, for plaintiff.

E. H. Owen and B. D. Silliman, for defendants.

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

SHIPMAN, District Judge. This is an action at law, brought to recover damages for the infringement of a well-known patent. The case came on to be heard at a prior term of this court, before a jury, and after some testimony had been taken tending to show an infringement by the defendants, the court, having doubts as to the validity of the patent, arrested the hearing of the evidence, and directed the counsel to argue the question of law arising on the face of the specification. This question—as will be obvious, at once, to any one familiar with the law of patents who reads the specification—is, is the subject matter of the alleged invention patentable? The question, after argument, was decided in the negative, and the patent was declared void. The same question is now again presented, on a motion for a new trial, before a full court.

The point is one of substance and not of form. It was discussed as such, and will be so decided. Any criticisms which we may make on the language of the specification, will be made only for the purpose of dealing with the subject which that language envelops; and, if at any time we appear to discard the phraseology of the instrument, it will not be because we complain of its terms, but only for the reason that we desire to strip the alleged invention and present it naked for consideration.

At common law an inventor has no exclusive right to his invention or discovery. That exclusive right is the creature of the statute, and to that we must look to see if the right claimed in a given case is within its terms. The act of congress provides, "that any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use, or on sale with his consent or allowance as the inventor or discoverer," shall be entitled to receive a patent therefor. The true field of inquiry, in the present case, is to ascertain whether or not the alleged invention, set forth in this specification, is embraced within the scope of the act. Very little light can be shed on our path by attempting to draw a practical distinction between the legal purport of the words "discovery" and "invention." In its naked ordinary sense, a discovery is not patentable. A discovery of a new principle, force, or law operating, or which can be made to operate, on matter, will not entitle the discoverer to a patent. It is only where the explorer has gone beyond the mere domain of discovery, and has laid hold of the new principle, force, or law, and connected it with some particular medium or mechanical contrivance by which, or through which, it acts on the material world, that he can secure the exclusive control of it under the patent laws. He then controls his discovery through the means by which he has brought it into practical action, or their equivalent, and only through them. It is then an invention, although it embraces a discovery. Sever the force or principle discovered from the means or mechanism through which he has brought it into the domain of invention, and it immediately falls out of that domain and eludes his grasp. It is then a naked discovery, and not an invention.

These remarks are not made for the purpose of laying down sweeping general propositions. We are too well aware of the futility, or, we might say, mischief, of that practice of expounding the law of patents, to embark in it. But these suggestions are submitted for the purpose of showing the relation of the terms "discovery" and "invention," and especially the dependence of the

former upon the latter, as used in the statute. Every invention may, in a certain sense, embrace more or less of discovery, for it must always include something that is new; but it by no means follows that every discovery is an invention. It may be the soul of an invention, but it can not be the subject of the exclusive control of the patentee, or the patent law, until it inhabits a body, no more than can a disembodied spirit be subjected to the control of human laws.

Now, that this patent contains the record of a discovery, there can be no doubt. And it is equally clear that, in a certain sense, it was new at or about the date of the patent. It is important here to ascertain precisely what that discovery was. It is described in general terms, in the first paragraph of the specification, to be "a new and useful improvement in surgical operations on animals." This is, at best, vague—not from any fault of the person who drafted the schedule, but from the inherent difficulties of his task, and the imperfect nature of human language as an instrument of thought. But we can clearly gather from the paper itself what the discovery was; and we are aided in this by those parts of the specification which state what was old and well known. The second paragraph recites: "It is well known to chemists that when alcohol is submitted to distillation with certain acids, peculiar compounds, termed 'ethers,' are formed, each of which is usually distinguished by the name of the acid employed in its preparation." The origin and existence of ethers, those wonderful agents that produce a harmless insensibility to pain, formed no part of the discovery. No one of them was brought to light by these patentees, for they were all well known before. The same paragraph further sets forth that "it has also been known that the vapors of some, if not all, of these chemical distillations, particularly those of sulphuric ether, when breathed or introduced into the lungs of an animal, have produced a peculiar effect on the nervous system, one which has been supposed to be analogous to what is usually termed intoxication." It was not, then, the fact that these vapors could be introduced into the air-passages and lungs that was discovered. This was as old as respiration, or, at least, as old as the existence of the vapors. Neither was it discovered that, when inhaled, these vapors produced an effect like that of intoxication, exhilaration, and more or less stupefaction. This, too, had long been known.

The next paragraph distinctly sets forth the real discovery that was made, namely, that this well-known inhalation of well-known agents (in increased quantities) would produce a state of the animal analogous to complete intoxication accompanied with total insensibility to pain. It appropriately adds: "This is our discovery." It is not important to inquire here whether this was the discovery of an increased and more perfect effect, the same in kind with that already well known, or whether it was the discovery of an entirely new effect. The effect discovered was produced by old agents, operating by old means upon old subjects. The effect alone was new, and to that only can the term "discovery" apply. That this mere discovery, however novel and important, is not patentable, needs neither argument nor authority to prove. This the specification impliedly concedes, for after thus clearly setting forth the discovery, a struggle is made to grapple it to something in active existence, and thus make the two, in this new special relation, a patentable invention. This is done by "combining it with, or applying it to, any surgical operation." "This is our invention." The beneficial effects described as resulting from the application, refer merely to the utility of the alleged invention, which is not in question, and may, therefore, be laid out of the case. The object of this combining the discovery with, or applying it to, surgical operations, is apparent. It was to shelter the discovery under those terms of the patent act which protect "any new and useful improvement on any art." It was clearly not the discovery or invention of an "art," or "machine," or "manufacture," or "composition of matter." Nor was it an "improvement" on any one of the last three. It was, therefore, called, in substance, an improvement in the art of surgery. But we can not change a thing by a name. In a certain general sense, it is an improvement in the art of surgery. So would the invention of a new and useful lancet, saw, forceps, or bandage be an improvement on the same art. But the patent securing the exclusive sale or use of such an instrument must rest exclusively upon the novelty of its construction. It could borrow no element of patentability from the art in which it was designed to be used, except merely the element of utility. Of this latter the art would furnish the test. Now this discovery of the effect of ether on the patient, in holding him motionless and insensible during the operation, has the same legal relation to the art of surgery that a machine or other mechanical contrivance for holding him would have. It holds him better, stiller, and with less discomfort and danger to himself than any mechanism could; but its office is to hold and protect the patient. It has no other relation to, or connection with, the art of the surgeon. We use the word "protect" as applied to the patient in the largest sense, and as including not only exemption from pain during the operation, but also from the shock which such operations often give the system. The only legal quality or aid, then, which this alleged invention can draw from the art with which it is connected in the specification, is that which relates to its utility. Of this it supplies undoubted evidence. The eminent surgeons who testified on the trial concurred in stating that its usefulness could not be overrated. We must, then, leaving the art of surgery to supply the

evidence of its utility, contemplate the discovery as separated from the use to which it is applied. At this point the patent breaks down; for the specification presents nothing new except the effect produced by well-known agents, administered in well-known ways on well-known subjects. This new or additional effect is not produced by any new instrument by which the agent is administered, nor by any different application of it to the body of the patient. It is simply produced by increasing the quantity of the vapor inhaled. And even this quantity is to be regulated by the discretion of the operator, and may vary with the susceptibilities of the patient to its influence. It is nothing more, in the eye of the law, than the application of a well-known agent, by well-known means, to a new or more perfect use, which is not sufficient to support a patent.

But it was insisted on the argument that the claim at the close of the specification when properly understood, disclosed the true character of the invention, and furnished ground upon which the patent can stand. This clause declares, that "what we claim as our invention is the hereinbefore-described means by which we are enabled to effect the above highly important improvement in surgical operations, viz: by combining therewith the application of ether, or the vapor thereof, substantially as above described." The plaintiff's counsel insists that the true reading of the claim, in the light of the preceding part of the specification is not that which asserts a combination of the discovery with surgical operations, but rather an application of the discovery to surgical operations by the means described; "and that the means described, and the only means described, are the process of rendering the system insensible to pain by the inhalation of ether." But we do not discover that this exposition of the claim relieves the difficulty. What is the process which is here set forth? The process of inhalation of the vapor, and nothing else. To couple with it the effect produced by calling it a process of rendering the system insensible to pain, is merely to connect the results with the means. The means, that is the process of inhalation of vapors, existed among the animals of the geologic ages preceding the creation of our race. That process, in connection with these vapors, is as old as the vapors themselves. We come, therefore, to the same point, only by a different road. We have, after all, only a new or more perfect effect of a well-known chemical agent, operating through one of the ordinary functions of animal life.

It is curious and instructive to observe the perpetual struggle in the specification to draw from the surgical operation some support to the patent beyond that of its utility. "We are fully aware," says the paragraph immediately preceding the claim, "that narcotics have been administered to patients undergoing surgical operations, and, as we believe, always by introducing them into the stomach. This we consider in no respect to embody our invention, as we operate through the lungs and air-passages." An examination of this single passage in the specification will demonstrate the impossibility of sustaining this patent on any grounds known to the law. Now, suppose these agents had been fluids instead of elastic vapors, and their effect had been known, when taken into the stomach, to be the same as that now long known to have resulted from their inhalation, viz: a state of partial intoxication: would the discovery that an increased quantity of the fluid produced a more perfect effect, by rendering intoxication complete, accompanied with total insensibility to pain, have rendered the discovery patentable? We think clearly not. In this view of the subject, we here lay out of the case the application of the new effect to surgical operations. We will allude to that again in a moment. Now, a precisely parallel case is presented, by the actual facts before us, to the one just supposed. The inhalation of the ethers had long been known. By increasing their quantity it was discovered that a new or more complete effect was produced, by which the subject was rendered wholly insensible. This can be no more patentable than the discovery that the increased quantity of liquors, taken into the stomach, would produce a like result. In both cases there is only a naked discovery of a new effect, resulting from a well-known agent, working by a well-known process. This effect is a temporary suspension of sensibility and motion in the animal body. Here, what is new in the alleged invention begins and ends. The fact that the surgeon can operate upon the body in the condition to which it is thus reduced, forms no part of the invention or discovery. It simply furnishes evidence that it can be applied to at least one useful purpose; a fact quite independent of the other elements necessary to make a discovery patentable.

Before dismissing this case, it may not be amiss to speak of the character of the discovery upon which the patent is founded. Its value in securing insensibility during the surgical operation, and thus saving the patient from sharp anguish while it is proceeding, and mitigating the shock to his system, which would otherwise be much greater, was proved on the trial by distinguished surgeons of the city of New York. They agreed in ranking it among the great discoveries of modern times; and one of them remarked that its value was too great to be estimated in dollars and cents. Its universal use, too, concurs to the same point. Its discoverer is entitled to be classed among the greatest benefactors of mankind. But the beneficent and imposing character of the discovery can not change the legal principles upon which the law of patents is founded, nor abrogate the rules by which judicial construction must be governed. These principles and rules are fixed, and uninfluenced by shades and degrees

of comparative merit. They secure to the inventor a monopoly in the manufacture, use, and sale of very humble contrivances, of limited usefulness, the fruits of indifferent skill, and trifling ingenuity, as well as those grander products of his genius which confer renown on himself, and extensive and lasting benefits on society. But they are inadequate to the protection of every discovery, by securing its exclusive control to the explorer to whose eye it may be first disclosed. A discovery may be brilliant and useful, and not patentable. No matter through what long, solitary vigils, or by what importunate efforts, the secret may have been wrung from the bosom of Nature, or to what useful purpose it may be applied. Something more is necessary. The new force or principle brought to light must be embodied and set to work, and can be patented only in connection or combination with the means by which, or the medium through which, it operates. Neither the natural functions of an animal upon which or through which it may be designed to operate, nor any of the useful purposes to which it may be applied, can form any essential parts of the combination, however they may illustrate and establish its usefulness. Motion for a new trial denied.

[For another case involving this patent, see Cushing's Opinion, 8 Op. 270.]

Case No. 9,866.

MORTON v. ROOT.

[2 Dill. 312.] [1]

Circuit Court, D. Nebraska. 1873.

EQUITY—CLOUD UPON TITLE—ADEQUATE REMEDY AT LAW—VOID SALE UNDER EXECUTION—DESCRIPTION OF LAND.

1. Equity has jurisdiction to remove a cloud upon the title to real estate where there is no adequate remedy at law.

2. A sale under an execution issued upon a judgment in which the land sold had not been attached, and where there was no service upon the defendant except by publication, is void.

[Cited in Levy v. Ferguson Lumber Co., 51 Ark. 317, 11 S. W. 286.]

3. In the description of a tract of land, an omission to state the course in one call, *held* to be supplied and rendered certain by the remainder of the description.

[Cited in Campbell v. Carruth (Fla.) 13 South. 433.]

This is a bill in equity to settle the title to certain real estate. The plaintiff in the bill alleges title in himself, derived as follows: 1. On the 27th of June, 1865, he sued Pierce in attachment in the district court of the then territory of Nebraska, for Douglas county, the writ of attachment issuing and being levied on the premises in question. 2. At the October term, 1865, judgment was entered, and also an order to sell the said lands and premises for the satisfaction of the said judgment. 3. On the 16th of May, 1868, an order of sale was issued commanding the sheriff to sell the said lands. 4. In pursuance thereof he, on the 29th of June, 1868, sold the premises to the plaintiff. 5. At the July term, 1868, the sale was confirmed by the court. 6. On the 15th day of April, 1869, the sheriff made the deed to the plaintiff. To show an adverse claim of the defendant the bill alleges that one Glass sued Pierce in attachment; that the writ was levied on property other than that here in question, and not upon the same; that Pierce was not served therein and did not appear thereto; that after the attached property was exhausted, a general execution was issued and the premises in question sold to Glass, who conveyed to the defendant. On the 2d of July, 1866, a deed, dated December 10, 1864, from Glass to Root, of said premises, was put upon the records of Douglas county. The defendant answers these allegations, saying that he believes them to be true, but the decree was void because it described no premises. To support the equity jurisdiction, the plaintiff alleges that the defendant is not in possession of the premises. This the defendant denies, and alleges that at the time when this bill was filed he was, and ever since has been, and now is, in the actual possession, under the deed from Glass, dated and recorded as above stated. The answer puts in issue the validity of the plaintiff's alleged title. The cause was submitted to the court upon proofs taken by the respective parties.

J. M. Woolworth, for complainant.

B. E. B. Kennedy, for defendant.

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

DILLON, Circuit Judge. The first question to be settled is the jurisdiction of the court. This is conceded in the arguments to depend upon the fact whether the defendant was at the time the suit was commenced in actual possession. If in possession, no reason is stated in the bill why the respective rights of the parties could not be determined in ejectment. The bill in this case was filed August 27, 1870. We find, upon a careful reading of the evidence, that no fences or permanent improvements of any kind have ever been made upon the premises; the acre and a half of potatoes were raised in 1871, and the weight of the evidence shows that the clearing off of the small quantity of land was in the fall of 1870, which would be after suit was commenced. Upon the proofs in this cause, the plaintiff could not have established possession in the defendant at the time this suit was brought; and the court has jurisdiction to determine the respective rights of the parties.

Both parties claim title under judicial sales against Pierce. The sale under which the defendant derives his right was void for the want of a valid judgment and execution Ju-

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

risdiction over the person or property is absolutely essential to a valid judgment, and as the property here in question was not attached, and as the judgment against Pierce was rendered upon constructive service by publication, there was no authority whatever to levy upon and sell this land.

This point is clear, and has not been contested by defendant's counsel in argument, but he has relied on the insufficiency or weakness of the plaintiff's title. We proceed briefly to notice his objections to this title.

It is urged that the court which rendered the plaintiff's judgment (under which judgment the plaintiff claims title), had no jurisdiction of the land in question. Although a portion of the papers in that action have been lost, yet the entries on the appearance docket, the order of sale, the return endorsed thereon, the appraisement, the notice of sale, the execution, the sheriff's deed to the plaintiff, all of which are produced, show that this objection is without foundation in fact.

It is also objected that the plaintiff's deed from the sheriff is void, because it and the precedent proceedings which it follows do not describe the land with sufficient certainty. The description is as follows: "Beginning at the northwest corner of section 28, thence south eight chains and five links, thence south eighty-five degrees, twenty chains and ten links, thence north nine chains and seventy links, west twenty chains, to the place of beginning, in township 15, range 13, east of the sixth P. M."

The only defect pointed out is the omission of the word east in the second call in the description. But the testimony of the two surveyors examined as witnesses satisfactorily shows that this omission is easily supplied by the data afforded by the description as a whole. The only uncertainty is whether the second course is eighty-five degrees east or west. As the last course is "west to the place of beginning," it is obvious that the course on the corresponding line on the south must be east. The testimony of Surveyor Wiltse puts this in a clear light. He says, "The description is defective in this, that in the second course from the place of beginning, the letter 'E' is omitted, running east. To determine whether it is east or west, I return to the place of beginning and reverse the courses and distances, until I arrive at the corner upon which this defective course must close, and I find that to close the survey, or retrace the boundary, the course must be south eighty-five degrees, east twenty chains and ten links." And to same effect is the evidence of George Smith, the only other surveyor examined to the point. The description is just as certain as if the word "east" had been inserted. The result is that the plaintiff is clearly the owner of the land in question, and is entitled to the relief prayed, which is to remove the cloud upon his title, and not for possession. Decree accordingly.

As to jurisdiction: Morton v. Smith [Case No. 9,867]. As to right to relief to remove cloud upon title to land: Bunce v. Gallagher [Id. 2,-133]; Craft v. Merrill, 14 N. Y. 456.

Case No. 9,867.

MORTON v. SMITH.

[2 Dill. 316.] [1]

Circuit Court, D. Nebraska. 1873.

EXECUTION SALE — REAL PROPERTY — DEFECTIVE ACKNOWLEDGMENTS—CONSTRUCTIVE NOTICE —LOCAL STATUTE CONSTRUED.

1. A levy upon real estate which is not sold for want of bidders does not render a subsequent sale of other land, on another execution, void.

2. Where a judgment is rendered upon service by publication only, a sale of land not attached, upon a general execution issued upon such judgment, is void.

3. Under the statutes of Nebraska in force in 1859, as to the acknowledgment and proof of conveyances of land, executed in another state, it was indispensable when these were not acknowledged before a commissioner appointed by the legal authorities of Nebraska, that the certifying officer should certify that the execution and acknowledgment is according to the laws of the state where the instrument is executed; and the record of a deed where this requirement is omitted does not operate as constructive notice of its existence.

[Cited in Prentice v. Duluth Storage & Forwarding Co., 7 C. C. A. 293, 58 Fed. 447.]

Bill in chancery [by William S. T. Morton] to quiet title to a certain tract of land near Omaha, containing twelve and sixty-seven-hundredths acres, and for partition. Neither party is in actual possession. Both parties claim under one Roswell G. Pierce. The plaintiff's title is derived under an execution sale made in November, 1869, upon a judgment in his favor against Pierce, rendered at the June term, 1860. The defendant [George R. Smith] claims title in two ways: First, under an execution sale upon a judgment rendered by publication in an attachment suit by one Glass against Pierce; second, by conveyances from Pierce, independent of the judicial sale.

J. M. Woolworth, for plaintiff.

C. S. Chase, for defendant.

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

DILLON, Circuit Judge. 1. The plaintiff's judgment against Pierce, and his execution sale thereunder, which was confirmed by the court, and followed by a sheriff's deed, gives him a title unless a better title is shown by the defendant.

The fact that a prior execution had issued upon the plaintiff's judgment and been levied upon other land which was not sold for want of bidders, does not amount to a satisfaction of that judgment and render the subsequent execution sale of the land in dispute void.

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

2 As to defendant's title. Prior to plaintiff's suit against Pierce, one Glass (January 10, 1860) commenced suit against Pierce by attachment, and levied the writ of attachment upon the undivided three-fourths of the land in controversy. Pierce was not served except by publication. Judgment was rendered upon constructive service, and the premises attached were ordered to be sold, and were sold, and the title under this sale is in the defendant. This sale is valid, and gives the defendant the prior and better title to the undivided three-fourths. After this sale, without any further service upon, or proceedings against, Pierce, the judgment creditor (Glass) caused a general execution to issue against Pierce, and this was levied upon the remaining undivided one-fourth, which was sold, and under this sale the defendant claims the title thereto. But there having been no attachment of this undivided quarter interest prior to the judgment, nor at any time, and no service upon Pierce except by publication, there was no authority to issue a general execution upon the judgment, and levy upon and sell property which had not been attached. That execution and sale were void.

But the defendant also claims title to this one-fourth in this wise: On the 12th of April, 1859, Pierce made a deed to one Ralph Marsh, which was filed for record before any of the judicial proceedings against Pierce had been commenced, and defendant claims by mesne conveyances under the deed to Marsh.

It is not denied that if this deed to Marsh conveys the same land and was duly acknowledged and recorded, that it defeats the plaintiff's title, for in such case Pierce had no interest in the land at the date of plaintiff's judgment, and execution sale.

No claim has been made in argument by the plaintiff's counsel that the deed insufficiently described the land in controversy, but he rests his case upon the proposition that the deed from Pierce to Marsh was not acknowledged and certified so as to be entitled to be recorded, and therefore the record of it was not constructive notice of its existence. There is no evidence whatever of actual notice to the plaintiff of this deed.

The deed from Pierce to Marsh was executed April 12, 1859, in the state of New York. It was acknowledged on that day before a commissioner of deeds in the city of New York, appointed by the authority of that state. A clerk of a court of record of the city or county of New York certifies under his seal that the commissioner is such officer as he represents himself to be, that he is well acquainted with his handwriting, and that his signature is genuine, as required by section 5 of the act of January 26, 1856 (Laws Neb. 2d Sess. 1856, p. 80), but he entirely omits to certify, as required by that section, "that the deed is executed and acknowledged according to the laws" of the state of New York. This is indisputably an essential requirement of the law then in force.

Another portion of the act requires this certificate to be recorded with the deed (sections 13, 14), and a subsequent section provides that deeds "shall not be deemed lawfully recorded unless they have previously been acknowledged or proved in the manner herein prescribed" (section 17). By section 16, "all deeds which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the register for record, and not before, as to all creditors and subsequent purchasers in good faith, without notice; and all such deeds shall be adjudged void as to all such creditors and subsequent purchasers, without notice, whose deeds shall be first recorded."

This deed not having been certified as required by law, the objection of the plaintiff to the admission of the record thereof as evidence was well taken, and it is void as against the plaintiff, a creditor of the grantor, and a subsequent purchaser under a judgment against him. The result is that the plaintiff owns an undivided one-fourth, and the defendant an undivided three-fourths of the land in controversy, and a decree will be entered accordingly. Each party to pay his own costs. Decree as above.

As to the sufficiency of the certificate of acknowledgment: Harrington v. Fish, 10 Mich. 419; Lyon v. Kain, 36 Ill. 362; Wright v. Taylor [Case No. 18,096]; Randall v. Kreiger [Id. 11,554].

MORTON (SWANSTON v.). See Case No. 13,677.

MORTON (TAYLOR v.). See Case No. 13,799.

MORTON (UNITED STATES v.). See Case No. 15,822.

MORTON (WOOD v.). See Case No. 17,958.

MORTON, The HAMILTON. See Case No. 5,992.

Case No. 9,868.

In re MOSELEY et al.

[8 N. B. R. 208.] [1]

District Court, S. D. Georgia. April, 1873.

BANKRUPTCY—HOMESTEAD—PROCEEDING IN STATE COURT—ASSIGNEE TO BECOME PARTY THERETO.

Where a homestead was set apart to a family, ten days before commencement of proceedings in bankruptcy, but from which judgment an appeal was then pending, the local statute declaring that the appeal suspends but does not vacate the judgment, *held*, the bankrupt court must respect the homestead right, though suspended, and will not take possession of the property for distribution to determine the validity or propriety of such judgment, but the assignee in bankruptcy will be directed to make himself a party to the proceedings in the state court, and first determine his right to the possession of the property, in that tribunal.

[Cited in Re Hall, Case No. 5,921.]

In bankruptcy.

[1] [Reprinted by permission.]

ERSKINE, District Judge. About the middle of April, 1872, the families of the present bankrupts, respectively, instituted proceedings in the court of ordinary of Lowndes county, in this district, under the thirteenth section of the act of October 3d, 1868, commonly called the homestead or exemption law, to have set apart and adjudged for the use of the families of each of the bankrupts, the real and personal property exempted by the provisions of that law. The value of the realty that may be set apart for the wife and children of the bankrupt may be two thousand dollars in specie, and in personal property one thousand dollars in specie. The ordinary appointed appraisers to appraise and allot the exempted property. They acted and returned their actings and doings in the premises into the court of ordinary. On the 27th of April, 1872, the ordinary approved the returns and set apart the property so appraised to the families of the bankrupts. On the 1st of May, certain creditors of the bankrupts took appeals to the superior court of said county from the judgments of the court of ordinary, on the ground that the property set apart was of greater value than that placed upon it by the appraisers, and sanctioned by the decision of the court of ordinary. These several appeals are now depending and undetermined in the appellate tribunal—the superior court of Lowndes county.

An appeal brings up the whole record and is a de novo investigation. "The appeal," says the Code, § 3572, "suspends, but does not vacate judgment; and if dismissed or withdrawn the rights of all parties are the same as if no appeal had been entered." But, notwithstanding the case is to be tried over again, it is obvious, from the very words of the Code itself, that the decision or judgment pronounced by the inferior court remains of force, though the fruits of the judgment cannot be gathered by the parties in whose favor it stands until the appellate court shall have decided that there is no error therein. If, however, the court find that there is error in the judgment, it will reverse the same in whole, or, I apprehend, in part, and then enter such judgment, according to the justice of the case, as the inferior court—in this case, the court of ordinary of Lowndes county—ought to have entered.

As already seen, the appeals from the several judgments of the court of ordinary to the superior court were taken on the 1st of May, 1872. On the 6th of the same month and year, the creditors of Moseley, Wells & Co., filed their petition in this court, under the thirty-ninth section of the bankrupt act, thus initiating proceedings against them in involuntary bankruptcy; and, on the 5th of June, 1872, Moseley, Wells & Co. were, by judgment of this court, declared bankrupts.

Counsel for the creditors contended that on the filing of the petition in involuntary bankruptcy, on the 6th of May, 1872, the jurisdiction of the state courts over the proceedings then pending, by virtue of the state statute of October 3d, 1868, in regard to the several homesteads and exemptions, ceased, and the jurisdiction of this court attached—drawing to it for adjudication and distribution among the creditors all the estate of the bankrupts, and in which estate was included the property set apart for and adjudged to the families of the several parties declared bankrupts on the 5th of June, 1872. It was further insisted, that the judgments pronounced by the court of ordinary on 27th of April, 1872, were respectively but mesne process; and being rendered within four months next preceding the commencement of the proceedings in involuntary bankruptcy, were, by force of the fourteenth section of the bankruptcy act [of 1867 (14 Stat. 522)], dissolved. In support of this last point, counsel cited and relied upon the case Randell v. McLain, 40 Ga. 162. There a judgment had been rendered by the federal court of South Carolina, and upon which judgment a suit was instituted in the superior court of Chatham county, Georgia. Warner, J., in delivering the opinion of the court, said: "The judgment obtained in the state of South Carolina in the district court could not be collected in this state, except by a suit thereon at common law, or by process of attachment; and in either case the proceeding instituted to collect the amount of the judgment debt in this state is mesne process. There can be no doubt that a writ of attachment is mesne process, and if sued out within four months immediately before the defendant is declared a bankrupt it must be dissolved as provided by the bankrupt act. And as to the judgment upon which the action was brought to recover its contents, it was a mere chose in action, with many of the attributes of a promissory note or bill of exchange, and the proceeding instituted to collect it was also but mesne process, for all writs necessary to a suit between its beginning and end are mesne process. And this is the well-established rule of practice in courts governed by the principles of the common law; therefore, the latter is affected by the bankrupt act like the former—the process of attachment. Tommey v. Finney, 45 Ga. 155, was also presented. This case consisted originally of two—one a suit in a magistrate's court, appealed to the superior court; the other, a suit brought in the superior court after the magistrate's case had been appealed. Both accounts, it seems, were due when the suit on one was brought in the magistrate's court. Montgomery, J., in giving the opinion of the supreme court, said: "It is insisted by defendant in error that both accounts are, under the agreed statement of facts, but one, and should have been sued in the same action. * * * The reply is, that an appeal is a de novo investigation and

the first action is a suit now pending (on appeal) in the superior court (Code, § 3571); and hence there is no judgment to bar." And the court held that the pendency of the first action as a defence to the account could not be taken advantage of by a plea in bar at the second term, but ought to have been by plea in abatement. It will be perceived that this case turned on a point of pleading and did not touch the legal status of the judgment rendered in the magistrate's court.

It was not questioned, I believe, that the court of ordinary had jurisdiction over the subject matter of the homestead. When the court of ordinary rendered its decisions on the homestead proceedings, the judgments were binding and effective, if no appeals had been taken to the superior court. Now, it is to the Code that attention must be directed to ascertain what effect each of the appeals had on the legal condition of the judgments rendered by the court of ordinary on the 27th of April, 1872, and appealed on the 1st of May following—six days prior to the commencement of the proceedings in involuntary bankruptcy. As previously stated, the 3572d section of the Code, says: "An appeal suspends, but does not vacate judgment." This language is too plain to need construction. I entirely agree with the counsel that the mere application for a homestead gives no lien on the property, and, also, that a lien, to have any standing in the bankrupt court, must be a lien at the time the party becomes a bankrupt. If, therefore, the judgments entered by the court of ordinary on the homestead exemption, in favor of the families of the parties since declared bankrupts, are not liens attached to the property allotted and set apart, then the property, by operation of the bankrupt law, is before this court for adjudication. Counsel cited the case of Woolfolk v. Murray, 44 Ga. 133; Seymour v. Morgan, 45 Ga. 201; and Inferior Ct. of Clark Co. v. Haygood, 15 Ga. 309, to show that no lien existed, notwithstanding the judgments of the court of ordinary in favor of the families of the present bankrupts. In Inferior Ct. of Clark Co. v. Haygood, Starnes, J., said: "By the provisions of our judiciary system, an appeal at common law vacates the judgment on the first trial, for all the purposes of a rehearing." If it was the intention of the court, as was insisted, to decide that when an appeal is entered from an inferior to a superior court, that that act vacates the judgment appealed from, then the reply is, that since the time of that decision the rule of law—if rule of law it was—has been changed by the code, which expressly declares that the judgment is suspended, not vacated. But still, I entertain doubts that the sentence just cited from the report of the case warrants a meaning so extended and strong as has been contended for. Counsel argued that the law of this state is now as it was at the time Inferior Ct. of Clark Co. v. Haygood was decided, and the case of Seymour v. Morgan was referred to. In that case McCay, J., in pronouncing the opinion of the court, observed: "One buying land after judgment against the owner, which has been vacated by an appeal, buys it with notice and subject to the final judgment, but he is no more a purchaser, after the judgment, than one who buys with notice of the vendor's lien, or with notice of any other fact which will make the land subject to a judgment against the vendor." If it was the purpose of the court to hold that an appeal vacated a judgment rendered in the court from which the appeal was taken, to my mind it seems directly repugnant to the very words and spirit of the 3572d section of the Code. If the word "vacated," as found in the report, is not there by mistake of the printer, or oversight, then it is manifest to the reader that a purchase, under the circumstances mentioned in the sentence quoted, would not find a judgment which has been vacated—made void—an impediment to the title. Woolfolk v. Murray—In this case the wife, after her husband had been adjudged a bankrupt and the property had passed into the hands of the United States marshal, made application to the ordinary to have a homestead set apart for herself and children, under the act of 1868. McCay, J., in giving the judgment of the court, said: "But it is very clear that until it (the homestead) is laid off there is no property or right of property in the family. * * * It is a right which depends for its existence upon the judgment of the court." And a like thought is expressed in a subsequent part of the opinion. That learned judge says: "It is clear to us, therefore, that this right of the wife is not title, lien or encumbrance upon the husband's property until it has been appropriated by a judgment." And as there was no judgment of the court of ordinary, or other court having jurisdiction, anterior to the adjudication of bankruptcy, the court held that the jurisdiction over the property sought to be exempted passed to the federal court to be there adjudicated. Lumpkin v. Eason, 44 Ga. 339.

A judgment is the sentence of the law, pronounced by a court or a judge thereof, upon a matter in issue in any cause before it. I am of the opinion that each of the appeals taken on the 1st of May, 1872, from the court of ordinary to the superior court, in nowise affected the decision or judgment of the former tribunal, further than to suspend or interrupt it from proceeding, until the cause appealed is reviewed and passed upon by the appellate court; in other words, that each of the judgments created a lien upon the property set apart to the families, respectively, of the present bankrupts, and each judgment so rendered remains intact, though for the time fruitless.

Whether the property set apart for the families of these bankrupts was partnership

property (for this is a point in controversy)—property held in trust for the firm creditors, or whether, if partnership property, these families would be entitled to homesteads out of it, are questions that this court, in this proceeding, declines to pass upon. And the same may be said as to the other points presented in argument, or other questions which might arise out of the facts of the case. On none of these matters will the court anticipate an opinion.

I instruct the assignee forthwith to apply to the honorable, the superior court of Lowndes county, for leave to be made a party to the proceedings there pending on the several appeals taken from the court of ordinary of Lowndes county, and there contest the proceedings had in the inferior court and the constitutionality of the statute.

MOSELEY (UNITED STATES v.). See Case No. 15,823.

Case No. 9,869.

In re MOSES.

[6 N. B. R. 181.] [1]

District Court, E. D. Michigan. Jan. 16, 1872.

BANKRUPTCY—INJUNCTION TO RESTRAIN TRANSFER OF PROPERTY—WHEN INJUNCTION TERMINATES—VIOLATION.

An injunction granted under section 40 of the bankrupt act [of 1867 (14 Stat. 536)] does not extend beyond the adjudication. Hence any proceedings to punish parties for contempt in violating an injunction after adjudication, must be dismissed with costs.

[Cited in Re Irving, Case No. 7,073.]

The injunction was issued under section 40 of the bankrupt act, on filing the petition for adjudication of bankruptcy. The petition was filed and injunction issued November fifth, eighteen hundred and sixty-nine. An order was issued at the same time, requiring the alleged bankrupt [S. J. Moses] to show cause, as required by said section 40, returnable November sixteenth, eighteen hundred and sixty-nine, on which day an order of adjudication of bankruptcy was made, and an assignee was appointed December eleventh, eighteen hundred and sixty-nine. The acts alleged to have been done by Lang in violation of the injunction, are alleged to have been done January twentieth, eighteen hundred and seventy, more than two months after the adjudication of bankruptcy. Those alleged to have been committed by Hanaw appear to have been committed also after the adjudication, although no specific date is alleged. It is contended on behalf of Lang & Hanaw that by the express provisions of section 40, under which the injunction was issued, its operation and effect were limited to the period of time between the time of its service on them and the time when the hearing and adjudication were had upon the petition for adjudication of bankruptcy, and therefore the acts complained of, not having been done within that period, are not within the purview of the writ.

Mr. Reilly, for assignee.

Mr. Peck, for Lang & Hanaw.

LONGYEAR, District Judge. So much of section 40 of the bankrupt act as is material to the consideration of the question presented, is as follows: "That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted; and may also, by its injunction, restrain the debtor, and any other person, *in the meantime*, from making any transfer or disposition of any part of the debtor's property not excepted by this act from the operation thereof, and from any interference therewith."

As a court of bankruptcy, this court possesses no general powers to issue injunctions. Its powers in that regard are derived solely from that portion of section 40 above quoted, and such powers are of course limited strictly within the scope of its provisions. The restraining power of the court then is limited in point of time to the period of time expressed by the words "in the meantime," which I have italicized in the quotation, and those relate manifestly to the period of time between the entering of the order to show cause and the time specified therein for the hearing, as provided in the first part of the quotation. I think the most extended construction that can be given to these words is, that they are intended to cover the whole period up to such time as a hearing and adjudication shall be had upon the petition for adjudication of bankruptcy. I can see no warrant whatever for extending their meaning beyond that. It is true that in this case the injunction is in the ordinary form and reads: "Until the further order of the court." But this clause must be read in the light of the authority under which the writ was issued, and being so read its meaning is as follows: "Until a hearing and adjudication shall be had upon the petition for adjudication of bankruptcy against Solomon J. Moses." If creditors, on filing petition for adjudication of bankruptcy, desire to restrain parties from interfering with the debtor's property beyond the time when an adjudication may be obtained, they must do so by invoking the general powers of a court of equity. This court does not possess such power. See In re Metzler [Case No. 9,512]; Irving v. Hughes [Id. 7,076]; In re Kintzing [Id. 7,833]; Creditors v. Cozzens [Id. 3,378]; In re Fuller [Id. 5,148].

The acts complained of in these cases having been done after the restraining power of

[1] [Reprinted by permission.]

the injunction had ceased to operate, the orders to show cause must be discharged, and the petitions and proceedings against the said Lang and Hanaw for contempt must be dismissed, with costs to the said Lang and Hanaw, including an attorney fee of twenty dollars (being ten dollars in each case), to be paid by the assignee out of the funds of the estate of the said bankrupt in his hands.

Case No. 9,870.

In re MOSES.

[See 1 Fed. 845.]

Case No. 9,871.

MOSES et al. v. BOYD et al.

[5 Blatchf. 357.] [1]

Circuit Court, S. D. New York. Nov. 28, 1866.[2]

GUARANTY — DAMAGE TO OTHER CARGO — CONDITION OF SHIP — LIABILITY.

1. Where a charterer of a vessel agrees with her master, on behalf of the vessel, to pay any damages that the vessel may be subject to, arising from lard in casks being stowed between decks and running on other cargo, the vessel is, notwithstanding this agreement, liable for damage caused to cargo in the lower hold by the leakage of lard from the casks and through the deck, if the deck is not well and sufficiently caulked.

2. Where such an agreement was made in view of the fact that the lard in the casks, while they were being stowed, was found to be leaking therefrom, and to be in an almost liquid state, and it appeared that the deck was well and sufficiently caulked: *Held*, that the vessel was not responsible for damage caused to cargo in the lower hold by the leakage of the lard from the casks and through the deck.

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

This was a libel in personam, filed in the district court, to recover a balance of $1,779.27 alleged to be due on a charter party, made July 24th, 1862, by the libellants [Oliver Moses, Charles Owen, Frank O. Moore, G. C. Moses, and Albert Otis], as owners of the ship Robert Cushman, chartering her to the respondents [Robert R. Boyd, John J. Boyd, and Edward Hincken] for a voyage from New York to Havre, in France. The district court dismissed the libel, and the libellants appealed to this court.

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

Erastus C. Benedict, for respondents.

NELSON, Circuit Justice. The vessel sailed from New York about the 17th of August, 1862, and arrived at Havre on the 23d of September following. The cargo consisted chiefly of wheat, lard, and tallow. The wheat in bulk, and also some in bags, was stowed in the hold. A portion of the lard was stowed between decks. The dispute in the case between the parties arises out of damage occasioned to the wheat in the hold by the leaking of the lard between decks, with which the charterers were charged in Havre and which they paid. They now claim the right to retain the amount out of the freight money, insisting that the vessel is responsible for the loss. Some difficulty seems to have existed, in the court below, in reaching this question, on the pleadings; but, whatever may have been the merits of the difficulty there, it has been remedied by an amendment of the pleadings in this court, and the question is fairly presented. This lard between decks, when delivered at the ship to be taken on board, was leaking badly from the casks, and most of it seemed to be apparently in an almost liquid state. The weather was excessively hot, so that the hands engaged in the stowage had to be frequently relieved, and, on some days, to lie by in the middle of the day. The stevedore who had charge of the loading refused to take the responsibility of placing the leaking casks between decks, from the danger of damaging the wheat below in the hold, and required the direction of the master, who also objected to taking in the cargo, and made his objections known to the charterers. Thereupon, they gave him, in due form, an agreement, before he would assent to the stowage, "to pay any damages that yourself (master) or the ship may be subject to, on the discharge of the cargo at Havre, the said damage arising from the lard being stowed between decks and running on the other cargo either in the between decks or lower hold." This I regard as a modification of the charter party, and it has been so treated in the amended libel, and removes the technical embarrassment of the case in the court below.

It is admitted that the damage to the cargo in question arose out of the leakage of the lard casks. Some were entirely empty, and over three hundred were partially empty, when discharged at Havre; and the lard had dripped through the seams of the deck to the cargo below, heated and damaged the wheat, and spread over the between deck.

It is claimed, on the part of the respondents, that the between deck was not well and sufficiently caulked, and that, if it had been, notwithstanding the leaky condition of the casks, the lard would not have worked its way to the lower hold, and, hence, that the ship should be held responsible for the damage. I agree, that, if this aspect of the case can be maintained, upon the proofs, the decree should be for the respondents, because the guarantee should not be construed as exonerating the ship from being, in all respects, in a seaworthy condition to carry this description of cargo. I have, consequently, looked into the proofs on this point, and, though there is some conflict of opinion among the witnesses, I am inclined to think

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

[2] [Affirmed in 7 Wall. (74 U. S.) 316.]

that the weight of the testimony does not sustain the allegation of the respondents. The witnesses who speak of the practice or usage of carrying leaking casks of lard between decks without danger to the cargo below, if the deck is properly caulked, generally qualify the remark as it respects lard in a liquid state in the casks, which, as is apparent from the proofs in this case, was the condition of a considerable portion of this lard when stowed; and, as the weather continued hot throughout nearly the whole of the voyage, this state of the lard must have increased rather than diminished. Indeed, the state of the casks when discharged, and of the between decks, goes far to confirm the evidence of the unusual leaking condition of the casks when put on board of the vessel, which led the stevedore and the master to object to them as not fit to be shipped; and the fact that the charterers, instead of insisting upon their right under the charter, chose to modify it, as respected the particular article, leaves an implication of its unfitness.

Some question was made upon a clause in the charter party stipulating that the vessel should be consigned to the charterers' friends in Havre, and under which she was consigned to the house of J. Barb & Co. This house received the bills of lading and collected the freight, and paid over to the master the amount due, excepting the balance in dispute. They obviously regarded themselves as acting in the interest, and for the benefit, of the charterers; and I cannot agree that the payment by them of the damages at Havre was a payment as agents of the ship, so as to conclude the owners. They dealt with the freight moneys not only as the friends, but as the agents, of the charterers, as is apparent from the accounts between the two houses. I think that the court below erred, and that the decree should be reversed, and a decree be entered for the libellants, for such balance.

[On an appeal by the charterers to the supreme court, the decree of this court was affirmed. 7 Wall. (74 U. S.) 316.]

Case No. 9,872.

MOSES v. DELAWARE INS. CO.

[1 Wash. C. C. 385.] [1]

Circuit Court, D. Pennsylvania. April Term, 1806.

MARINE INSURANCE—FACTS CONCEALED BY ASSURED—PARTICULAR KNOWLEDGE—GENERAL KNOWLEDGE.

Insurance on goods on board the Liberty, from Philadelphia to Charleston, lost or not lost. It was the duty of the assured, to communicate to the underwriters, a letter received by him, containing particulars of a hurricane which had occurred at Charleston after the vessel sailed; although the fact of there having been severe gales on the coast of Carolina, was known to the defendants. The knowledge of the plaintiff was particular, that of the defendants was general.

[Cited in Ruggles v. General Interest Ins. Co., Case No. 12,119; Sun Mut Ins. Co. v. Ocean Ins. Co., 107 U. S. 511, 1 Sup. Ct. 600.]

Action on a policy on goods, on board the Liberty, lost or not lost, at and from Philadelphia, to Charleston in South Carolina. The Liberty sailed from Philadelphia, on the 28th or 29th of August, 1804, and the policy was signed on the 22d of September, 1804. The vessel was found at sea, some time in September, turned bottom upwards. Great part of the cargo was thrown upon an island on the Carolina coast, and was sold, under a sentence of the district court, and salvage paid thereout. The defence was, that the plaintiff [Myers Moses] had concealed from the underwriters, a material fact, within his knowledge.

The evidence was, that on the afternoon of the 21st September, the plaintiff met with Mr. Steel in the street, who asked him if he had not shipped goods on board the Liberty, and whether he was insured. Being answered in the negative, Steel informed him, that he had that day received a letter from Charleston, dated the 9th, giving an account of a dreadful storm, which had happened there the day before, and that he communicated the contents of the letter to the plaintiff, every word, so far as he recollected. The words of the letter are, "Yesterday, the most dreadful storm happened here, that has ever been experienced; the damage amongst the shipping very great." Mr. Steel, who also was directed to insure the Liberty, applied at the different offices on the 21st, and was informed, that there had been severe gales on the coast, and much damage heard of. Most of the presidents disliked the risk. The Pennsylvania office spoke of asking seven per cent.; at the others, five was asked, which was double the usual premium. The president of the Delaware office informed him, that he had heard of the loss of the Patient Sally, which sailed on the 4th from Savannah, and which he should have to pay. The Sincerity sailed from Charleston on the 4th, and had arrived here, after experiencing great damage from the gale. The usual passage from here to Charleston, was proved to be ten to twelve days, but a vessel was not much out of time at eighteen days. It did not appear that the hurricane at Charleston, was known at any of the offices, until between ten and eleven o'clock of the 22d, after the arrival of the mail. The president of one of the offices declared in evidence, that after this account was received, no insurance could have been effected at his office, under fifty per cent., if at all. It was proved by the same person, and by one of the directors of the Philadelphia insurance office, that the accounts which came by this mail, did not state the storm in as strong language, as the letter before alluded to. After the arrival of the mail, the

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

Liberty was insured at the Philadelphia office, at five per cent., though the account of the storm, as stated by this conveyance, was known: but the office calculated, that the Liberty had not been out long enough to reach that part of the coast, where the severity of it was felt. Upon reference to the papers, from the 15th to the 21st of September, it appeared, that very heavy gales had happened on the coast, and vessels and wrecks found in the latitude of Charleston. The plaintiff, on receiving the communication from Mr. Steel, on the afternoon of the 21st, expressed himself satisfied as to the Liberty, as she might not be affected by the storm at Charleston. On the evening, however, of that day, he called at the Delaware office, to insure this cargo, but the president was not within. Early on the morning of the 22d, he called again, and effected the policy; but, the instrument not being filled up, he called two or three times for it, and finally received it between eight and nine o'clock in the morning. On the same morning, he informed an acquaintance of his of the dreadful storm which had happened at Charleston, and expressed his satisfaction at having got his insurance effected.

The defendant insisted, that the policy was annulled, in consequence of the concealment of this letter. Park, Ins. 209; 2 N. Y. Term R. [2 Caines] 57, in point.

The plaintiff contended, that the existence of the storm was known to the defendant; and, therefore, need not be communicated. 1 Marsh. Ins. 354; 4 Burrows, 1905; Park, Ins. 185.

Mr. Philips and Moses Levy, for plaintiff.
Rawle & Condy, for defendant.

WASHINGTON, Circuit Justice, charged the jury. It is admitted, that the plaintiff did not communicate to the office, the information he had received of the storm at Charleston, or that there was a letter in town respecting it; but, it is contended, by the plaintiff, that this was unnecessary, since it was sufficiently known to the defendants, to render the communication unnecessary. The rule is, that the insured must disclose every fact, material to the risk, within his own knowledge, which the insurer does not know, or is not bound to know. They were not bound to know of the particular storm mentioned in this letter; and, there is no evidence which brings home to them, in any respect, a knowledge of it. The only question, then, is; whether the communication of the contents of that letter, was material to the risk, taken in connexion with the knowledge, which the defendants had obtained through other channels.

The defendants knew generally, that there had been heavy gales on the coast, in the latitude of South Carolina; that damage had been the consequence; that a vessel, which had left Savannah on the fourth, was lost; that another had experienced its violence, was damaged, but had arrived. But, the plaintiff knew of a particular storm, more violent than had ever been experienced, which had done great injury to the shipping at Charleston, the port to which the Liberty was destined. She had been out ten or eleven days previous to the storm, and the usual voyage is from ten to twelve days, but not much out of time if extended to eighteen. She might, or might not, be within the fury of this particular storm. Was there any material difference, between the general information, which the defendants possessed, and that which the plaintiff possessed, as it respected the fate of the Liberty? If there was, the latter should have been communicated. Would you, after seeing this letter, and being yet ignorant of the fate of the vessel, have deemed the risk increased, from what it would have been estimated, with the general information possessed by the defendants? What was the plaintiff's opinion on the subject? At the time he received the account from Steel, he was his own insurer. Though he seemed to think lightly of the information given in the letter, he yet applied to insure the same evening; repeated it the next morning; and, after evident marks of impatience, got it concluded before the arrival of the post. If you think, that this conduct was induced by the contents of that letter, then it is plain, that he at least thought the information very material; and, on this point, furnishes strong evidence against himself. What was the conduct of the insurance offices? Under the impression of the general information of gales on the coast, double premiums were though sufficient. After the news of the Charleston storm had reached one of the offices, they still insured at five per cent.; but they did not know, that it was as severe as the letter to Steel had stated it, and they calculated, that the Liberty had not reached the place where it happened. After it was known, it appears, that, at another office, the risk would not have been taken at fifty per cent., if at all. Now, if the information of this particular storm was material, the defendants ought to have known it, so as to have had an opportunity of deciding, whether to take the risk, and at what premium.

The plaintiff suffered a nonsuit.

Case No. 9,873.

MOSES v. DUNNAHO.

[1 Cranch, C. C. 315.] [1]

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

SLAVERY — SUIT FOR FREEDOM — RIGHT TO GO IN SEARCH OF WITNESSES.

A petitioner for freedom has not a right to go in search of his witnesses.

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

Petition for freedom [by the negro Moses against Patrick Dunnaho].

Mr. Caldwell, for petitioner, moved the court for leave to the petitioner to go in search of evidence in support of his petition. Refused.

THE COURT said they knew no law which authorized them to give such leave. The usual recognizance is to permit the petitioner to attend court from time to time.

MOSES (UNITED STATES v.). See Cases Nos. 15,824 and 15,825

Case No. 9,874.

The MOSHER.

[4 Biss. 274.] [1]

Circuit Court, N. D. Illinois. Oct., 1868.

TOWAGE — REASONABLE DILIGENCE — SKILL — KNOWLEDGE OF CHANNEL—DUTY AFTER STRANDING.

1. The measure of a tug's duty is reasonable diligence and ordinary skill. The tug is not an insurer of the safety of the tow, nor held to the highest nautical skill.

2. The tug is bound to know the ordinary proper channel, but the responsibility is changed where the channel is shifting.

3. A schooner having taken the chances of entering in a storm, a harbor with a shifting channel, the tug is not to be held responsible, in the absence of proof of negligence, if the schooner touches some ridge of sand.

4. The tug is only bound to employ those means consistent with her own safety; she is not obliged to lay by the tow, when that would endanger herself.

Appeal from decree of the district court dismissing a libel filed by Sallie F. Dobbie and others, owners of the shooner Nicaragua, against the tug Mosher, to recover damage caused by the alleged negligence of the tug while towing the Nicaragua.

Miller, Van Arman & Lewis, for libellants.
George B. Hibbard, for insurance company.
Sandford B. Perry, for cargo.
Robert Rae, for respondents.

DAVIS, Circuit Justice. This case was argued at the last fall term by eminent counsel. I have since read all the testimony carefully, and although the case is not free from doubt, I am unable to see wherein the views of the district court are incorrect. I shall content myself with stating the ground on which I justify this conclusion.

The schooner Nicaragua, owned by libellants, on the 6th of August having encountered a heavy wind and high sea, which continued during the day, came to anchor, and shortly after, the tug Mosher took her in tow. The schooner furnished the tow line. The first broke; a second bore the strain. The vessel in the act of being towed into the harbor was stranded and ultimately lost. Is the tug responsible for this loss?

It is charged that the accident happened through the negligence and want of care of the officers of the tug, and that, at any rate, the disaster would not have been so ruinous, if these officers had used proper efforts to relieve the Nicaragua. The first question is, what degree of diligence and skill was required of the tug? The rule is well settled that reasonable diligence and ordinary skill is the measure of the tug's duty. The tug did not engage to insure the safety of the tow, nor for the use of the highest nautical skill. I think Judge Drummond stated the rule fairly, that the tug is bound to know the ordinary and proper channel into the harbor and to exercise reasonable skill under the circumstances, in towing the vessel.

As usual in cases of this kind the testimony is very conflicting and not easily reconcilable. It is claimed the schooner was kept windward of the tug. The weight of testimony is to the contrary. Neither do I think the tug went too far south. In my opinion the case turns on the condition of the channel at the time of the accident. The responsibility would have been very different if the channel was regular and established. Like the district judge, I do not wish to relax the need of caution of tugs in towing vessels nor establish harsh rules to make them insurers of property. There was no settled channel; it was in a shifting state. The old channel into the harbor had been substantially abandoned; it had been partly made in 1863–4, and about the time of this accident, whenever the dredging boats could work, they were dumping in one place and taking ground from another. The weather was changing, and during storms shoals would form. The channel was, in fact, a moving, changing channel. If an accident happened in towing a vessel through such a channel during a storm of several days' continuance, the tug, if it was managed with reasonable nautical skill and judgment, cannot be held responsible.

In what respect did the Mosher show less diligence and skill than required? The schooner having taken the chances of entering the harbor in a storm, the tug is not to be held responsible, in the absence of proof of negligence, if the schooner touched some ridge of sand. It is urged that she went aground on the old sand-bar. Although satisfied that she was ultimately wrecked there, I am not satisfied she first struck there. The winds and waves drove her south, and the probability is that her first position was changed.

But the tug is blamed for not using more effort than she did to get the schooner off the bar; in other words, is charged with fault in abandoning the schooner too soon. It is hard to get at the truth, for the witnesses on each vessel differ materially in their account of what occurred. At the argument it did seem to me that the tug left the schooner to

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

her fate sooner than she ought to have done, but since reading the testimony, I cannot say that she did not employ all the means practicable and consistent with her own safety. The captain of the tug was not obliged to stay by the schooner if in good faith he believed he would endanger his own vessel. On both points he is supported by the testimony. I think the decree dismissing the libel should be affirmed.

NOTE. As to the duty of a tug in a narrow channel, and especially with reference to a propeller meeting the tug and tow, consult The Alleghany [Case No. 204], and cases there cited. As to duty of tug with respect to speed, see The Alleghany [Id. 205]; and as to respective duties of tug and tow, consult The Brothers [Id. 1,969], and numerous authorities there cited. For the relative duty and liability of the tow, consult a recent opinion by Judge Drummond, The Margaret [Id. 9,068], July, 1873; also, The I. M. Lewis and The Aline [Id. 6,991], June 13, 1874.

Case No. 9,875.

The MOSLEM.

[1 Olcott, 289.]

District Court, S. D. New York. March, 1846.

SHIPPING—LEAKING VESSEL—SEAMEN EMPLOYED TO PUMP—SEAWORTHY CONDITION.

1. If seamen are shipped on a vessel unseaworthy at the time, they may rightfully abandon her or refuse to do duty on board.

2. When seamen know a vessel is leaking three or four inches the hour in port, and came in from sea in a leaky state, and they ship on board mainly to help pump her on her home voyage, they are not absolved from their contract because the leak continues or even increases on the voyage, if she was seaworthy when she left port.

3. Where a ship on a voyage from Manilla to New-York, went into Cape Town leaking, and there received partial repairs, and on survey was pronounced seaworthy, and shipped seamen for the home voyage, but in order to have the advantage of the trade winds, and smoother seas, and sooner to reach a suitable port for repairs, made for Pernambuco, that is not such a deviation as to discharge the seamen from their obligations to her. But if the master intended to take that course when he shipped the crew, or left Cape Town, he was bound to make it known to them.

4. It is no unreasonable service to require a full crew to keep a staunch vessel free of water which does not make exceeding four inches of water the hour; but if at the beginning of the voyage the crew become apprehensive of great danger, it is not disorderly or mutinous conduct for them, in a body, to apply respectfully to the officers, and urge that the ship be put back to port.

5. If, on that application, the master engaged to pay each man one dollar extra per day to continue the voyage, and work the pumps, and promised to sight the island of St. Helena, and to enter the port, if necessary, his failure to run in view of the island was not such a violation of contract as to release the crew from their obligation to the vessel, and justify them in refusing to do duty on board.

6. It was in the sound discretion of the master, in view of the safety of the ship and her company, to go into, or pass the island. Those who for that cause broke off work, and defied the authority of the master, were guilty of mutinous misconduct, and might be coerced back to duty, and also subjected to forfeiture of wages.

7. A punishment by abstraction of wages may be a partial or total withholding of them.

[See note to The Almeida, Case No. 254.]

8. If, on the arrival of the ship at Pernambuco, one of the crew claimed his right to leave the ship, because of her deviation, and refused to do further duty on board for that cause, but was afterwards subdued to the authority of the ship, such disobedience is not cause for the forfeiture of his wages.

9. The subsequent disorderly and mutinous behavior of the seaman, and obstinate refusal during the home voyage to do duty, deprives him of all claim to after wages, but does not retroact and forfeit those earned previous to arrival at Pernambuco.

Peter Scott, filed a libel against the ship Moslem, claiming the wages stipulated in his shipping articles; and also extra wages of one dollar per day on a voyage from the Cape of Good Hope to Pernambuco, and thence to New-York. After the action was commenced and the ship attached, John Rooney, Samuel Phillips and Thomas Channan united in this suit as co-libellants, making like demands of contract and extra wages. The pleadings on both sides are crammed with harsh and criminatory allegations and extraneous statements, by each party against the other. The substance of the charges and issues, which were the subjects of contestation on the trial and entered into the judgment of the court, related, on the part of the libellants, to the deception and misconduct of the master towards the libellants, in hiring them at the Cape of Good Hope, and taking them to sea, and in his unjust and cruel treatment of them on the voyage to Pernambuco; and in respect to Scott, his continued confinement in chains at Pernambuco and during the voyage from that place to New-York; and on the part of the claimants to the disorderly, insubordinate and mutinous conduct of the libellants on shipboard. The rate of wages at which the libellants shipped, and the period they were respectively with the ship, was not in dispute.

The case made by the averments of the libel is, that the libellants were shipped at Cape Town for a direct voyage to New-York. That the ship arrived at Cape Town from Manilla, leaking badly, and continued to leak at the rate of three or four inches the hour, during the period of two or three weeks she remained in that port. That after she put to sea, the leak increased to ten inches the hour. That the libellants, and the rest of the crew, respectfully requested the master to return to port, because of the unseaworthiness of the ship, but he refused to do so, and deviated from his voyage, and ran to Pernambuco. That because of their remonstrances against being forced to remain with the ship in her unseaworthy condition, and against the severe labor imposed upon them at the pumps, the master put them in close confinement on board, and deprived them of necessary food. That he engaged to pay them each one dollar a day extra wages from Cape Town to

Pernambuco, but refuses to pay the same, or any part of their wages. The answer avers that the ship was seaworthy when the libellants shipped, and when she sailed on the voyage. It denies any deviation, and charges that the libellants forfeited their wages by insubordinate and mutinous conduct on the voyage. It is unnecessary to set forth with greater particularity the details of the pleadings. All that are material are comprehended in the issues above stated. Each libellant was examined as a witness for his co-libellants. The main facts which apparently entered into the judgment of the court are gathered from a mass of contradictory allegations, and exceedingly diffuse and rambling statements found in the depositions and oral evidence offered on the trial. They amount substantially to these:

The ship, on her return voyage from the East Indies, put into Cape Town in a leaky state. She lay in port three weeks. Some of her crew left her there. The four libellants shipped there for the home voyage to New-York, making up an extra complement to the ship's company. They knew the ship was in a leaking condition, and shipped with express notice that their services would be mainly required in pumping her on the voyage. The ship leaked two or three inches the hour when she went to sea. After being out about thirty hours, the libellants made known to the master that they were unwilling to proceed on the voyage because the ship was unseaworthy, and requested to be put back to Cape Town. There was nothing disorderly or disrespectful in their proceedings on that occasion. The rest of the crew united in that request. After consultation on board, the ship was put about, and an attempt was fairly made to work her into port. The wind and current being against her, it was found, after twenty-four hours effort, that she made no headway, and the master called all hands and told them he could make St. Helena easier than get back, and would run so as to sight the island, and would put in for repairs if the condition of the ship rendered it necessary; and if the leak did not increase he would make Pernambuco, and there have the ship hove out and fully repaired. To encourage the crew he engaged to give each man one dollar a day extra wages if they would work faithfully on the voyage. The chief work was at the pumps, the ship running free on the trade winds, exacted but slight labor in her navigation. The leak continued without intermission, and required heavy services at the pumps to keep the ship clear. The evidence varied widely between the men and sub-officers as to the degree of leakage and labor; the libellants, in their testimony, represent the leak to have increased to ten inches the hour, which would require, in the estimation of the mate, 4,500 strokes of the pump per hour to keep the ship afloat. He does not estimate the leak to have exceeded four inches the hour at any time, or to have required more than 750 strokes an hour to clear her. Several ship-masters, experienced in voyages to and from Calcutta, Manilla, &c., testified that they considered the ship seaworthy, manned as she was and running with the trade winds, if she made three or four inches of water the hour, and that 1,000 strokes the hour would be no extraordinary labor at the pumps, as she was manned and provided. The ship, after receiving partial repairs, had been surveyed at Cape Town before going to sea, and pronounced seaworthy. The leak was supposed to have been in her upper works.

The libellants, from the time the ship resumed her voyage, after the fruitless attempt to work back to Cape Town, became reluctant and slack in their work, and disobedient to the officers. Scott was the ring-leader, and was on different occasions insubordinate and insolent to the master, and acted as if determined to shirk all duty. After the ship passed St. Helena, the libellants openly refused to do duty, and went below in defiance of the officers. Scott declared himself an Englishman, and denied the authority of the master over him. They then sung Rule Britannia, in a rude and boisterous manner, and damned the American flag, and refused to come on deck and return to their duty. The master ordered them to be kept in confinement below and on short allowance of provisions for their disobedience and misconduct. They afterwards submitted to the authority of the officers and were again put to duty. When the ship arrived off the roadsteads of Pernambuco, the libellants became turbulent and insubordinate, and assaulted the master; a handspike was raised upon him by one, and Scott seized and held him fast, tearing his clothes. Scott was put in irons for the offence, and was frequently afterwards called upon to return to his duty. The other libellants submitted and went again to their duty. Scott, however, utterly refused to do so, and continuing mutinous and stubbornly insubordinate, was kept under confinement at intervals during the stay at Pernambuco, and then permanently until the arrival of the ship at this port.

The claimants gave direct and positive proof that before the suit was brought the wages of Rooney, Phillips and Channan were paid in full, and their receipt therefor was also given in evidence. Their proctor testified that the master and owners refused to pay any extra wages, and only paid what the captain asserted was the balance due them on the shipping articles, and the libellants denied that the account he made out of their wages was true. He was contradicted in this statement by the person who made the payments.

A. Nash, for libellants, insisted that the master deceived the men as to the condition of the ship when they shipped, overworked them cruelly at the pumps during the voyage,

and had deviated from the voyage for which they shipped; that they had a right to refuse doing duty on board, and to leave the ship the first opportunity, and collect full wages to New-York; that they had not incurred a forfeiture of wages. That Scott was wantonly maltreated and imprisoned at Pernambuco and on the voyage thence to New-York, and that all the men were entitled to one dollar each per day extra wages for the full voyage home. He cited Sherwood v. McIntosh [Case No. 12,778]; Wood v. The Nimrod [Id. 17,959]; Snell v. The Independence [Id. 13,139]; 9 Johns. 158; 8 Law Rep. 70; Anth. N. P. 32; 1 Hall, 238; The Mentor [Case No. 9,427]; 1 Hagg. Adm. 182; Id. 59; 3 Esp. 7; U. S. v. Ashton [Case No. 14,470]; Jac. Sea Laws, 142; Butler v. McLellan [Case No. 2,242]; Curt. Merch. Seam. 296, 299; 2 Hagg. Adm. 243; Moran v. Baudin [Case No. 9,785]; Thomas v. Lane [Id. 13,902]; 14 Johns. 260.

E. Burr, for claimants, contended, on the facts, that the libellants established no right of action.

BETTS, District Judge. It will not be attempted in the examination of the merits of this case, to settle or discuss all the topics brought into the controversy in the multifarious evidence or protracted arguments of the parties. Four or five entire days have been exhausted on the hearing. The testimony upon various points in dispute cannot be reconciled, and the judgment of the court has not unfrequently been governed more by the strong probabilities surrounding the case, than the positive assertions of witnesses.

In respect to the condition of the ship when the libellants entered upon the voyage, I deem it less important to determine whether she was fully seaworthy than to ascertain the fairness of the dealing of the master with them. They were English seamen ashore, out of employment, and seeking an opportunity to leave the Cape. The ship lay about three weeks in the port undergoing repairs, and they had full opportunity to inform themselves of her state, so far as that could be known from external appearances and the degree of leakage, because, not only was her condition a fact of notoriety, but they were in intercourse with some of her crew who had left her at that port, and were themselves frequently about her, and, as it would appear, also on board her at her berth. The master explained her situation to them when they were hired, and engaged them expressly to aid in working the pumps, assuring them their general work in navigating her would be light, as he had shipped extra hands.

My attention has been carefully directed to this particular, as from the general heedlessness of sailors they are exposed to be drawn into improvident bargains; and these men, in a degree destitute, in that remote part of the world, where the opportunity to select their employment must be rare, would be eminently liable to imposition or disadvantageous engagements. But, looking watchfully at the whole evidence to this point, I am satisfied the libellants entered into this agreement with a plain understanding of its character and probable hazards, and that the officers of the ship practiced no deceit or improper influences with them in making the shipping contract. Still, if the ship was actually unseaworthy at the time, or proved to be so when she entered upon the voyage, the libellants were not bound by their contract, and could rightfully refuse to continue the voyage and compel the master to return with the ship to port. Porter v. Andrews, 9 Johns. 350; U. S. v. Ashton [Case No. 14,470]. The conduct of the libellants in requesting the master the first day out to go back to the port of departure, because of the leaking of the ship, was respectful and proper, and if not obeyed, provided the ship was unseaworthy, would have dissolved their obligation to remain with her and incur the hazard of a voyage on board. The master most properly submitted to their demand, and I think satisfactorily proves, he attempted in good faith to comply with it. His judgment, that greater danger was incurred by beating back against wind and current in her then state than by continuing his course upon the trade winds, is confirmed and justified by the judgment of several experienced shipmasters who were examined to that point on the trial. This was clearly explained to the crew at the time, and all hands went freely to their duty and put the ship upon her course. After this the libellants were bound to obey the orders of the master, and lend their services faithfully in the work of the ship.

I do not consider the statement of the master to the crew that he would run in sight of the island of St. Helena as a positive engagement to make that direction part of the route, so that a departure from it would constitute a deviation. The marine laws are peremptory that the master shall perform the voyage stipulated in the shipping contract, and holds the seamen discharged of their obligation to the ship if he deviates from it. Curt. Rights Seam. 25. But this duty respects the voyage, its inception, and its specified termini, and has no relation to the track or line of navigation pursued in accomplishing it. That must, from its nature, be contingent, or regulated at the sound discretion of the master. Had the libellants proved an express agreement of the master to run in sight of St. Helena, it would be no deviation, in a maritime sense, to have varied his route so as to fail of a literal fulfilment of such engagement. To keep intentionally away from the island would be a breach of the terms of such engagement, but it would be damnum absque injuria, if no necessity existed for resorting to that port. Of that necessity the master, from his position, must be judge, and if he acts in good faith and fairly upon the facts before him, his decision

should be final. He considered the vessel capable of making Pernambuco, that she was under no exigency to seek St. Helena, and that there was no object in stopping there except to save the crew from imminent peril to their lives, as the ship could not obtain repairs at that port, and the interests and safety of the ship and crew required him to pursue the most direct course to Pernambuco. This conclusion is fully supported by the evidence in the case.

Nor under the facts can the claim of the libellants prevail, that they were absolved from all obligation of obedience and duty to the vessel because she was put upon the course to Pernambuco, and not directly to New-York. Ordinarily, the shipping contract is to be understood as contemplating a direct voyage from the port of departure to that of its termination, unless a different course is stipulated in the agreement, or is plainly made known to the seamen. The Minerva, 1 Hagg. Adm. 347; The George Home, Id. 372. But in this instance, after the ship left port, a departure from the shortest line to her port of destination would be justifiable on the fact that Pernambuco was the nearest accessible port at which the repairs needed could be obtained; and also because it was the surest and speediest route in the condition of the ship. A change of voyage which may discharge mariners from the obligation of their contract, must be wilfully made by the master, and enforced against their consent or acquiescence. Wood v. The Nimrod [Case No. 17,959]. This is a common course of navigation with vessels bound from the Cape to the United States, and might reasonably be implied as so understood by the libellants, as they were in the port, waiting and seeking the opportunity of a return to this country. They made no opposition or objection to this course of the voyage, when it was declared to them and was resumed, and the promise of extra pay had been given them. They grumbled afterwards, and were insolent and occasionally insubordinate, but their complaints were against the state of the ship and the labor exacted of them, and not to the course run, until they were carried past St. Helena. Then it was they refused to perform further duty on board unless the ship was taken back to the island, and persisted in the refusal until coerced by close confinement and privation of food to yield and return to their services.

These facts, I think, afford a satisfactory presumption, that if the master intended going to Pernambuco when the libellants were hired, they were apprised of it, or that if that route was fixed upon after getting to sea, they either acquiesced in it, or the change was one of probable necessity, and thus excusable in the master. Under either circumstance, the libellants were bound to a full obedience and faithful discharge of their contract, and their misconduct on that occasion, in my opinion, justly authorizes the owners of the ship to resist the demand for wages, and have, at least, judgment of forfeiture of the extra pay, being a proportion of the libellants' wages. The court is not compelled to pronounce a forfeiture of the entire wages, but may punish malfeasances or dereliction of duty at sea by such abstraction of wages or mulcts as will, in its judgment, supply an appropriate punishment. The Baltic Merchant, Edw. Adm. 86; The Lima, 3 Hagg. Adm. 359; Cloutman v. Tunison [Case No. 2,907]; Poth. Mar. Cont. art. 178; The Elizabeth Frith [Case No. 4,361].

The after submission of the men to the authority of the ship, and return to duty, with the acquiescence of the master, and their continuing to serve on board until her arrival at Pernambuco, should operate in equity to preserve the wages agreed in the shipping articles. I do not hold the transaction an entire condonation of their offence, yet I do not think the master should be allowed to inflict corporal punishment sufficient to bring the men back to duty, avail himself of their services, and then exact a confiscation of their whole wages for conduct, although highly disorderly and mutinous, yet based upon colorable grounds of wrong towards them, and of right on their part to hold themselves discharged of all obligation to the ship.

The point taken on the defence, that the engagement of the master to give the crew extra pay was obtained from him by duress, or unlawful compulsion, is not tenable. It was proposed spontaneously by himself, and in the exigencies of the ship and all her company, was reasonable and proper in itself, and would be upheld in favor of these men, had they not sacrificed their rights by their own after misconduct.

It is further insisted, that this claim was satisfied by the master after the termination of the voyage at this port, and was included in a receipt in full, taken by him on settlement with all the men except Scott. The testimony of the libellants' proctor, and a clerk of the claimants' proctor, in respect to that settlement, stands in direct conflict. Without deciding the question of credit between those witnesses, and independent of the other special grounds of defence, I shall place the denial of extra wages to these men, exclusively upon the right of the owners to their forfeiture. The proof is ample that their contract wages were fully paid, and that they became parties to this action solely to recover their extra pay.

It is therefore ordered, that the libel be dismissed in respect to Rooney, Phillips and Channan.

Although Scott had been the ringleader in the disturbances and mutinous conduct at sea on the passage from Cape Town to Pernambuco, yet I regard his restoration to duty by the master, on his confession of his faults and promise of good behavior, a remittance of the absolute forfeiture of wages he had incurred, and I shall not accordingly discriminate

between his case and that of his fellows up to the arrival of the ship at Pernambuco roads.

The statements in the proofs of the transactions at Pernambuco in respect to Scott are entangled and equivocal, and lack that fullness and certainty which might enable the court to determine satisfactorily the true character and extent of his offences at that place. He was at times disorderly and dangerous, and was punished severely therefor, on shipboard and on shore, and it would appear that the master considered these punishments adequate and sufficient for the offences, as he offered to receive him back to his place in the ship. The other men involved with him in the misconduct accepted the pardon, and performed duty up to the arrival of the ship in New-York, and were there paid their wages in full. Scott maintained an unflinching refusal to submit, declaring he had been kept so long in irons he would remain in that condition to New-York, and be judged there, and he was accordingly confined in irons on board during the voyage home.

Scott addressed a letter to the master at Pernambuco, manifesting penitence and humble submission to his authority, promising to refrain from liquor and behave well thereafter. It is not clearly shown why that repentance was not accepted by the master, and it has not been made to appear distinctly that the letter was not written during his last confinement at that port, although much rambling and incoherent evidence was given tending to show that the letter was written long before the ship left the port, and that the conduct of Scott was constantly violent and refractory until her departure.

Scott insisted he was entitled to a discharge at Pernambuco, and that the master had no rightful authority over him there; and so far as he may be regarded acting under an honest belief in that right, his refusal to yield to the commands of the officers of the ship should be considered leniently, and his first offer to return to duty should have been accepted. The proofs, however, tend strongly to the conclusion that this submission was in fact offered and accepted on his first imprisonment, and that he immediately afterwards renewed his disorderly and mutinous conduct, and was imprisoned therefor on shore and in the ship. After he was brought back to the vessel, in irons, and on the homeward voyage, he was repeatedly urged by the master to return to his duty, but he peremptorily refused to do so. This conduct necessarily bars his demand for wages from Pernambuco to New-York.

Desiring to look as favorably as the testimony will admit at extenuating circumstances on the part of seamen, when a total forfeiture of wages already earned is sought for, I hold that the master has not given sufficient proofs to make the misconduct of Scott at Pernambuco, and from thence to New-York, forfeit his antecedent wages, and shall, accordingly, decree in his favor for the balance of wages due and unpaid, on the arrival of the ship at Pernambuco. I cannot collect from the proofs the true state of his accounts with the ship at the time he was imprisoned at Pernambuco, and, unless the parties agree upon the amount, it must be referred to a commissioner, to ascertain the sum then due him, deducting all payments made him.

The final decree will include all proper directions in respect to the details of the judgment and costs.

[The commissioner reported $15.42 as due to Scott. Exceptions were taken. The report was confirmed, but without costs to the libellant. Case No. 9,876.]

Case No. 9,876.

The MOSLEM.

[Olc. 374.] [1]

District Court, S. D. New York. July, 1846.

COSTS — ADMIRALTY — RULE — SEAMEN'S WAGES — FRIVOLOUS SUIT.

1. The prevailing party in admiralty suits is prima facie entitled to recover costs. The decree in his favor implies that he has been wrongfully delayed or prosecuted.

2. Still the common law rule to give costs in all cases to the successful suitor is not recognised in admiralty as the law of costs, and they are awarded at the sound discretion of the court, without regard to the ultimate termination of the action.

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

3. A seaman will be denied costs in a suit for a small balance of wages due him, when payment of the balance has not been demanded of the master or owner of the ship, and no refusal to pay them has been made by either, and particularly if the seaman tacks to the debt other distinct and unsupported claims, and sues for the whole conjointly.

[Cited in The Boston, Case No. 1,672; Walsh v. The Louisiana, 4 Fed. 752.]

Upon the hearing and decision of this cause in March term last, the court ordered a reference to a commissioner to ascertain and report the precise date the libellant was imprisoned at Pernambuco the last time, in order to determine whether he rendered any services to the ship after that period. [Case No. 9,875.] The commissioner made his report pursuant to the order, and when filed, the claimants interposed exceptions to it.

E. Burr, for claimants.

A. Nash, for libellant.

PER CURIAM. The commissioner, pursuant to the order made in March upon the decision on the merits of this case, reported that the libellant was last imprisoned at Pernambuco, previous to the sailing of the ship for New-York, on the 2d day of April, 1845, and, computing his wages to that day, found the amount earned to be $33.44, and the balance due him $15.42, after all just deductions allowed against him. The claimants except to the report, and the point raised by the ex-

[1] [Reported by Edward R. Olcott, Esq.]

ception relates to the time to which the commissioner carried forward and credited wages to the libellant. The court, on the final decree, regarded the libellant entitled to wages to a certain period of the voyage, and that he had disabled himself claiming wages subsequent to that; but, upon the answer of the master and the proofs before the court, it was equivocal whether the libellant, after one imprisonment in Pernambuco by the local authorities at the instance of the master, and his subsequent return to duty with a virtual condonation of the offence, and substantially under a new engagement, had been again put in confinement by order of the master; and if so, when such imprisonment took place.

It not having been a prominent consideration in the contestation of the cause, to determine precisely the termination of the libellant's imprisonment at Pernambuco, the court decreed it proper, with a view to the final disposal of the case, to refer the subject to a commissioner to report what was "the time the libellant was last imprisoned and confined at Pernambuco previous to the sailing of the ship for New-York." In this way the court hoped to ascertain, satisfactorily, whether the libellant was all the time subject to his original shipping contract, or was to be regarded connected with the ship by a new engagement at Pernambuco.

The commissioner reported that time to have been the 2d of April, 1845, and returned the evidence upon which the report was founded. It appears that the ship arrived at Pernambuco about the 24th of February, 1845, and that on the 27th, Scott and his co-libellants were imprisoned on shore, because of their refusal to assist in unlading and repairing the vessel. They remained in prison until the 11th of March, when they were taken out and returned to duty on board, agreeing to continue with the ship to the termination of the voyage. The libellant, when intoxicated, proved insubordinate and disorderly, yet in the main conducted so far satisfactorily to the officers of the ship that he was retained at his work until about the 20th of April. Having that day been guilty of gross acts of violence towards the master, he jumped overboard and swam ashore to escape arrest by the officers, and the master states, in his answer, was confined on shore by the local authorities, and was the next day brought back to the ship by his orders. Rooney, a witness for the libellant, testified that Scott was put in prison a second time, three days after that release, and was confined six days, and that he was out of prison twelve or fourteen days on duty, when he was again put in irons. There is a good deal of obscurity in the testimony respecting the order of the transactions with Scott on shore and in the ship, but I think the more credible explanation of the circumstances is, that the day after the affray, on the 2d of April, Scott was brought back to the ship and flogged, but refusing to return to duty, he was put in irons on board, where the master and under officers endeavored to bring him to submit to their authority. The ship sailed the 6th of May, and Scott, persisting in refusing to obey orders on board, was continued in irons until his arrival in New-York. Neither the captain, in his answer, nor the second mate or steward, in their testimony, speak of the second imprisonment testified to by Rooney, nor does Rooney, the mate or steward give evidence of Scott's confinement on shore the first of April; but it is manifest, by comparing all the proofs, that the libellant was in prison ashore after his release on the 11th of March; and as it belonged to the claimants to prove that this was anterior to his being put in irons in the ship, and as this was a specific point of reference to the commissioner, I shall concur in the conclusion of the commissioner who examined this point carefully, that Scott was imprisoned in Pernambuco the day before he was put in irons on board the ship, and overrule the exception to the report on that point, and adopt the report that there is payable to the libellant the sum of $15 42 out of the wages due him on the voyage to Pernambuco.

The question of chief interest to the parties in this cause is that of costs, as they have accumulated to considerable magnitude from the course the litigation has taken. The court has already decreed costs in full to the claimants as against the co-libellants of Scott, and it remains to consider what are the equities in respect to this particular suit. The claims of costs between litigant parties, where there is usually much wrong, mingled with strong color of right on each side, more especially in actions for seamen's wages, present a class of questions of the most perplexing character, not readily settled upon any fixed principles. The common law rule of awarding costs invariably to the successful party is often marked with such manifest impropriety, not to say injustice, that courts of equitable authority reject it as a principle of decision, and assume to regard costs as one of the subjects of litigation, and dispose of them with a view to all the sound equities of the case. [Canter v. American, etc., Ins. Co.] 3 Pet. [28 U. S.] 319; 3 Hagg. 76; 1 Hagg. 83; 1 Wm. Rob. 21; Id. 124, 131, 215, 334, 447. In most of the cases cited, costs were decreed to the party prevailing in the action, and yet numerous decisions are found in the English and American admiralty reports where costs are awarded and withheld, irrespective of the result of the suit on the merits. 2 Hagg. 90; 1 Notes Cas. 305; 1 Hagg. Ecc. 210; Hutson v. Jordan [Case No. 6,959]; [Bingham v. Cabbot] 3 Dall. [3 U. S.] 34.

The court is accordingly bound, in determining the matter of costs, to weigh the relative rights and equities of the parties disclosed in the case, without being gov-

erned by the ultimate conclusion for or against either in the decision of the subject in controversy. The prevailing party is prima facie entitled to the costs of his suit or defence, the decree in his favor importing that he has been wrongfully delayed or prosecuted. This inference is, however, open in admiralty suits to be met and displaced by the general equities of the case.

This action was instituted to recover, and the libel demands wages for the entire voyage from Cape Town to New-York, and also extra wages of one dollar per day, apparently for the entire voyage, but with certainty from Cape Town to Pernambuco. The answer and claim of the master contests and denies the whole demand. It claims a forfeiture of the contract wages, because of the mutinous misconduct of the libellant, and denies the obligation of the special agreement at sea to pay wages, set up in the libel, and both parties take proofs at great length in support of their respective allegations. The court made a decree for a small part of the libellant's demand, and sustained the answer as to most of the particulars contested, and which embodied those branches of the case most strenuously litigated. The award of wages for part of the voyage was not upon the ground of the general meritorious conduct of the libellant; on the contrary, the court was constrained to declare his conduct on board during that period to have been often disorderly and mutinous, and his claim to wages was supported only because the court regarded the discipline inflicted by the master, the submission of the libellant and his after restoration to duty, as an equitable remission of the forfeiture which might otherwise have been enforced against him. Had the case accordingly presented no other question than the libellant's right to wages to Pernambuco, I am not prepared to say that the defence would not have been regarded bona fide as to that demand, and the authorities cited show that the court will not then necessarily give costs against the ship or owner, although the defence is unsuccessful.

The other features of the case, the demand for extra wages, and of contract wages for the entire voyage, compelled the owners to contest the suit, and they have clearly shown that it was unfounded and inequitable in relation to any claim beyond that of simple wages to Pernambuco, and these were saved only through an implied condonation of the offences which would have forfeited them. I think, then, it would be contrary to the usage of admiralty courts, and against the principle regulating their proceedings, to regard the small recovery of $15 42, as entitling the libellant to costs against the owners, when they have defeated claims of his mingled with it to several times that amount, and have proved his conduct in all respects from the time he undertook the voyage from Pernambuco to New-York mutinous and most injurious to their interests. Although I cannot, for these considerations, award the libellant costs, and although the proofs show his conduct to have been often turbulent and highly insubordinate, yet there are some particulars in the case evincing great hardship upon the libellant, and I am not disposed to subject him to any decree in favor of the master or owners for costs. As to the voyage to Pernambuco, there was strong color for his belief that he had been shipped on board a vessel no way seaworthy. And his disorderly and refractory conduct in that state of mind justly claims a lenient and forbearing consideration. And in the mixed and confused events connected with his conduct, and the dealings of the master with him at Pernambuco, I am inclined to think it must be understood that the old contract between them ended with that part of the voyage, and that his return to the ship at that port was upon a new engagement for the home voyage. From that time he plainly forfeited all wages for services he might have rendered on board before the ship sailed from Pernambuco, but the severity of treatment he underwent at the time and during the voyage ought to be regarded a sufficient punishment, without having added to it a decree for costs of suit. He was kept in irons on board of the ship more than a month at Pernambuco, and from that port to New-York, without evidence to show that this was necessary for the safety of the officers, the crew or the vessel. He also proves his repeated demand of the master to be discharged at Pernambuco, and having been shipped abroad and being a foreigner, the master was under no obligation to bring him to the United States.

Upon these considerations, I decree that the owners pay the libellant, or his proctors, $15 42, the wages due on the arrival of the ship at Pernambuco, and that each party pay his own costs in this action. Costs are withheld from the libellant on the recovery of the small balance of $15 42 found to be due him, because he had never demanded payment of that sum before suit brought, nor had it been refused him by the master or owner, but more especially because he made that balance the occasion of tacking to it in this suit unwarrantable claims, and driving the parties into an expensive and protracted litigation.

MOSOROP (ELLZEY v.). See Case No. 4,412.

Case No. 9,877.

In re MOSS.

[19 N. B. R. 132.] [1]

District Court. S. D. New York. April 23, 1879.

BANKRUPTCY — STOCK BROKER — MERCHANT OR TRADESMAN—FAILURE TO KEEP BOOKS —DISCHARGE.

The bankrupt was a stock and gold broker, but was not a member of the Stock Exchange. He took orders for the purchase and sale of stocks and gold, but conducted the business exclusively through the agency of other brokers, who were members of the exchange, and divided the commissions with them. *Held*, that he was not a merchant or tradesman, within the meaning of the act, and as such disentitled to a discharge for failure to keep books of account.

In bankruptcy.

B. Skaats, for bankrupt.

Chas. E. Crowell, for creditor.

CHOATE, District Judge. This is an application for the discharge of the bankrupt. The only specification is that, being a "merchant or tradesman," he kept no books of account. The bankrupt kept no books. The only question is, was he a "tradesman," within the meaning of the act [of 1867 (14 Stat. 517)]? The evidence as to the nature of the bankrupt's business is very confused; but, as nearly as it can be made out from his examination, it was as follows: He was a stock and gold broker, but without being a member of the Stock Exchange. He took orders for the purchase and sale of stock and gold, but did not himself execute the orders. He opened accounts in his own name, as "agent," with other brokers, who were members of the exchange, and they bought and sold for him upon his orders, and gave him half the commission usual in such transactions. He furnished those for whom he did the business a memorandum of each transaction immediately after it occurred. It did not appear whether his customers knew that he bought and sold exclusively through other brokers, nor was there any evidence of concealment. The debts contracted by him consisted chiefly of balances due the brokers through whom he acted, being in reality for excess of his losses over the margins deposited. There were also some debts for borrowed money, and some debts due to the customers who employed him, for balances on these stock transactions. Upon these facts, I think it clear that the bankrupt was not a "merchant or tradesman," within the meaning of the act, and as such disentitled to a discharge for failure to keep books of account. The careful discussion of the meaning of the word "tradesman" in recent cases makes it unnecessary to do more than refer to those authorities. In re Coté [Case No. 3,267]; In re Stickney [Id. 13,439]; In re Marston [Id. 9,142]. Discharge granted.

[1] [Reprinted by permission.]

MOSS, The (MAGEE v.). See Case No. 8,944.

MOSS (RIDDLE v.). See Case No. 11,809.

MOTHERSHED (HEALY v.). See Case No. 6,296.

Case No. 9,878.

In re MOTT et al.

[N. Y. Times, Dec. 8, 1863.]

Circuit Court, S. D. New York. Nov. 28, 1863.

BANKRUPTCY—JURISDICTION OF DISTRICT COURT—SETTING ASIDE CONVEYANCE BY ASSIGNEE.

[Cited in Re Hyde, 6 Fed. 594, to the point that the district court in bankruptcy has the power to set aside by summary process a conveyance executed by the assignee in bankruptcy which was improvidently, irregularly, or without due authority, executed by the assignee, or which was procured to be executed by fraud upon the court or upon the assignee, while the property so conveyed is still in the hands of the party to whom so conveyed by the assignee.]

[This case is first reported as heard upon objections to petition of Jacob H. Mott to be decreed a bankrupt. Case No. 9,878b. It is next reported as heard in the district court upon application to set aside the sale by the assignee to Isaac C. Delaplaine of the bankrupts' interest in the estate of their grandfather John Hopper. The petitioners were allowed to move it into this court. Case No. 9,878a. It is now heard upon this removal.]

Judge Foote, for motion.

Mr. Betts, opposed.

NELSON, Circuit Justice. We have looked into the papers in this case, and are satisfied that the two orders entered by the district court, on the report of the general assignee, for a private sale of the assets of the bankrupts, on the 28th of February, 1860, were improvidently granted, and that they should be set aside, and, also, that the conveyance under them by the assignee to Isaac C. Delaplaine should be delivered up and canceled, and the monies paid by him, and deposited in the district court, be refunded to him, and those received by the assignee, and not so deposited, be refunded by the said assignee. We do not doubt but that the district court has full power and jurisdiction to make an order to the above effect. As to the prayer of the petitioners that conveyances of the property made by the assignee to Delaplaine be made to them, we are of opinion that the district court has no power to make such an order, or that it would be right or proper to make it, even if it had the power. In the existing condition of the matter in controversy, a proper and equitable disposition of them, in our judgment, would be an order directing a sale of these assets at public auction, giving ample notice of the time and place of sale, with a particular description of the nature, locality and boundaries of the property, it being real estate; or, at least, as full and particular a description as practicable. As to the question of the two years'

limitation in the bankrupt statute, it has heretofore been adjourned to this court by the district court, and by this court held not to apply. Let the above be certified by the clerk to the district court.

[NOTE. Subsequently the administrators of Isaac C. Delaplaine petitioned to have the amount paid by him refunded to them. Case No. 9,879. At the public sale of this interest it was purchased by James M. Smith, Jr. A petition was filed to set aside this last sale. Petition dismissed. 6 Fed. 685.]

Case No. 9,878a.

In re MOTT et al.[1]

[N. Y. Times. April 27, 1861.]

District Court, S. D. New York. 1861.

BANKRUPTCY—MOTION DENIED—AGAIN MADE ON SAME FACTS—DILIGENCE OF ASSIGNEE—FRAUD OF CREDITOR.

[1. A motion in a bankruptcy proceeding which has been denied without prejudice to any other motion, suit, action, or proceeding in respect thereto cannot be repeated on the same facts, nor upon additional papers which do not touch the merits of the controversy.]

[2. An assignee in bankruptcy is not bound to institute a search in respect to any interest the bankrupt may have in the estate of any of his ancestors, if it is not maintained in the schedules, nor indicated to the assignee or any of the creditors.]

[3. A creditor, who discovers a bankrupt's interest in an estate, asserts that it is of no value, and induces the assignee to agree to transfer it to him for a nominal consideration, is not entitled to a decree for specific performance, the assignee having in the meantime learned that the interest was valuable.]

[Cited in Re Hyde, 6 Fed. 593.]

[This case was previously heard upon objections to petition of Jacob H. Mott to be decreed a bankrupt. Case No. 9,878b.]

This was an application to set aside a conveyance made by the general assignee in bankruptcy. Decrees of bankruptcy were rendered against both parties on January 27, 1843, and certificates of bankruptcy were granted to Jacob H. Mott on May 23, 1843, and to Jordan Mott on May 27, 1843. On February 28, 1860, the general assignee, to whom their estates had been assigned, filed a report in each case setting forth that application had been made to him to procure at private sale all the interest which the bankrupts had in the estate of their grandfather John Hopper, who died in August, 1819; that he had carefully examined the subject; and moved for an order authorizing him to sell that property. The order was entered, and the assignee sold the property at private sale to Isaac C. Delaplaine, for the sum of $800 for the property, and $200 to the assignee for his costs and expenses. Before the order authorizing the sale, Mr. Foot, as counsel of the Union Bank, of this city, applied to the assignee to sell the property to the bank for a nominal consideration and his costs; and he testifies that the assignee agreed to make such conveyance, and received $25 as his costs, and made the arrangement with Delaplaine in violation of that agreement. The bank thereupon filed a petition setting up these facts, and that they were creditors of both bankrupts, to a large amount, and prayed that the conveyance to Delaplaine should be rescinded, and that the assignee be compelled to fulfill his agreement with the bank. This motion on the petition and the opposing affidavits came on to be heard before Judge Hall on April 21, 1860, and he denied the motion, but "without prejudice to the rights of the parties, or to any other motion, suit, action, or proceeding in respect thereto." The motion is now reviewed on the same papers, together with a notice by the assignee of a dividend to be declared, published June 14, 1860, and a correspondence as to the terms on which Delaplaine would transfer his bargain.

HELD BY THE COURT: That the leave granted by Judge Hall gives no authority to repeat the motion on the same facts, and the additional papers do not touch the merits of the controversy, or tend to impeach the integrity or validity of the sale to Delaplaine or to strengthen the legal or equitable right set up by the petitioners in their original motion. That it is doubtful whether the petitioners are competent to prosecute any motion or proceedings in equity without having proved debts in their favor, under the bankrupt law [of 1841 (5 Stat. 440)], or whether they show any matter triable in this court under that law, which provides that no suit at law or in equity shall, in any case, be maintained by or against the assignee, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of action shall have first accrued. That the interests of the bankrupts under the Hopper will was not maintained in their schedules, nor indicated to the assignee by any of their creditors. No duty was imposed upon him by law to institute a search, or even an inquiry, in respect to an object so occult. When the matter was first brought to his notice by the counsel for the petitioners, it was asserted that it was of no value, and its transfer was asked, therefore, on a nominal consideration. Instead of enforcing a specific performance, the court would have held it a high dereliction of duty on the part of the assignee if he had so transferred it, having learned that it was of value to the United States. That the proceedings out of which the sale arose were conducted according to law, although the sale was not conducted with so vigilant an inquiry into the salable value of the interest as the court was entitled to expect from the assignee. That the petitioners establish no right to the interference of the court to cause a transfer of the property to them; but it appearing that there is color in the case for a more authoritative decision upon points of law of a gen-

[1] [See note at end of case.]

eral character, affecting the limitations of the bankrupt act and rights of parties under it, the case may, on motion, within ten days, be adjourned to the circuit court for adjudication upon such points, at the expense of the petitioners; otherwise the motion is denied, with costs.

[NOTE. The conveyance was set aside in the circuit court, and an order entered for resale at public auction. Case No. 9,878. Subsequently the administrators of Delaplaine petitioned to have the amount paid by him refunded to them. Id. 9,879. At the public sale of this interest, it was purchased by James M. Smith, Jr. A petition was filed to set aside this last sale. Petition dismissed. 6 Fed. 685.]

Case No. 9,878b.

In re MOTT.

[Betts, Scr. Bk. 83.]

District Court, S. D. New York. July, 1842.

BANKRUPTCY—RULES—DEBTS OF BANKRUPT—CONSIDERATION—ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

[1. An order of court, accompanying the published rules and forms, providing that they shall govern proceedings in bankruptcy, requires that their substance shall be adhered to, rather than mere forms of expression.]

[2. A rule requiring petitions in bankruptcy to state the consideration or cause of indebtedness, as to the sums represented to be owing, is not violated by failure to state the consideration of a debt which has been converted into a judgment.]

[3. An allegation by a bankrupt that he had made an assignment for the benefit of his creditors some time before the date of his petition is not open to the objection that it fails to state what estate remains undisposed of, or that it fails to give the assignment itself, if accompanied by the sworn statement that the assigned property will not pay the debts it was conveyed to provide for.]

[In the matter of the petition of Jacob H. Mott to be decreed a bankrupt. Heard on objections to the petition.]

Before BETTS, District Judge.

Objections have been taken to the petition to be decreed bankrupt, because it is not in the form prescribed by the court, omitting the consideration or cause of indebtedness, as to various sums represented to be owing, and because it does not set forth the particulars of property assigned by the bankrupt in 1840 for the satisfaction of his then existing debts. The counsel for petitioner supposes the forms imposed by the court are not obligatory; and, if the court has such power to make them so, it has not exercised it in any notorious manner. The counsel is mistaken, as the published rules and forms are accompanied by an order of this and the circuit court that they shall govern proceedings in bankruptcy. The court, however, is not tenacious of words and phrases, but requires that the substance shall be preserved and adhered to, whatever deviations there may be from mere form of expression. The court has decided that when a debt no longer rests upon the personal undertaking of a bankrupt, but is converted into a judgment, it is unnecessary to give any other consideration, a judgment imputing the highest one in the law. So much of the objections as apply to judgments are therefore overruled. There are, however, various other items defective in alleging only an indebtedness to individuals, without any distinct disclosure of the consideration or grounds of indebtedness. A further objection is that the bankrupt alleges that he made an assignment in 1840 of all his estate and effects for the payment of his debts, but has not designated what his estate is, its location, &c. The court, in numerous cases, has decided that it is incumbent on the bankrupt to apprise his creditors and assignee what estate remains undisposed of, in cases of trust conveyance, and that this must be done by giving the assignment itself. These were, however, in cases where there was a resulting trust to the debtor manifestly unextinguished. The present case differs from those in this: that the petition and schedule nowhere represent that there is any residuary interest, as reserved to the bankrupt, and it does not therefore fall within the terms of those previous. This objection, at least, is an exceedingly sharp one, for the bankrupt swears explicitly that the assigned property will not pay the debts it was conveyed to provide for. Had the creditors charged that this reason was studied and intentional, and that the bankrupt knew that there was a contingent interest to his own benefit accompanying the assignment, and established the allegation by proof, the question as to the effect of the statement in its present form would be very different, for the matters of merit would be directly connected with the defect of form. This shows that the objections are all strictissimi juris. They involve no higher consideration than whether the petitioner has honestly and fully conformed to the forms prescribed by the court, and are undoubtedly well taken to the establishing a direction of that character. It is better that all parties should feel the necessity of adhering to an uniform course of practice, and that no deficiency or uncertainty of information to creditors should be encouraged in the framing of bankrupt papers, and therefore the court places this in the category of those where the party has made default in complying with the rules, and holds that the bankrupt cannot proceed on these papers without perfecting them by a proper amendment. This order, however, is not to carry any costs against the bankrupt.

[NOTE. Subsequently this case was heard upon an application to set aside the sale by the assignee to Isaac C. Delaplaine of the interest of the bankrupts in the estate of their grandfather John Hopper. The court allowed the petitioners to move the case into the circuit court. Case No. 9,878a. The conveyance was set aside in the circuit court. Id. 9,878. At a later date the administrator of Delaplaine petitioned

to have the amount paid by him refunded to them. Id. 9,879. There was another sale of this same interest at public auction in 1868, at which sale it was purchased by James M. Smith, Jr. A petition was filed to set aside this sale. The petition was dismissed. 6 Fed. 685.]

Case No. 9,879.

In re MOTT et al.

[1 N. B. R. (1873) 223 (Quarto, 9).] [1]

District Court, S. D. New York.

BANKRUPTCY—CONTRACT WITH ASSIGNEE—APPLICATION TO HAVE AMOUNT PAID REFUNDED.

Where the general assignee of the bankrupt made certain conveyances of the real estate, the administrators of the grantee made application to have the amount paid on the contract of sale refunded, which was denied for the reasons that the contract of sale was not delivered up to be cancelled, and further that there was a failure to show that the transaction with decedent was made in good faith by the general assignee.

[In the matter of Jacob H. Mott and Jordan Mott, bankrupts.]

G. B. Goldsmith, for petitioners.

BLATCHFORD, District Judge. When the questions in regard to the sales and transfers made to Isaac C. Delaplaine by the general assignee in bankruptcy in these cases were before the circuit court for this district in December, 1863, by adjournment from this court, Mr. Justice Nelson, in his opinion delivered in the matter, said that not only ought the orders of this court of the 28th of February, 1860, for the making of the sales in question, to be set aside, but the conveyances made under those orders by the general assignee to Delaplaine ought to be delivered up and cancelled, and the money paid by him and deposited in this court, amounting to $800, ought to be refunded to him, and the money paid by him to the general assignee and not so deposited amounting to $200, ought to be refunded to him by the general assignee, and that this court had power to make an order to that effect. [Case No. 9,878.] Judge Betts, in disposing of the matter in this court on the decision by the circuit court of the questions adjourned into that court, delivered a written opinion in which, after deciding that the proceedings to obtain the orders of sales were irregular, and that the sales were void, and ought to be set aside, he said: "If the purchase made by Delaplaine from the general assignee was bona fide, and in the belief that the power exercised on the occasion was rightly and fairly used by the general assignee in his behalf, it is competent for the court, if necessary, to afford the said Delaplaine relief against the erroneous proceedings, by compelling the restoration to him of the consideration paid by him on such void sale." It appears from the papers on file in these matters that on the 29th of February, 1860, the general assignee made conveyances to Delaplaine in pursuance of the sales, the conveyances being of interests of the bankrupts in certain real estate, and received from Delaplaine as the purchase money, $800, being $400 in each case, which sum of $800 was paid into this court, and is still in court, and also received from Delaplaine $200 for his "legal professional services" in the matters, which latter sum he has retained. It also appears from an affidavit made by Delaplaine on the 14th of December, 1860, that after his purchase from the general assignee, he employed a person by the name of Irving to ascertain the market value of the purchased property; that Irving had no authority to offer it for sale, but that having been informed by Irving of an offer he had made of it, he, Delaplaine, expressed his regret, but declared that as the offer had been made he would confirm what Irving had done. It also appears from the files of the court that Irving on the 14th of June, 1860, made a written offer on behalf of Delaplaine to sell for $20,000 what had been conveyed to Delaplaine by the general assignee.

An order was made by this court on the 17th of June, 1864, in pursuance of the decision of Judge Betts, before referred to, decreeing that the sale to Delaplaine was void, and that the orders of sale be revoked and annulled, and that the general assignee proceed in the due course of the administration of the duties of his office, and dispose of the assets of the bankrupts in his hands, and distribute the same according to law. The order made no provision in regard to paying any money back to Delaplaine, probably for the reason that Delaplaine made no application to court for that purpose, and still adhered to his purchase, as evidenced by the fact that he did not offer to deliver up for the purpose of cancellation, the conveyances which had been made to him by the general assignee. Delaplaine having died in July, 1866, his administrators now apply to this court by petition, praying for the refunding to them of the $1,000. But they do not offer to deliver up to be cancelled the conveyances made by the general assignee to Delaplaine; nor do they show that Delaplaine never assumed to dispose of what purported to be conveyed to him; nor do they show that Delaplaine never realized anything from a sale of the interests, or what disposition he made of them; nor do they show, in accordance with a view taken by Judge Betts in his opinion, that the purchase made by Delaplaine was bona fide, and in the belief that the power exercised on the occasion was rightly and fairly used by the general assignee in his behalf. The purchase for $800, with a fee of $200 to the general assignee, of what the purchaser less than four months afterwards held for sale at $20,000, would seem pretty conclusively to repel the idea that there could have been any bona fides in the transaction on the part of Delaplaine, or any belief on his part that the

[1] [Reprinted by permission.]

general assignee, in parting with the interests sold for $800, was exercising in a right and fair manner the powers of his office, which required him to realize as much as possible for the creditors of the bankrupts. The application, in the shape in which it is now made, is denied.

[NOTE Subsequently this same interest formerly purchased by Isaac C. Delaplaine was sold at public sale, and purchased by James M. Smith, Jr. A petition was filed to set aside this last sale. Petition dismissed. 6 Fed. 685.]

Case No. 9,880.

MOTT v. MARIS.

[2 Wash. C. C. 196.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

BANKRUPTCY—ACT 1799—PREFERENCES—BOND FOR DUTIES—PAYMENT BY SURETY.

1. The sixty-fifth section of the bankrupt law of the United States, passed the 2d of March, 1799 [1 Stat. 676], does not repeal the provisions of the law of the United States, which give to the surety who pays bonds for duties, a preference over other creditors.

2. The provisions of the bankrupt law except from its general operation, not only the preference of the United States, but also the right of preference for satisfaction of debts due to the United States.

Judgment was agreed to be entered in this case for the plaintiff, subject to the opinion of the court on the following point: Whether a surety on certain custom-house bonds, having discharged the same after the date of the commission of bankruptcy, some of which were due before, and some after the date of the commission; can recover the amount so paid in the present action, and is entitled to a preference over the general creditors, to be first paid out of the effects of the bankrupt [Maris] in the hands of the assignee.

WASHINGTON, Circuit Justice. The only question is, whether plaintiff is entitled, under the sixty-fifth section of the act of March 2d, 1799, to recover against the assignees, the full amount of what he has paid to the United States, as surety for the bankrupt, in the custom-house bonds mentioned in the case. The only difficulty is, whether this section of the law, so far as it respects the preference given to the surety, be or be not repealed, by the general terms of the bankrupt law. It is admitted, that it is not repealed in express terms, although it is certain that the general terms of the law make no discrimination in his favour; and, in some respects, there is an apparent inconsistency between the provisions of the first, and those of the second law, in relation to such preference. On the other hand, it may be said, that the first law went very far to place the surety, who has discharged the debt, on the pre-eminent ground on which the United States stood, by authorizing him, instead of pursuing his common law remedy against the principal, to bring his action on the bond itself, though given to the United States; thus, in a measure, sheltering him under the high prerogative rights of the United States. It may be contended, that upon the principle admitted in courts of equity, the surety, if first resorted to, and obliged to pay may claim the advantage of all the securities which the creditor possessed against the principal, and which he might have enforced, had a recovery been had, in the first instance, against the principal; and that his situation ought not to be rendered worse, by the election made by the creditor, over whose conduct he had no control. It might further be said, that the sixty-second section of the bankrupt law, does not merely save from the general operations of that law, the preference due to the United States, but the right of preference to satisfaction of the debts due to the United States; that this was a debt due to the United States, entitled to certain privileges; and that, consequently, the bankrupt law never attached either to the right of the United States, or to the debt itself. We feel some doubt whether this be the correct construction of the law; but, as it has been adopted by the supreme court of this state, our respect for the talents of that court, and our wish that as little collision as possible, should take place between the decision of the federal and state tribunals upon the same questions, will induce us also to adopt the same construction. Judge PETERS entirely concurs in that opinion. Though, in the case referred to, the payments were made by the surety before the bankruptcy of his principal, still there is no difference between that and this case, if the right of preference of the surety remains unaffected by the bankrupt law. Judgment for the plaintiff for his full demand.

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

MOTT (RIDDLE v.). See Case No. 11,810.

Case No. 9,881.

MOTT v. RUCKMAN.

[3 Blatchf. 71; [1] 16 Law Rep. 397.]

Circuit Court, S. D. New York. Oct. 10, 1853.

MARITIME LIENS—SUPPLIES—FURNISHED TO MASTER—SHIPPING—CHARTER-PARTY—RECORD—CONVEYANCE.

1. Where the master of a vessel, who was her charterer for a specific term, under a charter-party which provided that he should furnish her with all requisite stores, purchased supplies for her: *Held*, that the master, and not the owner, was exclusively responsible for the supplies.

[Cited in The Caroline Casey, Case No. 2,421a.]

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

2. *Held*, also, that, under the circumstances of this case, the vendor of the supplies was chargeable with notice that the master was the charterer.

3. Semble, that a charter-party is not a conveyance, within the provisions of the act of July 29, 1850 (9 Stat. 440), and is not required to be recorded in the collector's office.

[Cited in Perkins v. Morse, 78 Me. 20.]

4. The recording or non-recording of the conveyance of a vessel, only affects the question of the priority of liens on the vessel. It does not affect the question of the personal liability of her owner.

[Cited in Secrist v. German Ins. Co., 19 Ohio St. 484.]

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

This was a libel in personam, filed in the district court, by [John H.] Mott against [Elisha B.] Ruckman, as owner of the brig Radius, to recover the sum of $274, for necessary stores and provisions furnished the vessel upon the order of her master. She was about entering upon a voyage from New York to Norfolk, Va., and thence to the West Indies, and credit was given for the bill of supplies until she should return from her voyage. Jennett, the master, who ordered the supplies, chartered her from Ruckman, on the 25th of September, 1851, for twelve calendar months from that date, at the rate of $200 per month, the charterer to keep the vessel in good repair during the term, and pay all bills and demands against her, and do all acts necessary to her safety and good condition, and deliver her up in good order at the expiration of the twelve months, ordinary wear and tear excepted. There was also a special stipulation in the charter-party, that the charterer should furnish the vessel with all the requisite stores and materials, and should also bear the expenses of her navigation, the vessel to be delivered into his possession for his sole use and disposal during the said term. The vessel had been purchased by Ruckman on the 25th of September, 1851. On the same day, the sale was recorded, the vessel was registered in his name, and the charter-party was entered into between him and Jennett. The supplies in question were ordered by Jennett on the 19th of September, although they were not delivered until the 25th. The question in the case was, whether or not the owner was liable for them under the circumstances. The supplies were furnished by the firm of S. & E. S. Bloomfield; but, in order that the members of that firm might be witnesses in the case, they assigned the demand to the libellant, and one of the members of the firm was the principal witness to sustain the action. Jennett, who was a witness for the defence, testified that, at the time he purchased the supplies, he informed the firm, that he had chartered the ship for the voyage above mentioned, and that he wanted the goods on credit until the vessel should return, which was agreed to. The vessel returned in February, 1852, and, soon afterwards, the bill was presented to him for payment, but was not paid. Bloomfield denied that Jennett informed the firm, at the time of the purchase, that he had chartered the vessel from Ruckman for the voyage; but admitted that Jennett told him, at the time, that Ruckman was negotiating for the purchase of the vessel, that the papers for the transfer had not been completed, but that they would be in a few days, and that he (Jennett) was to be the master. He further stated, that he delayed the delivery of the stores until Ruckman became the owner, for the purpose of securing his liability for the payment; and that he ascertained that the title of the vessel was perfect at the custom-house before the goods were actually delivered.

[This is the substance of the testimony in the case that has any material bearing upon the question involved, although the examination of the witnesses was extended in the court below to a most unreasonable and unprofitable length.] [2]

The court below decreed in favor of the libellant. The respondent appealed to this court.

John Cochrane, for libellant.
Edward Sandford, for respondent.

NELSON, Circuit Justice. Looking at the case in any aspect in which it can be viewed, it is quite clear, that, although Ruckman was the general owner of the vessel at the time the supplies were furnished, yet Jennett, who procured them, was himself the owner pro hac vice, by virtue of the charter-party, and hence the person exclusively responsible for them. Frazer v. Marsh, 13 East, 238; McIver v. Humble, 16 East, 169; Reeve v. Davis, 1 Adol. & El. 312; Abb. Shipp. (4th Am. Ed.) 22, and notes; Webb v. Peirce [Case No. 17,320]. He was not the master of Ruckman at the time, but the master of the vessel, representing his own interest as charterer. Ruckman had neither appointed him, nor held him out to the public as the master of a vessel over which he had any control; and hence Jennett possessed no power to bind him, as his agent.

This was admitted by the counsel for the libellant, on the argument; but it was insisted that, in the absence of notice of the charter-party to the persons who furnished the stores, it must be regarded as null and void, under the provisions of the act of July 29, 1850 (9 Stat. 440). But, assuming this to be so, I am satisfied that the Messrs. Bloomfield are chargeable with notice. Besides the positive testimony of Jennett, it appears that they made inquiry in respect to the fact of the purchase of the vessel by Ruckman and of the transfer of her title, of which vessel Jennett was to become the master. Having made this inquiry, they must have known

[2] [From 16 Law Rep. 397.]

the relation in which he stood as master of the vessel; or, if they did not, the failure must be attributed to their own negligence. After they took so much pains to ascertain the point of time when the negotiation for the vessel was concluded, and when Ruckman became owner, so as to charge him with the stores previously ordered by Jennett, and delayed the delivery till he could become the master, it is difficult to say that they were not cognizant of all the circumstances connected with the transaction, and consequently of the relation in which he stood as master of the vessel. I cannot doubt, therefore, that they are properly chargeable with notice of that relation, if the fact be at all material.

The act of July 29, 1850, provides, that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, &c., shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless the same be recorded in the office of the collector, &c. The second section provides for the recording; and the third, that the collector shall keep an index of such records, inserting, alphabetically, the names of the vendor or mortgagor, and of the vendee or mortgagee, &c. The argument is, that the charter-party in question is a conveyance, within the first section of the act, and, not having been recorded, is, therefore, void as to third persons who have not had actual notice of it, and hence is not in the way of the libellant. There is, undoubtedly, some plausibility in the argument, and some difficulty in answering it. And yet, the instrument in question is so common and well known in the business of commerce, and in the use and employment of vessels, that if congress had intended to embrace it, it would have been most natural to have mentioned it in terms. And the phraseology of "vendor" and "vendee," and "mortgagor" and "mortgagee," used in the third section of the act, to designate every description of conveyance specified in the first, is scarcely appropriate language to define a charter-party. But, be this as it may —and I do not intend to express any definite opinion upon it—it seems to me quite clear that, even conceding the construction contended for, the only consequence would be to subject the vessel to liability in favor of third persons, the same as if no conveyance had been made. Recording acts relate to conflicting interests, and liens acquired in and upon lands and chattels, and are designed to regulate the same. Thus, in the present case, if the Messrs. Bloomfield had had a valid lien upon the vessel for the stores furnished, a previous unrecorded conveyance by the master would be postponed. This is the extent of the act. In my judgment, it has nothing to do with the personal liability of the owner of the vessel. It is important when the question relates to an interest in or claim upon the vessel itself, but not otherwise.

In any view, therefore, that I have been able to take of the case, I think that the decree of the court below was erroneous, and that it must be reversed, with costs.

MOTT (SHERMAN v.). See Cases Nos. 12,766 and 12,767.

Case No. 9,882.

MOTT v. SMITH.

[2 Cranch, C. C. 33.] [1]

Circuit Court, District of Columbia. Nov. Term, 1811.

WRIT—RETURN—COLLATERAL ATTACK—ATTACHMENT.

In an action for a malicious attachment, the official return of the attachment is not conclusive, but may be contradicted by parol.

Case, for a malicious attachment for rent, not due, under the act of Virginia, of 29th November, 1792, p. 154, § 8; the tenant being about to remove.

Mr. Taylor, for defendant, moved the court to instruct the jury that the attachment was not laid, the return of the officer being "not executed by order of the plaintiff," (the present defendant.)

THE COURT (CRANCH, Chief Judge, contra) decided that the return was not conclusive; but that the plaintiff (although he had produced the writ of attachment, and its return, in evidence,) might contradict the return, by parol.

MOTT (UNITED STATES v.). See Case No. 15,826.

Case No. 9,883.

MOTT v. WRIGHT.

[4 Biss. 53.] [2]

Circuit Court, D. Indiana. Nov. Term, 1865.

NOTES—LAW MERCHANT—RULE IN INDIANA—INDORSER—LEX LOCI—DELIVERY.

1. By the law of Indiana, ordinary promissory notes are not governed by the law merchant. But, as a general rule, the indorsee, having first used due diligence by suit to collect such notes from the maker, has his recourse on the indorser.

2. The indorsement of a note is a new, distinct contract; and such contract is governed by the law of the place where it is made, without regard to the law of the place where the note was made.

[Cited in Stubbs v. Colt, 30 Fed. 419.]

3. The contract of indorsement includes two essential things: the writing itself, and the delivery of it to the indorsee. And if the indorsement is written in one state, and delivered to the assignee in another, the law of the latter state controls the contract.

[Cited in Stubbs v. Colt, 30 Fed. 419.]

4. A indorsed notes in Indiana, and sent them by mail to B the indorsee, in New York, where B received them. *Held*, that the indorsement was governed by the law of New York.

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

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

[This was a suit by John Mott against Williamson W. Wright.]

Barbour & Howland, for plaintiff.
McDonald & Roach, for defendant.

McDONALD, District Judge. This is an action of assumpsit on ten promissory notes, all dated in May, 1861. Four of them are payable six months after date, and six of them, seven months after date. Their aggregate is $5,219.90. They are all dated at the city of New York, and are made payable at the Bank of North America in that city. These notes were executed by John Wright to the defendant, Williamson W. Wright, and were by him indorsed in blank.

Non-assumpsit is pleaded; and the trial of this issue is, by agreement, submitted to the court without a jury. It would be tedious to detail all the testimony. The following is the substance of the evidence:

The notes and their indorsements were produced in evidence. For some time before they were made, John W. Wright was largely indebted to Robert Ellis, of New York. The debt evidenced by these notes had been kept afloat by what are called "renewal notes" made to Ellis. Of these, the notes sued on are the last series. To procure them, Ellis sent his agent from New York to the residence of the maker and indorser in Indiana, with the notes then blank, to get them executed and indorsed. John W. Wright being then abroad, the agent called on Williamson W. Wright, the defendant, who, at the agent's request, indorsed the notes. Thereupon, the agent left the notes in this condition with D. D. Pratt, an attorney of Indiana, with the request to him that he should ask the said John W. Wright to sign them and forward them to Ellis, in New York. Pratt did so. John W. Wright thereupon signed the notes in Indiana, and forwarded them by mail to Ellis, in New York. When the notes respectively fell due a demand for payment was properly made, and notices of their non-payment were duly given, according to the law merchant.

By the law of Indiana, the indorser of such notes as these is not liable, in consequence of their non-payment and notice thereof, to pay them. Due diligence to collect them from the maker by a suit against him must generally be used in order to fix the liability of the indorser. 1 Gavin & H. St. 448; Kelsey v. Ross, 6 Blackf. 536. By the laws of New York, it is otherwise. There, such notes are governed by the rules of the law merchant; and the indorser is liable, as on an inland bill.

It becomes important, therefore, to ascertain whether the indorsements in question are governed by the laws of Indiana or the laws of New York. According to the evidence, if the Indiana law prevails, the plaintiff can not recover, because he does not appear to have exercised the diligence which that law requires. But if the law of New York is to govern in this matter, then it is plain that the finding must be for the plaintiff.

It is settled in Indiana that the indorsement of a note is a new, distinct contract, and is governed by the law of the state in which the indorsement is made, and not by the law of the place where the note was executed. Hunt v. Standart, 15 Ind. 33; Rose v. Park Bank, 20 Ind. 94. The only question, then, is, were these indorsements executed in Indiana or New York? The execution of an indorsement—and indeed of every written contract—includes, in legal contemplation, two essential things; the actual writing and signing of the instrument, and the delivery of it thus written and signed.

In the case at bar, it is very clear that the writings on the back of the notes were made by the defendant in Indiana. But to make those writings of any validity as a contract between the parties, they must have been delivered. Upon the evidence, were these notes, thus indorsed, delivered to Ellis in Indiana or in New York? It is a well-settled rule of law, that "a note has no binding effect until it is delivered. So, when indorsed by the payee. * * * No matter when or where notes are signed; they are made at the time and place, and by the act, of delivery accompanied by acceptance." Edw. Bills, 187; Hyde v. Goodnow, 3 Comst. [N. Y.] 266. The same rule must apply to the indorsement of notes, because the reason is the same. Well may we therefore say, that no matter when or where an indorsement of a note is made, in legal contemplation the indorsement is executed by the act of delivery to, and the acceptance of, the indorsee.

In this view, the discussion seems to be narrowed down to the following inquiry: Was the act of John W. Wright in inclosing the notes, filled up, signed by him, and indorsed by the defendant, in a letter directed to Ellis in New York, and in placing the same in an Indiana postoffice, a delivery of the notes and indorsements to Ellis, and an acceptance of them by him? In view of the evidence, I can not think that, in legal contemplation, it was. The notes, as indorsed, were "renewal notes." The acceptance of them would, I think, under the circumstances proved, have operated to extinguish the old notes in the place of which they were given. When they were received by Ellis, in New York, he might, so far as I can see, have refused to accept them, and held on to the old notes. But when they came to his hands and he determined to take them in satisfaction of the old notes, the new notes with the indorsements on them were, I think, then and there, in legal contemplation, delivered and accepted. And I am inclined to the opinion that neither the notes nor the indorsements on them had any legal existence till that moment.

It has been suggested by counsel for the defendant, that if these notes had been lost

on their way to New York, the plaintiff might have sued on them as lost instruments. But this, I rather think, is begging the question. He might have sued on them, under such circumstances, if there had previously been a legal, valid delivery and acceptance of them; otherwise, not.

From the evidence, I conclude that the arrangement between Ellis and John W. Wright was substantially this: that if the latter would send to the former certain notes well indorsed, he would receive them in lieu of the notes he then held of John W. Wright; and that till he did so receive them, the arrangement was not consummated. Moreover, till Ellis had actually received these notes, he could not have negotiated them, as he did, to the plaintiff. The notes, as we have seen, were indorsed in blank, and were negotiated to the plaintiff by actual delivery. Indeed, they could not have been transferred to him in any other manner.

Besides, it may well be asked whether, if these notes had been lost on their way to New York, Ellis would have been bound to deliver up the old notes as satisfied by the receipt of the new. I think that, in such a case, he might have maintained an action on the old notes. It should seem unreasonable to hold that the old notes were extinguished before the new were actually received and accepted.

The case of Cook v. Litchfield, 9 N. Y. 279, appears fully to sustain the foregoing view. That case was much like the present. In both, the defendants were accommodation indorsers, and indorsed, out of the state of New York, notes payable in it. In the case referred to, the court say "the defendant indorsed the notes for the accommodation of the maker. This appears from the fact that the notes came from the possession of the maker and not of the indorser, and were first negotiated in New York, and apparently for the benefit of Carew, the maker. So long as they remained in Carew's hands, there was no liability on the part of the indorser. The indorser's contract, therefore, must be regarded as having been made in New York, where the notes were delivered to Ryckman (the first indorsee) and the indorsement first became effective. The law of Michigan (where the indorsement was made) has no application to the case. The contract having been made in New York, the law of New York governs the case with respect to the sufficiency of the notice."

With some doubt as to the justness of the views above expressed, I am inclined to think that, on the evidence, the law is with the plaintiff. Finding for the plaintiff accordingly.

NOTE. An assignment of a negotiable instrument is a new contract between the assignor and assignee, and is governed by the law of the place where it is made. McClintick v. Cummins [Case No. 8,699].

The doctrine of lex loci is thoroughly discussed by Judge Story in his work on Conflict of Laws, §§ 261–272, and §§ 316, 317, where he says that it is clear, upon principle, that the indorsement, as to its legal effect and obligation, and the duties of the holder, must be governed by the law of the place where the indorsement is made.

In the case of Williams v. Wade, 1 Metc. [Mass.] 82, which was an action in Massachusetts upon a note made and indorsed in Illinois, it was held that the plaintiff could not recover against the indorser, it not being shown that he had taken those proceedings against the maker which, in Illinois, are essential before a recovery can be had against the indorsee. Chief Justice Shaw, in delivering the opinion in that case, says: "The note being indorsed in Illinois, we think that the contract created by that indorsement must be governed by the law of that state. The law in question does not affect the remedy, but goes to create, limit and modify the contract effected by the indorsement. In that which gives force and effect to the contract and imposes restrictions and modifications upon it, the law of the place of contract must prevail, when another is not looked to as a place of performance."

In the case of a bill drawn and indorsed in New Granada, payable in New York, it was held in Everett v. Vandryes, 19 N. Y. 436, that as between the drawer and indorsee the law of the place of payment should govern, though as between indorser and indorsee the law of the place of indorsement would control. Consult also Aymar v. Sheldon, 12 Wend. 439.

The only case within our knowledge asserting a contrary rule is Roosa v. Crist, 17 Ill. 450, which was an action by the indorsee of a promissory note, payable to bearer, transferred by delivery in New York, where such a transfer is good and passes the legal title; by the law of Illinois the indorsement must be by writing and upon the instrument itself. The court held that the law of the forum must govern, and that the plaintiff could not sue in his own name. The court, however, in that case seem to overlook the distinction between the mode in which relief will be administered and the legal status of the parties, and one of the three judges, in a dissenting opinion, insists upon what is certainly the general rule and the current of authority, that the effect of the negotiation by delivery in New York was to transfer the legal title to the plaintiff, and by the law of comity he may sue in this state in his own name, adopting the forms of remedy afforded by the local law.

For further authorities that the place of contract and delivery is to govern, see 2 Pars. Notes & B. 327, note z.

Consult Trimbey v. Vignier, 1 Bing. N. C. 151, 159; 27 E. C. L. 584, where, in a suit by the holder of a bill of exchange made and indorsed in blank in France, but without the formalities required by the Civil Code, it was held that no recovery could be had in the English courts, as the contract was governed by the laws of France.

See also De La Vega v. Vianna, 1 Barn. & Adol. 284; 2 Kent, Comm. 453–463, and cases there cited.

Case No. 9,884.

MOTTE v. BENNETT.

[2 Fish. Pat. Cas. 642.] [1]

Circuit Court, D. South Carolina. June, 1849.

CONSTITUTIONAL LAW—TRIAL BY JURY—PATENTS—ACTION FOR INFRINGEMENT—INJUNCTION—PRACTICE IN EQUITY.

1. The seventh amendment to the constitution of the United States is a provision exclusively for cases at common law.

2. Section 14 of the act of July 4, 1836 [5 Stat. 123], is, in terms, exclusively for actions

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

at law for damages, and the treble amount which the court may give, over the sum found by a jury, can not, in any case, be given by a court of chancery.

3. If each infringement of the patent were to be made a distinct cause of action, the remedy would be worse than the evil. The inventor might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.

4. The plaintiff could have no preventive, at law, to restrain the future use of his invention injuriously to his title and interest.

5. By discretion is meant an obligation upon judges in chancery to determine each case, as nearly as it can be done, by what has been the course in chancery in like cases. It never means will or authority in the judge, but both restrained by decided cases or long standing rules.

6. The rules in respect to injunctions to restrain a party in a suit at law, whatever may be the character of such a suit—for instance, to restrain an action of ejectment—differ materially from those which govern courts in granting or refusing injunctions in cases of invention and copyright.

7. A jury trial of the alleged infringement has not been a prerequisite for the action of the court, in England, since 1761.

8. In England, for more than eighty years, injunctions, both provisional and perpetual, have been granted, in the first instance, in cases of copyrights and patents; and where they have been perpetual in the first instance, they have been made so without the intervention of a jury to try the question of title or infringement, in all cases where the court was fully satisfied with the proof, notwithstanding the defendants may have denied in their affidavits or answers the originality of the invention or the sufficiency of the specification. The practice in the courts of the United States, in respect to granting injunctions in patent cases, has always been that of the English chancery.

[Cited in Brown v. Hinkley, Case No. 2,012.]

9. In equity, where the case is clear and without reasonable doubt, where the bill states a clear right to the thing patented, which, together with the alleged infringement, is verified by affidavit, and where the plaintiff has been in possession of it, by having sold or used it, in part or in the whole, the court will grant an injunction and continue it till the hearing or further order, without sending the plaintiff to law to try his right.

[Cited in Brown v. Hinkley, Case No. 2,012.]

10. The rule as to injunctions applies as well to a bill brought by an assignee as to one brought by the original inventor.

This was bill in equity [by Joshua W. Motte,] filed to restrain the defendant [Washington J. Bennett] from infringing letters patent for an "improvement in the method of planing," etc., granted to William Woodworth, and more particularly referred to in the report of the case of Foss v. Herbert [Case No. 4,957].

W. H. Seward, for complainant.

Petigru & Memminger, for defendant.

WAYNE, Circuit Justice, after examining the question of infringement, and one or two preliminary points relating to local practice, proceeded as follows:

After the court had overruled the motion of the defendant's counsel to conclude the argument, Mr. Memminger proceeded in it, and stated three propositions.

First. "That by the seventh amendment to the constitution the alleged infringement should be tried by a jury." That amendment is a provision exclusively for cases at common law. It is: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

That it is meant exclusively for suits at common law, has been several times ruled by the supreme court of the United States. Besides, all the legislation of congress concerning trials of suits in the courts of the United States, makes the same distinction between trials of suits at common law and of those in equity and admiralty. It could not be otherwise, as the distinction is made in section 2, art. 3, of the constitution, between "cases at law and equity." And every case in which a jury shall be called, in the courts of the United States, is provided for, either in the constitution as it came from the convention, or in the subsequent amendments. They are: "The trial of all crimes, except in cases of impeachment, shall be by jury." Section 2, art. 3. "No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury." 5th amendment. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." 6th amendment. The other instance is the seventh amendment, already cited. We will only further remark upon this point that section 14 of the act of July 4, 1836, which was cited on the argument in connection with the constitutional amendment, has no bearing upon it. That section is in terms exclusively for actions at law for damages, and the treble amount which the court may give over the sum found by a jury, can not, in any case, be given by a court of chancery. Indeed, if any one thing could show more plainly than another, that a trial by a jury in a patent cause was not thought the best way to compensate a patentee for an infringement of his patent, it is this legislative authority given to the court to give a threefold amount over the sum found by the verdict of a jury.

The second proposition, that the bill of the complainant could not be maintained, because he had an adequate remedy at law, can not be sustained.

The principle upon which courts of equity have jurisdiction in patent cases, and upon which injunctions are granted in them, is not that there is no legal remedy, but that the law does not give a complete remedy to those whose property is invaded; for if each infringement of the patent were to be made a distinct cause of action, the remedy would

be worse than the evil. The inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights. Hogg v. Kirby, 8 Ves. 223; Harmer v. Plane, 14 Ves. 132; Lawrence v. Smith, Jac. 472.

In addition to this consideration, the plaintiff could have no preventive at law to restrain the future use of his invention or the publication of his work, injuriously to his title and interest. Besides which, in most cases of this sort, the bill usually seeks an account, in the one case, of the books printed, and, in the other, of the profits which have arisen from the use of the invention, to the persons who have pirated the same. And where the right has been already established under the direction of the court, there this account will, in all cases, be decreed as incidental to the other relief which may be obtained prospectively by a perpetual injunction. Mit. Eq. Pl. (by Jeremy) 138; Hogg v. Kirby, 8 Ves. 223, 224; Universities of Oxford and Cambridge v. Richardson, 6 Ves. 705, 706; Baily v. Taylor, 1 Russ. & M. 73.

This brings us to the third proposition in the argument. It was that a court of equity had no discretion to decree an injunction upon an alleged infringement of a patent unless that question had been first passed upon by a jury, and that such was the meaning of that provision in section 17 of the act of July 4, 1836, which gives to the circuit courts power "to grant injunctions according to the course and principles of courts of equity." By discretion, of course, is meant an obligation upon judges in chancery to determine each case, as nearly as it can be done, by what has been the course in chancery in like cases, as well as to prescribe the practice to be observed in each case, and the principles by which the right is to be determined between the parties in controversy. It never means will or authority in the judge, but both, restrained by decided cases or long standing rules.

The point then is, what have been the course and principles of courts of equity in granting injunctions for alleged infringements of inventions. It is not denied, nor can it be denied, that the infringement is regularly and fully alleged in this case, with all those substantial averments and affidavits which the practice in courts of equity requires.

Before showing what the course in equity has been, in granting such injunctions, it is proper to state what an injunction is, in the meaning and practice of a court of equity. It is either provisional or perpetual. The first being common or special—common, such as are granted upon the defendant's default either in appearing or answering, and are only applicable to restrain proceedings in the courts of common law—special, when granted upon the special grounds arising out of the circumstances of the case. Injunctions of this description are issued sometimes on the merits disclosed by the answer, sometimes on affidavits before the answer is filed, and sometimes even without notice and before the defendant has appeared. Beames, Orders Ch. 16; Perk. Daniell, Ch. Prac. 1810. A perpetual injunction is a part of the decree made at the hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience. Id. Such is the injunction sought for in this case.

From this statement of what an injunction is, and the different kinds of them for different purposes, it is obvious that, in any investigation on an application for one, the object of it must first be considered, in order to make to it a proper application of decided cases. The rules in respect to injunctions to restrain a party in a suit at law, whatever may be the character of such suit, for instance to restrain an action of ejectment, as was the case in Brown v. Newall, 2 Mylne & C. 571, cited by counsel, differ materially from those which govern courts in granting or refusing injunctions in cases of invention and copyright. In these there are requisites and allowances peculiar to themselves, which do not exist and are not permitted in any other case of an application for an injunction. Daniell, Ch. Prac. 186. It is asked in this case on account of an infringement of an invention. It can only be granted according to the course of equity, after the complainant in the case has brought his case within that course.

Is a jury trial of the alleged infringement a prerequisite for the court's action? It has not been so in England, as a rule, since 1761. In Dodsley v. Kinnersley, Ambl. 403, in which the expressed point was raised upon a bill for an injunction to restrain the defendant from printing Dr. Johnson's Rasselas, and for an account of the profits made by having printed it, Sir Thomas Clarke, master of the rolls, said: "I would have it understood that there is no impropriety in the application to this court. The method of proceeding in these cases has been changed. Formerly, in the case of a patentee, on opening the case, he partly was sent to law to establish his right, and then came back for an account." We see also, from an anonymous case from Vernon, cited by Drewry on Injunctions, a work relied upon by the defendant, that the practice had been as was stated by the master of the rolls in Dodsley v. Kinnersley. But we also see, in the same work, that at the present day it is not generally necessary that the plaintiff should establish his right at law, in order to come into equity, the right appearing prima facie on the record by the letters patent. Drew. Inj. 221, margin, for which he cites Mitf. Eq. Pl. 147, Hicks v. Raincock, Dickens, 647, and 1 Ves. Sr. 476. In truth, what was the practice in England in respect to patents, and for reasons which we shall state before we conclude, has not been the practice there for more than eighty

years. Daniell, as we have shown Drewry does, says: "On both occasions of patents and copyrights, it was formerly the practice, on opening the case, to send the party to law to establish his right. But, on both occasions, the practice has been altered, and now, when the right of the patentee appears on the record, and the patent has been granted for some length of time, and the public has permitted the exclusive and undisturbed possession of it for several years, under such circumstances the court will interpose by injunction in the first instance without putting the party previously to establish his right in an action at law." For this he cites Boulton v. Bull, 3 Ves. 140; Harmer v. Plane, 14 Ves. 133; and Hill v. Thompson, 3 Mer. 622. In such cases, however, there must be satisfactory evidence of exclusive possession by the patentee, and where this is wanting, the court will not interfere without a trial at law. Collard v. Allison, 4 Mylne & C. 487. And what in England is meant by exclusive possession, we know from what was said in the case of Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689. There Lord Eldon denied the rule stated by the judges in Millar v. Taylor, 4 Burrows, 2377, as to injunctions, and referring to Boulton v. Bull, and several other cases, stated the principle, particularly in regard to patents, to be, that if a party gets his patent and puts his invention in execution, and has proceeded to a sale, that may be called possession under it. However doubtful it may be whether the patent can be sustained, equity will hold that possession under a color of title, is ground enough to enjoin and to continue the injunction till it is proved at law that it is only color and not real title." Of course, when the patent or the infringement of it is already before a jury, as was the case in Collard v. Allison, 4 Mylne & C. 487, equity will not interfere to enjoin while it is so.

We will now notice the cases which were cited by counsel in support of the practice for a jury trial. Some of them are inapplicable, because they do not relate to patents or copyrights, and we have shown that injunctions in such cases are controlled by rules exclusively applicable to them. When carefully examined, some of the other cases maintain the opposite doctrine to that contended for by the counsel for the defendant. No one of them maintains the practice of the right of a party charged with the infringement of a patent, when he denies it either by affidavit or by answer, to a jury trial, except the case of Millar v. Taylor, 4 Burrows, 2400, decided in 1769, which we have seen is an overruled case by several subsequent decisions, and is denied by Lord Eldon, in Hill v. Thompson, 3 Mer. 626, ever to have been the rule of practice in patent or copyright cases.

The cases of Lord Tenham v. Herbert, 2 Atk. 483, and of Brown v. Newall, 2 Mylne & C. 571, were for the trial of title, the first to an oyster fishery, the other to land. In the first, Lord Hardwicke refused to interfere by injunction to settle a right of fishery between the lords of two manors; and Brown v. Newall was an application for a common injunction to restrain proceedings at law in a case of ejectment. Boulton v. Bull, 2 H. Bl. 492, was an action on the case for infringing a king's patent and the court said, upon a point raised whether a model was or was not necessary for the purpose of showing an infringement, that it was not the province of a judge in a court of law to decide an infringement, but that it was a question for the jury, and that if they could understand the case without a model or drawing, there was no rule which made one indispensable. But it will be found also that the court, in that case, recognized the rule in chancery, "that when the right of the patentee appears on the record, and the patent has been granted for some length of time, and the public has permitted the exclusive and undisputed possession of it for several years, under such circumstances, equity will interfere by injunction, in the first instance, without putting the party previously to establish his right in an action of law." The case of Blanchard v. Hill, 2 Atk. 485, was a controversy about the use of the same stamp upon cards, the stamp being stated to have been appropriated by the complainant under a charter granted by King Charles the First. The injunction asked for was, of course, denied. It was the first application of the kind ever made to a court of chancery. It was a monopoly granted by the king, had never been sanctioned by an act of parliament, and, in these cases, as we will hereafter show, the court never granted an injunction until the right claimed had been established at law. The case of Motley v. Downman, 3 Mylne & C. 14, was another case of a party using upon his goods the mark of another, and not a patent case. It was a case, too, in which the complainant could not claim anything by patent or charter. It was, therefore, a pure legal right in controversy between the parties, in which nothing exclusive could be claimed until it was settled at law. In such case, before a court of chancery will interfere by injunction, it must appear that the party suffering from the usurpation of his mark by another, is suffering from the artifice, fraud, or misrepresentation of the latter, in selling goods with the mark of the former of an inferior quality, by which the first may be injured in his sales and manufactures.

The case of Sheriff v. Coates, 1 Russ. & M. 159, was not a patent case, though it was analogous, on account of the exclusive right given to calico printers in their designs. In that case the lord chancellor said: "It is essentially necessary that the party applying should establish the originality of the pattern in a court of law." But why? Because as the calico printers by the statute have an exclusive right in their designs for two months

only, they can not have either that possession or that length of enjoyment which a patentee may have, from the longer continuance of his right, and which must appear before equity will restrain an infringement by an injunction. The case of Saunders v. Smith, 3 Mylne & C. 728, was a case altogether different from what the learned counsel who cited it in argument supposed it to be. It states, in terms, the practice of courts of equity in granting injunctions, coincidently with what we have said the practice is, and has been for almost a hundred years. "The office of the court is consequent upon the legal right, and it generally happens that the only question the court has to consider is, whether the case is so clear and so free from objection upon the grounds of equitable consideration that the court ought to interfere by injunction without a previous trial at law, or whether it ought to wait till the legal title has been established. That distinction depends upon a great variety of circumstances, and it is utterly impossible to lay down any general rule upon the subject by which the discretion of the court ought in all cases to be regulated. The court always exercises its discretion, as to whether it will interfere by injunction before the establishment of the legal title."

The case of Bacon v. Jones, 4 Mylne & C. 437, turned entirely upon the omission of the plaintiffs to apply for an interlocutory injunction for four years, while the cause was pending. And the lord chancellor stating what the course might be upon an application for an interlocutory injunction, says, as a matter of opinion but not as a rule of practice, that in such a case it is a more wholesome practice to direct the plaintiff to establish his title at law, suspending the injunction until the result of the legal investigation. But he concludes with this declaration in respect to what the practice is in such cases: "Which of these courses ought to be taken must depend entirely upon the discretion of the court according to the case made. When the cause comes to a hearing, the court has also a large latitude left to it, and I am far from saying that a case may not arise, in which, even in that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right and of the evidence by which it is established—these and other circumstances may combine to produce such a result, although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless, it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted, will do justice between the parties."

We have now shown what the old practice was in England in respect to a jury trial, before a court of equity would interfere to protect a patent by injunction, also the change which took place in that practice in England more than eighty years since, and that the practice now in England is in conformity with that change.

Before proceeding to show what the practice has uniformly been in the courts of the United States which have jurisdiction of patent causes, and that the old practice in England never prevailed in them, we would venture to suggest the causes which led to the old practice in England. When those causes ceased to exist, that practice was discontinued, and these causes never existed in the United States.

Besides the caution with which courts of equity have always used their power to grant injunctions of any kind, there has been at all times, in the chancery of England, a wholesome jealousy of all monopolies and patents granted by the king, on account of the legal abuse of this prerogative. It is a singular thing, but history shows, that while monopolies and special immunities contributed to revive commerce in Europe, it was the abuse of them which led to its freedom.

First, corporate bodies were formed to protect the interests of their members, then there were associations of towns for the same purpose, and the Hanseatic league was formed in the twelfth century for promoting commerce, and the interests of the cities in the league.

Godson properly says: "Europe was soon astonished by the wealth which it rapidly gathered, and the immense power, its inseparable concomitant, which it quickly obtained." England was in a great degree enlightened by it; and then began in England those privileges and monopolies which, aiding commerce for a time, became oppressive as soon as the kings of England supplied their pecuniary wants (which parliament refused to satisfy) by an abuse of prerogative in conferring exclusive grants. Elizabeth abused it more than any English monarch. But the complaint of her people compelled her to cancel the most oppressive patents which she had granted; allowing such only to be continued as time had shown were not hurtful to the public interests, and which did not restrain the sale of commodities in daily use.

Mr. Macaulay is not full enough in his account of this strife of liberty with usurpation: but he rightly says in his own compendious way: "The house of commons met in an angry and determined mood. It was in vain a courtly minority blamed the speaker for suffering the acts of the queen's highness to be called into question. The language of the discontented party was high and menacing, and was echoed by the voice of the whole nation. There seemed for a moment to be some danger that the long and glorious reign of Elizabeth would have a shameful and disastrous end." But the queen avoided the pressure by yielding to it in a great measure, being afraid that parliament would abrogate the exercise of such power, as it afterward did by St. 21 Jac. I., c. 3. By that statute it

was so much lessened that the crown could only make a grant or exclusive privilege in cases of new inventions. That, it was conceded, the king could do by the common law, to secure to inventors the exclusive use and sale of their discoveries.

On the statute of James is founded all the law in England as to patents and inventions, both in the courts of common law and in equity. From the time of the passage of that act, notwithstanding the attempts which were made by Charles I. to disregard it, and to revive the exercise of the power in the crown to grant monopolies, the judges in England followed the lead of popular feeling so far as to place a jury between the exercise of prerogative and liberty, whenever they could do so with safety to themselves. It must be remembered that these offices were then held at the will of the crown. The statute had taken the investigation of patents from the star chamber. They were afterward to be heard, tried, and determined, "by and according to the common law of the realm and not otherwise." And thus came, as remedies for the infringement of patents, the action at law for damages, and proceedings in equity for an injunction and an account of profits.

Anciently, however, and before the star chamber was established, the chancellor had jurisdiction in cases of patents and charters according to the usual practice, without the intervention of juries. When the statute was passed, the practice in chancery, co-operating with the parliament to restrain the crown, was, without ever having been reduced to the precision of a rule, such as we shall now state.

If an injunction was applied for in a case of a monopoly or a patent, the first inquiry was, is the monopoly or patent a grant from the king or by act of parliament? If the former, before a court would grant it, the right to it was heard by a jury; if by parliament, and the right was not contested for any of those causes which, by the common law, would invalidate it, the court acted without a trial of the right by a jury, in this way aiding the parliament, during the reigns of James and Charles, to confine the privileges of the crown within the limits of the common law. And the courts did this with more constancy and courage in cases of the king's patents, because, by the statute, only such were good as were not contrary to the common law. But even then, in a clear case of the infringement of a king's patent, the chancellor would grant injunctions to restrain infringements, though the continuance of them was made dependent upon the finding of a jury, where the originality of the invention was denied, and the defendant asked that it might be tried by a jury. And that was done in one of two ways, either by sending the plaintiff to a court of law to establish his right, or by a feigned issue in the court of chancery. And so the practice was, as we have stated it, in respect to all actions in cases of patents, until the spirit of English liberty rose above all the restraints of prerogative over commerce, and was no longer apprehensive of such usurpation. The courts thereupon partook of this triumph, and as the practice in chancery, of trying the title under a king's patent, had been adopted more for protecting the public from usurpation than for the protection of individuals, it was discontinued in all cases of alleged infringements of patents where the title of the patentee was clear beyond a reasonable doubt, and where he had had the possession and use of his machine without other interference than such as had arisen from the wrongful use of it, or from the piracy of the whole under the pretense of some improvement or addition. And the records of the English chancery will show that for more than eighty years, injunctions, both provisional and interlocutory, and perpetual, have been granted in the first instance in cases of copyrights and patents; and that where they have been perpetual in the first instance, they have been made so without the intervention of a jury to try the question of title or infringement, in all cases where the court was fully satisfied with the proof, notwithstanding the defendants may have denied in their affidavits or answers the originality of the invention or the sufficiency of the specification.

It now only remains for us to state the course pursued in the courts of the United States in granting injunctions in patent cases.

The reasons for the early practice did not exist at any time in this country. That practice in England had been changed before the war began which ended in our separation from the mother country. The constitution of the United States was not formed until thirty years after that change had taken place. Under the constitution, courts have been established with jurisdiction exclusive, and concurrent with that of the courts of common law, in cases in which those courts can not give full remedies for the preservation of every equitable right. They have as large a jurisdiction as the courts of chancery in England. Their practice in all matters is the same, except where differences exist from legislation, or by the rules of the supreme court.

The practice in them, in respect to granting injunctions in patent cases, has always been that of the English chancery, always cautiously exercised, frequently followed, however, in every part of the United States, without injury to legal rights, and never complained of, as far as we know, until it was urged on the argument of this cause, that for the court to grant an injunction for the infringement of a patent, without a trial by a jury, when the infringement was denied by the defendant, was an invasion of the right of trial by jury.

If it be so, it is an evasion of very long standing, both in England and in the United States, and one with which the courts in this

day can not be charged. We have shown that the practice has been the same, without any variation, in England since 1761.

Mr. Justice Washington said, in Ogle v. Ege [Case No. 10,462], decided in 1826: "I take the rule to be, in cases of injunctions in patent cases, that where the bill states a clear right to the thing patented, which, together with the alleged infringement, is verified by affidavit, if the patentee has been in possession of it, by having used or sold it in part, or in the whole, the court will grant an injunction, and continue it until the hearing, or further order, without sending the plaintiff to law to try his right. But if there appears to be a reasonable doubt as to the plaintiff's right, or the validity of the patent, the court will require the plaintiff to try his title at law." And Curtis, in his work on Patents (section 328), citing Neilson v. Thompson, Webst. Pat. Cas. 277, says: "It seems to be the result of all the authorities that there is a prima facie right to an injunction, without a trial at law, upon certain things being shown, namely, a patent, long possession, and infringement." The case of Ogle v. Ege [supra] is, in its particulars, the case at bar.

The case of Isaacs v. Cooper [Case No. 7,096], previously decided by the same learned judge in 1821, and cited in argument as against the rule subsequently laid down in the case of Ogle v. Ege, is so far from being so, that it in words anticipates the rule as laid down in that case. "The practice of the court of equity upon motions of this kind is to grant an injunction upon the filing of the bill, and before a trial at law, if the bill states a clear right and verifies the same by affidavit. If the bill states an exclusive possession of the invention or discovery for which the plaintiff has obtained a patent, the injunction is granted, although the court may feel doubts as to the validity of the patent. But if the defects in the patent or specification are so glaring that the court can entertain no doubt as to that point, it would be most unjust to restrain the defendant from using a machine or other thing which he may have constructed, probably at a great expense, until a decision can be had at law." And the injunction in that case was denied upon four separate grounds, each of them being within the rule stated in the case of Ogle v. Ege, all of which must appear to exist before the court will grant the injunction.

In the year 1812, the point we are here considering was discussed with as much precise learning as it has ever been, in the case of Livingston v. Van Ingen, 9 Johns. 507. Justices Yates, Thompson, and Kent, all concur in granting an injunction, without sending the plaintiff to a court of law, or awarding a feigned issue to try his right, on the question of infringement, by a jury. Mr. Justice Yates says: "The right being claimed under an express grant by the statute, creating the forfeiture, and no doubt remaining of the existence of the boats, the presumption was irresistible that they navigated contrary to the statute, and that the property was in the appellants." Then, after noticing the cases of Blackwell v. Harper, 2 Atk. 92, Anon., 1 Ves. Sr. 476, Boulton v. Bull, 3 Ves. 140, and Harmer v. Plane, 14 Ves. 130, he says: "From these and numerous other cases, no doubt can exist that the injunction in this case ought to have issued." Mr. Justice Thompson says: "Where the right is clear, an injunction is never refused; as when the right claimed appears on the record, or is founded on an act of parliament, it is a matter of course to grant an injunction, without first obliging the party to establish his case at law. In the case of Blanchard v. Hill, 2 Atk. 485, Lord Hardwicke said: "That in cases of monopolies, the rule that the court had governed itself by was, whether there was any act of parliament under which the restriction was founded. But the court will never establish a right of this kind claimed under a charter only from the crown, unless there has been an action to try the right at law. This will be found on examination to be a governing distinction running through the numerous cases cited in the argument. And whenever an injunction has been refused, the right was claimed under a patent from the crown, and that right considered doubtful." Kent, then chief justice, says: "If the legal right be in favor of the appellants, the remedy prayed for by their bill is a matter of course. Injunctions are always granted to secure the enjoyment of statute privileges of which the party is in the actual possession, unless the right be doubtful. This is the uniform course of the precedents. I believe there is no case to the contrary; and the decisions in the English chancery on this point were the same before, as since, the American Revolution." Then, citing many cases from the English books, from 1740 to the cases of Universities of Oxford and Cambridge v. Richardson, 6 Ves. 707, and of Harmer v. Plane, 14 Ves. 130, the learned judge says: "I cite these cases to show that the law has been settled in England for the last seventy years at least, and has been preserved in a steady uniform course under a succession of their ablest and wisest men. The principle is, that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed until the opponent has fairly tried them at law, and overthrown their pretension."

The federal courts in this country have thought so, for under the patent laws of congress they have protected the right by injunction. The cases cited from the federal courts are those of Morse v. Reed [Case No. 9,860], decided by Chief Justice Ellsworth, in 1796, and of Whitney v. Fort [Id. 17,587], decided in the circuit court for the district of Georgia, by Mr. Justice Johnson,

in the year 1806. In both of those cases injunctions were granted in the first instance, and subsequently made perpetual, without trials by jury. The last case is as decisive of what that eminent jurist, Mr. Justice Johnson, thought and adjudicated to be the practice in patent cases, as any other on record. In every particular of fact and pleading, that case and the one before us are alike, except that the defendants, in their answer in the former case, admitted that the plaintiffs had received a patent, but contested it for the want of originality. In this case the defendant does not deny that the plaintiff has received a patent, but puts him to the proof of it, and then denies its validity, alleging that the thing patented was not original. The cases then became alike, in that particular, so soon as the plaintiff in this case established that he had received a patent from the United States, nothing being left in controversy but the question of originality.

The counsel in Whitney v. Fort [supra], supposing from the answer that the denial of originality would induce the court to order a feigned issue to try the question, actually prepared and joined issue in one without having taken such an order from the court. But it was not tried, for the court thought that the patent, possession, and use made such a proceeding unnecessary, and Judge Johnson having granted an injunction, in the first instance, gave an order for a perpetual injunction, his associate, Judge Stephens, concurring. It certainly can not be necessary, with such an array of authority, to cite other cases from our own jurisprudence to show what has been the practice in the United States courts, in granting injunctions to restrain infringements of patent rights, or rather to show how much that practice was misunderstood on the argument of this cause, for, until that argument was made, we were not aware that the practice was considered doubtful by any portion of the profession in the United States. We can only account for the misapprehension of it in this instance, by supposing that the difference of proceeding in a patent case at law and in equity was overlooked. We are indebted to Phillips, in his work on Patents (chapters 20–24), for a more compendious, and, we think we may say, more accurate statement of these differences than has been given by any other elementary writer.

At law the question of infringement or no infringement is generally, if not invariably, for the jury. Phil. Pat. 431. The instances of exception, verified by cases, are well stated in that work, and we need not repeat them.

In equity, where the case is clear and without reasonable doubt, where the bill states a clear right to the thing patented, which, together with the alleged infringement, is verified by affidavit, and where the plaintiff has been in possession of it, by having sold or used it in part or in the whole, the court will grant an injunction and continue it till the hearing or further order, without sending the plaintiff to law to try his right. And the rule applies as well to a bill brought by an assignee as by the original inventor.

What, then, finally, is the case before us? It is a bill brought by an assignee, with proof of the assignment to him, for the exclusive use of it in Charleston district, of a machine originally patented to William Woodworth, subsequently renewed by a board of commissioners, in conformity with law, and afterward extended by an act of congress, under which the assignment to the plaintiff is made. He comes before the court, then, not only with a patent granted in the usual form, but with a statute right, which, having been brought to the notice of the court, the court must consider as conclusive of title. This and the other requisites of possession and use concurring from the testimony in the case, and the defendant having voluntarily abstained from going into any proof of the averments in his answer in respect to the originality of the patent, the want of a sufficient specification, and that the last specification attached to the patent is for a different machine from that first specified by the patentee, we are left without any alternative, as well from the proofs in the case on the part of the plaintiff, as from the omission of all proof by the defendant to maintain his case, except to award against him a perpetual injunction.

The originality of Woodworth's invention, like that of Whitney's cotton gin, from repeated trials in court, from the many attempts which have been made to pirate it, and from the work which it does, so efficiently and so differently from what was ever done before by any planing machine, is now almost a universally received opinion; so much so, that the language of Mr. Justice Johnson, in the case of Whitney v. Fort, is very appropriate. Two witnesses were, in that case, produced on the stand to prove that the invention was not original; one of them said he had seen in England, seventeen years before, "a teazer or devil" like it, the other that he had seen a machine like it in Ireland. The learned and lamented predecessor of one of us in this court said in reply to that evidence: "There are circumstances within the knowledge of all mankind, which prove the originality of this invention more satisfactorily to the mind than the direct testimony of a host of witnesses. The cotton plant furnished clothing to mankind before the age of Herodotus. The green seed is a species more productive than the black, and by nature adapted to a much greater variety of climate, but by reason of the strong adherence of the fiber to the seed, without the aid of some more powerful machine for separating it than

any formerly known to us, the cultivation of it could never have been made an object. The machine of which Mr. Whitney claims the invention, so facilitates the preparation of this species for use, that the cultivation of it has suddenly become an object of infinitely greater importance than that of the other species ever can be. Is it then to be imagined that if this machine had been before discovered, the use of it would ever have been lost or could have been confined to any tract of country left unexplored by commercial enterprise?"

The last sentence is peculiarly appropriate to Woodworth's planing machine, for it now does, in every part of the civilized world, that which could not be done before with the same efficiency by machinery, and which is not here done in any degree by any machine which has been before the courts of the United States, unless by piracy of Woodworth's combination.

[For other cases involving this patent, see note to Gibson v. Van Dressar, Case No. 5,402; Bicknell v. Todd, Id. 1,389; Woodworth v. Cooke, Id. 18,011; Same v. Curtis, Id. 18,013; Same v. Edwards, Id. 18,014; Same v. Hall, Id. 18,016; Same v. Rogers, Id. 18,018; Same v. Stone, Id. 18,021; Same v. Weed, Id. 18,022.]

MOULSON (FIELD v.). See Case No. 4,770.

Case No. 9,885.

In re MOULTON et al.

[4 Pac. Law Rep. 127.]

District Court, D. California. Oct. 1, 1872.

BANKRUPTCY—PRIORITY OF LIENS—FRAUD.

[In the matter of Moulton & Masson, bankrupts.] Motion by judgment creditor to dissolve injunction.

M. G. Cobb, for assignee in bankruptcy.
Thomas V. O'Brien, for judgment creditor.

HOFFMAN, District Judge. An execution levy upon judgment obtained without fraud or collusion in a state court prior to institution of bankruptcy proceedings gives a lien, under sections 14 and 20 of the bankrupt act [14 Stat. 522, 526], that must first be satisfied. Evidence that the judgment was against a partnership, though only one partner was served; that it was in favor of an assignee who had paid no consideration for the assigned accounts upon which the judgments were obtained; that the judgment creditor had offered one of the judgment debtors (subsequently bankrupt) 25 per cent. of the judgment to consent to an immediate sale under execution; that before entry of judgment another creditor threatened to put defendants (afterwards bankrupts) in bankruptcy unless the plaintiff would discontinue suit or divide proceeds, the plaintiff thereupon promising to discontinue (other evidence being offered to show that the conversation last mentioned between plaintiff and creditor took place after judgment and levy),—evidence of such circumstances does not establish such a case of fraud, under the bankrupt act, as would authorize interference of a court of bankruptcy. Injunction dissolved.

MOULTON (BACHELDER v.). See Case No. 706.

MOULTON (UNITED STATES v.). See Case No. 15,827.

MOUNGER (POE v.). See Case No. 11,240.

Case No. 9,885a.

In re MOUNT.

[2 Hayw. & H. 44.] [1]

Circuit Court, District of Columbia. March 25, 1851.

PETITION FOR THE SALE OF ALL THE INFANT'S REAL ESTATE.

Act Md. 1798, c. 101, subc. 12, § 10, allowing the guardian to sell a part of the real estate of the infant, does not authorize the court sitting in chancery to decree the sale of the whole of the said real estate.

Appeal from the orphans' court.
In equity.

C. G. Wallack, for petitioner.

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

"Petition of Sarah Ann Mount respectfully represents that she is the guardian of Sarah Ellen and James Henry Mount, infant children of James Mount, deceased. That it would be advantageous to her said wards, and indispensably necessary to their maintenance and education, that the real estate whereof the said James Mount died, seized, be sold by order of the court, in pursuance of the statutes in such case made and provided. That the said Mount died possessor of no personal property, except household and kitchen furniture, which is absolutely and indispensably necessary to be retained and kept together for the use, comfort and convenience of the said wards. That the real estate consisting of lots 17 and 18, in square 696, lot 32, in square 877, and lot 6, in square 1078, with the improvements, is entirely unproductive and yields no income, and she therefore prays that the same may be ordered sold," &c.

The order as prayed was thereupon granted. Subsequently the judge of the orphans' court set aside the order, as follows: "For reasons appearing to the court, the foregoing decree is set aside. One among others is that the law forbids all the real estate belonging to infants being sold, for the above purposes; this is according to an interpretation given by the circuit court for this district."

[1] [Reported by John A. Hayward, Esq., and George C. Hazelton, Esq.]

The following were the arguments used in favor of the original decree: "Chapter 101, subc. 12, § 10, Act Md. 1798: 'And the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate, and to make use of the principal and to sell part of the same under its order, provided nevertheless, that no part of the real estate shall, on account of such maintenance and education be diminished without the approbation of the court of chancery,' &c. This act does not, as I conceive, prohibit it in any manner, nor prevent the court from ordering the sale of the whole of the real estate; the words 'and to sell part of the same,' evidently being intended to apply to the whole estate, or principal of the estate, of which the whole of the real estate may be only a part, as in this case, the object of which is to sell the real estate, in order to retain for the use and comfort of the infants the household furniture, the balance of the principal within the meaning of the act. The court will perceive also, by reference to the list of property filed with the petition, that though it consists of more than one lot, yet it is entirely indivisible, for the reason that all but one of said lots are of mere nominal value. The act, so far as it regards real estate, merely prohibits the sale of any part thereof, without the approbation of the chancery court, and does not limit the chancery court to any portion thereof."

Under the rulings of the judge of the orphans' court, the petitioner was empowered to sell a part of the real estate, viz.: lot 32, in square 877, and lot 6, square 1078, provided the circuit court of the District of Columbia, for the county of Washington, sitting in chancery, shall, by its proper order, approve and confirm the same. Which was approved as follows: "Ordered that it be certified to the orphans' court, that the foregoing decree (empowering the guardian to sell a part of the real estate of the said infants) is approved according to the statute in such case provided."

Case No. 9,886.

MOUNT DIABLO MILL & MINING CO. v. CALLISON et al.

[5 Sawy, 439; [1] 9 Morr. Min. Reps. 616.]

Circuit Court, D. Nevada. March 19, 1879.

MINES—VEIN—LODE—LOCATOR OF LEDGE—MINING ACT—CLAIM—WORK ON CLAIM —FORFEITURES.

1. While metalliferous rock in place, not in a fissure, may be found under such conditions within clearly defined boundaries, as to require recognition as a vein or lode, as in Eureka Consol. Min. Co. v. Richmond Min. Co. [Case No. 4,548], a broad metalliferous zone having within its limits true fissure veins plainly bounded, cannot be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced.

[Cited in Book v. Justice Min. Co., 58 Fed. 121.]

2. The language of a mining law being, that "the locator of a ledge shall be entitled to hold one hundred feet on each side of his ledge:" *Held*, that by virtue of a location of a certain number of feet along the ledge, without any distinct claim of side ground, the locator was entitled to hold one hundred feet on each side of the ledge so located.

3. Where a locator, in his notice of location, claimed "all the privileges granted by the laws" of the mining district: *Held*, that this was a sufficient claim of the one hundred feet on each side of his ledge granted to a locator by the mining law, admitting such claim to be necessary.

4. Section 3 of the mining act of May 10, 1872 [17 Stat. 91], recognizes as valid, locations of mining claims, made prior to its passage, and while the mining act of 1866 was in force, the surface lines of which included more than one vein or lode, and confirms the locators thereof in the exclusive possession of all the lodes which have their apex within the surface lines of such mining claims.

5. "Mining claim" is the name given to that portion of the public mineral land, which the miner takes up and holds, in accordance with mining laws local and statutory, for mining purposes, and the term includes the vein specifically located, all the surface ground located on each side of it, and all other veins or lodes having their apex inside the surface lines.

6. Work on a claim is work done anywhere upon the surface of it, within its surface lines, or anywhere below the surface, within those lines extended down vertically, and though it should be shown that the work done within the lines below the surface was also within a lode having its apex outside of such vertical surface lines, it will still be work on the claim within the meaning of section 2324 of the United States Revised Statutes.

7. Work done outside of a claim for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the claim itself.

[Cited in Book v. Justice Min. Co., 58 Fed. 117; Chambers v. Harrington, 111 U. S. 353, 4 Sup. Ct. 430.]

[Cited in Harrington v. Chambers, 3 Utah, 94, 1 Pac. 371.]

8. The owner of several contiguous claims may form one general system adapted and intended to work them all, and when such is the case work in furtherance of the system is work on all the claims intended to be developed by it.

[Cited in Chambers v. Harrington, 111 U. S. 353, 4 Sup. Ct. 430.]

[Cited in Harrington v. Chambers, 3 Utah, 94, 1 Pac. 371.]

9. Forfeitures are deemed, in law, odious, and must be made clearly apparent before courts will enforce them.

[This was a proceeding by Mount Diablo Mill & Mining Company against J. L. Callison and others.]

Garber & Thornton and Jonas Seely, for plaintiff.

Stewart, Vanclief & Herrin and Lindsey & Dickson, for defendants.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

BY THE COURT (HILLYER, District Judge). This is an action to recover posses-

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

sion of a mining claim situated in the Columbus mining district, Esmeralda county, Nevada. The complaint alleges ownership of fourteen hundred feet of a certain quartz lode, called the Dinero lode, seven hundred feet easterly and seven hundred feet westerly from the Dinero location monument, "together with one hundred feet of surface on each side of said fourteen hundred feet of said lode," with all the dips, spurs, etc.; and also all that portion of the Dinero, and of all other lodes or veins, the top or apex of which lies within such surface lines, and end planes drawn north and south through points seven hundred feet east and west from a stake marked "Centre Mount Diablo Claim."

The trial has been by the court, a jury having been waived by a written stipulation of counsel. There has been a somewhat extended oral argument, and, in addition, a very full discussion of all the points in briefs. The point most discussed is as to the lateral boundaries of the Mount Diablo lode; the plaintiff contending that the Mount Diablo, Dinero and Callison, or "Mountain Boy" claims, are all on one and the same vein or lode, and the defendants that the Callison is a lode distinct from every other in that district. By agreement of parties, three scientific mining experts only were examined on each side. For the plaintiff, W. S. Keyes, Carl Davis and Dr. Blatchley are of opinion that the said claims are on one single lode. For the defendants, C. A. Luckhart, Professor W. F. Stewart and Charles F. Hoffman are of opinion that the Callison is a separate lode. All of these experts are men of large and practical experience in mining. Each one has examined the mining region now in question with care, and has, under oath, stated the facts upon which he bases his opinion. If the court is not now fully informed, such result is not due to the failure of the parties on either side to present their case thoroughly, but to the inherent difficulties to be found in the questions brought forward for decision.

We proceed now to a consideration of the first question stated, namely, whether the Mount Diablo and Callison claims are on the same or separate lodes. We find at the point where the claim in controversy is located a metalliferous belt, or zone, or district, extending east and west some two miles in length, the width of which has not, so far as appears in this case, been accurately ascertained. Scattered over this belt or zone, a dark rock stained with iron and manganese is seen, called by all the witnesses croppings. Looking west, from the Mount Diablo claim, the general course of the metalliferous region can be seen marked by these black croppings for about two miles. Along this line a great many claims have been located; in some cases several claims being parallel, or nearly so.

Describing this belt of country at the point where the claim in dispute lies, the experts tell us, that they find on the south of the Peru claim, and perhaps coming into that claim, a rock in place which they call variously, silicious, or stratified, or unaltered clay slate. (The Peru is a claim belonging to the plaintiff which lies immediately south of the Mount Diablo. Then follow, going north, the Mount Diablo, the Dinero, and lastly, the Mountain Boy, which covers on the surface nearly the same ground as the Dinero.)

Going north from the Peru; that is, across the belt, the experts find a rock which the plaintiff's witnesses name clay slate, and which they insist, notwithstanding some alterations in color and texture, extends from the stratified slate on the south to a belt of greenstone found about two hundred feet north of the Callison claim, or some eight hundred feet from the Peru south line. This rock is, according to the plaintiff's experts, for the most part a decomposed clay state. In many places, and especially near ore bodies, it is white, and without signs of stratification; in other places it becomes a hard and highly silicious rock of a dark brown color, also unstratified, but always, in their opinion, clay slate more or less altered and decomposed, and all a part of the Mount Diablo lode. On the other hand, the experts of the defendants name this prevailing rock in the Mount Diablo, Dinero and Callison claims, felsite porphyry and decomposed felsite porphyry; the former being the dark brown, and the latter the white clay slate of the plaintiff's witnesses.

Except in the names they give the rocks, and that they differ as to the presence of feldspar crystals therein, the witnesses on both sides agree in their description of such rocks as to color, texture and position.

The stratified slate on the south is barren, as is the greenstone to the north. Throughout this belt the ore bodies, the pay ores, have occurred quite irregularly, unless we except the Callison ore body, to be considered further on. The main tunnel of the Mount Diablo followed, for two or three hundred feet, a crack or fissure which Mr. Keyes at first took to be the fissure up through which the metals came to impregnate the neighboring rocks; but later concluded was a rent made after the deposition of the metals.

Along the line of this tunnel, for the first two hundred feet, the paying ores of the Mount Diablo have chiefly been found. From a point at the foot of an incline (No. 2) sunk from this tunnel, which point is near the center of the Mount Diablo claim, a drift, called the "connecting drift," has been run north two hundred and thirty feet to the Callison upper incline and ore body. At a distance of one hundred and fifteen feet from the foot of this incline there is encountered in the drift a belt of rock, called, by some of the witnesses, the "black dyke," which is from twenty-two to thirty feet in thickness. By whatever name called, clay, slate or porphyry, it is in every exterior quality presented to the sight or touch a different rock from that

adjoining it on each side. About two hundred and fifty feet east of this, in the "blue drift," run from the foot of incline No. 3, a dyke of similar rock is found at a depth considerably greater than in the connecting drift, and appearing, from its position and physical properties, to be the same black dyke found in the connecting drift. This dyke, the defendants claim, is the hanging wall of the Mount Diablo lode. Assuming it to be continuous between the points exposed in the two drifts, it has a course east and west corresponding to the general course of the ore channels in the Mount Diablo and Callison claims. Going on north in the connecting drift from this dyke, we pass through some decomposed felsite porphyry or slate, some quartz and other rocks, not in place, just under the ravine which runs between the Mount Diablo and the Callison claims, and at ninety feet north of the dyke come to a stratum of dark, hard, flinty rock, which is about six feet thick; lying upon this next comes about fifteen feet of defendants' decomposed felspathic porphyry, or plaintiff's clay slate, which defendants call their foot-wall. Then comes the Callison ore body, from two to six feet thick, followed by a hanging wall of the white decomposed barren rock, extending on one hundred feet or more to belts of porphyry, greenstone and serpentine. From the Mount Diablo tunnel to the "black dyke," assays taken by Mr. Keyes every ten feet show from sixty-four dollars and ten cents, in one place twenty feet north of the tunnel, to three dollars and seventy-seven cents silver.

The black dyke is practically barren, though traces of silver are shown by some assays. The material passed through is none of it "pay ore," but is called "vein matter." From the north side of the dyke to the edge of the Callison foot-wall the assays of Mr. Keyes show from five dollars and sixty-five cents to traces of silver. The Callison foot-wall is entirely barren, except that traces of silver may be found on its outermost edges.

The Callison ore channel has been opened one hundred and seventy-seven feet in depth on its dip, and one hundred and eighty-six feet in length on its course or strike; throughout its whole extent the ore has lain on this barren white clay or porphyry, dipping with regularity to the north at an angle of about forty-five degrees. It is from two to six feet thick, and the hanging wall is this white material, before mentioned, extending on north one hundred feet or more. The ore bodies in the Mount Diablo are bounded by decomposed white rock, similar to the foot and hanging walls of the Callison, though no body so large and regular has been found as that in the Callison.

These are the leading facts, and upon them, though the question is not entirely free from doubt, we are inclined to think, and for the purposes of this decision shall assume, that the Callison is a vein or lode separate from the Mount Diablo, within the meaning of those words as used in the acts of congress, and as interpreted in the Eureka Case [Case No. 4,548]. In that case it was held that the terms, vein and lode, are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

It was considered in that case that the terms, vein and lode, as used by congress, for reasons there given, could not be restricted, always, to "aggregations of mineral matter in fissures of rocks"—that is to say, to typical fissure veins—but must be so extended as to include any other aggregation of mineral matter containing ores lying within clearly defined boundaries. Such boundaries were found in that case in the quartzite on the south, and the clay-slate on the north. Between those boundaries, however, no others appeared clearly dividing the included rock or vein matter; and it never was intended in that case to hold that every metalliferous zone of country to which boundaries could be found must be regarded as one vein or lode, for this would be to reduce all mining districts to one lode. Moreover, in this case we look in vain for clearly defined boundaries where the plaintiff claims the boundaries to be. Dr. Blatchley, a witness for plaintiff, says that on the south "the line of demarcation between the stratified slate which contains no mineral and that which is not so strongly stratified and does contain mineral (meaning gold and silver) is not very clearly defined." Again he says: "There is no distinct or definite line that can be drawn accurately." Mr. Keyes considers the stratified slate as the boundary between the Peru and a claim southwest of it called the "Stump and Adams." This division line is observable on the surface, but he has seen no boundary of unaltered slate below. Both he and Dr. Blatchley consider the south limit of the lode to be where the "impregnation" ends. To the north, where the greenstone is found, the boundary is still less clearly defined. Dr. Blatchley says the line of demarcation between the greenstone and slate "is not plain and clear, * * * to fix it exactly would be very difficult." Again he says, "they (the divisions) are all very vague and indefinite." Beyond the slate claimed to be the boundary on the south ore has been found, increasing the difficulty of fixing the limits of impregnation in that direction.

Looking, then, at this metalliferous zone as a whole, at the point where the claims in question lie, it is impossible to find clearly defined boundaries. There is, however, such a zone there, and there is, no doubt, a limit beyond which the rocks are not impregnated with silver, which limit is at present not clearly ascertained.

Having such a zone or district, when we find within it fissures like that opened by the Callison, filled with ore, we think we must regard them as veins or lodes. For, while

metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone cannot be permitted to swallow up, under the name lode, true fissure veins found within its limits. We think the Callison claim must be regarded as being upon such a fissure, and as having unmistakable visible boundaries.

We have been unable to feel the importance of determining whether the prevailing rock in these claims shall be called decomposed clay-slate with the plaintiff, or decomposed felsite porphyry with the defendants. Nor do we regard it as a safe guide, in determining whether there is one lode or more here, that chemical analysis shows these rocks to be composed of the same ingredients. The same test would require us to pronounce plumbago, anthracite, coal, and massive diamond to be the same.

In these cases, where visible practical boundaries are the important things, the optical qualities of rocks seem to us a safer guide than chemical analysis. All the witnesses agree that true fissures may exist in this rock, whether slate or porphyry; and, be it what it may, we find at the Callison mine a fissure having foot and hanging walls, dip, strike, and a quite uniform breadth. Judging from exterior appearances, we at once pronounce the brown quartz, the stratified clay-slate, the decomposed material, and the "black dyke," different rocks. To the eye, the foot-wall of the Callison mine with its brown, flinty quartz, and overlying clay, is a plain line of demarcation between it and the country rock south of it. For the purposes of this decision, therefore, as before stated, we shall assume the Callison to be a separate vein or lode.

Assuming the Callison to be a separate lode, still the plaintiff claims it, under the operation of the mining laws of the Columbus district, by virtue of the Dinero location. Section 8 of those laws reads as follows: "Section 8. Each locator or claimant in any ledge in this district shall be entitled to two hundred (200) feet by location, and all the dips, spurs, angles, off-shoots, out-crops, depths, widths, and variations, and all the minerals and other valuables therein contained; and the discoverer and locator of any new ledge or lode, shall be entitled to one claim of two hundred (200) feet additional for discovery. The locator, or locators, of any ledge or lode, shall also be entitled to hold one hundred feet on each side of said ledge or lode, together with all minerals (whether in distinct ledges or otherwise) therein contained."

Under this section the plaintiff contends that when a party locates a given number of feet along a given lode, he holds, by virtue of such location, a hundred feet on each side of his lode, without expressly claiming it in his notice; or, in other words, that when a party becomes a locator, he is entitled to hold in that quality the one hundred feet on each side of his lode. The Dinero notice reads as follows:

"Notice.—Dinero Quartz Claim, One Thousand Four Hundred Feet. We, the undersigned, this seventh day of September, A. D. 1867, locate and claim one thousand four hundred feet (1400) on this Dinero quartz lode, together with all the privileges granted by the laws of this, the Columbus mining district, running seven hundred feet each side of this notice. Signed, A. Hanke, and five others."

Upon the strength of the claim in this notice of all the privileges granted by the district laws, the plaintiff further contends that if the quantity of surface ground claimed must be put in the notice of location, he has substantially and sufficiently complied with the law.

The requirements of the Columbus mining laws in regard to locating claims are, that "each claim located shall have a mound or stake placed thereon, on which shall be marked the name of the company, and the number of feet located and claimed;" and further, that "all notices of location shall contain the names of the locators or claimants." There is nothing requiring a marking out of the surface boundaries on the ground.

The construction placed upon the mining laws by the defendants is, that before a locator becomes entitled to hold this surface ground, he must claim it and give notice of his claim; that the miner cannot hold what he has not claimed, and that it is as essential to locate and claim the surface, and specify the number of feet on each side desired, as the number of feet along the lode. Further, that the claim of "all the privileges," etc., does not help the plaintiff, that claim being too indefinite to be of any validity.

After a careful consideration of the language used by the miners, the circumstances under which, and the condition of the district at the time the laws were made, together with the arguments of counsel, we are constrained to hold that the miners meant by section 8, to say, that when a person had become a locator by putting up his stake or mound, and his notice of the number of feet claimed on the lode, with the name of the company and the names of the locators, such person became, by virtue of such location, invested with a right to hold one hundred feet on each side of the lode he had located.

The language is, "the locator of a ledge shall be entitled to hold one hundred feet on each side of his ledge," not that he may locate that quantity of surface ground. This construction gains force from the language which follows that entitling the locator to one hundred feet on each side of his ledge, viz., "together with all minerals (whether in distinct ledges or otherwise) therein contained." This shows that the one hundred feet were to be held for something more that surface ground for convenience in working the claim. When the miners framed the law, doubts ex-

isted, doubts which have not yet been settled, as to the character of the ore deposits in the Columbus district.

Hence this privilege was intended to secure the locator a reasonable quantity of ground, whether his ore deposit should be called a lode or impregnation, or "otherwise." It was, as we think, a definition of what a location of feet along a lode or supposed lode should embrace.

But if we admit that there ought to be a claim and notice of the surface ground, aside from the location of the lode itself, then we consider the notice in this case to be a good and valid notice of the claim of Hanke and his co-locators to fourteen hundred feet along the Dinero lode, and to one hundred feet on each side of that lode.

If it is necessary to express in terms the number of feet the locator intends to claim on each side of the lode, would it not be equally necessary to claim, in distinct, express terms, all the dips, spurs and angles of the lode, which the mining law gives to the locator? We presume it would not be insisted that the locator should not be permitted to follow the dip of his lode outside his surface lines unless he had expressed his intention to claim that right in terms. Yet the right to dips, spurs, etc., is given by the mining law in the same terms as the right to one hundred feet on each side of the lode.

The object of any notice at all being to guide a subsequent locator, and afford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably, should be held a good notice. Great injustice would follow, if, years after a miner had located a claim, and taken possession and worked upon it in good faith, his notice of location were to be subjected to any very nice criticism.

We agree with the defendants, that the locator should make his locations so certain that the miners who follow him may know the extent of his claim, and be able to locate the unoccupied ground without fear that, when they shall have found a paying mine, the theretofore indefinite lines of some prior location may be made to embrace it.

But id certum est quod certum reddi potest. When the miner has stated, as the rules require, the number of feet he claims along the lode on which he has set his stake, and has referred all whom it may concern to the laws of the district, by claiming all the privileges granted by the laws of the district, and those laws, in express terms, entitle each locator to hold one hundred feet on each side of his lode, then the length and breadth of his claim are fixed with reasonable certainty, because, by reading the laws of the district, with the notice referring him to them, the subsequent locator can make certain the exact thing claimed. See Gleeson v. White Mining Co., 13 Nev. 442.

It is true that a locator might, if he desired, take less than the one hundred feet, but in this case, Hanke and his associates did claim all the law allowed. And, after all, is it not the gist of the whole matter, that the miner actually takes possession and goes to work, thus giving publicity to his claim? That was done in this case. Plaintiff and its grantors have been on this ground, claiming it, prospecting and working it for years. The defendants cannot claim to have been misled by the notice in this case, for when they located the Mountain Boy, in February, 1878, they knew it was upon the Dinero claim, but insisted that the Dinero, for lack of the required amount of work upon it, had been forfeited.

Besides all this, in March, 1876, almost two years before the defendants located the Mountain Boy, the plaintiff had made a survey, and staked off the exterior boundaries of what it claimed, beyond all chance of mistake. This was done by placing stakes as follows: One at the center, one at the east, and one at the west end of the center line of the Mount Diablo claim; one three hundred feet north, and one three hundred feet south of both the east and west center stakes, thus plainly marking the center line and the four corners of ground claimed by the plaintiff, under the three locations made by Hanke and his associates. The Mountain Boy claim is almost wholly located within the lines marked by these stakes, and the ore body opened by the Callisons has its apex eighty-seven feet south of plaintiff's north line as thus marked.

We think the plaintiff, under the mining law quoted, became entitled to hold one hundred feet on each side of the Dinero lode, by virtue of the original location, unless, as is further urged by defendants, this section 8 was void for conflict with the act of congress of 1866 (14 Stat. 251). It does not appear to us necessary, at this day, to decide the effect of the act of 1866, upon locations made after its passage, and before the act of 1872. We think it by no means certain that the act of 1866 confined locations so that surface ground could not have been taken up, embracing more than one lode, although it is true that a patent under that act could have issued but for one lode.

For, be this as it may, the act of 1872 (17 Stat 91; Rev. St. § 2322) recognizes locations made prior to its passage, the surface lines of which included more than one vein or lode. The language is: "The locators of all mining locations heretofore made * * * shall have the exclusive right of possession, and enjoyment of all the surface included within the lines of their location, and of all veins, lodes or ledges, the top or apex of which lies inside such surface lines." * * *

It is very clear that this language reaches the case of locators who had located claims while the act of 1866 was in force, the surface lines of which included the tops of more than one lode, and confirms their possession to all the surface, and all the lodes included within their lines. That is the case at bar.

The top or apex of the Callison lode lies within the surface lines of the Dinero, and within forty-seven and a half feet of the location monument which Hanke placed on the Dinero croppings; and it follows that the plaintiff is entitled to the exclusive possession of the Callison lode, unless for non-compliance with the law, a forfeiture of the Dinero claim has been incurred.

The evidence altogether refutes the idea that there was any abandonment in fact, or any intention to abandon the Dinero claim on plaintiff's part. There can be no doubt from the evidence that sufficient work was done on the Dinero claim to hold it down to 1876 and 1877. But however that may be, it is conceded that, under the statute, if sufficient work was done during the year 1877 to hold it, then there was no forfeiture. The whole question, therefore, on this branch of the case, is, whether in the year 1877 one hundred and forty dollars worth of labor was performed, or improvements made on the Dinero claim. If not, the claim was subject to relocation in February, 1878, by defendants, otherwise not.

On this point we find that a road was made during the year 1877 over the surface of the Dinero and Mount Diablo to be used in working the three mines, the Peru, Mount Diablo and Dinero, all at this time owned by the plaintiff, and to reach the Mount Diablo ore dump and the point on the surface of the Dinero, where the winze in the connecting drift would come out when raised as was then proposed. That portion of the labor on this road done on the surface of the Dinero claim was worth from fifty to seventy-five dollars.

A survey was also made to locate the point where the winze, when raised, would come to the surface, a point within the surface lines of the Dinero. In this year, Mr. Sweetapple located for plaintiff a proposed shaft at the point "R" on the Dinero ground, north of the ravine, and beyond the apex of the Callison vein. This projected shaft was to be a two-compartment shaft, and was to be sunk for prospecting the Dinero ground. An advertisement for bids was made, and six or eight were put in. The shaft was not begun in 1877 because, as Mr. Sweetapple testifies, the company being short of funds, decided to postpone sinking it until the following year.

All this was done on the surface of the claim; but it does not distinctly appear that the worth of it was so much as one hundred and forty dollars. It is evidence, however, of a continued purpose to hold the Dinero ground, and tends to confirm the claim of plaintiff, that all the work performed in this connection was intended to be applicable to all these three claims.

The plaintiff further shows that in prosecuting work from the main tunnel, which tunnel begins on the Mount Diablo ground, such as drifting and stoping out ore, some three thousand dollars' worth of labor was done during this year within the surface lines of the Dinero, if those lines are dropped perpendicularly down. This, the defendants say, was not, properly speaking, work on the Dinero claim, but within and on the Mount Diablo lode, which, in its downward course has pitched into the Dinero. The plaintiff, on the other hand, also insists that this and all other work was a part of a systematic plan applicable to all their claims.

This presents a question of practical importance for decision, which the consideration of a few additional facts may help us to do correctly. In the year 1867, the grantors of plaintiff Hanke and his associates, located three quartz claims at the point now in question, viz., the Peru, Mount Diablo and Dinero, all lying side by side, with the Mount Diablo in the center, the Dinero being the first location. The surface of each claim was two hundred feet wide. The plaintiff and its predecessors, from that time on, have been in the undisturbed possession of the mining ground covered by these three claims. During the years from 1867 to 1878, when the defendant entered, a large amount of work had been done by the plaintiff in and upon the claims, consisting of tunnels, drifts, winzes, cross-cuts, inclines, ore stopes, and all the labor usual in the development of such a mining claim. Over ninety-four thousand dollars have been expended by the plaintiff on the claims; much the larger portion within the lines of the Mount Diablo claim.

When Hanke located these three claims, he first located the Dinero, putting up a mound on the croppings; then going south, he located next the Mount Diablo, and last the Peru, putting a notice on the croppings of each. The three claims adjoin each other, and the surface area of the three together is just what the law of 1872 permits a locator to take on locating a single lode, unless the mining laws restrict him, namely, three hundred feet on each side of the center of the Mount Diablo claim. The Columbus laws do restrict the locators to one hundred feet on each side of the ledge located. At the time Hanke made his discovery and locations, he found upon the surface of all three claims black iron and manganese croppings. Ignorant of the real character of the ore deposits he believed he had found, and it being impossible, in the absence of developments beneath the surface, to determine whether these croppings were the signs of one lode or more, he made three locations. This he had a right to do. It was no more than any careful miner desiring to secure the fruits of his discovery, would have done. Subsequent explorations have shown that valuable ore deposits exist in each of the claims so located.

The mining law, providing for the peculiar mode in which the metalliferous deposits occur in the Columbus district, gave the locator a right to stick his stake at the point he supposed and claimed his ledge to be, and then entitled him to hold one hundred feet on each side, with all the ores and metals

therein, thereby, in some degree, protecting the locator upon newly-discovered croppings, against his liability to mistake in selecting the spot to place his stake and notice.

These three claims, so located, the plaintiff has held and worked for more than ten years. The main tunnel, starting in the Mount Diablo, bears north until it penetrates the Dinero ground about one hundred and fifty feet. From this tunnel cross-cuts have been run south into the Peru and north into the Dinero, i. e., across the line dividing on the surface the Mount Diablo and Dinero claims.

Sometime in the year 1876 a cross-cut was made, north about forty-three feet towards the Dinero claim, some two hundred feet from the mouth of the main tunnel. From the north end of this cross-cut, an incline was sunk the same year, one hundred and forty-three feet, bringing the foot of the incline more than fifty feet into the Dinero ground. In 1877, drifting and stoping were carried on from and about this incline, and, according to Mr. Sweetapple, and the fact is not disputed, at least three thousand dollars' worth of this work was done on the Dinero, north of the Mount Diablo north line. A little north of the foot of this incline a cross-cut from the drift running north, was run, in 1877, twelve or fifteen feet west, at a cost of over one hundred and forty-four dollars. This cross-cut is wholly in the Dinero ground as marked on the surface.

This is the substance of the testimony on this point, and upon it we are called upon to decide whether the plaintiff in the year 1877 failed to comply with the conditions, as to labor on the Dinero claim, stated in section 2324 of the Rev. St., thereby leaving that claim open to re-location.

What, then, is a "mining claim," and what is "work on a claim?" It may be answered, to the first part of the inquiry, that a "mining claim," is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. It must under the law of congress of 1872 (Rev. St. § 2320), be located upon at least one known vein or lode, but the vein or lode is not the whole claim.

"No claim," says the act, "shall extend more than three hundred feet on each side of the middle of the vein at the surface." A claim may therefore, if there is no restriction in the local rules, be six hundred feet wide, although the known lode to include which such claim is located is not twelve inches in width. The owners of such a mining claim have, in the language of the law, "the exclusive right and enjoyment of all the surface included within the lines of their locations." Rev. St. § 2322.

Applying the law to the case in hand, the Dinero claim consists of a tract of mining ground fourteen hundred feet long and two hundred feet wide. The Mount Diablo Company being the owner of the claim, had, in 1877, the exclusive right of possession to the whole tract, so far as the surface is concerned. Below the surface the possession was subject to such right as was given by statute to the owner of an adjoining claim to follow his lode downward across his line into the Dinero ground. Assuming this definition of a mining claim to be correct, the second branch of our inquiry is easily answered; work on a claim is work done anywhere within the lines upon the surface, and anywhere within those lines below the surface, when they are carried down vertically into the earth.

Had the Dinero ground been owned by another than plaintiff, and had this three thousand dollars' worth of work been done by such other owner at the point where it was in fact done by plaintiff, there could not be, it seems to us, any pretext for claiming a forfeiture against the Dinero owners on the ground that the work done, though on the claim, turned out to be within a lode which had its apex outside the Dinero surface lines. We think the fact that the plaintiff was the owner of both the Mount Diablo and Dinero claim, ought not to deprive it of credit for this work done on the Dinero. It is literally and in fact work done on the Dinero claim. If an outside lode dip into the claim, the work may also be done inside of that lode, but at the same time on the Dinero claim. A mining claim, as we have seen, is not merely the vein or lode, but that with a certain quantity of surface ground. The owner has the exclusive right of possession to such surface, as well as to the veins or lodes cropping out therein.

When the owner of a vein having its top outside the lines of such claim, follows his vein into an adjoining claim, he does so by permission of a positive law, without which he would have no more right to go upon his neighbor's claim below, than upon the surface. It is a sort of easement in, or servitude laid upon, the mining claim adjoining. We therefore conclude that when a miner does the necessary labor, anywhere within his boundaries upon the surface or below it, the condition of the mining law as to labor has been complied with. We cannot hold that he shall make no mistakes; that he is bound to ascertain at the risk of forfeiture, whether he is working on a lode having its apex outside his surface lines. The miner has perils and perplexities enough, without adding this. The ten dollars' worth of labor which the law requires the plaintiff to do on each one hundred feet of the Dinero claim, to save it from forfeiture, is too small to be of any practical consequence as a development of the claim. Congress plainly required this work to be done by way of a continuous, annual assertion, or renewal of the original claim and location, and nothing more. This being so, it would hurt our sense of justice did we feel compelled to say, that one hundred and forty dollars' worth of labor done

on the surface, utterly valueless as a development of the claim, would have saved the claim from forfeiture, and that the three thousand dollars' worth of work done below the surface cannot.

It is also to be remembered that the plaintiff had long been the owner and possessor of these three claims; that the precise limits of the lodes, if more than one, and the nature of the ore deposit was, and may still be said to be, by no means free from doubt. A long tunnel was driven into this ground, a drift off to the south was run to prospect the Peru; on the north side inclines were sunk, and drifts run, some extending into the Dinero, some not. Wherever, in the Peru, Mount Diablo, or Dinero promise of ore appeared, there work was done, and when found the ore was stoped out.

At two different times, the last in 1874, notices were put up, and one of them recorded, notifying all that the work then being done was intended for the development of the three claims. Work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it.

A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by plaintiff. And we think that all work done was a part of that general system, and, as such, applicable to all the claims which had by purchase been concentrated in a single party, the plaintiff. Under the circumstances of this case it would be little short of downright absurdity to require the plaintiff to segregate his work, and proclaim the labor of removing one wheelbarrow full of earth from the common tunnel to be specifically applicable to the Dinero claim; another to the Mount Diablo, and a third to the Peru. The natural and reasonable presumption is that all the work is done as a part of the system, and as such applicable to all the claims.

Finally, when we consider that the plaintiff had been in unquestioned occupation of all these claims, for over ten years, prior to the entry of defendants, and the amount of labor altogether done on the ground, we have no inclination, and do not deem it our duty to strain for a construction of the law or of the facts upon which to declare a forfeiture. Forfeitures have always been deemed in law odious, and courts have universally insisted upon the forfeiture being made clearly apparent before enforcing it. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them. Our conclusion is that the plaintiff is entitled to the possession of the demanded premises. Judgment must accordingly be entered in favor of plaintiff.

MOUNTFORD (WILMARTH v.). See Case No. 17,774.

MOUNTJOY (UNITED STATES v.). See Cases Nos. 15,828 and 15,829.

MOUNT PLEASANT (FOOTE v.). See Case No. 4,914.

Case No. 9,887.

The MOUNT WASHINGTON.

GEIGER v. The MOUNT WASHINGTON.

[4 Adm. Rec. 523.]

District Court, S. D. Florida. Nov. 3, 1851.

SALVAGE — IN DISTRESS — PERIL — NUMBER OF SALVORS—FORFEITURE.

[1. Compensation in the nature of salvage may be awarded for services rendered to a vessel in distress, although she was in no imminent peril of loss.]

[2. Other things being equal, the total award of salvage should vary with the degree of peril from which the property was saved.]

[Cited in The Calcutta, Case No. 2,298.]

[3. In fixing the total award, the number of salvors necessary to perform the services may be considered, but not the number actually employed.]

[4. The fraudulent employment by a salvor of an unnecessary number of assistants in order to magnify the importance of the services should cause a forfeiture of all compensation.]

[This was a libel for salvage by John H. Geiger and others against the ship Mount Washington and cargo (Blaisdell, master and claimant).]

Wm. W. McCall, for libelants.

S. R. Mallory, for respondent.

MARVIN, District Judge. The principal facts in this case are as follows: The ship Mount Washington (Blaisdell, master), while on a voyage from New Orleans to Bordeaux, about the 22d of August last, encountered a heavy gale, and lost her jib boom, foremast, and sails attached. When the gale subsided she came to anchor in about five fathoms water near the west end of the Quicksands, about forty miles west of Key West. The ship had leaked badly during the gale, and the cargo had changed its position, making her careen considerably. After the gale was over the master pumped out his ship, and did what he could to get the ship righted. He also erected a jury foremast and rigged jury sails and he was getitng ready to proceed to sea, with the view to go into the port of Key West or Havana for repairs, when, on the 24th of August, he was boarded by the libelant Geiger, master of the wrecking schooner Champion, who was then on a cruise for vessels in distress. The master of the ship employed Geiger to assist him in getting the ship to Key West, wanting his services

as a pilot. The schooner Lafayette arrived at the ship about the same time. The direction of the ship being given up to Geiger, he got her under weigh, and stood towards the reef to the southward, and tacked and stood in again. On attempting to tack the second time, the ship misstayed, and it was soon ascertained she would not obey the helm, and, indeed, that the rudder post was split and broken. Geiger says that the ship was totally "unmanageable," attributing her staying at the first tack to a favoring tide and sea, and not to the efficiency of the rudder. Finding the ship would not stay, and the wind being ahead, so that it was necessary to beat the ship, making short tacks, he placed the schooners Champion and Lafayette ahead of the ship, and towed her. He subsequently placed the schooner Louisa also ahead, and finally the Euphemia, all employed in towing the ship. He arrived with the ship at Key West on the 27th. The winds were light, and the weather pleasant.

Such are the principal facts in the case. Geiger and the master of the ship do not materially differ in their relation of the facts; but Geiger alleges, as a matter of opinion, that, but for the services rendered by him and his consort, the ship and cargo would have been lost. He claims, therefore, salvage. The master admits the usefulness of the services, but alleges, as his opinion, that the ship and cargo would not have been lost, had no such services been rendered. It is very certain that Geiger and his associates are entitled to compensation for the services rendered, and whether this compensation is called "salvage," or simply "compensation," is really of no practical importance. It is true that salvage, in the legal acceptation of the word, and eo nomine, is allowed only for services which result in saving property from the perils of the sea. In this sense of the word, there must be, as a foundation for salvage, impending and imminent peril, and a saving from that peril. But compensation, larger or smaller, in the nature of salvage, is allowed by the court for services to property on the high seas, when such property is not in imminent peril, or perhaps in very little peril, of total loss; the amount of this salvage, or this compensation made, to vary with the varying circumstances of each individual case. So that the circumstances of each case must be considered, and a remuneration fixed either as a salvage eo nomine, or as a compensation in the nature of salvage. In fixing the amount of compensation for marine services, the various circumstances constituting the imminency of the danger to which the property was exposed, and from which it had been saved, the value of the property, the labor of the salvors in saving it, their gallantry, good conduct, and many other circumstances, all enter into the calculation, and are duly considered, as well as considerations of public policy, which prompts a liberal reward for salvage services, in order to advance the interests and promote the security of commerce generally. But in every case of a claim for salvage or compensation the great and important element in the calculation, in fixing the amount, constantly is, the condition and situation of the property in regard to its exposure to peril or danger of loss or destruction,—what was the peril or danger, if any, and the extent thereof; and according to the extent of this danger, all other things being equal, will the compensation or salvage be.

Let us now consider the question of danger in this case. Was this ship, at the time Geiger went to her, in peril of total loss? The true answer to this question will result from a consideration of her condition and situation. She lay at the west end of the Quicksands, at anchor in five fathoms of water, with an open sea to the southward, and no reefs so near as to interfere with his getting under weigh. Was there danger in this position? I do not see it. She had lost her foremast and jib boom. But the master had erected a jury foremast, and had got sail upon it. He had also rigged up a jib. Was she, in consequence of the loss of her foremast and sails, in danger of total loss? Her security may have been thereby somewhat diminished; but I do not think that it can properly be said that the ship, well manned and commanded as this ship was, is, in ordinary weather, in danger of loss simply because she has a jury foremast and a bad-fitting jib. But adding the further fact that her rudder was broken, and she steered badly, or would not steer at all, and still I think it cannot be said with truth that the ship was in danger of total loss. An experienced shipmaster like Captain Blaisdell knows very well how to repair or remedy the defects of a broken rudder, or how even to navigate the ship without a rudder, when necessary. It is very evident that this is the view which Captain Blaisdell himself took of the matter at the time. He wanted a pilot. He says he proposed to Geiger to pilot him, not that he considered his ship in any danger, but that it had become necessary, in consequence of the gale, to go into port, and the services of a pilot would be useful to him. He knew his position, and could himself navigate the ship into Havana or Key West without a pilot; but a pilot would be very useful to him, in giving him confidence, and enabling him to take advantage of tides, currents, &c.

It appears to me, upon a careful consideration of the facts and circumstances of the case, that this ship, at the time Geiger went on board, was in little or no danger of a total loss, but that the probability, decidedly, is that, had no person gone to the ship, Captain Blaisdell would himself, unaided, have navigated his ship into this port, or the port of Havana. Such I think must be the opinion, too, of all candid men possessing any considerable nautical ex-

perience. Indeed, when we consider that the gale was over, the weather good, the ship snugly at anchor, and not leaking badly, and that the ship had two good masts and a jury foremast, and was within forty miles of this port, with an experienced commander and an efficient crew, it may well be doubted whether it was not the duty of Captain Blaisdell to have declined altogether the services offered by Geiger, and to have carried out the purposes and views he entertained before the arrival of Geiger at the ship. But Captain Blaisdell thought he needed the pilot, and employed Geiger accordingly. I think the unconditional employment of Geiger under the circumstances, was probably excusable. It was evidently done in good faith, and, without doubt, it appeared to the master to be advisable and proper; and I think it was. But I do not think that a pilot, even, was indispensably necessary to the safety of the ship,—much less the employment of any vessels in towing the ship necessary to her safety. The rudder could have been repaired, or, if not, the ship could have been anchored in safety, and navigated to this port when the wind should become more favorable.

The very most, it appears to me, that can possibly be claimed, truly and fairly for Geiger's services, is that they were very proper, and, under the circumstances, allowable, and necessary to get the ship to this port in the shortest time, and with satisfaction to the master; but it cannot be said that they were necessary to the ship's safety, or that they contributed to save the ship, for I do not consider her as having been in danger. Salvage, therefore, eo nomine, is not due; but a fair and reasonable compensation for the services rendered. In estimating the value of these services, and fixing the amount of compensation to be allowed therefor, I consider the services of Geiger and the schooner Champion and crew as useful, and proper to be paid for, not that I consider either as necessary to the safety of the ship; but they were useful and necessary to get the ship into port in good time, and without too much labor and anxiety. The services of one vessel and crew are therefore to be paid for. The services of the Louisa, the Lafayette, and the Euphemia were no further useful than as they contributed to get the ship into port perhaps a day or two sooner than she would have arrived without them. These vessels did no hurt; they did some good; and there is no objection to their employment. But there is no principle or usage or practice of this court, or of any other, that indorses or in any way sanctions the idea of allowing a larger compensation in the nature of salvage, or a larger salvage, for services rendered by a larger number of salvors than would be allowed for the same services rendered by a less number. The compensation cannot be increased by increasing the number of salvors. On the contrary, it has been the steady practice of the court to adjust its amounts of salvage in each case with reference, not to the number of vessels and men actually employed, but with reference to the number necessary to do the service. In determining what number, in any particular case, was necessary, much, often, would have to be left to the judgment of the parties interested and on the spot. But in no case has this court ever increased the amount of salvage in consequence of there being a larger number of salvors, where it has been apparent at the time that a less number would be sufficient. I have above remarked that there is no objection to the employment of the Louisa, the Lafayette, and the Euphemia. They did no hurt, and did some good. Their employment ought not to diminish the compensation to be allowed for the service actually renuered; for their employment seems to have been in good faith, and the reasons assigned for it are satisfactory. But did the facts and circumstances of the case fully satisfy me that these vessels had been employed with the view to magnify the importance of the services, and to make out an apparently strong case of salvage, with a view to a larger compensation than the real facts would fairly warrant, there would be no doubt in my mind as to what the law would require me to decree. Such conduct works a forfeiture of all salvage or compensation. The law just as much exacts fairness and honesty in the salvors in presenting a claim of salvage to the court as it does fidelity and honesty in preserving the property from embezzlement. Salvors are not to impose on the master of the ship or vessel, nor on the court, but to conduct themselves fairly and honestly in regard to both.

To return to the question of compensation: The case of The Herman [Case No. 6,406], decided in this court in 1840, is somewhat analogous to the present case. That ship got ashore on Alligator reef, and drove over, knocking off her rudder. Bethel and Roberts piloted the ship into this port steering her by the sloop Texas. The court decreed $800. That ship was in as much danger as this. She was inside the reef, and without a rudder. In that case, however, the ship was to windward of the port, and could be more easily brought in. More time and labor were required to bring this ship in. Upon the whole, I think that $1,500 is a suitable compensation to be decreed for the services rendered.

It is therefore, ordered, adjudged, and decreed that the sum of fifteen hundred dollars be allowed the libelants for their services rendered said ship Mount Washington as alleged by them in their libel, and that upon the payment thereof and the costs and expenses of this suit, the wharfage, storage, and bills for labor, the marshal restore said ship to the master, for and on account of whom it may concern. It is further ordered that the marshal proceed to advertise and sell at public auction a lot of old brass taken from the old rudder, and whatever other old material the master may desire to have sold.

Case No. 9,888.

The MOUNT WASHINGTON.

[4 Ben. 171.] [1]

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

COLLISION ON HUDSON RIVER — SCHOONER AND STEAMBOAT.

1. A steamboat, with a heavy tow at the end of a hawser, was going slowly up the Hudson river, close along the west shore, when a collision occurred between a boat on the port side in the tow, and a schooner. The schooner was scarcely doing more than drifting down with the tide, as the wind was very light. The steamboat, just before the collision, took a rank sheer to the east, and, when the schooner was just off her port bow, stopped her engine: *Held*, that it was the duty of the steamboat to keep out of the way of the schooner, and she must show that her failure to do so arose from no fault on her part.

2. The sheer of the steamboat was not justifiable, and she should have stopped and backed sooner.

In admiralty.

R. D. Benedict, for libellant.

Beebe, Donohue & Cooke, for claimant.

BLATCHFORD, District Judge. This is a libel for a collision which occurred about 8 o'clock a. m. on the 1st of August, 1867, between the schooner Annie, owned by the libellant, and a canal-boat in tow of the steamboat Mount Washington, a short distance below the upper end of Wagner's Island, in the Hudson river. The schooner was bound down the river. The steamboat was going up close along the west shore, off Wagner's Island, having seventeen boats in tow—one on each side of her and fifteen on a hawser, astern, in three tiers of four each, and an extreme stern tier of three. The tide was ebb. There is a dispute as to how the wind was, but there is no doubt it was very light. The schooner was scarcely doing more than drifting with the tide. The speed of the steamboat was very small, as her tow was heavy. The port bow of the schooner struck the port bow of the extreme port boat, of the four boats in the first tier behind the steamboat, and the schooner swung around, so that her port side lay against the bows of the boats in that tier. She was finally shoved out, and claims to recover $200 for the damages she sustained and for loss of her time.

It was the duty of the steamboat to keep out of the way of the schooner, and she must show that she failed to do so through no fault on her part. This she has not, on the whole evidence, satisfactorily done. It is admitted, that, just before the collision, the steamboat took a rank sheer to the eastward, by putting her helm hard a-port, and that she and the boat on her port side went clear of the schooner, on the port side of the schooner. I am not satisfied that this sheer was justifiable, or that there was anything in the position or movements of the schooner, to call for it. The steamboat, on her own showing, was very close to the west shore, and it was not reasonable for her to suppose that the schooner would attempt to pass between her and the west shore. It was on that supposition alone that she acted, in porting where she did. Moreover, I think the steamboat did not soon enough stop and back. Her master says, that, when the schooner was nearly an eighth of a mile off, he thought she was going in to the westward of him, and that he, at that distance, hailed the schooner not to do so, but without effect. Yet he says, that he did not slow or stop his engine till after he had put his wheel hard a-port, and that, when he stopped his engine, the schooner was just off his port bow. I think, on the evidence, that, if the steamboat had not ported at all, and, certainly, if she had stopped and backed, when she hailed the schooner, there would have been no collision. There must be a decree for the libellant, with costs, with a reference to ascertain the damages sustained by the libellant.

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

MOUNTZ (HODGSON v.). See Case No. 6,569.

Case No. 9,889.

MOUNTZ v. JONES.

[1 Cranch, C. C. 212.] [1]

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

INSOLVENCY—ACT 1774—DISCHARGE—POSTING AT CLERK'S OFFICE.

Under the insolvent act of 1774 (chapter 28), a discharge of the debtor is not valid unless a copy of the justices' certificate be affixed at the door of the county clerk's office.

Plea of release under the insolvent act of 1774 (chapter 28). General demurrer.

Mr. Mason, in support of the demurrer, contended that the release was not valid under the act of 1774. That act provides that a copy of the justices' certificate shall by the sheriff be affixed to the door of the clerk's office of the county, and at the door of the prison of the county. The prisoner must be confined in the county jail, and the debtor's property is to vest in the sheriff of the county. The plea states that the copy was put up on the door of the clerk of the corporation, and on the door of the jail of the corporation, and that the prisoner was confined in the jail of the corporation, in custody of the sheriff of the corporation. No power was vested in the corporation to have a jail. The justices met at the corporation jail.

Mr. Morsell, contra. The act of 1774, meant to apply to all cases of commitment for debt, where the debts did not amount to £200 sterling. It was not necessary that the commitment should be in the common jail of the county. The corporation jail, was a jail

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

of Montgomery county. Georgetown was part of the county of Montgomery. The justices acted not as ministerial, but as judicial officers, in discharging prisoners. Their certificate, is, therefore, conclusive evidence of a compliance with requisites of the act of 1774. The power to have a jail is an incident to the judicial power over criminals vested in the court of the corporation, by the charter of Georgetown, 1787 (chapter 23). The alderman's executions were returnable to the mayor's court, who had a right to commit on non-payment. It was a case within the spirit of the act of 1774.

THE COURT (CRANCH, Circuit Judge, contra,) were of opinion, that the plea was bad, because a copy was not set up at the door of the county jail, but only at the corporation jail.

KILTY, Chief Judge, thought, also, that the county justices had no authority to command the corporation sheriff.

Case No. 9,889a.

MOWATT v. BROWN.

[14 Betts, D. C. MS. 80.]

District Court, S. D. New York. Dec. 28, 1848.

SEAMEN — WAGES — DISABILITY CONCEALED AT TIME OF SHIPPING.

[A seaman who ships for a voyage, concealing from the master a long-standing disease, which incapacitates him from labor, is not entitled to wages.]

[This was a libel by John Mowatt against Joseph R. Brown for seaman's wages.]

PER CURIAM (BETTS, District Judge). The libellant shipped in this port the 7th of April last as an able seaman on the barque Adario for a voyage to the coast of Africa and back. He entered on board in a disordered state of body, and never regained his health and strength in the five months the vessel was absent, so as to be able to perform his duty on board. He now sues the master of the vessel for wages on the voyage and claims a balance of $31 and upwards. This is not the case of a seaman taken sick in the service of the ship, when, by the maritime law, he continues entitled to running wages, and also to be cured of his malady at the charge of the ship. Abb. Shipp. 733; Curt. Merch. Seam. 107; Id. 291. He was laboring under an old and fixed affection disabling him from performing the duty of a sailor, and it was a fraud upon the master and owner to ship as an able seaman under such circumstances. Pet. Adm. 263; Curt. Merch. Seam. 29. Had he been able to perform valuable services to any amount, he might obtain satisfaction pro tanto, the master having the right to make a reasonable deduction for his deficiency. Abb. Shipp. 734, note; 3 Kent, Comm. (6th Ed.) 186. Under the proofs in this case it is made to appear that the libellant was disabled by an old infirmity, which he concealed from the master at the time of shipping, and which continued upon him, and disabled him from duty during the voyage, and therefore he cannot now sustain an action as for meritorious services. Libel dismissed, with summary costs.

MOWATT (STOKES v.). See Case No. 13,481.

MOWBRAY (ATLANTIC GIANT POWDER CO. v.). See Case No. 624.

Case No. 9,890.

MOWER et al. v. BURDICK.

[4 McLean, 7.] [1]

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

PLEADING AT LAW—PLEA—TRAVERSE—ARGUMENTATIVELY DENIED.

A plea which argumentatively denies a fact averred in the declaration, is demurrable. The traverse must be direct.

[This was a proceeding by Mower and Stevens against Burdick.]

Barstow & Douglass, for plaintiffs.
Joy & Porter, for defendant.

OPINION OF THE COURT. This action is brought upon a sealed instrument, dated the 9th of June, 1839, in which the defendant agreed to indemnify the plaintiffs and save them harmless against the payment of a certain promissory note, made and signed by the plaintiffs jointly and severally, with one Samuel Mower, then of Michigan City, Indiana, for the sum of seventeen hundred dollars, payable in one year, for the benefit and use of the said Samuel Mower. And the plaintiffs aver, that on the 12th day of July, 1842, they paid the said note. The second count in the declaration was substantially the same on another note.

The defendant pleaded that the said Samuel Mower did himself take up and pay each of the said several promissory notes when they became due, without this, that the said plaintiffs paid the sums due upon the said promissory notes when they became due, or any part of all or either of them in manner and form, etc., which the said defendant is ready to verify. To this plea, the plaintiffs demurred. This plea is bad. The plaintiffs aver that they paid the notes after they became due; the plea alleges that Mower paid them when they became due, which is not a direct answer to the averment in the declaration. This may be a good argument to show that the plaintiffs could not have paid the notes as they allege, but it is an argumentative denial of the fact stated in the declaration, which should be traversed. Steph. Pl. 175–177, 181, 385. The case was discontinued.

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

Case No. 9,891.

MOWREY v. INDIANAPOLIS & C. R. CO. et al.

[4 Biss. 78.] [1]

Circuit Court, D. Indiana. June Term, 1866.

INJUNCTION—NOTICE—CORPORATIONS—ACTS OF MAJORITY—CHANGES IN CHARTER—BY LEGISLATURE—OBJECTIONS — ESTOPPEL — COURTS — FEDERAL JURISDICTION.

1. The national courts can not order temporary injunctions, except on reasonable notice to the adverse party or his attorney.

2. It is a general rule, that the acts of a majority of a body politic bind the whole corporation, when confined to its ordinary transactions, and consistent with the original objects of its formation.

3. When, at the time of subscribing stock in a corporation, there are existing laws by which the charter of the body politic may be fundamentally changed, such subscription must be presumed to have been made with a view to such laws, and to changes which may possibly be made conformably to them. And in such case a majority of the stockholders may adopt such changes against the will of a minority.

[Cited in Mower v. Staples, 32 Minn. 286, 20 N. W. 226.]

4. Under the provisions of the national constitution, prohibiting the states from making any law impairing the obligation of contracts, and in cases not falling within the foregoing rules, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation without the consent of all the stockholders, unless the legislature has provided otherwise in the charter.

5. If a member of a Board of Directors of a corporation be present at the adoption of a resolution and aware of what is being done, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding be merely preliminary to a decision by a subsequent vote of the stockholders on the consolidation of the corporation with another corporation, which can only be ultimately decided by the vote of all the stockholders, and not of the board of directors, such consent so given by a member of the board of directors, who is also a stockholder, does not estop him from afterwards objecting to the consolidation.

6. To effect a consolidation of railroad companies subsisting under special charters not providing therefor, the consent of every stockholder must be given; and any one dissenting stockholder is entitled to an injunction against such consolidation.

7. In a suit against a corporation in the United States circuit court for the state, by a citizen of another state, service of process within the state upon a joint defendant, a citizen of a third state, gives the court jurisdiction over him.

In equity.

Bartley & Burnett and McDonald & Roach, for complainant.

G. E. Pugh and Hendricks, Hord & Hendricks, for defendants.

McDONALD, District Judge. This is a proceeding in equity for an injunction. The bill was filed on the 28th of May, 1866. On the same day, the complainant, without notice to the defendants, and in their absence, moved for a temporary injunction to operate till the motion could be fully heard on due notice on a day to be fixed by the court. As the bill stated facts indicating a pressing emergency, I then ordered that the defendants should be enjoined as prayed, till, on due notice to them, the motion could be fully heard on the fifth day of June, 1866. On the latter day, all parties appeared by counsel. The defendants then moved for a dissolution of the injunction already granted; and, at the same time, the complainant moved for a temporary injunction till the final hearing, or till the further order of the court.

The injunction ordered on the 28th of May was decreed without much consideration on my part. I followed a practice which had long prevailed in the courts of the state of Indiana. But, on further reflection, I think my order for a temporary injunction was premature. Equity would seem to demand that, in cases of emergency, where irreparable injury would follow unless an immediate injunction were ordered, the national courts should have power to grant temporary injunctions without notice of the application for them to the party enjoined. But the act of congress of March 2, 1793, forbids that any writ of injunction shall "be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." 1 Stat. 335. In view of this act, as well as of the 55th rule in equity of the supreme court, it should seem that no special injunction can be granted by this court but on due notice. And in the case of New York v. Connecticut, 4 Dall. [4 U. S.] 1, the supreme court has decided that an injunction can neither be granted by the United States courts, nor any judge thereof, without due notice to the adverse party or his attorney. I, therefore, dissolve the injunction ordered on the 28th of May.

We proceed to consider the motion now made by the complainant for a temporary injunction. By the bill, it appears that Albert L. Mowrey, the complainant, is the owner of three hundred and thirty-one thousand five hundred and fifty dollars in the shares of the capital stock of the Indianapolis and Cincinnati Railroad Company; and that the defendant [Henry C.] Lord, is the president of the company. The corporation exists under a special charter from the Indiana legislature, granted before the adoption of the constitution of 1851.

The bill alleges that a negotiation has lately been set on foot to consolidate said company with the Lafayette and Indianapolis Railroad Company. To this consolidation it appears that the latter company has already consented. And it further appears that the board of directors of the Indianapolis and Cincinnati Railroad Company have called a meeting of their stockholders to obtain their consent to the consolidation.

The bill charges that, on the 10th of May

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

last, certain articles of consolidation were agreed to and signed by H. C. Lord, T. A. Morris, and W. Wright, a committee on the part of the Indianapolis and Cincinnati Railroad Company, and by W. F. Reynolds, a committee on the part of the Lafayette and Indianapolis Railroad Company. A copy of these articles is exhibited; and they purport to be the work of the boards of directors of the two companies, "by and with the assent of their respective stockholders." Among other things, these articles provide for the issuance by the consolidated company of bonds to the amount of two million eight hundred thousand dollars, of which two millions and a half are to be delivered to said Reynolds in trust, first, to pay all the expenses of such trust; second, to pay all the legal liabilities of the Lafayette and Indianapolis Railroad Company for their stock; third, to pay such stockholders of the Indianapolis and Cincinnati Railroad Company as desire to exchange their stock for these bonds. The articles provide that, after these payments, the residue of the bonds shall be appropriated in various ways unimportant to the present decision to be stated.

The bill also charges that in 1865 a corporation was organized to construct a railroad from Indianapolis to the Indiana state line in the direction of Danville, Illinois, by the name of the Cincinnati, Indianapolis, and Danville Railroad Company; that, at the instance of the defendant Lord, the complainant subscribed two hundred thousand dollars to the capital stock of that company, and other persons subscribed thereto one million eight hundred thousand dollars; that Lord, and the directors of the Indianapolis and Cincinnati Railroad Company, and the directors of the Lafayette and Indianapolis Railroad Company, are attempting to effect the said consolidation, with the fraudulent design to break down the Cincinnati, Indianapolis, and Danville Railroad Company, and render the complainant's stock therein worthless; that by issuing said bonds, the defendants intend to buy up therewith all the stock so, as aforesaid, subscribed to the road last aforesaid, except the two hundred thousand dollars subscribed by the complainant; and that with a view to that object, the said Lord has already, as president of the Indianapolis and Cincinnati Railroad Company, actually bargained for a considerable portion of the stock of the Cincinnati, Indianapolis, and Danville Railroad Company, agreeing to pay therefor said bonds when they shall be issued.

To all these doings the complainant objects as frauds on his rights; and he especially objects to said consolidation, insisting that the same can not be legally effected without his consent. I lay no stress on the averments in the bill touching the Cincinnati, Indianapolis, and Danville Railroad Company. That company is not a party to this suit; and if it were, I think the matters relating to it and its stock are not proper subjects of consideration in a bill whose principal object, evidently, is to enjoin the consolidation of two other railroads. Indeed, I suspect that to unite all these matters in one bill might make it multifarious.

Nor do I deem material any inquiry into the policy of the proposed consolidation. Whether such a consolidation would be beneficial or injurious to the stockholders in general, or would favorably or unfavorably affect the complainant's stock in particular, are matters to be considered and determined by them alone. The only question for the court is a question of power. Have these corporations the power to consolidate against the will of one of the stockholders? If they have, we will not disturb them in the exercise of that power; if they have not, we are bound to forbid its exercise.

The statute of Indiana, on the subject of the consolidation of railroad companies, gives the power to consolidate in general terms, without any provision as to the consent of stockholders. 1 Gavin & H. p. 526. While, therefore, the general power of consolidation without doubt exists in this state, yet, whether such consolidation—especially in the present case—can be legally effected, without the consent of all the stockholders, cannot be determined by any Indiana statute, but must depend on general principles of law.

We have seen that complainant is a stockholder in the Indianapolis and Cincinnati Railroad Company to the amount of three hundred and thirty-one thousand five hundred and fifty dollars. He insists that by virtue of this interest he is entitled to object to the proposed consolidation, though every other stockholder in the two companies should desire it. If in this he is right, the injunction must be granted; otherwise, not. And this is the great question in the case.

It is certain that the proposed consolidation, if effected, would work a material and fundamental change in the corporation in which the complainant holds his stock. Nay, it would extinguish that corporation; for it is well settled that the consolidation of two railroad companies under the Indiana statute extinguishes them both; and that the consolidated institution is a new corporation, distinct from both the old ones out of which it was formed. State v. Bailey, 16 Ind. 46.

I think the following propositions may be laid down as clear law:

1. It is not to be doubted that, as a general rule, the acts of a majority of a corporation are binding on the whole, when confined to its ordinary transactions, and consistent with the original objects of its formation. Troy & R. R. Co. v. Kerr, 17 Barb. 581, 604; 1 Kyd, Corp. 422; Ang. & A. Corp. (2d Ed.) pp. 53, 396.

2. In all cases, where at the time of subscribing stock in a corporation, there are existing laws by which the charter of such corporation may be fundamentally changed, such subscription must be presumed to have been

made with a view to such laws and to changes which may possibly be made conformably to them; and in such case, a majority of the stockholders may adopt such changes against the will of a minority. Bish v. Johnson, 21 Ind. 299.

3. Under the provision of the national constitution prohibiting the states from making any "law impairing the obligation of contracts," and in cases not falling within the proposition last above stated, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation, without the consent of all the stockholders, unless the legislature has provided otherwise in the charter. 2 Redf. R. R. 575, 576.

The defendants' counsel have argued that the case of Clearwater v. Meredith, 1 Wall. [68 U. S.] 25, is opposed to the last of these propositions. But I think that case sustains it. In Clearwater v. Meredith, the question of the consolidation of two railroad companies was discussed. Clearwater was a stockholder in one of these roads. And Mr. Justice Davis, who delivered the opinion of the court, said that "Clearwater could have prevented this consolidation had he chosen to do so."

The only American case which I have found, and which seems opposed to this proposition, is that of Lauman v. Lebanon Val. R. Co., 30 Pa. St. 42. This case decides that a single stockholder has no right to object to the consolidation of the company in which he holds stock, with another railroad company. The learned chief justice who pronounced this decision cites no authority in support of it. His reasoning on it seems to me not very satisfactory. It may be right under Pennsylvania laws touching railroad corporations. But it is singularly inconsistent with the judgment rendered in the case, which was that the complainant could not be made a stockholder against his will in the consolidated company; and that the consolidation should be enjoined till he was secured in the payment of the value of his stock. Why enjoin the consolidation at all, if he had no right to object to it. His objection in that case seems to have been pretty effectual.

There is, indeed, a dictum in the case of State v. Bailey, 16 Ind. 46, which seems to favor the Pennsylvania doctrine above mentioned. It is to the effect that in the case of the consolidation of two railroad companies, "those stockholders in the old who do not enter the new, are entitled to withdraw their shares in the capital stock, and may enjoin till they are secured." This may be true, if the objecting stockholder should choose to adopt that course. But is he bound to adopt it as his only remedy? Is he bound either to sell out his stock in this way, or to abandon it, or to become a stockholder in the consolidated company? Would not forcing him to either of these alternatives be a violation of his contract? Directly opposed to the case in 30 Pa. St., and to the dictum in 16 Ind., so far as these maintain the doctrine that a single stockholder has no right to object to a consolidation, is the well-considered case of Stevens v. Rutland & B. R. Co., 29 Vt. 545. This case expressly decides that any stockholder in a railroad corporation may have an injunction against the other corporators to prohibit any fundamental change in the original purpose of the act of incorporation, though the proposed change be authorized by an act of the legislature. And, in perfect agreement with this ruling, it is well settled in Indiana, that the consolidation of two railroad corporations, against the consent of a subscriber of stock to one of them, releases him from the payment of the stock thus subscribed. Sparrow v. Evansville & C. R. Co., 7 Ind. 369; McCray v. Junction R. Co., 9 Ind. 358. These cases proceed on the just view that the relation between a stockholder and the corporation is one of contract; and that every fundamental change in its charter, made against his consent though on the authority of a subsequent act of the legislature, is a violation of that contract, and is forbidden by the national constitution. Now if, as is the rule in Indiana, a consolidation against the will of a subscriber of stock releases him from paying it because it is a breach of his contract, it must inevitably follow that, if, as in the case at bar, the subscriber has already paid for his stock, such consolidation against his will is equally a violation of his contract. Everybody knows that if several men enter into a valid contract, it cannot be fundamentally altered but by unanimous consent. Why should a different rule prevail as between corporators?

Upon the whole, I think that if the case made by the complainant does not fall within either the first or second of the propositions which I have above laid down, and does fall within the third, he is entitled to relief in equity. It cannot be insisted that the proposed consolidation is within the first of these propositions. For, as already shown, the consolidation would not only fundamentally affect the Indianapolis and Cincinnati Railroad Company as a corporation, but it would destroy its very existence.

The defendants, however, argue, that the case at bar is within the second, and not the third, of these propositions, both because the charter of the Indianapolis and Cincinnati Railroad Company has been so amended as to meet the complainant's objection, and because he has consented to the consolidation. I will consider these points separately.

First. As to the amendment of the charter of the Indianapolis and Cincinnati Railroad Company: The 35th section of that charter reserves to the legislature "the right at any time to alter or amend it, two-thirds of both branches concurring therein." Under this section there can be no doubt of the power of the legislature to amend the charter, even against the will of every stockholder. But it may be

more doubtful whether under this reserved power, the legislature could consolidate this corporation with another against the will of the corporators. For that would be to destroy, not "to alter or amend," the charter. Be this as it may, however, if no amendment authorizing the consolidation in question has been made, it is obvious that the complainant's rights are the same as if the power to amend had not been reserved. But the defendants insist that an amendment altering the rights of the complainant has been made to the charter. The amendment to which they refer is the Indiana act of February 23, 1853,—a general law authorizing the consolidation of railroad companies. 1 Gavin & H. p. 526.

The Indiana constitution of November, 1851, prohibits the legislature from passing special acts of incorporation, and authorizes the passage of general laws of incorporation. Under this provision, the general railroad act of 1852 was passed. It provided rules under which any company of men might become a railroad corporation. Its 37th section reserved to the legislature the right to amend or repeal the whole act. And the supreme court of Indiana, I think, justly regard as an amendment of it, the above-mentioned act of February 23, 1853,—the only act in this state authorizing the consolidation of railroad companies. We must then regard the last-named act as being substantially part and parcel of the general railroad law of Indiana. We must bear in mind, however, that the charter of the Indianapolis and Cincinnati Railroad Company is a special act, passed before the constitution of 1851. And the question is, does the general railroad law above referred to effect such an amendment of this special charter as is contemplated by its 35th section, which reserves the power to alter or amend the charter? I think it does not. We may well suppose that the only object of the reservation in the 35th section of this special charter was to retain in the legislature a power, which, without the reservation, could not be exercised,—a power to amend the charter authoritatively and without the consent of the railroad company. On the contrary, the consolidation act of 1853 is a mere privilege, allowing—not obliging—railroad companies to consolidate if they please to do so. Such a privilege the legislature doubtless could have offered, and perhaps did offer, by the act of 1853, to the Indianapolis and Cincinnati Railroad Company, just as well, and with exactly the same effect, without the said reservation in its charter, as with it. Besides, the privilege thus offered would be utterly inoperative as an amendment of the charter, till it was accepted by the company. Now the acceptance of this offered privilege would involve a fundamental change in the charter of the company accepting it,—a change which, if the doctrine already stated be true, could not be effected in the case of a corporation subsisting under a special charter, but by the consent of every stockholder. So far as appears, no such consent has ever been given by all the stockholders, or even by a majority of the stockholders, of the Indianapolis and Cincinnati Railroad Company. I conclude, therefore, that the general law of 1853, permitting railroad companies, at their pleasure, to consolidate, has never become part and parcel of the charter of the company in question, either by legislative amendment or otherwise.

Second. Has the complainant consented to the consolidation under consideration? And is he by such consent now estopped to insist on his objection to the consolidation? It appears that he was one of the directors of this company on the 24th of May, 1866. On that day, the board of directors met to consider the subject of this proposed consolidation. He was present, and did not object. On the contrary, it appears by the minutes of the board, of that day, that the committees already mentioned then reported to the board the terms of consolidation agreed on by them; whereupon the board unanimously approved of the action of the committees reported, and the consolidation of the two companies upon the terms and conditions agreed to by the committees; and the board then and there recommended to the stockholders to consent to the consolidation, and they called a meeting of the stockholders to be held on a designated day in order that they might vote on the question of the consolidation. Immediately on the conclusion of these transactions of the board, the complainant resigned his office of a director. But the weight of the evidence before me strongly indicates that, so long as he remained a director, he made no objection to any of these proceedings, though he was present, might have objected if he pleased, and well knew what was going on. Under these circumstances, I think he ought to be considered as consenting to what was done. "Qui non prohibit quod prohibere potest, assentire videtur."

But does this consent, given under these circumstances by the complainant, estop him to urge the present objection to the consolidation? The proceedings of the board of directors as above detailed were merely prefatory and preparatory to the settlement of the question of consolidation. Certainly no decision of the board could effect the consolidation. To do that, required the decision of the stockholders. So the board understood it, else they would not have called a meeting of the stockholders to vote on the question. And the very articles of consolidation reported to, and approved by, the board at that time, recited that the consolidation was to be effected "by and with the assent of the stockholders." And as the board fixed a day for the taking of the vote of the stockholders, and as the board evidently meant to refer the settlement of the question to them, it must have been understood that if the stockholders voted against the consolidation the whole thing would fail. It may fairly be presumed that all these di-

rectors were stockholders. Under all the circumstances, it seems very clear that all these directors holding stock would have the right to attend on the day appointed and vote for or against the consolidation. If any of them proposed then to vote against it, no man would have had a right to tell him, "You must not vote so: you are estopped to do so, because you voted for the consolidation on the board." To such an objection, he might well answer: "I voted then not as a stockholder, but as a director, guided by the best light I then had. Now I exercise my right as a stockholder. Besides, I have changed my opinion. I think now that the proposed consolidation would be injurious to my interests; and so I shall oppose it."

I cannot conceive how any vote of the complainant as one of the board of directors could destroy his right to vote as he pleased as a mere stockholder. Surely there remained to him and to all the directors the locus poenitentiae. After their action on the board they may have changed their minds. They had a right to do so up to the moment of the final voting by the stockholders, just as a bidder at an auction has a right to withdraw his bid before the property is knocked off to him. In all he did on this subject, there appears to have been nothing fraudulent, nothing deceitful, nothing injurious to any other stockholder. And there is nothing in his conduct throughout the whole transaction bearing the slightest resemblance either to a legal or equitable estoppel.

It has been urged on the part of the defendant, Henry C. Lord, that this court has no jurisdiction over his person; and that therefore we can make no order enjoining him. This objection is made on the ground that he is not a citizen of Indiana. The bill states that the complainant is a citizen of New York; that Lord is a citizen of Ohio; and that the Indianapolis and Cincinnati Railroad Company is an Indiana corporation. It appears that Lord was served with process in this case in this district. Under these circumstances, I should think that we could not take jurisdiction of the person of Mr. Lord by virtue alone of the eleventh section of the judiciary act of 1789 (1 Stat. 78). But the act of February 28, 1839, must be considered in connection with the judiciary act (5 Stat. 32). A fair construction of both these acts, I think, gives us jurisdiction of the person of Mr. Lord in this case. I suppose that a citizen of New York may sue a citizen of Ohio in this court if he is served with process in the district of Indiana. This seems to be now the practice in the United States courts. Whether Mr. Lord is either a necessary or a proper party to this suit, is another question,—a question not necessary to be decided on the present motion.

In view, then, of the whole case, I am reluctantly led to the conclusion that the complainant's motion for a temporary injunction ought to be granted. Therefore, it is ordered, adjudged, and decreed, that upon the complainant filing an injunction bond in the penalty of one hundred thousand dollars, with the usual condition and sufficient sureties to be approved by the court, the said Indianapolis and Cincinnati Railroad Company, its board of directors, officers, and agents, be enjoined, till the further order of this court, from proceeding any further to consummate the said proposed consolidation, or to issue any of the bonds mentioned in the complainant's bill, or to apply any of such bonds or any of the funds or property of said company to the purchase of stock in the Cincinnati, Indianapolis and Danville Railroad Company.

NOTE. In a case recently (July, 1874) heard at Madison, Wisconsin, before Judges Davis, Drummond, and Hopkins (Piek v. Chicago & N. W. R. Co. [Case No. 11,138]), it was held that a provision of the constitution of the state, that railroad charters "may be altered or repealed by the legislature at any time after their passage," underlies all subsequent grants of rights and franchises to the railroad corporations of the state; that stock and securities in such corporations were taken and held subject to this paramount condition, of which, in law, all holders had notice; and that such corporations could not clothe their creditors with greater rights, as against the state, than it possessed itself; and that this principle was not changed by authority from the legislature to consolidate with other railroads.

The mere presence of a person at a lawful meeting does not make him responsible for a resolution there passed, if he protests against it; and where a director opposed a resolution, but, finding himself in a minority, insisted on the insertion of certain terms, believing that such insertion would prevent the plan of the majority from being carried out, *held*, that he was not responsible on the plan being carried out on those terms. In re Direct East & West Junction Ry. Co., 31 Eng. Law & Eq. 430.

The act of February 28, 1839, was passed to remedy the inconvenience under the settled construction of the judiciary act of 1789, by which, when there was more than one party, plaintiff or defendant, the court must have jurisdiction between each party, plaintiff and defendant, or the action could not be maintained. Taylor v. Cook [Case No. 13,789]. This act of 1839, however, wrought no change in the jurisdiction of the circuit courts, as respects the character of the parties; it only obviates difficulties arising from inability to join or serve those not liable to be sued by the plaintiff, or not within reach of process. Commercial Bank of Vicksburg v. Slocomb, 14 Pet. [39 U. S.] 60.

This act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons having an interest are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591; Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738; and Harding v. Handy, 11 Wheat. [24 U. S.] 132; Shields v. Barrow, 17 How. [58 U. S.] 141. If the absent defendant be a resident of the same state with the plaintiff, the jurisdiction cannot be sustained, as the suit would not be, as between them, a suit between citizens of different states. Bargh v. Page [Case No. 980].

Several of the above cases are commented upon in Louisville, C. & C. R. Co. v. Letson, 2 How. [43 U. S.] 497, in which case the court say (page 557): "We think, as was said in the case of

Commercial Bank of Vicksburg v. Slocomb [supra], that this act was intended to remove the difficulties which occurred in practice, in cases both in law and equity, under that clause in the 11th section of the judiciary act, which declares that no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; but a re-examination of the entire section will not permit us to reaffirm what was said in that case,—that the act did not contemplate a change in the jurisdiction of the courts as it regards the character of the parties."

Consult, also, Heriot v. Davis [Case No. 6,404]; Clearwater v. Meredith, 21 How. [62 U. S.] 489.

Case No. 9,892.

MOWRY v. BARBER.

[1 MacA. Pat. Cas. 563.]

Circuit Court, District of Columbia. Jan., 1858.

PATENTS—JURISDICTION OF COMMISSIONER—QUESTION OF PRIOR USE—WITHDRAWAL OF APPLICATIONS.

[1. The sixth section of the act of 1836 (5 Stat. 119) gives the commissioner jurisdiction to examine and decide the question of prior public use or sale, and to refuse a patent if he finds there has been such use or sale.]

[Cited in Ellethorp v. Robertson, Case No. 4,409; Wickersham v. Singer, Id. 17,610.]

[2. The withdrawal of an application and receiving back $20 of the patent office fee, pursuant to the act of 1836, § 6, is a final abandonment of the claim, and effects a final extinction of all protection, saving, and privilege under the act of 1836, § 7, and no claim to the same invention can be revived by filing a new application. If such new application is filed it will not relate back to the date of the original application so as to avoid the effect of an intervening public use.]

[This was an appeal by Charles Mowry from a decision of the commissioner of patents, in an interference between appellant and H. B. Barber, a prior patentee, whereby a patent was refused to the appellant.]

Barber, the appellee, held a patent for the invention dated July 8, 1856, No. 15,273.

J. S. Brown, for appellant.

MORSELL, Circuit Judge. The first reason of appeal is "because the commissioner of patents has no cognizance of the matter on which his decision was based." The facts in relation to this point are: In August, 1849, the appellant filed a caveat, and on the 1st of March, 1851, filed his application for a patent for improvements in machine for drawing water from wells, &c. This first application was examined and references were given; upon these the application was withdrawn by a letter from the appellant dated the 12th of April, 1852, in which, among other things, he says: "To the commissioner of patents: I hereby withdraw my application for a patent for improvements in a machine for drawing water from wells, &c., now in your office, and request that twenty dollars may be returned to me, agreeably to the provision of the act of congress authorizing such withdrawal." This was done as requested. That provision is to be found in the sixth section of the act of 1836, in these words: "In every such case, if the applicant shall elect to withdraw his application relinquishing his claim to the model, he shall be entitled to receive back twenty dollars, part of the duty required by this act, on filing a notice in writing of such election in the patent office." This, the commissioner states in his report, was, and now is, by the practice of the patent office, final, &c. The application in this case is dated on the 2d day of March, 1857, and filed on the 10th of April, 1857. This, so far as I understand it, is substantially a renewal of the former claim.

The commissioner states in his report, in reply to the reason of appeal already mentioned, that "the decision of the commissioner is based upon the fact of abandonment. The evidence clearly shows that Mowry had been manufacturing and vending said machine for more than two years prior to his present application. His former application (withdrawn in April, 1852) is only admissible as evidence as to priority of invention, but does not affect the question of abandonment." The duty and authority of the commissioner are declared by the various acts of congress, and it is true that he has none besides. Whether he could take cognizance of the matter objected to him in the first reason, as before stated, depends upon the construction of the seventh section of the act of 1836, in these words: "That on the filing of any such application, description and specification, and the payment of the duty hereinafter provided, the commissioner shall make or cause to be made an examination of the alleged new invention or discovery; and if on such examination it shall not appear to the commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or in any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to the application, if the commissioner shall deem it to be sufficiently useful and important it shall be his duty to issue a patent therefor," &c. The first part of this section, though expressed in more general terms, contains an express condition precedent as to the same matter. This provision of the statute, it seems to me, is very explicit in its requirements, and equally so in its intended application to the right in its inchoate state. After the other previous requisites are complied with, and before the granting of a patent, it directs the commissioner to make the examination on the subject, and to decide (of course) on what shall appear to him to be the result, or otherwise it would be idle to require the examination. One part of the subject of his examination is expressly declared to be whether or not the alleged discovery had been "in public use or on sale." This, then, surely gives him cog-

nizance or jurisdiction. If, then, the result of such examination should be that it appeared to him that the alleged invention or discovery had been in public use or on sale contrary to the provision of the statute, ought he, notwithstanding, proceed to grant the patent, that an opportunity might be afforded to the applicant to have the matter submitted to a jury in a court of law? I cannot think so. The same jurisdiction, I think, continues after interference declared and until the patent is delivered, unless otherwise decided on appeal.

In support of the proposition involved in his first reason of appeal, the appellant's counsel bases his argument on the authority of a decision made by Judge Cranch in the case of Heath v. Hildreth [Case No. 6,309], and Pomeroy v. Connison [Id. 11,259], and to the decisions there referred to. It will be seen upon examination of that case that Judge Cranch's allusion is the defense set up of a delay or general abandonment, of which, intention and special circumstances constitute the gist, and the authorities there referred to are of decisions made in cases brought for the infringement of patent rights in a court or courts of law in which, according to their fundamental establishment, the jury forms a constituent part for the trial of issues of fact. Such is not the case of trials before the commissioner. Judge Cranch says: "But the question of forfeiture or abandonment is for the jury upon a trial at law. The first invention is prima facie entitled to a patent, and the commissioner, as before observed, is bound to issue it under the seventh section of the act of 1836, if certain facts should not appear to the commissioner, as therein specified, which specification of facts does not include delay or abandonment; so that the question of delay or abandonment is not by that section submitted to the jurisdiction of the commissioner." It is not my intention to discuss this position of Judge Cranch at this time, or to express any opinion, because I do not think the question now before me requires it. What the commissioner means by the term "abandonment," as the ground of his decision, is the statutory disability in the appellant to assert his right to a patent because of the public use or sale by others, with his knowledge and consent, of said invented machine more than two years before his application for a patent in this case. These terms, as before particularly stated, are among those specified and enumerated in the statute. I think, therefore, that the commissioner had cognizance of the matter.

The second reason is in these words: "Because, even if he had cognizance of the matter, the act of the inventor in the premises was not an abandonment of the invention to the public within the meaning of the law, but, on the contrary, his acts as proved by the testimony in the matter of the interference between his application and Barber's patent show that he still asserted his right to the invention, and intended to secure it by letters-patent, if possible." Third. Because the failure of Mowry's first application having been caused by the act of the commissioner of patents solely, and by no fault on the part of the inventor, and thus the second application having become necessary by the said act of the commissioner of patents, the date of selling the articles by Mowry should be considered in relation to the first and not to the second application. To which the commissioner answers: "Asserting his 'intention to secure a patent if possible,' after he had withdrawn in 1852 and not offering until 1857, and then only upon learning that Barber had obtained a patent for the same thing, and having mean time manufactured and sold said machines for more than ten years prior to applying, appears to invalidate the second reason for appeal. Third. The usual office course was taken. The first application was examined, references were given, and upon these the application was withdrawn pro forma. This was and now is, by the practice of this office, final; and the application thus conditioned can only be (by the custom of this office) available as evidence of date of invention in any future contingency, and can only be again before this office, as such. A subsequent application for the same thing has no necessary connection with the former, except where a case is formally withdrawn to amend, or to represent within a reasonable time for affecting such amendment." These two reasons will be considered together. The question which grows out of them is, what is the effect of withdrawing the first application in this case under the circumstances of receiving back twenty dollars, part of the duty required by the act? Without qualification or any reservation, it seems to be considered in the law as a relinquishment of his (the appellant's) claim to the model. I think it must be considered as finally abandoning the further prosecution of the claim, and effecting an entire extinction of all protection, saving, and privilege under the act of 1839, section 7, and which cannot be revived by any new application for the same invention. If this be correct, then the rule as laid down by the supreme court in the case of Shaw v. Cooper, 7 Pet. 29, applies, which is: "Whatever may be the intention of the inventor, if he suffers his invention to go into public use through any means whatsoever without an immediate assertion of his right, he is not entitled to a patent; nor will a patent obtained under such circumstances protect his right." I agree with the commissioner that the evidence shows that Mowry had been manufacturing and vending said machine for more than two years prior to his present application, and that he is not entitled to a patent.

MOWRY (DUNLEVY v.). See Case No. 4,165.

Case No. 9,893.

MOWRY et al. v. GRAND STREET & N. R. CO.

[10 Blatchf. 89; 5 Fish. Pat. Cas. 586.] [1]

Circuit Court, E. D. New York. June 25, 1872.

PATENTS — ASSIGNMENT — EXTENDED TERM — BRAKES FOR RAILWAY CARS—INJUNCTION.

1. T., having made an invention, and applied for letters patent for it, on a specification filed in the patent office, assigned to H., in 1852, "all the right, title, and interest whatsoever, which I now have, or, by letters patent, would be entitled to have and possess, in the aforesaid invention, the said invention being described in the specification as prepared and executed by me, or to be prepared and executed by me, for the obtaining of said letters patent, the whole to be held and enjoyed" by H., "to the full extent and manner in which the same would have been, or could me, held and enjoyed by me, had this assignment never been made," and authorized the issue of "the said" patent to H., "as the assignee of my whole right and title to the same, and to the new invention aforesaid." A patent was accordingly granted to H., on the invention, in 1852. In 1854, H. assigned to S. all his interest in any extended term of the patent. In 1866, the patent was extended to T.: *Held*, that, by the assignment of 1852, no right to the extended term passed to H., and, consequently, S. had no such right.

[Cited in Waterman v. Wallace, Case No. 17,261.]

2. Whether the claim of the letters patent granted, July 6th, 1852, to Henry Tanner, as assignee of Lafayette F. Thompson and Asahel G. Bachelder, for an "improved mode of operating the brakes of railway cars," namely, "to so combine the brakes of the two trucks with the operative windlasses, or their equivalents, at both ends of the car, by means of the vibrating lever, A', or its equivalent, or mechanism essentially as specified, as to enable the brakeman, by operating either of the windlasses, to simultaneously apply the brakes of both trucks, or bring or force them against their respective wheels, and whether he be at the forward or rear end of the car," is limited to a combination of two or more brake systems, as they are ordinarily found in the swivelling car-trucks of an eight-wheeled car, with each other and with the operative windlasses, by means of a vibrating lever, or whether it covers any combination of the brakes of a car with each other, and with the windlasses, by means of a vibrating lever, so that all the brakes can be applied simultaneously from either end of the car, even where the car has no swivelling trucks with separate brake systems, quere.

3. The latter construction of the claim not having been maintained in any judicial decision, or acquiesced in by the public, and its novelty, on such construction, being shown to be doubtful, an application for a provisional injunction against an arrangement which was no infringement except on such construction, was refused.

[Motion for a provisional injunction. Suit brought [by James D. Mowry and others, against the Grand Street & Newton Railroad Company] upon letters patent for "improved mode of operating the brakes of railway cars," granted July 6, 1852, to Henry Tanner, assignee of Lafayette F. Thompson and Asahel G. Bachelder, and extended for seven years from July 6, 1866, to Bachelder, in his own right, and also to him and George O. Way, administrator of L. F. Thompson, deceased.][2]

Samuel D. Cozzens, for plaintiffs.
Tracy, Catlin & Van Cott, for defendants.

BENEDICT, District Judge. This is a motion for a preliminary injunction, to restrain the defendants from using upon their horse-cars a certain brake claimed to be an infringement upon what is known as the Tanner patent, which the plaintiffs are said to own. The motion was brought to a hearing before me on a former occasion, upon the plaintiffs' bill and moving papers alone, the defendants at that time interposing no denial of any of the averments in the plaintiff's papers. It is now before me upon additional papers on the part of the plaintiffs, and is now opposed by affidavits on the part of the defence.

One question now first presented in the case relates to the title of the plaintiffs. This question having been fully argued by counsel representing, for that purpose, the interest of Mr. Sayles, whose title is the one opposed to that of the plaintiffs, and having been fully considered, may be now disposed of, so far as my action is concerned.

The facts respecting the title to the patent are as follows: Prior to April, 1852, Lafayette F. Thompson and Asahel G. Bachelder had invented "an improved mode of operating the brakes of railway cars." Specifications presented by them were already before the patent office, which they were about to amend, and on which they were applying for letters patent. Before any patent was issued to them, they executed an assignment to one Henry Tanner, to whom, in pursuance of the statute, and in accordance with a requirement inserted in the assignment, and upon amended specifications made by Bachelder, and dated April 8th, 1852, a patent for the invention was issued, on the 6th of July, 1852. In March, 1866, Tanner assigned to Bachelder and George O. Way, administrator of Lafayatte F. Thompson, deceased, all the right, title, and interest which he then had in and to any extended term of the said letters patent, and, in July, 1866, the patent was extended, and a certificate of extension, dated July 5th, 1866, was issued to Bachelder and Way, from whom the plaintiff derives title. It appears, however, that Tanner, prior to his assignment, of March, 1866, to Bachelder and Way, and on the 13th of July, 1854, had assigned to Thomas Sayles all his right, title, and interest in any extended term of

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 10 Blatchf. 89, and the statement is from 5 Fish. Pat. Cas. 586.]

[2] [From 5 Fish. Pat. Cas. 586.]

the patent, whence it results, that if, by the first assignment of Bachelder and Thompson to Tanner, in April, 1852, the right to the extended term was conveyed to Tanner, that right passed to Sayles by the assignment of July 13th, 1854, and the plaintiffs have no right thereto.

The question therefore is, whether the legal effect of the assignment of April 1st, 1852, from Bachelder and Thompson to Tanner, was to convey the right to the extended term of the patent in question to Tanner. The words of that assignment are as follows: "Whereas, we, Lafayette F. Thompson, of Charlestown, and Asahel G. Bachelder, now or late of Lowell, in the state of Massachusetts, have invented an improved mode of operating the brakes of railway cars, and have applied, or intend to apply, for letters patent of the United States of America therefor, now, therefore, this indenture witnesseth, that, for and in consideration of one hundred dollars in hand paid, the receipt whereof is hereby acknowledged, we have assigned and set over, and do hereby assign, sell and set over, to Henry Tanner, of Buffalo, in the state of New York, all the right, title and interest whatsoever, which we now have, or, by letters patent, would be entitled to have and possess, in the aforesaid invention, the said invention being described in the specification as prepared and executed by us, or to be prepared and executed by us, for the obtaining of said letters patent, the whole to be held and enjoyed by the said Henry Tanner, and his legal representatives, to the full extent and manner in which the same would have been, or could be, held and enjoyed by us, had this assignment never been made; and we do, by these presents, authorize the commissioner of patents to issue the said letters patent to the said Henry Tanner, and his legal representatives, as the assignee of our whole right and title to the same, and to the new invention aforesaid."

It is important, in determining the effect of this instrument, to notice, that, whatever else was the subject matter of the contract, it was not a share in the invention, nor a right restricted to any particular locality, and, further, that, at the time of its execution, no letters patent had been issued, but the inventors had an application for letters patent for the first term then pending in the patent office. At this time, therefore, the property of the inventors in this invention, capable of being the subject matter of such a contract, consisted of an inchoate right to a monopoly of their invention for a term of fourteen years, which right would be completed and secured by the letters patent for which they were then applying, and a further inchoate right to apply for and secure a monopoly for an extension of the term. Between these rights a distinction exists, arising from the fact that an extension of a patent is made dependent upon proofs of new and different facts. It is a new grant (Wilson v. Rousseau, 4 How. [45 U. S.] 646, 682), the right to which is capable of being transferred in the same manner as the inchoate right to the monopoly for the first term, by an agreement disclosing such an intention (Railroad Co. v. Trimble, 10 Wall. [77 U. S.] 367). But, being contingent and personal to the inventor, it cannot be held to pass as an incident to the invention and appurtenant thereto. Clum v. Brewer [Case No. 2,909]. In this posture of the law and the facts, the inventors of this improvement sold to Tanner what they described as "all the right, title, and interest whatsoever which we now have, or, by letters patent, would be entitled to have and possess, in the aforesaid invention." In this description, the words, "or, by letters patent, would be entitled to have and possess." as used, are words of limitation, and confine the grant to the right which would have been completed and secured by the letters patent for which the inventors were then applying. Clearly, it was not the intention, by those words, to extend the conveyance to all rights which would be secured by any letters patent whenever issued, and whether extended or not; for, subsequently in the instrument, the letters patent referred to are plainly designated as those for the obtaining of which specifications had been prepared and executed, and which were about to be amended. Extended letters patent are not issued upon specifications in that manner, and no other letters patent than those for the first term could be issued upon the pending application. These words, therefore, appear to me intended to limit the conveyance. They indicate that the subject matter of the contract, which was in the minds of the parties, was the monopoly which letters patent issued upon the pending application would secure, and show that the new grant which might be secured by the inventors upon a future application for an extension, but which could not be given upon any proofs then pending, or likely to be then in contemplation, was not intended to be covered by the contract. This conclusion is entirely consistent with the broad words of the habendum clause. The habendum says, "the whole to be held," &c. The whole of what? Manifestly, the whole of the right described in the granting clause, and no more. Moreover, I find, in this instrument, no words which import an intention to transfer both a present and a future interest; and words which imply that two inchoate rights, different in character, were intended to be assigned, are wanting. One such right is clearly described, and there is no allusion to any other.

Furthermore, it is highly improbable that the right to the extension would have been intended to be conveyed, for the reason, that an assignment of the right to the extension

would in effect destroy the right, as extensions of patents are issued to inventors only, and are not granted to assignees. It cannot be supposed, that any part of the consideration expressed in this instrument was paid by the assignees for what would be valueless in their hands; and it is equally unlikely that the inventors would part with such a right without consideration. Such an intention, if entertained, it may be believed would have been expressed in clear and distinct language.

Nor do I see that a different conclusion can be arrived at, if the instrument be a conveyance of the whole invention, without words of limitation, in view of the repeated decisions, that a conveyance of the invention merely does not carry the right to the extension. These decisions the late decision of the supreme court in the case of Nicholson Pavement Co. v. Jenkins, 14 Wall. [81 U. S.] 452, which has been here relied on as declaring a different law, appears to me to confirm. That decision assumes, that an assignment of the invention, without words importing an intention to convey both a present and a future interest, will not pass the right to an extension. Such words being absent from the instrument under consideration, the intention must be considered as absent. It was easy to have inserted such words, but this was not done; and, in view of the right of the inventors personally, in certain contingencies, to apply for and secure an extension, their absence leads to the conclusion, that the parties did not contract with reference to it.

The question raised as to the title of the plaintiffs to letters patent having been thus found in favor of the plaintiffs, I proceed to consider whether the validity of the patent has been so well established by judicial determination, or so generally asquiesced in, as to entitle them to an injunction before a hearing of the cause; and here is met an issue which has been raised in respect to the invention intended to be secured by the letters patent in question. The claim in the patent is as follows: "What is claimed by us is, to so combine the brakes of the two trucks with the operative windlasses, or their equivalents, at both ends of the car, by means of the vibrating lever, A', or its equivalent, or mechanism essentially as specified, as to enable the brakeman, by operating either of the windlasses, to simultaneously apply the brakes of both trucks, or bring or force them against their respective wheels, and whether he be at the forward or rear end of the car." If this claim limits the invention to a combination of two or more brake systems, as they are ordinarily found in the car trucks of an eight-wheeled car, with each other and with the operative windlasses, by means of a vibrating lever, it is manifest that the defendants do not use the plaintiffs' combination, for they do not use cars running upon trucks whose systems are operated in combination with a vibrating lever and the windlasses. They use the ordinary four-wheeled horse cars, in which there are no trucks with separate brake systems, and, consequently, no free swivelling action by means of trucks or their equivalents.

The plaintiffs contend, that the patent is not thus limited, but that it covers any combination of the brakes of a car with each other and with the windlasses, by means of a vibrating lever, so that all the brakes can be applied simultaneously from either end of the car, and that the ordinary brake of street cars, such as is used by the defendants, is, therefore, within the scope of the patent, and an infringement. To this position the defendants answer, that, so understood, the patent is void for want of novelty, and has never been sustained by any judicial determination or acquiesced in by the public. I do not find it necessary, upon this motion, to determine whether or not the construction of the patent contended for by the plaintiffs can be maintained. It is sufficient, for this motion, to say, that such a construction of it has not as yet been maintained in any of the suits brought upon this patent, to which the plaintiffs refer. All these suits related to eight-wheeled railroad cars, having two truck systems combined and attached to the windlasses through a vibrating lever. No suit hitherto decided has involved the question which is here presented. The evidence given in those suits related to eight-wheeled truck cars, and the decisions rendered therein cannot be claimed to be judicial determinations in favor of the plaintiffs' patent as here sought to be construed. They appear to be entirely consistent with a construction of the patent in accordance with the views of the defendants, and in accordance with a conclusion that the defendants do not infringe the patent. The issue in this case, as to the validity of the patent, is, therefore, new; and, not only is the novelty of the invention, as now claimed, denied, but a fair doubt in respect to its novelty is raised by affidavits introduced to show a prior use, in the construction of a car, of a combination claimed to be substantially similar to the combination of the plaintiffs, as they now seek to have it construed. It is, also, made clear, that, while the patent, as understood by the defendants, and as limited to truck cars, has been acquiesced in by the public, there has been no public acquiescence in the claim now put forth, but the validity of the patent, so construed, has been constantly denied. I must, therefore, in accordance with well-settled rules, and without intimating an opinion as to the proper construction of the patent, refuse an injunction, until after final hearing, upon the ground, that there has been no judicial inquiry into the novelty of the invention now claimed by the plaintiffs, and no public recognition of the validity of

the patent, as securing such an invention, but, on the contrary, its validity is in doubt.

[For other cases involving this patent, see note to Sayles v. Chicago & Northwestern Ry. Co., Case No. 12,414.]

MOWRY (WHITNEY v.). See Cases Nos. 17,592-17,594.

Case No. 9,894.

The MOXEY.

[1 Abb. Adm. 73.] [1]

District Court, S. D. New York. Dec., 1847.

COLLISION — INJURY BY RUBBING AGAINST — BY WHOM CAUSED—MUTUAL CONTRIBUTION.

1. An injury received by a vessel at her moorings, in consequence of being violently rubbed or pressed against by a second vessel lying alongside of her, in consequence of a collision against such second vessel by a third one under way, may be compensated for under the general head of collision, as well as an injury which is the direct result of a blow properly so called.

[Cited in The Nora Costello, 46 Fed. 871.]

2. But to entitle the injured vessel to recover against her stationary neighbor, under such circumstances, instead of against her who was the original cause of the accident, such stationary vessel must be proved to have been in fault.

3. The rule of mutual contribution is not applied to cases of accidental collision from physical causes for which neither vessel is to blame; but each vessel in such case must bear her own loss.

This was a libel in rem, by Abner and John H. Davis, owners of the barge New London, against the brig Moxey and the schooner Avenger, to recover damages for a collision between those vessels and the New London. The libel stated, that on November 19, 1846, the barge New London, owned by libellants, was lying in one of the slips in the port of New York, engaged in delivering her cargo, and that she was well secured to the wharf, well manned, &c. That on the same day, the schooner Avenger lay at the end of the pier to which the New London was secured; and the brig Moxey lay within the slip, alongside of the New London, and quartering on her bow, and was fastened to the pier by one line from the bow, another line from the stern, which latter line passed across the New London, and by a third line fastened to the New London. That during the night a storm arose, and the Avenger, being carelessly and negligently fastened to the pier, broke loose from her moorings and floated around into the slip and alongside of the Moxey. That the Moxey, being negligently and carelessly fastened to the wharf, and, in particular, not having a line carried to the pier on the opposite side of the slip, as in such weather she ought to have had, was, by the collision of the Avenger, driven against the New London, whereby, and by being thrown up and down between the brig and the wharf, by the surging of the water, she received much damage. The answer denied all the charges of carelessness or negligence; and averred that the Moxey was well manned and well and properly secured; and that she had taken the position occupied by her at the request of those in charge of the New London, to accommodate them in delivering her cargo; and that every means was taken at the time of the collision by those in charge of her, to avoid injuring the New London. The answer also charged, that the New London was old and decayed, and that any injury which she suffered was ascribable, not to any neglect or want of care or skill on the part of the master and crew of the Moxey, but to her own decayed and unsound condition. The libel was originally filed against both the Moxey and the Avenger; but upon exceptions taken to the libel, it was held by the court, that inasmuch as it was not charged in the libel that the collision complained of was the joint act of the two vessels, or that it was made by them at the same time, or that they were under charge of the same crew or persons, or that the injury inflicted was upon the same part of the vessel of libellants, the libellants were not entitled to proceed against the two vessels conjointly in one action, but must elect to sue either the Moxey or the Avenger. In pursuance of this decision, the suit was discontinued as against the Avenger, and the libellants proceeded against the Moxey alone. The cause now came before the court upon the proofs taken against her. So far as the decision of the case turned upon matters of fact, the opinion of the court shows how far the respective allegations of the parties were regarded as sustained by the proofs.

S. P. Nash, for libellants.

I. By the general principles of maritime law, the vessel having the greatest facilities of movement is regarded as guilty of negligence if she does not employ those facilities for the protection of other vessels. Story, Bailm. §§ 611, 611b; Abb. Shipp. 234. Here the Moxey lay outside and was moved by sails. The barge was a tow-vessel, having no self-moving power; and she moreover lay inside, where she could not be moved out of danger. She was also the weakest vessel. Under such circumstances, the burden of proof is thrown upon the Moxey, to free herself from the presumption of negligence; and it does not devolve upon the New London to prove her guilty of it.

II. The fact that the New London was unsound could have no bearing on her right to an indemnity; it could only affect the amount of damages. A vessel has a right to be protected in her lawful position, whether she is sound or unsound.

Edwin Burr, for claimants.

I. This is not a case of collision. That term always implies a movement of one vessel through the water, and a striking against

[1] [Reported by Abbott Brothers.]

another, causing injury to her. 2 Condy's Marsh. Ins. 431. The barge, in this case, was moved up and down by the surging of the water, and was thus injured. The damage in no way resulted from any fault or negligence in navigating the Moxey.

II. Primâ facie, the injury is from the act of God, and the libellant must show a strong case of fault in the claimants, to rid himself of this conclusion and render the brig liable.

III. In ordinary cases of collision, the libellant must be held to strict proof that the injury was caused by a breach of some nautical rule or usage on the part of the crew of the brig, or some want of ordinary nautical skill, without such breach or neglect on the part of the libellants. Story, Bailm. § 611. In all cases of collision, the libellant must prove that the injuries complained of resulted from the fault of the defendant, there being no want of ordinary care on his own part. Abb. Shipp. 238.

IV. It is the Avenger which is chargeable with responsibility for the collision.

BETTS, District Judge. This clearly is not a case of collision within the nautical acceptation of that term, which imports the impinging of vessels together, whilst in the act of being navigated. Common usage, however, applies the term equally to cases where a vessel is run foul of when entirely stationary, or is brought in contact with another by swinging at her anchor. Jac. Sea Laws, 326, note; 1 Condy's Marsh. Ins. c. 12, § 2; Abb. Shipp. 238.

A loss under the circumstances of the present case is, moreover, a loss from the peril of the sea, (1 Phil. Ins. 249,) and it falls also within the class of losses adjusted, under many maritime codes, by mutual contribution of the vessels injuring and receiving injury. Thus Weskett says: "When two or more ships are lying at anchor, and another, in what manner soever it may happen, is in danger of coming too near, the master who lies foremost shall, if he can, make way, and be obliged, at the other's call, to weight anchor and remove; in failure whereof, he shall be answerable for whatever damages may ensue, especially if happening in a harbor where the water may ebb away and the ship be aground;—in case he who in this manner endeavors at the other's call to make way, shall receive any damage in ship or goods, he shall be indemnified by the other according to arbitration; but if in making way he shall happen to do any damage to the other ship or goods, he shall not be answerable for it." Wesk. Ins. tit. "Running Foul."

I do not think that the term "collision," as used in the maritime law, is to be construed with the absolute strictness contended for by the claimant's counsel. An injury received by a vessel from being violently rubbed by another, or pressed by her with force against a pier or wharf, as in this case, may, I am inclined to think, be recovered for in admiralty under the general charge of collision, as well as where the injury is derived directly from the headway of a vessel under navigation, or drifted against her.

But conceding that this description of injury, whether technically a case of collision or not, is still one for which the libellants could sustain an action in rem, I do not think the particulars essential to the support of such action have been established by the proofs.

The brig was placed alongside the barge at the request of those who had her in charge, and in such a way as to accommodate them in unlading cargo from their own barge into her. She was adequately secured in the mode usual in this harbor, and was manned and managed in her berth conformably to the usage of the port. The injury inflicted occurred during a violent gale of wind arising suddenly in the night. Whether that injury was occasioned by the swell of the waves rubbing the two vessels together as they were lifted up and down, or whether the causa causans was the drifting of another vessel, which had broken loose in the gale, against the brig, neither circumstance affords ground for imposing the loss upon the brig. No fault is proved against her in taking the place she occupied, or in any thing done on board of her conducing to the injury of the barge.

It is asserted that there was blameable negligence on the part of the brig, in not placing fenders between herself and the barge, and also in omitting to carry a line across the slip to the opposite pier, so as to ease off the pressure against the barge.

As to the first particular, it is to be remarked, that the duty of using fenders between the two vessels was mutual and reciprocal, the brig being by law equally entitled with the barge to the berth she occupied, and not bound to do more than the other vessel for their common protection. But there is proof that the brig had a competent supply of fenders, and used them on each side of her till they were broken up by the jamming of the two vessels in the severity of the storm. Indeed, the evidence renders it quite probable, that the efforts to protect the barge in this way led to her injury, as it would seem she was principally damaged at the points where fenders had been placed against her.

In regard to the second point, wherein it is asserted that the brig was culpably negligent in omitting to carry a line to the opposite pier, the city ordinances prohibit running lines in this manner across the opening of slips (Ordinance N. Y. City, 1839); but if it had been lawful to use one in the emergency of the case, it was as much the duty of the libellants as of the claimants to take that precaution. This was not a common culpable act, conducing to the collision, but a mutual omission to do an act on shore which might have prevented or lessened the injury,

and neither party can make the other responsible to him for such an omission.

Two circumstances are to be regarded:—

1. The brig was entitled by the law of the port, to the berth she occupied; she had entered it without injuring the barge, and was secured there by the usual and competent fastenings. When, therefore, the peril of this storm came upon them, the barge had no right to require the brig to leave the slip, or to change her position, unless it be clearly shown that the change could have been made at the time and under the circumstances, without hazard to her.

2. The Avenger, another vessel, was driven from her fastening and into this slip against the brig by the gale; and as the wind crowded her directly upon the brig, and thereby increased the pressure of that vessel against the barge, the damage incurred by the latter would be attributable to the Avenger, her action being the direct cause of the injury. In legal contemplation, she was in fault in taking a berth in an insecure place, or in not using fastenings sufficient to hold her there, and adequate to protect her from being driven off by the storm.

The brig has no connection with that fault; and in so far as she participated in the injury inflicted upon the barge, the collision was by vis major, without negligence or blame on her side, and the loss must be borne where it falls. 3 Kent, Comm. 231.

Although the rule of mutual contribution may be adopted by our courts in cases of loss by collision at sea or in port, occurring by accident or through the mutual fault of both vessels, there would be no reason for applying it where there was no common fault, and where the management of the two vessels in taking their positions in relation to each other was by mutual agreement. On the contrary, where damage is incurred without fault on the part of either vessel, and by some irresistible force constituting a case of vis major or inevitable accident, the loss must be borne by the party upon whom it happens to fall, the other not being responsible to him in any degree. By the maritime law of both England and the United States, where a collision happens by inevitable accident and without fault of either vessel, each must bear the damage received by her, whatever it may be, and has no claim upon the other for contribution.[2] The Woodrop Sims, 2 Dod. 85; The Catherine of Dover, 2 Hagg. Adm. 154; The Shannon and The Placidia, 7 Jur. 380; The Ebenezer, Id. 1118, 2 W. Rob. Adm. 206; Reeves v. The Constitution [Case No. 11,659]; The Eliza and Abby [Id. 4,349]; Abb. Shipp. 238; Story, Bailm. § 608, and note 2; 3 Kent, Comm. 231.

In my opinion the action cannot be sustained, and the libel must be dismissed with costs to be taxed.

[2] This rule has since been laid down by the supreme court of the United States, in Stainback v. Rae, 14 How. [55 U. S.] 532. The same principle appears to be recognized in Scotland. Innes v. Glass, 4 Murray, 167. By the law of other maritime states, however, the aggregate damage to both vessels incurred through a collision for which neither was to blame, is apportioned equally between them.

MOXLEY (HAYMAN v.). See Case No. 6,266.

MOXLEY (NAN v.). See Case No. 10,007.

MOXLEY (UNITED STATES v.). See Case No. 15,830.

Case No. 9,895.

MOXON et al. v. The FANNY.

[2 Pet. Adm. 309.] [1]

District Court, D. Pennsylvania. 1793.

PRIZE — VESSEL TAKEN IN NEUTRAL WATERS — VIOLATION OF NEUTRALITY LAWS—RESTORATION.

1. The brigantine Fanny was captured within five miles of Cape Henry, and brought into the port of Philadelphia. The owners of the Fanny claimed her, and prayed that she might be restored to them, she having been taken within the territorial jurisdiction of the United States, but the court dismissed the libel for want of jurisdiction.

[Cited in The Lotty, Case No. 8,524.]

See Findlay v. The William [Case No. 4,790].

[2. Cited in The Gilbert Knapp, 37 Fed. 211, to the point that the admiralty has cognizance of matters on land if they are incidents to those at sea.]

[This was a libel by John Moxon and others against the brigantine Fanny (Michael Pile, master).]

The libel states: That the libellants were the true owners of the brig Fanny, now in the port of Philadelphia. That on the night of the seventh of May last, the said brig, being on her voyage from the island of Jamaica to Baltimore and near Cape Henry, was hailed in the English language, from a small schooner, who enquired if they wanted a pilot; that they answered in the negative, and not suspecting they were near an enemy, continued their course all night, and at daybreak next morning, found themselves within five miles of Cape Henry, when and where they were boarded and made prize of by sundry armed men, belonging to the armed schooner Sans Culottes, commanded by J. B. P. A. Ferey, and the officers and the crew of the said brig made prisoners. That the cargo enumerated in the libel was the property of the persons respectively therein named, being the libellants. That they do not admit that the said schooner was duly commissioned to capture British vessels or property. That the said brig at the time of her capture was on neutral ground, within the territorial jurisdiction and under the protection of the United States, who are now at peace with the king and people of Great Britain: and the said J. Ferey had no authority or permission from the United States to capture British vessels or property within that distance from the sea coast, to

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

which by the laws of nations and those of the United States the right and jurisdiction of the United States extend. They, therefore, pray restitution of vessel and cargo, and damages for detention.

To this libel J. B. P. A. Ferey put in a plea to the jurisdiction of the court; and in his plea sets forth: That he was at the time of the capture of the brig Fanny duly commissioned by the French republic, as captain on board the armed schooner Sans Culottes, belonging to citizens of the said republic, to attack all the enemies of the said republic wherever he might find them, &c., which commission he is now ready to shew, &c. That so being commissioned he took as prize, the said brig, &c., belonging to British subjects, at open war with the French republic, and brought her as prizé into the port of Philadelphia, &c. That by the laws of nations, and the treaty of amity and commerce with France, it doth not pertain to this court to hold plea, &c. He, therefore, prays to be hence dismissed, and the brig and cargo discharged from arrest, &c. A copy of the commission, as stated in the plea, was shewn and by consent, was admitted.

The libellants reply, that the libel ought not to be dismissed, because: (1) That the brig Fanny and cargo were unlawfully seized and taken within the territorial limits of the United States, by the said J. B. P. A. Ferey, and divers citizens of the United States, the said United States then and now being at peace with the king and people of Great Britain. (2) That the said schooner Sans Culottes was unlawfully armed, manned, victualled and fitted out within the United States, with the citizens thereof on board her, to cruize within the domain and territorial jurisdiction thereof, against the king and people of Great Britain, and against the citizens and subjects of Holland, with whom the United States were then and now are at peace. (3) They deny that the said J. B. P. A. Ferey was duly commissioned; or that the schooner Sans Culottes belonged to the citizens of France, at the time of the pretended commission; or that the French republic then had any authority to grant a commission for her to cruize, as an armed vessel, against the friends of the United States. They, therefore pray sentence according to the prayer of the libel.

The defendant rejoins by protestation, &c. and relies on his plea as before stated. The several matters mentioned in the replication in addition to those in the libel were abandoned, or were not insisted on by the advocates for the libellants, and the cause put on the ground of the libel. The arguments were much the same with those in the former cause of Findlay v. The William [Case No. 4,790], with the addition of some new matter; and, therefore, I consider this in the nature of a re-hearing of the point determined in that cause.

The arguments, either explanatory or additional, seem to be: (1) That by the more ancient authorities (Lex Merc. 206, 207, 227; Inst. Adm. 7, 219; Molloy, 41, bk. 1, c. 2, § 21), it appears that, if at that day, the prize was carried into neutral territory, the admiralty might restore, and the owners were not divested of the property, if it were not carried infra praesidia of the captors, and condemned in a court of admiralty. It is allowed that the custom of selling prizes in neutral ports, has altered this law; but the authorities shew that, before the custom of selling, the courts had jurisdiction, and if the property were not changed, before this practice of selling took place, it is not changed here, because taken in neutral territory, and the capture unlawful; and, therefore, the courts here have the jurisdiction the admiralty possessed before this custom of selling prevailed. (2) That the act of taking being illegal, it can give no right. Every sovereign is owner of the soil of his country, and the jurisdiction over a certain extent of sea-coast, and this jurisdiction should be acknowledged by the whole world. And though it is not well settled how far territorial limits extend on sea-coasts, the most approved writers agree the distance to be three leagues. That within these limits there is no war; and, therefore, there can be no prizes lawfully made. That the laws of nations forbid fitting out privateers in a neutral country, or capturing within its limits, friends of the neutral. These acts are penal and liable to punishment. If the property is not restored and compensation made, it is a cause of war, as it also is if neutral territory is invaded by the nations respectively affected by either of these circumstances. And, if we shall be under the necessity of paying for the property taken in our territory, the captors will, in part, carry on their war at our expense. It is acknowledged, that we have no concern with captures lawfully made; but this is no lawful capture, and we have a right to exercise our jurisdiction in this case. The proper means to do this is through our courts of justice, who have cognizance of all invasions of our jurisdiction and territorial rights. (3) That we do not here investigate the question of prize, but pursue a remedy for a marine trespass, a subject evidently within the jurisdiction of our admiralty courts. (4) That, however it may be with the sovereignties of other nations, ours is divided into executive, legislative, and judiciary; and by the constitution, the judiciary have cognizance of all cases of admiralty and maritime jurisdiction. It, therefore, rests with them to give a remedy in all such cases, and this court is particularly by law vested with authority where an alien sues for a tort only in violation of the laws of nations, &c.—and this is a case falling under that description. (5) Much argument and discussion were used on the subject of Palachi's Case [1 Rolle, 175]. It was said that this case was originally a prosecution for piracy under a British statute; and therefore

the reasoning and determination of the judges do not apply to it. But by the same case, as reported in Bulstrode [3 Bulst. 28], it appears that a prohibition was refused to the admiralty who took cognizance civilly and adjudged restitution. That the cases on which the report in the Exposition de Motifs, &c. was made were different from the present case; and, therefore the positions of those who made that report being founded on the cases under their consideration, do not, in any respect, apply to the case in question. It was, however, agreed that whatever be the proper decision as to legality of prize, or limits of territory, the question always recurs,—What department of government is vested with the power of enquiring into it, and giving the remedy? To these were added many arguments of inconvenience and policy. The prize here may be sold without inquiry, if this court will not make it; but in France their courts would examine into circumstances and prevent injustice. If the capture is wrongfully made, the captor will not carry it to France; and even there, in the case of the most valuable ship, there is nothing to which the injured party can resort but the privateer bond; therefore, if carried to France, restoration would be made if the capture is illegal. But here if the court will not take cognizance, it must be sold, and there is an end of redress. By bringing property into our ports captors submit to our jurisdiction. That the silence of the books is owing to admiralty cases not being published, and cases of plunder brought into neutral ports are uncommon.

On the part of the captors the arguments made use of in the case of Findlay v. The William [supra], were repeated, and much was said in answer to the reasoning of, and authorities produced by, the advocates for the libellants.

The doctrines laid down in the exposition, &c. were relied on as to the law of nations, and the treaty was called the sheet-anchor on which the captors depended. It was contended that the treaty forbids the courts from interfering, but the right of diplomatic interference was not denied; nor were the arguments on this side extended further than as the subject related to captures by one enemy from another. An objection was taken to the parties libellants, who, it was said, had no power to sue and recover on the point of violation of territory, which did not give rights to parties at war, but merely affected the neutral nation. It was acknowledged that a capture in a neutral territory was an offense to the neutral, and that the neutral government might order restitution. But this is a matter of state policy, not of judicial proceeding. If the United States were a party, it might alter the case; but here are only belligerent parties. That as to the Case of Palachi, in 3 Bulst. 28, it must be misreported, or some circumstances existed, not now appearing, as it differs in the general positions from those laid down by my Lord Coke in his Institutes, where civil as well as criminal proceedings are mentioned. That the authorities out of Sir Leoline Jenkins are all founded on references from the king to him, and he does not give judgment, but refers the remedies to royal authority.

The doctrine of infra praesidia was denied, and it was asserted that the property was vested by capture as to the enemy; that though it may be trespass as to the neutral, the taking vests the right in the captor, and the trespass done to the neutral is a subject for him to enquire into and obtain redress, but not for the party at war. And it appears by the British instructions to their privateers, that they are of opinion that a prize may be taken on neutral ground if the government of the neutral permits it. That if there are no adjudged cases in favour of the captors, there are none on the other side, and both are on an equal footing in this respect.

One of the advocates entered largely into the point of territorial limits, and shewed the uncertainty in which it was involved. It was said that these limits must be settled by treaty; and by treaty, if it were deemed right, a power in the neutral courts to judge of prizes taken in neutral bounds ought to have been vested, for it cannot be assumed without the consent of the sovereign of the party making the capture. The inequality of remedy was also insisted on; there can be no reciprocity, where the one party may be obliged to restore, but cannot have condemnation of the capture.

I have re-considered the arguments adduced on a former occasion as well as those brought forward in this case. I shall say nothing on the new ground taken in the replication, because it is not insisted on by the replicants. This being a public point, I have been desirous of hearing all that could be said upon it; If I am still of the same opinion I delivered in the former case, it is not because I indulge the petty and inflexible pride of consistency, but because I am not convinced that my former decree was erroneous. It is not with pleasure, that I continue to differ with the advocates for the libellants in this or the former cause: I have a sincere deference for their opinions in general, but my duty will always prompt me to follow the impressions the subject produces in my own mind. If these are erroneous they must be set right by an appeal to a superior tribunal, in whose decision I shall very cheerfully acquiesce. I shall be obliged to be more diffuse than, in common cases I wish to be, as the subject has been ably and extensively discussed by the advocates on both sides of the question, and it is a point of public consequence. I will avoid, however, as much as possible, going into minute investigation, and confine myself, chiefly, to general principles.

The doctrine, advanced on the part of the libellants, that it is necessary for the complete transfer of property to the captors, that the prize should be carried into their terri-

tories and there condemned, seems to present itself as the first object of investigation. It appears to me that much of the argument, founded on the authority of the old cases is built on this doctrine. I am not satisfied that this opinion was at any time well founded. If the old cases produced shew that prizes brought in solo amici, were considered as subjects of cognizance in neutral courts, because the capture was not complete, not being carried infra praesidia of the captors, I cannot be convinced that they should have the weight contended for, if they were not more explicit and certain than they appear to be. Lex Merc. 206, 7, 227. And I think that on a careful inspection of most of these cases it will be seen that the civilians (Molloy, 41; Inst. Adm. 219) then founded their opinions as to admiralty jurisdiction, in captures brought in solo amici, upon this principle. If this were the case, these authorities ought not to govern us; cessante ratione, cessat lex. To adduce them to shew that courts now have the authority exercised when the doctrine of infra praesidia prevailed, in cases of illegal captures, does not strike me forcibly; because, if the authority was then assumed on fallacious principles, it amounts to nothing more than to found one error upon another.

The general positions (Grotius, de Jure B. lib. 3, c. 6, § 3, note 3), that the property taken is not changed until brought into the ports of the captors, appears, even by the old authorities, merely to relate to the rights of postlimine and salvage, on re-capture. The instance of captures at sea, given by Grotius, recognizes the true reason on which ancient writers found their opinions, viz. that "the capture is then complete when all hope of recovery is lost." It is lost if carried within a fleet of the sovereign of the captor, or, "by the modern law of nations, it is sufficient if these kinds of things have been during twenty-four hours in the power of him who took them from his enemy." Freem. 40. Goods taken from an enemy on land and recaptured, shall be the property of the recaptor, unless re-taken the same day and claim put in before sunset. Bynker de R. B. lib. 4. Goods or ships must be brought into port and continue infra praesidia a night, "so that all hope of recovery be lost."

It is then, only required that "all hope of recovery be lost," to establish the principle; and the going into the territory, &c. are only mentioned as instances and not requisites; so that it does not appear by these authorities, some of which are cotemporary with Palachi's case, that it was essential to a complete capture, that it should be carried into the captor's territory. Burlamaqui, 233, 234. Burlamaqui has cleared up this point in his Principles of Politic Law (chapter 7, §§ 16, 17): "The prizes taken from an enemy become the property of the captor as soon as they are taken. The truth is, this distinction" (carrying or not infra praesidia) "has been invented only to establish the rules of the right of postlimine or the manner in which the subjects of the state, from whence something has been taken in war, re-enter upon their rights, rather than to determine the time of the acquisition of things taken by one enemy from another."

In the case of Goss v. Withers, in 2 Burrows, 683 (Just. Inst. bk. 2, tit. 1, § 17), this doctrine is discussed. It is there shewn, that the enemy acquire a property by the mere occupation, where all hope of recovery is lost. A case mentioned in page 694 of that book, was on a former occasion relied on, as bearing on the case in question.

Restitution to the British owner was decreed against a vendee or re-captor, in the time of Charles the Second, of a ship having been fourteen weeks in the possession of the enemy, and re-taken by a British privateer. Another is there cited from Lucas, p. 79, upon the same principles, against a vendee, after a long possession, two sales and several voyages. Yet Woodeson (volume 2, p. 441) expressly says, that "by alienation of a capture to subjects of a neutral power, the property is become irretrievable as to the original proprietors," and vide post, 443. But Lord Mansfield justly observes, that most of the rules on this subject are arbitrary, and not the object of reason alone. They are contrivances of nations in favour of their own subjects and to prevent too easy transfers to neutrals. Every nation (Burlamaqui, 224), for the benefit of its own citizens, makes what rules it pleases as to the recovery by the owner of the property re-taken. But what has a neutral court to do with such arrangements? They relate to the adjustment of salvage between subjects of the same nation, but have no operation between one enemy and another. For with respect to them, "the ship is lost by the capture though she be never condemned at all, nor carried into any port or fleet of the enemy." Goss v. Withers, 2 Burrows, 683. If then the ship is lost to the enemy, from whom it is captured (the mere capture being held sufficient to ground a claim of insurance) what new title can he acquire by coming into the port of neutral and becoming party to a suit for recovery of his former property? The court were of opinion, in the case first mentioned, that the question "whether by the capture the property was or was not transferred to the enemy," could only happen in two cases. 1st. Between the owner and a neutral purchaser. 2d. Between the owner and the recaptor. If a third case had existed, my Lord Mansfield was too accurate not to have added it, to wit—between the owner and his enemy in a neutral court. But he had given a contrary opinion, and knew no such case ought to occur. Vide Bynkers. de R. B. bk. 1, c. 15, p. 191.

It therefore seems to me that cases, grounded on the doctrine of infra praesidia, and condemnation in a court of admiralty of the captors, are not sufficient guides in this ques-

tion. All that is said about this doctrine is not to be understood as relating to the parties at war; for, as to them, the capture is complete when made. But in support of the rights of postlimine, in cases of re-capture, this necessity of bringing into port, condemnation, &c. is asserted to settle the matter between the former owner and the recaptor. So that the salvage paid is different at the will of nations who make regulations obligatory on their own subjects, according to the time the prize had been in the enemy's possession. These are different in different nations. Vide 2 Wood. 441–443. A neutral subject has nothing to do with them, except he becomes a purchaser; he must then examine into them merely to see what situation he will be in as to his purchase, if it falls into the hands of the nation to whom the former owner is a subject. But how this right of postlimine would operate in such case is not the subject of enquiry in a neutral court. It has no relation to a dispute between enemy and enemy, and never can operate so as to warrant their carrying on against each other, in a neutral country, a war of suits. But whether a sale be or be not good, is not the present question: it is a capture by one enemy from another, which gives, at least, prima facie, the right. It is not material now, whether, as some contend, the person making a capture has only a possessory or an absolute right. 2 Burrows, 689. Be this how it may, as to the captor, the former owner is by the capture totally divested of his property; the captor takes it as a subject of a belligerent nation, and in the first instance for his nation. 2 Wood. 446, 447. The intervention of a court of admiralty of the captor is made necessary, not to give validity to the capture but to inquire into the circumstances, and give the captor his reward by transferring to him the right of the nation, and the court will not vest it in him if the capture is improperly made. This view of the matter shews in a stronger light, that the whole is a national concern. Neutral courts or private individuals, are not clothed with authority to vindicate or carry on national contests; but these disputes must be settled by sovereignties alone. The capture being originally for the nation at war, is national property, and as such, the neutral, anticipating the justice of the belligerent sovereign, whose subject has done the wrong, and at the same time vindicating the rights of its own sovereignty and neutrality, may seize and restore the prize when the neutral territory is invaded in making the capture, if the property is within its power: if not, he may demand restitution and satisfaction from the sovereign of the captors. If this demand is refused, he may obtain what he requires, by reprisals or war—modes of redress far beyond the reach of judiciary tribunals.

The reasoning founded on the supposed illegality of the prize is a petitio principii. For the question is how that is to be ascertained? The discussion about neutral territory is another question, which lies between the sovereign of the captor and that of the neutral nation. Grotius, de Jure B. lib. 3, c. 6, § 24. The rights of neutrality were not established for the benefit of belligerent parties. They only affect the neutral; and invasion of these rights is an offence to him and not to the party at war. When Cheline who had a commission from the French, then at war with the Dutch, took a ship of the latter near the port of Dublin, the capture was not held piratical, or as to the Dutch unlawful. But it was criminal and unlawful as to the English sovereign, who was a neutral, and the ship was lying under his protection. 2 Wood. 442; Sir L. Jenkins, 754. The party whose property is taken in a neutral country calls on the neutral sovereign to assert these rights, for the protection of those within the territory. If this cannot be done by negociation, it resorts to force, the only law among sovereigns where they differ upon public points. There seems, therefore, no small weight in the objection made to the party libellant. It does not seem proper that a suit, founded on the ground of invasion of neutral territory, should be maintained by a belligerent party. It is even allowed that it would be most conformable to the true point of the case if the suit was in the name of the United States. What effect this would have I do not determine.

As to the Case of Palachi, reported by Bulstrode (3 Bulst. 28), I leave it to be judged of from an inspection of it, and the principles I have before mentioned as prevailing among the civilians in England at that day. My Lord Coke's statement of it in his 4th Institute does not confine it to criminal proceedings under British statutes (4 Inst. 154). He says that if the Spaniards sue for the property taken civiliter in the admiralty, a prohibition should be granted. And yet in Bulstrode it appears that the prohibition was refused. The civilians and common lawyers of that day, held some opinions not accounted sound at this time. My Lord Coke might have thought that the British laws and statutes alone should be attended to; and that the admiralty had no jurisdiction because the goods were on land, intra corpus comitatus; and the civilians thought otherwise, because the capture was not carried into the enemy's territory. But both these opinions are now exploded: for the admiralty has cognizance of matters on land if they are incidents to those at sea; and the doctrine of the civilians, as before supposed, is confessed not to be the law of this day. Modern improvements in jurisprudence have abolished many ancient opinions, and we must act upon the law as it now is. This case of Palachi has been insisted on by both sides, as favourable to their opposite opinions. This, it must be allowed, does not shew its precision and certainty. It is to be presumed (because it is mentioned by Lord Coke in delivering the opinion of the court, or stating the case as Bulstrode has re-

ported it) that Palachi, or Pelagus, being a Jew, and having drowned some Spanish prisoners, had some influence on this case. The Spanish ambassador was a formidable antagonist to the ambassador from Morocco. Gondemar governed King James, and royal influence was not unknown in the courts of justice. Political motives had their weight, and it was not as well settled then as it now is, that the Moors were to be treated on a footing with other nations. See 2 Wood. 425.

I do not think the worse of cases in general for their antiquity. But I do not follow them unless I am satisfied with the principles on which they stand. All the cases produced by the libellants, that I recollect, are a century old, and in this period it is singular that none can be produced expressly to their point. Those in Sir Leoline Jenkins do not shew any restitution by sentence of the court of admiralty. There appear to have been many proceedings in that court. One of them in Ireland evidently wrong; and another in which a prize was dismissed for trial in the proper jurisdiction, (Life of Sir L. Jenkins, 733, 727),—probably the court of the captor. But, by breaking bulk, she came under the notice of the court again, possibly for a breach of fiscal arrangements. In general, all that is to be found in Sir Leoline Jenkins, shews references from the king to him, and reports to the crown in consequence, to aid diplomatic enquiries. This seems to favour, rather than oppose, the opinions of the advocates for the captors in this case. There are a great variety of sentiments and opinions in these extra judicial reports of Sir L. Jenkins, of which I highly approve. Life of Sir L. Jenkins on this subject, passim. But I am not convinced that this court is the proper place to carry them into effect. If the court over which Sir Leoline presided could, in his opinion, have effected the objects of his correspondence with the king, we should have seen decrees and not letters on the subject from him to the crown. His opinion in page 751, is against the doctrine of carrying prizes infra praesidia.

As to the opinions in the "Exposition de Motifs," it is easy to say, as it is said by one of the advocates for the libellants, that they do not apply. It is as little difficult to say that they do. The cases on which the dispute originated, it is very true, are different from this. They were those of captures on the high seas, and the neutral ships brought into the ports of the captors, having the property of enemies on board. The commissioners appointed by the king of Prussia, composed a kind of court of review. But the principles laid down will apply to captures by one enemy from another. This may be seen by a reference to the books in which the exposition is to be found.

I do not extend these opinions farther, than to captures by one enemy from another. The treaty with France (Treaty of Alliance with France, § 17) insisted on by the captors, extends no farther than to such captures. This treaty has its due weight with me; but only in cases evidently comprehended in it. And it appears to me that this case is one of them, so far as judiciary, but not diplomatic examinations are concerned.

The idea that part of the sovereignty of this country is given to the judiciary for the purposes here required, is to me new. It should be well weighed before it is agreed to. I have not the same opinion in this point. I consider the judiciary as the expositors of the laws, and not partakers of the sovereignty for the objects of this suit. Their power is confined to matters of internal police; externally they have no power: they have none of the powers of peace or war. They have no right to command the forces of the country; and these are the means after negociation fails, by which sovereigns decide their disputes. The courts of England, though they decide freely on all matters of internal police, will not meddle with these rights of the sovereign. 2 Burrows, 765, 766. They will not even grant a habeas corpus in the case of a prisoner of war, because the decision on this question is in another place, being part of the rights of sovereignty. Although our judiciary is somewhat differently arranged, I see not, in this respect, that they should not be equally cautious.

The position, that in a neutral territory there is no war, and therefore there can be no legal captures is a good argument if used in the proper place. The reason is, that "he who acts against his enemy in the territory of a friend, acts also against the state who governs there." Lee, 122, 123. It is an offence to the neutral state. But still the question recurs—which is the proper department of the neutral state to inquire into and vindicate this offence? The weight of this argument, though it bears upon the point of outrage to the neutral, does not relieve us from the difficulties attending it. If this court would assume jurisdiction, and could ascertain our territorial limits and restore the property, the outrage would still remain for the nation to vindicate, if it should think proper. Therefore the court could afford but a partial remedy: and it is best to be settled where the whole can be accomplished.

The allegation that the libellants are not calling forth the powers of a prize court, but are seeking redress for a marine trespass, does not comport with the terms of the libel. But it is impossible to enquire into the question of trespass, without involving that of prize or no prize, and so "the original cause must all come over again." Doug. 612. The procedure here is in rem, and the object a specific restitution.

Damages may be superadded, but a proceeding for a marine trespass is different, as it is entirely a suit for damages, and not for the thing itself. Neither does this suit for a specific return of the property, appear to be included in the words of the judiciary act of

the United States, giving cognizance to this court of "all causes where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." Judiciary Act, § 9 [1 Stat. 76]. It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.

A variety of observations were made by the advocates for the libellants, on the general principles of government, the rights of sovereignty and neutrality, and the consequences flowing from an invasion of those rights, just in themselves, but not, in my opinion, necessary for me to determine upon. They will fall very properly under the notice of our government, when the subject is before them. I should very willingly relieve them from part of the burthens thrown upon them by the unhappy contests among other nations; but my views of the powers of this court forbid my interference.

I do therefore decree, order and adjudge, that the brigantine Fanny, her tackle, apparel, and furniture, and the goods, wares and merchandize, mentioned in the libel, be discharged from arrest, and the libel be dismissed, the plea to the jurisdiction being relevant.

Case No. 9,896.

The MOXY.

[See Case No. 9,894.]

MOYER (DIXON v.). See Case No. 3,931.

Case No. 9,897.

MOYNAHAN v. WILSON.

[2 Flip. 130; 6 Cent. Law J. 28; 5 Reporter, 329; 26 Pittsb. Leg. J. 16.] [1]

Circuit Court, E. D. Michigan. Dec. Term, 1877.

REMOVAL OF CAUSES—WAIVER—FRAUD IN PROCURING SERVICE OF PROCESS—REPLEVIN.

1. The act of filing in a state court a petition for the removal of a case to the circuit court of the United States is no waiver of a fraud in procuring service of process.

[Cited in Woolridge v. M'Kenna, 8 Fed. 657.]

2. Accordingly where property was fraudulently decoyed within the jurisdiction of a state court and seized upon a writ of replevin, and the defendant at once removed the case to a federal court and moved to set aside the service of the writ: *Held*, the motion did not come too late.

On motion to dismiss suit and for the return of property replevied. This was an action of replevin [by Matthew J. Moynahan against James Wilson] commenced in the circuit court for the county of Wayne, on the 7th day of November, 1877, and removed to this court on the 13th. Upon the same day a certified copy of the record was filed in this court, and a motion made to dismiss the suit upon the ground that the property replevied [viz. the racing-mare "Bay Sallie"] [2] was decoyed within the jurisdiction of the state court by a fraudulent device or trick of the plaintiff.

L. T. Griffin, for plaintiff.

M. E. Crofoot, for defendant.

BROWN, District Judge. Most of the statements contained in the affidavits read upon this motion relate to the merits of the controversy, and, therefore, have no bearing here. It appears that the plaintiff and one Demass, when in Indianapolis, made a bargain with one Gosnell, the then owner of the mare, to bring her here with the intention of matching her against a horse known as "Tom Hendricks" and that five hundred dollars were deposited in Gosnell's hands, either as security for the safe return of the mare, or as a personal loan from the plaintiff. Gosnell claims that the agreement was to be cancelled if, in the mean time, he could sell the mare, and that he did sell her to Wilson with the consent of all parties, the money being returned to Demass. On the other hand, it is claimed by the plaintiff that he was to have the use of her for a year, to race her as he liked, and to divide the profits with Gosnell; that he knew nothing of the sale to Wilson, and that Demass received back the $500 after plaintiff had left Indianapolis, and without authority from him. All this is immaterial to the present controversy; so likewise are the affidavits with respect to the value of the mare, and to the propriety of driving her in harness. I am satisfied she is worth more than five hundred dollars, and consequently that the court has jurisdiction.

On Demass returning to Detroit, plaintiff, finding his agreement had fallen through, and that the mare had been sold to Wilson, the defendant, and had passed into his possession, wrote defendant the following letter: "I am very sorry that you took 'Bay Sallie' away from Demass, as I have made a match against Hendricks to pace next week for five hundred dollars a side; the money is up, and as John (Demass) says you would bring the mare if matched, please ship her at once to Detroit, as there will be a great betting race. Don't fail to send her; if you don't send her, I lose the money that is now up, so don't fail." To Gosnell he wrote a similar letter adding, "Write or telegraph me when she will be here, as we have not fixed the day to pace until I hear from you." Supposing that statement to be true, defendant at once shipped the mare to Detroit in charge of an hostler, and on arriving here, plaintiff took possession of her, paid for her transportation and sent her to a stable; he then took the advice of counsel and, acting upon such advice, re-

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 5 Reporter, 329, and 26 Pittsb. Leg. J. 16, contain only partial reports.]

[2] [From 6 Cent. Law J. 28.]

turned her nominally to the possession of defendant, who soon after arrived here himself, then demanded her of him, and upon defendant refusing to deliver her up, took out this writ of replevin. It appears from the affidavit of Mr. Greusel, owner of the "Tom Hendricks," that his horse had not been matched against the mare at all, nor had he made any agreement with the plaintiff, to pace with the "Bay Sallie," nor had he nor any one for him, to his knowledge, put up any money for such a race. Indeed, Moynahan admits that the only foundation for his letter was, that he had some talk with the owner of "Tom Hendricks" about making a match if he could get his friends to put in with him, and stated that he would see plaintiff again, and that before seeing Greusel again he wrote the letters in question, although he says he had been informed by friends of Greusel there would be no trouble in making a match for five hundred dollars, and "deponent believes that such was the fact, and now expects that he will have no difficulty in making the match." In short, the letters were false from beginning to end, and were evidently intended as a device to get the horse to Detroit. I am satisfied, too, that the subsequent surrender to defendant was solely for the purpose of anticipating a writ of replevin from him, and getting her into his own possession under the writ in this case.

It is perfectly well settled that where a defendant is brought within the process of the court by a trick or device of this kind the service will be set aside and he will be discharged from custody. Union Sugar Refinery v. Mathiessen [Case No. 14,397]; Wells v. Gurney, 8 Barn. & C. 769; Snelling v. Watrous, 2 Paige, 315; Williams v. Bacon, 10 Wend. 636; Metcalf v. Clark, 41 Barb. 45; Stein v. Valkenhuysen, El., Bl. & El. 65; Williams v. Reed, 5 Dutch. [29 N. J. Law] 385; Carpenter v. Spooner, 2 Sandf. 717; Pfiffner v. Krapfel, 28 Iowa, 27.

Though these were all actions in personam where the defendant was himself discharged, I see no reason why the same principle will not apply to a case of replevin where property is fraudulently decoyed within the jurisdiction of the court.

A serious question, however, remains to be considered: Plaintiff insists that filing the petition for removal in the state court was an appearance, and a waiver of any defect in the service of the writ. That the filing of a petition for a removal is an appearance within the meaning of the judiciary act of 1789 [1 Stat. 73], requiring the petition to be filed "at the time of entering his appearance in the state court" was decided, I think correctly, in Sweeny v. Coffin [Case No. 13,686]. A like ruling was made by a majority of the court in the case of Chatham Nat. Bank v. Merchants' Nat. Bank, 1 Hun, 702.

While I have little doubt that filing this petition is a sufficient appearance to answer the requirements of the judiciary act, my impression is it cannot be considered as a general appearance in the cause. An appearance has been defined to be a submission to the authority of the court in the case, whether coerced or voluntary, or an act importing that the defendant submits the determination of a material question in his case to the judgment of the court. Cooley v. Lawrence, 5 Duer, 610.

It has frequently been held that a motion to dismiss a case for want of jurisdiction is not an appearance, the very act of making the motion implying that the party does not submit himself to the authority of the court. Sullivan v. Frazee, 4 Rob. [N. Y.] 616; Decker v. New York Belting & Packing Co. [Case No. 3,727]; Commercial Bank v. Slocum, 14 Pet. [39 U. S.] 60; Ulmer v. Hiatt, 4 G. Greene, 439, 440. And I am strongly inclined to think that filing a petition in the state court, which, according to the better authority, requires no action on the part of that court, and deprives it instantly of its jurisdiction of the case, cannot be considered a general appearance in the cause.

But whether this be so or not, I am satisfied that the petition for removal should not be construed as a waiver of a fraud in procuring the service of the writ. While it is true that a general appearance is a waiver of irregularity in the writ or its service, none of the authorities go to the extent here claimed. In 3 Chit. Gen. Prac. 522–525, an important and suggestive distinction is taken between mere irregularities and such defects as render the proceedings a total nullity and altogether void; for although an irregularity may be waived, if not objected to within a reasonable time, it has been considered to be a general rule that a nullity or essential defect may be taken advantage of at any subsequent stage of the action. In Taylor v. Phillips, 3 East, 155, it was held "that service of process on Sunday was absolutely void by statute and could not be made good by any subsequent waiver of the defendant by his not objecting until after a rule to plead given." And to the same effect is Morgan v. Johnson, 1 H. Bl. 628. A large number of other cases are cited in Chitty, which apparently proceed upon the same ground. While I think the American courts would not go so far in holding that material defects could not be waived, the distinction between irregularities and nullities is noticed and approved in several American cases. In U. S. v. Yates, 6 How. [47 U. S.] 605, it was said, that leave to withdraw an appearance will not authorize a motion to dismiss for want of citation, nor for mere irregularity in its service, provided the appeal is in other respects regularly brought up and authorized by law. "The citation is merely notice to the party and his appearance in person or by attorney is an admission of notice on the record and he cannot afterwards withdraw it; but the appearance does not preclude the party from moving to dismiss for the want of jurisdiction or any other sufficient ground except for

the one above mentioned." So in Carroll v. Dorsy, 20 How. [61 U. S.] 204, it was held that a defect in the writ of error or an omission to file a transcript of the record at the term next succeeding the issuing of the writ, were fatal errors, notwithstanding a general appearance. And the earlier case was cited and affirmed. The court held that the appearance of the defendants without making a motion to dismiss cured nothing but the defect in the citation. See, also, Buckingham v. McLean, 13 How. [54 U. S.] 150.

There is, undoubtedly, a class of cases which hold that where the state court has acquired jurisdiction by attachment of property the defendant, on removing, will not be permitted to claim that the case should be dismissed, because the federal court would not have had jurisdiction if the case had been originally commenced there. This was really all that was decided in Sayles v. Northwestern Ins. Co. [Case No. 12,421], though there are sentences in the opinion which seem to conflict with the views here expressed. So in Bushnell v. Kennedy, 9 Wall. [76 U. S.] 387, it was held, that after removal defendant could not defeat the action by showing it was not originally cognizable in the federal court. To the same effect is Barney v. Globe Bank [Case No. 1,031].

These cases hold that if the defendant, not being compelled to appear in the state court, does actually appear and remove the case, he thereby submits to the jurisdiction and cannot raise in this court a defense he could not raise in the state court; but in the case under consideration the defendant was compelled to make this motion somewhere or lose the benefit of the defense. If he allowed the case to go to judgment it would probably be too late, the fraud rendering the service of the writ not void but voidable. Advantage must undoubtedly be taken of the defect within a reasonable time, but it does not follow that an act which for some purposes may be considered an appearance and possibly sufficient to operate as a waiver of previous irregularities, should be construed as confirming a fraud in the service of the writ. It is a general rule for which numerous cases may be cited, that in order to confirm a fraud the party injured must not only do some act manifesting an intention to confirm, but must be aware of the legal consequences of the act. Indeed, there seems to be in cases of this class a well-settled exception to the general maxim "Ignorantia legis neminem excusat." Kerr, Fraud, 296; Murray v. Palmer, 2 Schoales & L. 486; Cockerell v. Cholmeley, 1 Russ. & M. 425; Cumberland Coal & Iron Co. v. Sherman, 20 Md. 117; Cherry v. Newsom, 3 Yerg. 369; Stump v. Gaby, 2 De Gex, M. & G. 623. If this rule be applicable here (and I see no reason why it is not) the case is freed from all doubt. There is not the slightest reason for supposing the defendant intended to waive the fraud by removing the case. Indeed, the promptness with which the removal was effected, and this motion made, precluded the idea either of an intention to confirm or a belief that such was the legal effect of his act.

Again: It seems to me inconsistent with the general scope and purpose of the removal acts to compel a party to litigate any portion of his case in a state court, or lose his defense pro tanto. Under the judiciary act, if the defendant had made this motion in the state court, he would thereby have waived his right of removal, since it was necessary to file his petition at the time of entering his appearance; and while, under the act of 1875 [18 Stat. 470], the removal may be made before, or at the term at which the cause could be first tried, and before the trial thereof, it is provided in section 6, that in case of removal the circuit court shall proceed therein as if the suit had been originally commenced in the federal court.

In Lamar v. Dana [Case No. 8,005], a suit was brought in the state court for an arrest made by the defendant, during the Rebellion, by authority of the president, and the plaintiff move to remand on the ground that the jurisdiction of the federal court over the case had been taken away by the act of 1867 [14 Stat. 558]. It was held that, notwithstanding this act, the parties could raise any question in the federal court after removal which they could raise if the cause had been originally commenced here, and it was said by Judge Woodruff, "the removal places the case in the same position here as if so (originally) brought. This operates in this case as in all other cases so removed. Had the cause been brought here in the first instance, all legal defenses would have been available to the defendant, whether they went to jurisdiction to inquire, or were in bar of the action on any ground. All that the removal has done is to change the tribunal which is to pass upon the questions involved." See, also, Gier v. Gregg [Case No. 5,406]; McLeod v. Duncan [Id. 8,898].

There is no doubt that this motion might have been made in the state court, and that the decision of the state court thereon would have been res adjudicata; but I think the defendant is not compelled to split up his defense in this way. There is no reason to suppose that the removal acts were not aimed at the possible partiality of local judges as well as local influence upon juries, and any construction which would deprive litigants of a judicial interpretation of the law in this court, as well as a determination of the facts involved, would, to that extent, defeat the intention of congress. The power of removal is not limited to cases where only questions of fact are involved, and this court would clearly not be called upon to remand if the sole question in the case were one of law.

Without deciding how far a petition for removal is an appearance, or how far a general appearance would operate as a waiver of a fraud in service of a process, it is suf-

ficient here to say that I do not think that the petition for removal is a waiver of the right of the defendant to insist that the service of the process was procured by a fraudulent device or trick.

But I think the plaintiff has made his motion too broad, in asking that the writ itself be set aside, and vacated. Service of the writ must be set aside, and the plaintiff ordered to return the property to the defendant; and, as defendant came into this district after hearing that the plaintiff had replevied or treatened to replevy his property, and for the purpose of rescuing it, I think the service should be set aside also, as to him.

M. P. RICH, The (BURKE v.). See Cases Nos. 2,161 and 2,162.

Case No. 9,898.

The M. R. BRAZOS.

[10 Ben. 435.] [1]

District Court, S. D. New York. May, 1879.

COLLISION — TUG AND BATH HOUSE — ENGINE CATCHING ON THE CENTRE—JURISDICTION.

1. The steam-tug B., having three barges in tow, went into the cove at the foot of 65th street, East river, to take up a fourth. In coming in, her engine caught on the centre and she drifted towards the rocks. The pilot, as soon as possible, turned her head out of the cove and went ahead, but before he could get out, she was carried by the tide so near the point as to run against the corner of a floating bath house which was moored to the shore there: *Held*, that the bath house was not a vessel;

2. The admiralty had jurisdiction of a libel filed by the owner of the bath house against the tug, to recover the damages caused by the tug;

[Cited in Snyder v. Floating Dry Dock, 22 Fed. 686; Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 63 Fed. 848.]

3. The tug was not in fault for the engine's catching on the centre, or in her navigation otherwise, and the libel must be dismissed.

In admiralty.

D. McMahon, for libelant.

W. R. Beebe, for claimant

CHOATE, District Judge. This is a libel for collision between the steam-tug M. R. Brazos and a floating bath house belonging to the libellant, August Brown, which was at the time of the collision, moored to the westerly shore of the East river, near the foot of East 65th street. Between 56th and 64th there is a cove, into which the tug had gone with three loaded boats in tow for the purpose of taking in tow a fourth boat or barge, loaded with manure, at a pier near the foot of East 63rd street. She was bound from New York to Saybrook, Conn. At 64th street, the upper or northerly end of the cove, the shore sets out boldly into the river, forming a high point of rocks, against which the flood tide sets with considerable force. The libelant's bath house was moored to the rocky shore about sixty feet above this point, and it projected out into the river considerably further than this rocky point. It was framed with timbers and was about forty-nine feet long and thirty feet wide, and except for a short time at low tide it was wholly floating in the water. At low tide a small portion of it next the shore rested on the rocks under the surface of the water, the rest of it being afloat. It was secured to the shore by poles and chains, so arranged as to allow it to rise and fall with the tide, one end of the chains being fastened securely to the structure itself and the other end being attached to pins inserted in holes drilled in the rocks. Access to it from the shore was had over a gangway of planks. It was placed there by permission of the department of docks of the city of New York, for the purpose of being used as a public bath, but it lay outside the bulkhead line as established at that time. It was so constructed that the tide flowed freely through it. It was kept afloat in part by the buoyancy of its materials and in part by barrels underneath some of its outer timbers.

The collision happened about ten o'clock on Sunday morning, August 31st, 1873. The day was warm and fine and the river at the time was free from other vessels. The tug having gone into the cove for this fourth boat and come out without taking her up and proceeding on her voyage up the East river, came so near to the bath house that the barge, on her port side, struck against the outer and lower corner of the bath house, injuring and shattering it so that it fell apart and was carried off by the tide. The libel alleges that the collision was caused by the negligence of those in charge of the tug.

It is objected by the claimant, the owner of the tug, that the court has no jurisdiction of the cause, on the ground that the injury complained of was not on the water but on the land, within the meaning of the rule governing the jurisdiction of the admiralty courts in actions for marine torts. It is clear that the libelant's bath house, though described in his libel as a "vessel," was not a vessel constructed or used or intended to be used as an instrument of commerce or navigation. The test, however, of the jurisdiction of the courts of admiralty in respect to torts, is whether the place of the alleged injury was "on the water." The Maud Webster [Case No. 9,302], and cases cited. This structure cannot be said to have become a part of the land. Its connection with the shore was for a temporary purpose. The testimony shows that it was a movable structure, moored in this place in tide waters, for use as a bath house during the summer months, the design of the owner being to disconnect it from the shore in the autumn and

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

float it away to some more suitable place for laying it up during the winter. The mode of its attachment to the shore was adapted to this purpose and was such that it could be readily disconnected. I do not see that the case is any different from what it would be if the bath house had been moored at anchor in the same place or out in the middle of the river. The case is clearly distinguishable from the case of The Maud Webster, cited above, in which it was held that the place where the derrick which was injured stood had become a part of the land. The libelant, therefore, has the right to have the case determined on the merits.

The defence set up by the tug is that the injury was the result of inevitable accident—that while the tug was properly and for a lawful purpose and without negligence attempting to back up to the pier in the cove to take in tow the boat loaded with manure, her engine, without fault on the part of the engineer, caught on the centre; that she used all proper diligence in prying the engine off the centre, and that in the situation in which she then was, having been drifted by the tide while thus helpless towards the rocks on the point at 64th street, the only proper and prudent course to avoid going ashore was to head out into the river and go ahead with all speed; that she did this with all possible expedition and thereby succeeded in avoiding the point, but the tide still setting her up towards the corner of the bath house after she cleared the point, she had not gained sufficient headway to clear the bath house, and that without fault on her part, the boat on her port side struck the corner of the bath house and did the injury complained of. This defence is, I think, made out. The testimony in this case shows very clearly that the catching of the engine on the centre is an accident which cannot, by the exercise of any degree of watchfulness be anticipated or by any precaution prevented, and that it does not show any defect in the machinery or want of care in the engineer. Up to the time the engine so caught on the centre the management of the tug was without fault. She had a perfect right to come into this cove to take the boat in tow. She lay there off the pier a short time, drifting slowly up with the tide, stopped, or almost stopped, and hailed those in charge of the boat to be taken up. Her attempted movement by backing to take up the boat, which was in an eddy setting down along the shore on the inside of the cove, was proper. The drifting of the boat towards the point while her engine was caught made it impossible for her to resume this movement. Her pilot immediately did what was obviously the only safe thing for him to do, turn her head to the river and go ahead as fast as he could. By doing so he cleared the point only by about fifteen feet. The evidence shows that when he thus started to go ahead he put his wheel a-port so as to head her out into the river; that she grazed so near the rocks at the point that it was necessary to put the wheel amidships in passing in order to throw the stern of the tow off from the rocks, and that when the stem of the tow had got by the bath house he attempted to keep the stern of the tow from coming in contact with the bath house by putting his wheel to starboard in order to throw the stern off. It was a very close thing between the force of the tide setting up the river and the headway of the tug driving her out into the river, and the force of the tide proved too strong. But the real cause of the collision was the catching of the engine on the centre and the consequent drifting of the tug and tow into a position where, with the exercise of all reasonable care and skill, it was impossible to avoid coming in contact with the bath house. There was no fault in the construction or motive power of the tug. She had no larger tow than she could properly manage. Her pilot was familiar with the navigation of the river; he knew the set and force of the tide and the nature of the navigation he had to encounter in going into this cove. It is true that he had not actually been to this pier before, but that is immaterial, as he was familiar by frequent observation in navigating the river with the tides at this place, and there was neither negligence in going into the pier nor want of skill in endeavoring to extricate the tow from the situation in which she was unavoidably placed while there. I have given no weight to the suggestion that the bath house was an obstruction to navigation. I do not perceive that, if that were so, the tug could justify her own negligence in running against it. Libel dismissed with costs.

Case No. 9,898a.

The M. S. BACON v. ERIE & W. TRANSP. CO.

[5 Cin. Law Bul. 637; 26 Int. Rev. Rec. 316.]

Circuit Court, W. D. Pennsylvania. Aug. 20, 1880.

DEMURRAGE—PROMPTNESS IN DELIVERING CARGO—CUSTOM OF UNLOADING.

1. An express stipulation for demurrage in a contract of affreightment is not necessary to entitle the owner of a vessel to compensation for the unnecessary or improper detention in loading or unloading.

2. Reasonable promptitude in delivering a cargo at its point of shipment, and in receiving it at its destination, is a duty implied in such contracts, and for a violation of it, damages in the nature of demurrage are recoverable.

3. Where it is the prevailing custom at the lake ports for grain-bearing vessels to unload in the order of their arrival, the ship owner must await his turn for a reasonable time, to be measured by the ordinary volume and the exigencies of trade at the place of discharge.

4. In view of so well established and so reasonable a custom, it is not within the province of a ship owner, by notice to a consignee, to define an arbitrary period within which his cargo must be discharged.

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

In admiralty.

F. F. Marshall, for appellant.
J. M. Stoner, for appellee.

McKENNAN, Circuit Judge. An express stipulation for demurrage in a contract of affreightment is not necessary to entitle the owner of a vessel to compensation for her unnecessary or improper detention in loading or unloading. Reasonable promptitude in delivering a cargo at its point of shipment, and receiving it at its destination, is a duty implied in such contracts, and for a violation of it, damages in the nature of demurrage are recoverable. This is too well settled in England and this country to need discussion or authority. Whether the consignee of a cargo, who is not its owner, is chargeable with such damages it is unnecessary to consider, because the respondent is admitted to have been the shipper of the cargo, and hence as a party to the contract of affreightment, is accountable for any breach of an obligation imported by it. The Hyperian [Case No. 6,987]. Was the vessel here subjected to unwarrantable delay in discharging her cargo? This is the decisive question in the case.

On the 20th of October, 1875, the respondent shipped on the libellant vessel, at Chicago, a cargo of corn, consigned to itself, at Erie, Penn. The vessel reached Erie on the 26th of October, and her master promptly reported to the respondent's agent, and was told that "we would unload him as soon as it came his turn; that there were four vessels ahead of him." The respondent has the control and possession of the only two elevators at Erie, and as soon as the vessels arriving before the Bacon were unladen, the discharge of her cargo was commenced, viz.: October 30, about 2 o'clock p. m., and was finished in the forenoon of the 31st. The libellant claims damages for four days, alleging improper detention. That it was the right of respondent to require the cargo of the vessel to be unloaded at the Erie elevator is unquestionable, and that the facility and dispatch of such method of discharge was advantageous to the vessel is obvious. If other vessels with the same consignment, arrived in port before her, and were awaiting the discharge of their cargoes, she was entitled to a berth at the elevators only in her turn, and her necessary detention for a reasonable time, under these circumstances, is not imputable to the respondent as a wrong. This is the result of the proofs as to the prevailing custom at the ports on the lakes, and especially at the port of Erie, and of accepted decisions by English and American courts. Upon this point the master of the Bacon testifies: "I don't know that it is the custom at all the lake ports for the first vessel at the elevator to be unloaded first." William Christie, another witness for the libellant, is more explicit: "It is customary for vessels loaded with grain to wait their turn to unload in the order of their arrival at the elevators; in fact, you have got to wait your turn wherever you go." And again, J. C. Van Scoter says: "It is the usage and custom throughout the lakes, for grain-bearing vessels consigned to the same elevators to wait their turns to be unloaded, in the order of their arrival; of course when an elevator is disabled, the consignee has more time." All the testimony on both sides is concurrent with this. Now, in view of so well established and so reasonable a custom, it is not within the province of a ship owner by notice to a consignee, to define an arbitrary period within which his cargo must be discharged. If he must unload in his turn, he must await it for a reasonable time, to be measured by the ordinary volume and exigencies of trade at the place of discharge, and it would be a solecism to affirm that the consequent necessary delay can be treated as a wrong, upon which to found a claim for damages.

The subject is fully discussed and the result of the cases touching it is clearly stated by Chief Justice Denio, in Cross v. Beard, 26 N. Y. 85. After speaking of the effect of an agreement for demurrage in a charter party, he says: "But the rule is somewhat different when no period of delay is fixed by the contract. There a reasonable time is implied, and this is to be determined upon by a regard to all the circumstances legitimately bearing upon the case, and is a question for the jury. * * * If it be conceded that the defendant had a right to require that the coals should be delivered upon his own deck, he was guilty of no fault or breach of contract in delaying the plaintiff's vessel until she came up to the dock by taking her turn among the other vessels which were also waiting to be discharged, unless he was guilty of some fault in suffering such an accumulation of craft laden with cargo for himself, for the same wharf, at the same time." See, also, Rodgers v. Forresters, 2 Camp. 483, and Burmester v. Hodgson, Id. 488.

The only question then is, was there a culpable detention of the vessel for an unreasonable time? She reported to the consignee in the afternoon of October 26, and the discharge of her cargo was completed in the forenoon of the 31st; four vessels had precedence over the Bacon. There is nothing to indicate that this number of vessels, consigned to the respondent, in port at the same time, was extraordinary, especially so near the period of closing navigation, nor that the delay in unloading the Bacon was at all unreasonable. On the contrary, all practicable dispatch seems to have been afforded her, and the respondent was not therefore in default.

And now, August 20, 1880, this cause having been heard upon the pleadings and proof, and having been argued by the proctors of the parties respectively, it is here adjudged

and ordered that the decree of the district court be reversed, that the libel be dismissed, and the libellants and their stipulators pay to the respondent its costs in the district court, as well as in this court, to be taxed by the clerk.

MUCKEY (GOODFELLOW v.). See Case No. 5,537.

Case No. 9,899.

Ex parte MUDD.

District Court, S. D. Florida. Sept., 1868.

HOMICIDE—MURDER OF THE PRESIDENT OF THE UNITED STATES IN TIME OF WAR—MILITARY TRIBUNAL—AMNESTY PROCLAMATION 1868.

1. The crime of murdering the president of the United States, in time of civil war is triable by a military commission.

2. The crime of being accessory to the murder of the president was not embraced in the amnesty proclamation of 1868.

[Decided by BOYNTON, District Judge. Nowhere reported; opinion not now accessible. The above statement of the points determined was taken from 2 Brightly, Dig. 101, 140.]

Case No. 9,900.

MUDD v. CLEMENTS.

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

Circuit Court, District of Columbia. Dec., 1826.

SEDUCTION—ACTION BY FATHER—LOSS OF SERVICE—UNDER PROMISE OF MARRIAGE—EVIDENCE—FORM OF ACTION.

1. In an action upon the case for seduction of the plaintiff's daughter, per quod servitium amisit, the plaintiff may give evidence that the defendant promised to marry the daughter, as a means of the seduction.

2. An action upon the case will lie for seduction of the plaintiff's daughter, whereby he lost her service.

Action upon the case for seducing plaintiff's daughter, whereby he lost her service. Damages laid at $2,000.

Mr. Lear, for plaintiff, offered to prove a promise of marriage as the means of seduction.

The defendant's counsel, Mr. Marbury, objected, and cited 2 Phil. Ev. 159; Tullidge v. Wade, 3 Wils. 18; Dodd v. Norris, 3 Camp. 519, and Foster v. Scoffield, 1 Johns. 297.

But THE COURT, (nem. con.) permitted the evidence to be given for the purpose of showing the means by which the defendant accomplished the seduction; and the defendant took a bill of exceptions. See Starkie, Ev. pt. 4, pp. 1309, 1310; Peake, Ev. 355; and Elliott v. Nicklin, 5 Price, 641.

The defendant's counsel then prayed the court to instruct the jury that this action upon the case would not lie, and that the action had been misconceived.

But THE COURT (nem. con.) refused, saying that they might move it in arrest of judgment, if it were a substantial objection. See 1 Chit. Pl. 138; 2 Chit. Pl. 265, 271, 315, 422; 3 Starkie, Ev. (Am. Ed.) 1307, 1308, note 1; Bennett v. Allcott, 2 Term R. 167; Woodward v. Walton, 2 Bos. & P. N. R. 476; Macfadzen v. Olivant, 6 East, 387; Parker v. Elliotte, Gilmer, 33, 6 Munf. 587.

The defendant took his second bill of exceptions.

Verdict for plaintiff $2,000. There was no motion made in arrest of judgment, nor any writ of error issued.

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

MUDD (CRIPPS v.). See Case No. 3,391.

MUDD (FRERE v.). See Case No. 5,107.

MUGGRIDGE (PARKER v.). See Case No. 10,743.

MUHLENBRINK (UNITED STATES v.). See Case No. 15,831.

MUIR, In re. See Case No. 13,196.

Case No. 9,901.

MUIR et al. v. The BRISK et al.

[4 Ben 252.] [1]

District Court, E. D. New York. June, 1870.

SHIPPING—POSSESSION—MASTER—LIEN—LOADING VESSEL WHILE IN CUSTODY—BONDING AFTER DECREE—APPEAL.

1. The owners of a British vessel filed a libel, to recover possession of her, against the master who claimed to have a lien upon her, under the English law, and to hold her by reason of such lien; and, after the vessel had been seized by the master, under the process in the action, the owners, through a new master whom they had appointed, chartered the vessel, and by consent of the marshal, but without the permission of the court, began to load the vessel under the charter: *Held*, that the fact, that the master claimed a lien on the vessel, under the English law, furnished no ground for his refusal to deliver the vessel to her owners.

2. A court of admiralty has the right to decline to entertain jurisdiction, where all the parties are foreigners resident abroad.

3. The act of the owners, in interfering as they had done with the vessel, while in the custody of the law, would well justify the court in declining to exercise jurisdiction in the premises, but as that had been done with the consent of the marshal, and the rights of the defendant could be otherwise protected, the court would decree that the libellants recover possession of the vessel without costs, on their paying into court the inward freight collected by them, less the usual inward charges, including unloading and crew's wages, as security for the payment of any sum found due to the master, in an action to be brought by him within twenty days, if he was so advised.

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

4. After such decree was entered, the respondent gave notice of appeal, but took no steps to perfect his appeal for several days, and the owners applied to the court for leave to bond the vessel: *Held*, that the court would not grant leave to bond the vessel, but would direct that the decree be executed, unless the respondent perfected his appeal, and procured the cause to be transmitted to the appellate court within two days.

In admiralty.

Emerson, Goodrich & Wheeler, for libellants.

Beebe, Donohue & Cooke, for respondent.

BENEDICT, District Judge. This is an action brought by the libellants William Muir and others, claiming to be the sole and only owners of the British brig Brisk, to obtain possession of that vessel from the defendant, Alfred Morine, who claims to hold the vessel as the master thereof, and denies the right of the libellants to remove him. The defendant by his answer puts the libellants to their proof of ownership, and sets up in opposition to the demand of the libellants, the fact that he has a claim against the owners for wages and advances as master, which the libellants have not offered to pay, and for which by the law of England, he has a lien upon the vessel and her freight, by reason of which he insists that this court should refuse the decree prayed for by the libellants.

The evidence of ownership introduced by the libellants, I consider to be sufficient to entitle them to the relief prayed for; certainly, in the absence of any countervailing evidence, or any suggestion that any other parties are the owners of this vessel. As to the fact that the defendant has an unpaid demand for wages and disbursements, for which the law of England gives him a lien upon the ship and freight, it is only necessary to say that, assuming the facts to be as set up, they afford no reason for refusing to the owners the possession of the ship, to which they are entitled as being the sole owners. A lien for wages and disbursements cannot give to the master a legal right to the possession of the vessel, as against his owners. Cases might be imagined, disclosing such equities and presenting such features of hardship in the dealings of owners with their master, as would justify a court of admiralty in refusing the aid of its decree in favor of owners who refuse to do equity, but this case presents no such features. These owners are not shown to be irresponsible—they offer to give the defendant security to pay any sum which may be due him, while they deny that anything is due. It would follow therefore that the libellants, upon such a state of facts, must be entitled to the decree, which they seek by this action to obtain. But a circumstance has been proved in the case which, considering that the vessel in question is foreign, and all the parties to the action foreigners residing in a foreign country, makes it proper in my opinion for this court, to decline to exercise jurisdiction in this case, except upon the condition hereafter to be stated.

The right of the court of admiralty, to decline to entertain jurisdiction, when all the parties are foreigners residing abroad, has been often declared. The Martin, 4 C. Rob. Adm. 293; Davis v. Leslie [Case No. 3,639]; Coote, Adm. 47.

The circumstance to which I allude is this, that since the seizure of the vessel by the marshal under the process issued in this action, at the instance of the libellants, and while the vessel was thus in the custody of the law, awaiting the determination of this court, the libellants without any permission from the court, have caused the vessel to be loaded with a cargo shipped for a foreign voyage, and she is now nearly full of cargo belonging to third parties, laden under a charter party executed by one Banks, who is the master whom the libellants seek to place in command of the vessel instead of the defendant.

This extraordinary mode of dealing with a vessel in custody of the law, on the part of foreigners who were seeking the decree of this court to put them in possession of the vessel, would well justify the court in exercising its privilege to decline jurisdiction in the premises.

No reason is seen why the aid of the court should be invoked by parties, who by their acts show that they do not consider any decree of the court necessary, to enable them to assume possession and control of the vessel. But it also appears, and the statement has caused me surprise, that the action of the libellants in loading their ship was with the knowledge and consent of the marshal. For this reason, therefore, and because the result of this action of the officer of the court, might be to work serious inconvenience and loss, if no decree were here pronounced, and inasmuch as all the rights of the defendant can be protected by making the payment of the freight into court a condition of exercising jurisdiction, that course will be adopted instead of absolutely declining to render a decree. If, then, the libellants deposit in the registry of the court the amount of the inward freight by them collected, less only the usual inward charges, including unloading and crew's wages, such freight to remain subject to the order of the court, as security for any sum which the defendant may recover against the owners of this vessel or said freight, in an action, to be brought within twenty days, in case he be so advised, the court will entertain jurisdiction, and a decree be entered in favor of the libellants without costs. If such freight be not so deposited within forty-eight hours, after notice of this determination, a decree will be entered dismissing the libel.

Upon the entry of the decree above mentioned, the defendant at once filed and served a notice of intention to appeal in the usual

form, but for five days thereafter took no steps to perfect his appeal and gave no security. Upon these facts, and affidavits showing that the detention of the vessel would involve serious loss, the libellants moved for a release of the vessel on bail.

BENEDICT, District Judge. No reason is assigned for the omission to make this application at an earlier stage in the cause. One reason given for the application at this time, is that she is under a charter and loaded and ready for sea. This charter and loading of the vessel has been before alluded to in disposing of the cause upon the merits, and it is sufficient to say here, that the embarrassment growing out of the charter and loading of this vessel was caused by the libellants themselves, when they assumed to charter and load a vessel while in custody of the law, and can not be considered as one of the ordinary incidents attending a possessory action. Under the circumstances, the position of the vessel, arising from her charter, does not appeal very strongly to the consideration of the court. Furthermore an order to release a vessel on bail, is an interlocutory order made pending the determination of the court upon the issues raised, to avoid the expense and loss incident to delay in the determination of those issues. When therefore the court has made its decree, the reason for making such an order no longer exists, and it is not seen what form of security could well be taken from the libellants here, in an action like the present, after an absolute decree made in their favor, which it is the duty of the court to see duly executed. The delay sought to be protected against, is not delay in this court, but in the appellate court.

I do not say that a state of facts might not be presented, which would make it incumbent upon this court, to direct the release of a vessel, held in a possessory action, even after final decree in the cause, and before an appeal; but in the present case, the delay sought to be protected against, is not delay in this court, but anticipated delay in the appellate court; for notice of appeal has been filed, and the appeal can be perfected without delay, and the application can at once be made to the appellate court. The order which I propose to make, will enable relief to be obtained more speedily by an application to that court than by the present motion here, and, therefore, I do not consider the interposition of this court, in the manner proposed, to be necessary. An order can be made to prevent further delay in this court, and insure the transmission of the cause to the appellate court without further delay, by shortening the time usually allowed for perfecting the appeal. It is accordingly directed that the decree of this court be executed, unless the defendant perfect his appeal, and procure the cause to be transmitted to the circuit court, within two days from the making of this order.

Case No. 9,902.

MUIR v. GEIGER.

[1 Cranch, C. C. 323.] [1]

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

PAYMENT—RECEIPT OF BOND OF THIRD PERSON.

A receipt of a bond of a third person "in part pay" of a precedent debt is conclusive evidence of payment to that extent, although the obligor was insolvent at the time of the receipt given.

Indebitatus assumpsit, for a desk and bookcase sold and delivered. The defendant produced a receipt from the plaintiff, for a bond of one Allison, for £16. 14s. 10½d., "in part pay on a desk and bookcase."

The COURT (DUCKETT, Circuit Judge, absent,) said it was conclusive evidence that the bond was received in part payment, although the bond might have been unproductive, and Allison insolvent at the time.

Case No. 9,903.

MUIR v. JENKINS.

[2 Cranch, C. C. 18.] [1]

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

NOTES—NEGOTIABILITY—ACTION BY HOLDER.

The indorsee of a promissory note, not payable to order, but expressed to be "negotiable at the Bank of Discount and Deposit," may maintain an action upon it in his own name, against the maker.

[Cited in Bank of Sherman v. Apperson, 4 Fed. 29.]

Jenkins made a note for $250, payable to Stebbins, without the words "or order," but made "negotiable at the Bank of Discount and Deposit." Stebbins indorsed it to the plaintiff. There was a verdict for the plaintiff, and a motion in arrest of judgment, by Caldwell & Porter, the defendant's counsel.

Mr. Jones, for plaintiff, contended that a promissory note, without the words "or order," is a note within the statute of Anne, so as to enable the payee to maintain an action thereon under the statute. That if it is a note within the statute for one purpose, it is so for all other purposes; and that therefore an indorsee of a note, not payable to order, may maintain an action in his own name under the statute. Nicholson v. Sedgwick, 1 Ld. Raym. 180; Burchell v. Slocock, 2 Ld. Raym. 1545; Smith v. Kendall, 6 Term R. 123; Chit. Bills, 48, 108; Gibson v. Minet, 1 H. Bl. 569, 3 Term. R. 481; Tatlock v. Harris, 3 Term R. 174.

Caldwell & Porter, for defendant, cited Carlos v. Fancourt, 5 Term R. 482; Hodges v. Steward, 1 Salk. 125; Hill v. Lewis, Id. 133; Nicholson v. Sedgwick, 1 Ld. Raym. 180; Chit. Bills, 48; Imp. Mod. Pleader, 390; and contended that the words "negotiable at the Bank of Discount and Deposit at Washington," only confine the negotiability of the

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

note to that place, or make it payable out of a particular fund; that promissory notes are put upon the same footing as inland bills; and that an inland bill, not payable to order, is not negotiable. They cited also, Smith v. Kendall, 6 Term R. 123; Banbury v. Lisset, 2 Strange, 1211; Chamberlyn v. Delarive, 2 Wils. 353; Dawkes v. De Lorane, 3 Wils. 207; Chit. Bills, 174; Evans, Bills, 139; Kyd, 34, 35, 63, 96, 97; Esp. 26.

Mr. Morsell, for plaintiff, in reply, cited Roberts v. Peake, 1 Burrows, 323, where the note was not payable to order, and was only payable upon an uncertain contingency; and the court decided that it was not a negotiable note, because the contingency was uncertain, without noticing the objection that it was not payable to order.

The COURT (CRANCH, Chief Judge, contrà) overruled the motion in arrest, and rendered judgment for the plaintiff, on the ground that it was the intention of the defendant to make a negotiable instrument.

Case No. 9,904.

MUIRHEAD v. ALDRIDGE et al.

[14 N. B. R. 249; 2 N. Y. Wkly. Dig. 480; 33 Leg. Int. 213.] [1]

Circuit Court, D. New Jersey. March 28, 1876.[2]

HUSBAND AND WIFE—WIFE'S PROPERTY—ACCUMULATED BY HUSBAND—BANKRUPTCY.

Where the husband receives money from his wife, and engages in transactions in real estate, in her name, until he accumulates property of considerable value by his skill and energy, the property is liable to his assignee.

Appeal from the decree of the district court.

[This was a proceeding by William Muirhead, assignee in bankruptcy of Thomas Aldridge, against Thomas Aldridge and others to obtain a conveyance of certain property alleged to belong to the bankrupt.]

McKENNAN, Circuit Judge. The main purpose of the complainant's bill is to obtain a conveyance to him, as the assignee in bankruptcy of Thomas Aldridge, of certain real estate, described in the bill, the title to which is apparently in Mrs. Aldridge, but is claimed to be meritoriously in her husband. This real estate was acquired and conveyed to Mrs. Aldridge during her coverture, and so is alleged to be her separate property. By the laws of the state of New Jersey (see Dixon's Dig. 547), every married woman is invested with the capacity "to receive, by gift, grant, devise, or bequest, and to hold to her sole and separate use, as if she were a single female, real and personal property," independently of the control or disposal of her husband, and without liability for his debts. According to the obvious import of the statute, the courts of the state, in numerous decisions, have construed it to authorize the acquisition by a married woman of personal property and real estate, and to intercept the common-law right of her husband to reduce her personal property to possession, and to appropriate the rents, issues, and profits of her real estate as an incident of his initiate estate by the courtesy. And it has also been held that where a deed is made to a married woman she is, prima facie, to be taken as having paid the consideration stated in it out of her separate property, thus assimilating her as to this, to every other grantee, and placing her in a more advantageous position than is assigned to her by the courts of other states, in which similar laws exist. But as a mere presumption, the primary effect of which is to impose the burden of proof upon the party who gainsays it, it will not outweigh satisfactory evidence that her separate means were entirely insufficient, or even grossly inadequate, to pay the consideration of the conveyance. When, therefore, the title to real estate is conveyed to a married woman, she must be considered the bona fide owner of it, as if she were a single female. But it must be intrenched in the real good faith by which an honest acquisition is distinguished. If it is purchased by her or for her, no matter by whom, its validity cannot and ought not to be questioned. But if she has no separate estate, or that is disproportionately small, compared with the consideration ostensibly furnished by her, and her means are materially supplemented by her husband's contribution from resources, whether money or its equivalent, which he could not rightfully so apply, such a transaction does not specially invite, as it certainly does not deserve, any legal sanction.

These general principles seem to me to be the clear result of all the cases discussed on both sides in the argument, and the decision of the cause to depend, therefore, upon the solution of the question, whether the several parcels of real estate described in the bill were acquired by Mrs. Aldridge, by the appropriation of her own separate means to their purchase, or whether her husband ought to be regarded as their real owner, by reason of his having contributed the chief part of the consideration paid for them. It would involve unnecessary elaboration to discuss in detail the evidence in the record touching this inquiry. It is sufficient to say that, after a careful collation and consideration of it, I am convinced that the prayer of the bill ought to be allowed. During nine years, from 1861 to 1870, twenty-one pieces of real estate, of various kinds, were purchased for and conveyed to Mrs. Aldridge, for the aggregate consideration of about thirty-three thousand dollars. Of these properties, portions were sold and exchanged, and buildings were erected on some of them; and there remains, as the net result of these operations, property nearly equal to twenty thousand dollars in value, nominally belonging to her. Now, what was the extent of

[1] [Reprinted from 14 N. B. R. 249, by permission. 2 N. Y. Wkly. Dig. 480, contains only a partial report.]

[2] [Reversed in 101 U. S. 397.]

her agency in producing this result? A contribution to the purchase money in all of about three thousand dollars, probably considerably less than that. Whatever additional contribution was required was either supplied by her husband or was obtained upon the credit of the property purchased, by mortgages executed by both of them, and by re-sales at advanced prices. Nor was the money employed the most fruitful source of the accumulating profits accruing from these investments. They were obviously much more largely due to the skill and sagacity with which the selection of properties was made; with which negotiations in reference to them were conducted; with which contracts of purchase and modes of payment were arranged; with which resales and exchanges were affected; and with which improvements were devised and made, and to the discreet judgment and vigilance exercised generally in the management of these transactions. This efficiency was certainly not supplied by the wife. She was informed by her husband of the plans which he had conceived, and was consulted by him; but the degree of control and supervision over their execution, which she exercised was only such, in her own words, "as it was necessary and proper for a lady to do." Her husband devised and executed them, and it was almost wholly by reason of his skill, experience, judgment, diligence, and services, that they bore such fruit; and this remarkable consequence followed, that while the services of the husband were the chief agency in creating the wealth of the wife, and its proportions were steadily expanded under his vigilant and skillful manipulation, his debts were uncared for, and the earnings, to which his creditors had a just right, were diverted to swell the nominal acquisitions of his wife. And when he filed his petition in 1873, for the benefit of the bankrupt law [of 1867 (14 Stat. 517)], his schedule was barren of any available assets. Laws for the protection of married women were not enacted to sanctify such results. If they can be so perverted they are instrumentalities of great injustice. They were never meant to afford any shelter for the misappropriated resources of a husband who is forgetful of his just obligations to others. They have a more benignant aim and operation. They were intended to provide a shield against the rapacity or improvidence of the husband, and against liability for debts not her own, and in which she ought not to be implicated.

A debtor cannot be compelled to labor for his creditors, but he cannot divert the product of it to his own substantial benefit, by putting it into the form of property only nominally acquired by his wife. As was said, with characteristic emphasis and force, by Mr. Chief Justice Black, in Keeney v. Good, 21 Pa. St. 349, 354: "But after supporting his family he must give the best exertions of his mind and body to his creditors. This is but his reasonable duty—a duty sanctioned by all laws, moral, civil, and divine. No effectual mode of evading it has yet been invented. The usual device of covering the property of the debtor, under the name of some friend or a member of his family, will only answer the purpose as long as it remains undiscovered. I need not say how deeply such shams are branded by the law with marks of its detestation." Nor will the nominal agency of the husband for the wife be any more effectual. Doubtless he may act for her in that capacity, in reference to her separate property, without thereby acquiring any interest in it or subjecting it to liability for his debts. But where it is employed as a device to cover his acquisitions under the name of his wife, it will prove unavailing. Again using the language of Chief Justice Black: "An arrangement to buy property on her credit, and have it managed and paid for by him, as her agent, is too unsubstantial and too easily shammed to be at all satisfactory. All these things can be done by mere words, and words are but breath."

The proofs in the cause convince one that the real estate claimed by the complainant is really the property of the respondent, Thomas Aldridge; that the title to it was vested in his wife, in fraud of his creditors, and that a decree ought to be entered for its conveyance by the respondents, according to the prayer of the bill. Let a decree to that effect be prepared.

[On an appeal, the cause was taken to the supreme court, where the decree of this court was reversed, and the cause remanded, with instructions to dismiss the bill with costs. 101 U. S. 397.]

Case No. 9,905.

In re MULDAUR et al.

[8 Ben. 65.] [1]

District Court, S. D. New York. April, 1875.

BANKRUPTCY — ASSIGNEE'S COMPENSATION — ATTORNEY.

1. An assignee in bankruptcy cannot be allowed anything, in addition to disbursements and the commissions provided for in section 5100 of the Revised Statutes of the United States, except for the services and at the rates set forth in general order, No. 30, adopted April 12, 1875.

2. Nothing can be allowed him as "a reasonable compensation for his services" under section 5099.

3. The fact that the assignee is an attorney at law makes no difference.

[In the matter of Emile H. Muldaur, William S. Hall, and Edward A. Coburn, bankrupts.]

In this case the register certified that the assignee, who was an attorney at law, had presented a claim against the estate and asked to be allowed to retain out of moneys in his hands, as a reasonable compensation for his services, under section 5,099 of the Revised Statutes of the United States, the sum

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

of $1,485 in addition to the percentage and disbursements allowed by law.

BLATCHFORD, District Judge. These bills are part of the accounts of the assignee. Under section 4998, subdivision 8, they are to be audited and passed by the register, in the first instance. Under the new general order No. 30, the assignee cannot be allowed anything, in addition to disbursements and the commissions provided for in section 5100, except for the services and at the rates set forth in such general order. Nothing can be allowed to him as "a reasonable compensation for his services," under section 5099. The discretion of the court to make such allowance is taken away by such general order. The fact that the assignee is an attorney at law makes no difference. Fees cannot be allowed to an attorney at law, under said general order, except where he is "necessarily employed by the assignee." Where the assignee is himself an attorney at law, he does not, as assignee, employ himself as an attorney at law. If he is a merchant, or banker, or engaged in any other occupation, or happens to be especially versed in any branch of business, his gifts or qualifications are incident to his personality, and he brings them all to the discharge of his duties as assignee. So, also, if he is an attorney at law. Moreover, where the assignee is an attorney at law, it is not, as a general thing, necessary for him to employ an attorney at law. These principles must be observed in auditing these accounts.

[This case was subsequently heard upon the matter of the claim of Charles S. Baum, expunged by the register. Case No. 9,906.]

Case No. 9,906.

In re MULDAUR et al.

[8 Ben. 127.] [1]

District Court, S. D. New York. June, 1875.

BANKRUPTCY—POWER OF REGISTER—EXPUNGING CLAIM—PRACTICE.

Under general order in bankruptcy No. 34, a register has no power to expunge or diminish the claim of a creditor, if the creditor objects, but must require the parties to form an issue, to be certified to the court for determination.

[This case was previously heard upon the application of the assignee to be allowed additional fees. Case No. 9,905.]

In this matter [of Emile H. Muldaur and others,] the register certified to the court that the assignee had presented to him a petition for the re-examination of the claim filed against the estate by Charles S. Baum; that he made an order for such re-examination, on which the creditor appeared, and evidence was taken on behalf of the assignee and of the creditor, which was submitted to the register for decision, and he thereupon, on the 15th of February, 1875, made an order expunging the claim; that, thereafter, counsel for the assignee applied to him, on notice to the creditor, to take further action in the premises, which the register, considering the order of February 15th as valid, declined to take; and that, on request of said counsel, he certified the matter to the court.

BLATCHFORD, District Judge. I understand general order No. 34 to mean, that, if the creditor objects to having his claim expunged or diminished, the register cannot order it to be expunged or diminished, but must require the parties to form an issue, to be certified to the court for determination. If, therefore, the attorney for Baum, prior to the making of the order of February 15th, 1875, by the register, and after the testimony taken before the register was closed, took the ground, before the register, that the evidence taken did not justify the expunging or diminishing of the claim, the order of February 15th ought now to be vacated, and the proceedings ought to be resumed at the stage at which they were before such order was made.

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

Case No. 9,907.

MULFORD et al. v. PEARCE et al.

[13 Blatchf. 173; 2 Ban. & A. 190; 9 O. G. 204.] [1]

Circuit Court, S. D. New York. Nov. 3, 1875.[2]

PATENTS—CHAIN FOR NECKLACES—MATERIAL—GOLD TUBING.

1. The claims of the letters patent granted to Lewis J. Mulford and others, February 24th, 1874, for an "improvement in chains and chain links for necklaces, &c.," namely, "(1.) An ornamental chain for necklaces, &c., formed of alternate closed links A, and open spiral links B, substantially as shown and described; (2.) The open spiral links B, formed of coils of tubing, substantially as shown and described," cover new and patentable inventions.

2. The distinctive feature of the invention consists in constructing the open spiral link of annealed gold tubing, such link possessing a peculiar elasticity, and being easily separated and united to another link without any injury to itself or to the solid link into which it is sprung, and constantly preserving its elasticity and shape.

3. The first claim is not a claim for an ornamental chain composed of alternate closed links and open spiral links, without reference to the material of which the spiral link is made, but it is a claim for a chain composed of alternate closed links and open spiral links formed of one or more coils of gold tubing, as shown and described.

4. The process of making gold tubing was well known to manufacturing jewellers, and, therefore, it was not necessary to describe in the specification how it has to be made.

[Suit by Lewis J. Mulford and others against Thomas D. Pearce and others for the infringement of reissued letters patent

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 2 Ban. & A. 190; and here republished by permission.]

[2] [Reversed in 102 U. S. 112.]

No. 5,774, granted to S. Cottle Feb. 24, 1874, the original letters patent No. 147,045 having been granted Feb. 3, 1874.]

Benjamin F. Lee and Alwyn A. Alvord, for plaintiffs.

Joseph C. Fraley and Henry Baldwin, Jr., for defendants.

SHIPMAN, District Judge. This is a bill in equity, alleging an infringement by the defendants of reissued letters patent which were issued to the complainants on February 24th, 1874, for an "improvement in chains and chain links for necklaces, &c.," and praying for an injunction and an account. The defendants, admitting in their answer the manufacture and sale of the patented article, deny the novelty or patentability of the alleged invention, and further insist that the patent is invalid by reason of the vagueness of the specification. The specification states, that the "invention has for its object to furnish an improved chain for necklaces, &c., having links of peculiar construction, which enable all the links to be finished separate, and then put together to form the chain. The invention consists in an ornamental chain, whereof the links are connected together by open spiral links B, finished before being connected together, the connection being made by springing the finished links into each other in the manner described. A and B represent the links of the chain. The links A are round and closed, and are made and polished or colored separately from the other links. The links B, which constitute the peculiar feature of my invention, are formed of one or more coils of tubing of the proper length, so as to form a double spring link. Into each end of the tube forming the link B is soldered a small shot, as shown in the drawing, which shot gives a finish to the link. The links B may then be colored or polished, and the chain is formed by springing the links into each other. * * * * By this construction, the links may be made and finished in quantities, and the chain formed from the finished links by springing them into each other, to produce any desired combinations of the links of the same or different kinds. Finishing the separate links in this way enables them to be more perfectly polished or colored, and with a greatly diminished expenditure of labor and time, and enables the links to be put together without injuring them in the least, however highly they may be polished or colored." The claims of the inventor are: "(1.) An ornamental chain for necklaces, &c., formed of alternate closed links A and open spiral links B, substantially as shown and described; (2.) The open spiral links B, formed of coils of tubing, substantially as shown and described."

Ornamental gold chains, formed of alternate closed links and spiral links, or of spiral links alone, have long been known. Chains composed of split rings which are "sprung" into each other, or into a solid link, are familiar articles, and there can be no novelty in the mere shape or form of the chain, or of the link which is shown in the drawings of the patent. The distinctive feature of the invention does not consist in the fact that the link is spiral, but does consist in the construction of the open spiral link from a specified material, viz., gold tubing. The article which is called tubing, in the jeweller's art, is made by drawing a strip of gold through a draw-plate, the gold strip having been placed around a copper wire in such a manner as to encase the wire. The copper wire, with the strip of gold around it, is then wound upon a mandrel and cut into proper lengths. The copper is destroyed by acid, leaving a hollow spiral link, which is bound with wire and annealed. The wire is then unfastened, and the link which is thus made possesses a peculiar elasticity not affected by the annealing, is easily separated and united to another link without any injury to itself or to the solid link into which it is sprung, and constantly preserves its elasticity and shape.

The discovery which led to the invention consisted in the discovery of the fact that links made of tubing possessed a peculiar elasticity which was unaffected by annealing. The invention was the application of this discovery to the production of a new and useful result, namely, the manufacture from tubing of ornamental chains which possess the following elements of novelty and utility: First. All the links can be completely finished and then put together without injury to the chain, and thereby the article can be produced at a much less expense than had previously been necessary. Gold chains which are constructed in any other manner must be finished or polished or colored after the chain is completely formed, which is a difficult and somewhat expensive part of the manufacture, while, inasmuch as their links are sufficiently elastic to be united together or sprung upon a solid link without injury to any part of the chain, the separate links can be made in quantities, and completely finished and polished before being united. Second. The elasticity of the spiral links is such that the chain can easily be separated by the fingers of the owner, and united in different forms and for different purposes, and reunited in the original chain, without detriment to the polish of the links, and with no loss of their elasticity. As has already been suggested, these features of novelty and utility do not result from the fact that the chain is made in part from a spiral link, but from the fact that the spiral link is manufactured from a material which possesses a peculiar quality of permanent elasticity. The invention consists in the fact, that whether the inventor was or was not the first person to discover the peculiarity, he first utilized the discovery, and applied the

peculiar property of the material to a useful result in the manufacture of chains.

It being self-evident that chains composed of spiral links have been well known, it was insisted by the defendants that the chains heretofore in use possessed substantially the same qualities which are attributed to the patented article, and that the patented article has no advantage over the chains which were introduced as exhibits, and which were made of gold split rings, or split links, in various forms. But, it was satisfactorily proved, that the split rings which are manufactured from solid gold wire compressed in dies, and made elastic by hammering, are not sufficiently elastic to permit the chain to be joined without injury to the material into which the split link is sprung, and this injury renders necessary a repolishing or finishing of the completed article. Again, if the chain of split gold links is taken apart, the act of separation causes the coil to spring asunder, so that it loses its shape and its beauty, and, if a necessity of annealing arises, the process of annealing destroys its elasticity. The difference between the patented article and a chain made of split gold rings is clearly marked. It is a difference in kind and not merely in degree.

Testimony was also offered by the defendants to prove that chains of spiral links, made of tubing, had been in use prior to the date of the invention, but the evidence failed to satisfy me that chains of open and unsoldered spiral links, made of tubing, had been manufactured prior to the date of the patent. Links had been made of tubing, which, after being united in a chain, were soldered together, and thus a chain was made which could not be taken apart, and which required finishing and polishing after it was soldered together. The testimony did not show that the plaintiffs' invention of the open spiral link from tubing had been practically anticipated by others.

A large serpentine bracelet, made of a coil of gold tubing, to be worn upon the forearm, and to be kept in its place by pressure, was also introduced as an anticipating device. It manifestly is a very different article from a chain, and the fact that gold tubing was known and used in the manufacture of jewelry was conceded by the plaintiffs.

It was also suggested by the defendants, that the specification does not describe the process of manufacture of the spiral link with the exactness which is requisite. The manner in which gold tubing is manufactured is well known to all persons skilled in the art. After having been compressed around copper wire, it wound upon a mandrel, the wire is then removed by acid, and the coil of tubing, having been secured with wire, is annealed into the proper shape. This process is thoroughly understood by the manufacturing jeweller. It would have been a waste of words to explain the method of manufacture to a class of persons who are sufficiently informed, when they are told that the link is "formed of one or more coils of tubing of the proper length, so as to form a double spring link."

The first claim is not a claim for an ornamental chain composed of alternate closed links and open spiral links, without reference to the material of which the spiral link is made, but it is a claim for a chain composed of alternate closed links and open spiral links formed of one or more coils of gold tubing, as shown and described. The finish which is given to the chain by the shot at the end of the open link is not a material part of the invention.

There should be a decree for an injunction, and a reference to a master to take and state the account.

[NOTE. This case was subsequently heard upon exceptions to the master's report. The report was confirmed. Case No. 9,908. From the final decree entered an appeal was taken to the supreme court, where the patent was held void. 102 U. S. 112.]

Case No. 9,908.

MULFORD et al. v. PEARCE et al.

[14 Blatchf. 141; 2 Ban. & A. 542; 11 O. G. 741.] [1]

Circuit Court, S. D. New York. Feb. 21, 1877.[2]

PATENTS — ORNAMENTAL CHAIN — INFRINGEMENT — LIMIT OF DAMAGE.

In the case of a patent for an ornamental chain, as a new article of manufacture, where there is a difference in kind between the patented chain and prior chains, and where what was open to the public could not make a chain like the patented article in its peculiar characteristics, the patentee is not, in ascertaining the damages sustained by him by the infringement of his patent, limited to the advantage derived by the defendant from using the peculiar features of the patented chain over what advantage he would have had from using what was so open to the public.

[This was a bill in equity by Lewis J. Mulford and others against Thomas D. Pearce and others for the infringement of reissued letters patent No. 5,774, granted to C. Cottle, Feb. 24, 1874, the original letters patent, No. 147,045, having been granted Feb. 3, 1874. There was a decree for an injunction, and a reference to a master to state the amount. Case No. 9,907. The case is now heard on exceptions to the master's report.]

[The patent had two claims: (1) An ornamental chain for necklaces, &c., formed of alternate closed links A and open spiral links B, substantially as shown and described. (2) The open spiral link B, formed of coils of tubing, substantially as shown and described. Upon the accounting it appeared that the defendant had made certain chains constructed precisely as described in the first claim of the patent, and certain other chains com-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 542; and here republished by permission.]

[2] [Reversed in 102 U. S. 112.]

posed entirely of the open spiral link claimed in the second claim of the patent. Upon these chains the master awarded as damages the entire profits which the complainants would have made on the sale of the entire chains, deducting, of course, the cost of manufacturing, selling, &c. The defendants made certain other chains, in which open spiral links were used to connect a series of several closed links joined together in the usual manner. Upon these chains the master awarded as damages the profits which the complainants would have made on the spiral links alone in said chains.][3]

Benjamin F. Lee, for plaintiffs.
Henry Baldwin, Jr., for defendants.

SHIPMAN, District Judge. The defendants except to the master's report in regard to the amount of damages found to have been sustained by the plaintiffs, by reason of the infringement of their patent. The principal exception is stated in two forms—that, inasmuch as the defendants had a right to make chains of alternate links, and to use tubing for one link, provided it was soldered so as to make that link closed, the question to be determined by the master was, 1st, What advantage was derived by the defendants from using the open links over what they would have had in using closed links made of tubing? Or, 2d, What advantage have the defendants gained, by reason of having used open spiral links of gold tubing, over what would have enured from the use of open spiral links of solid wire?

The patented article was a new ornamental chain or necklace, a new article of manufacture, and the first claim has been held by this court to be a claim for a chain composed of alternate closed links and open spiral links formed of one or more coils of gold tubing. Mulford v. Pearce [Case No. 9,907]. The distinctive feature of the invention, it was held, did not consist in the fact that the link was spiral, but did consist in the construction of the open spiral link from a specified material, viz., gold tubing. The two elements of utility and novelty which the new article possesses are described in the opinion, in which it was shown that these elements did not exist either in a soldered chain of tubing, which could not be taken apart, and which required finishing and polishing after it was put together, or in a chain made of split gold rings of solid wire. It was said that the difference between the latter article and the patented chain was clearly marked and was a difference in kind. The patented and the unpatented articles are entirely distinct from each other. By the use of closed or soldered links of tubing, or links of solid wire, the manufacturer cannot obtain the result which is found in the patented invention, and, therefore, the principle which was decided in Mowry v. Whitney, 14 Wall. [81 U. S.] 620, and which is invoked by the defendants, is not applicable. That was a case of a new process of manufacture, and the court say that the proper inquiry was, what was the advantage in bringing the article by the patented process to a state of perfection, over bringing it to the same state by other processes open to the public, and which would be equally beneficial. In this case, the links of a chain which are open to the public, cannot, from their nature, make a chain which is like the patented article in its peculiar characteristics. The master might as well undertake to estimate the advantage which the patented article possesses over any other gold chains, as over those which the defendants have selected.

The master seems to me to have observed, in this case, the rules which have heretofore been sanctioned by the circuit and supreme courts. The cases of Buck v. Hermance [Case No. 2,082]; Pitts v. Hall [Id. 11,192]; Cowing v. Rumsey [Id. 3,296]; Livingston v. Jones [Id. 8,414]; Seymour v. McCormick, 16 How. [57 U. S.] 480, are in point.

In regard to the motion for treble damages, I do not perceive any adequate reason which calls upon the court to exercise its discretionary power to increase the actual damages.

The master's report is confirmed, and the exceptions are disallowed. The motion to increase the damages is denied.

[For another case involving this patent, see note to Mulford v. Pearce, Case No. 9,907.]

[The final decree entered in this case was reversed upon appeal by the defendants to the supreme court, when the patent was held void. 102 U. S. 112.]

[3] [From 11 O. G. 741.]

Case No. 9,909.

The MULGRAVE.

[See Case No. 9,910.]

Case No. 9,910.

The MULHOUSE.

[22 Law Rep. 276; 42 Hunt, Mer. Mag. 191.] [1]

District Court, S. D. Florida. 1859.

SALVAGE — APPORTIONMENT BETWEEN CARGO, FREIGHT, AND VESSEL—DESTRUCTION OF VESSEL—CARE OF PROPERTY SAVED—EMBEZZLEMENT — NEGLIGENCE — INNOCENT OWNER OF SALVOR VESSEL—SAVING LIFE.

1. Where a ship and cargo, accidentally stranded, are saved by lightening the ship, by carrying out anchors, or by other common or continuous labor or service, carried on with a view to the saving of both ship and cargo, the salvage expenses are properly to be apportioned upon the ship, freight, and cargo, in proportion to their respective values, as in a case of general average.

2. But where the ship is lost, and the voyage broken up, no such rule obtains; but each article of the cargo is charged with its own particular expenses of saving. The interests of the parties are sundered by the destruction of the ship, and the maxim "Sauve qui peut" applies.

[1] [42 Hunt. Mer. Mag. 191, contains only a partial report.]

3. By the maritime law, salvors are bound to exercise the same degree of diligence in keeping the property in their custody, that a prudent man ordinarily exercises in keeping his own property.

4. Embezzlement, or a fraudulent concealment, of any of the goods saved, works a forfeiture of the salvage of the guilty party.

5. Slight negligence in taking care of the property saved, diminishes the amount of salvage; gross negligence works a total denial or forfeiture of salvage, in the same manner as embezzlement.

6. Salvors are bound to use every reasonable degree of diligence to prevent plunderage by others.

7. The owner of a salvor vessel, himself being innocent, is entitled to compensation for the use of his vessel where a valuable salvage-service has been rendered, notwithstanding the negligence or misconduct of the crew.

8. The master and crew of a transient or trading vessel, which in the course of her voyage accidentally falls in with a vessel in distress or abandoned, and renders salvage-services, are not, while performing such services, acting within, but beyond, the scope of their employment, as the agents or servants of the owner. Consequently, he is not liable for loss or damage caused by their misfeasance or nonfeasance while thus employed.

9. But the master and crew of a vessel employed in the business of performing salvage services, as that business is conducted on the southern coast of Florida, are to be considered as the agents and servants of the owner, while engaged in such business. He is consequently, liable for loss or damage caused by their torts, frauds, collusions, negligences or ignorance in saving, preserving, or accounting for the property, or in any other matter within the scope of their employment.

10. Salvage for saving life, unconnected with the saving of property, is not allowed, except for saving the life of a slave.

11. If life is saved in connection with property, it is proper for the court, reasonably to enhance the salvage on that account.

12. If, in a case of shipwreck, one set of salvors saves life, but no property, and another saves property, each should be compensated out of the property saved, according to the merit of its services.

13. The sum allowed for saving life is in the nature of a general salvage charge upon all the property saved.

14. There is no implied obligation on the part of the owner of a transient or trading vessel, which in the course of her voyage, accidentally falls in with a vessel in distress or abandoned, and renders salvage assistance, that his vessel is seaworthy, or fit for that service. He is therefore entitled to salvage for the service rendered, notwithstanding the unseaworthiness of his vessel, and, is not liable for loss or damage caused by such unseaworthiness, there being no fraudulent misrepresentation, or concealment, on his part, as to its condition.

15. But there is an implied undertaking on the part of the owner of a vessel employed on the coast of Florida, in the business of saving shipwrecked property, that his vessel is seaworthy, and fit for the business she is engaged in. He is therefore liable for loss or damage caused by the leaky condition of his vessel; and is also liable to have his salvage diminished or forfeited, on account of his neglect to keep his vessel in good condition.

16. Salvage claimed for saving passengers, and refused to the owner of the wrecking vessel, on account of its leaky condition. Refused to the crew, on account of their being in such a state of intoxication as to be unfit for service, at a time when their services were needed. Fifty dollars allowed to the master, and twenty to the cook, of a wrecking vessel for saving the lives of twenty-six passengers.

17. The officers and crews of public vessels are entitled to salvage for their personal services, in the same manner as other persons. But as they risk no property, and their time is paid for by the public, they ought to be satisfied with a less rate of compensation than would be allowed to other persons for like services.

18. One hundred dollars allowed for saving the crew of the ship.

19. In a case of shipwreck and total loss of the ship, the court allowed salvage as follows: 5 per cent. for saving specie. 25 per cent. for saving dry dock cotton. 45 per cent. for saving cotton submerged under water, between decks; and 55 per cent. for saving cotton out of the lower hold, by diving in from eight to sixteen feet of water. Shares forfeited for negligence.

[Cited in Pent v. The Ocean Belle, Case No. 10,961.]

This suit was instituted by several distinct sets of salvors, numbering in all some one hundred and fifty or more persons, to recover salvage for their services in saving a considerable portion of the cargo and materials of the ship Mulhouse, Wilner, master, of and from New Orleans, and bound to Havre in France. The ship sailed from New Orleans laden with 2689 bales of cotton, and $25,500 in silver coin, and on the 26th day of March last stranded upon that part of the Florida reef known as the "Quick Sands," an exposed reef situated out of sight of land, and about thirty miles to the westward of this port. Before assistance could be obtained, the ship bilged, filled with water, and, a day or two after, drove into deeper water, heeled over and sunk so low in the water as to submerge her upper hatches, leaving her upper rail and bulwark, as she lay careened, out of water; all the rest of the ship was under water. The libellants and petitioners saved from the wreck,—the crew, twenty-six passengers, the money, and 2,102 bales of cotton. The more particular facts of the case are sufficiently stated in the opinion of the court, which we are obliged somewhat to condense.

Winer Bethel, for libellants.

J. L. Tatum and W. C. Maloney, for certain petitioners.

S. J. Douglas, for claimant and respondent.

MARVIN, District Judge. Where a ship and cargo, accidentally stranded, are saved by lightening the ship by carrying out anchors, or by other common or continuous labor or service, carried on with a view to the saving of both ship and cargo, the salvage expenses are properly to be apportioned upon the ship, freight and cargo, in proportion to their respective values, as in a case of general average. Moran v. Jones, 7 El. & Bl. 523; Bedford Ins. Co. v. Parker, 2 Pick. 1; 11 Pick. 90; Beran v. Bank of U. S., 4

Whart. 301; The Emma, 2 W. Rob. Adm. 315; Nelson v. Belmont, 5 Duer, 310. In this class of cases, each article of the cargo—whether it be of great value and little bulk, and so easily saved, as money or jewelry, or of great bulk and little value, as coal or lumber, and so saved with difficulty—is charged with the same rate of salvage as the ship or freight, or any other article of the cargo. Beran v. Bank of U. S., 4 Whart. 301; Abb. Shipp. pt. 4, c. 10, § 12 et seq. For the interests of all the parties being connected in a common enterprise, and in the service being a common or continuous service carried on for the common benefit, the law considers that the parties are benefited by the service in equal proportions, and that, therefore, they ought to be charged with equal proportions of the expense,—"Qui sentit commodum sentire debit et onus." But where, as in the present case, the ship is lost, and the voyage broken up, no such rule obtains, but each article of the cargo or invoice is to be charged with its own particular expenses of saving. The interests of the parties are sundered by the destruction of the ship, and the maxim "Sauve qui peut,"—"Save who can,"—applies. It is like the case of a fire, on land, where each person saves his own goods at his own proper charge, and without any connection with his neighbor. The Samuel, 15 Jur. 407; s. c., 4 Eng. Law & Eq. 581; Bridge v. Niagara Ins. Co., 1 Hall, 468; Emerigon, tom. 1, p. 612; Perkins' Abb. Shipp, pt. 4, c. 10, § 4, in notis; Marv. Wr. & Salv. §§ 164–167. In the present case, the ship being a general ship and accidentally lost, and the voyage broken up, it becomes the duty of the court to discriminate between the different articles saved, and to shape its decree in such a manner that each article shall be charged with its own separate salvage, determined in amount according to the labor expended and risk encountered in saving it, notwithstanding the fact that the master, as the common agent of all the shippers, claims the whole cargo by a single conjoint claim.

The sloop Beckwith, Parke, master, was one of the first vessels at the wreck. When the sloop arrived, there were six or seven feet of water in the ship's hold. More men and vessels were deemed necessary to save the ship and cargo. Captain Wilner, accordingly, determined to load the sloop, and proceed without delay to Key West for further assistance. He put on board the sloop sixty-seven bales of cotton, and five kegs, containing $25,500 in silver coin, and proceeded in the sloop to this port. Arrived at anchor in the harbor, at about ten o'clock at night, his business required him to go on shore and the master of the sloop and two of her crew took him in their boat and landed him. The master of the sloop went to his house, and remained there all night. The two men got intoxicated, and remained on shore several hours—precisely how long does not appear. Two men were left on board the sloop. Whether they continued awake or went to sleep does not appear. Between two and three o'clock in the night, some men from the shore went on board the sloop and stole one of the kegs containing $5,000. Before, however, they had succeeded in getting it on shore, Baker, Roberts, and Preston, three fishermen, who had risen early in the morning, in order to market their fish, missed their boat; and, while looking for it, they discovered a boat coming towards the shore, with three men in it. They hailed the men, and challenged the boat as theirs. They soon heard a plunge in the water, near where the boat then was, and thought one of the men had fallen overboard. The three men, however, landed on the wharf, and disappeared, without being recognized, in the dim starlight. About seven or eight o'clock in the morning, the fishermen, hearing of the loss of the money, suspected that the men who had taken their boat so unceremoniously, had taken the money also; and they thought it likely that the money might be found at the place whence proceeded the sound of the plunge. Acting on this idea, they soon realized the truth of their conjectures, and found the money sunk in seven or eight feet of water. They restored it to the captain of the ship. They claim compensation in the nature of salvage for this service.

Now, it is very plain, upon the foregoing statement of facts, that Parke, master and part-owner of the sloop, both as master and part-owner; Rand, mate; Noyes and Robinson, seamen; composing the whole crew who came up in the sloop from the wreck, and upon whom the duty of watching and taking care of the goods committed to their keeping was devolved, have forfeited their shares of the salvage, both upon the money and upon the cotton, on account of their neglect to take proper care of the money. Their duty was obvious. They were each and every of them, bound to take the same kind of care, and exercise the same degree of diligence in keeping the property placed in their custody, that a prudent man ordinarily takes and exercises in keeping his own property. Tested by this rule, it is plain that they were guilty, not of ordinary neglect merely, but of gross negligence—so gross, that it produces a suspicion that they were in collusion with the thieves. But it is not necessary to accuse them of larceny or embezzlement. Their shares are as much liable to forfeiture for so gross a neglect of duty, as for embezzlement or larceny. "The maritime law," says Justice Story, "demands most emphatically from salvors, scrupulous good faith and uprightness of conduct—giving them a liberal reward for fidelity and vigilance, and visiting them with severe reprobation and diminished compensation for every negligence." The Boston [Case No. 1,673]. "Salvors," says Judge Ware, "are not only bound to scrupulous honesty themselves, but while the prop-

erty is in their custody, they are jointly required to employ every reasonable degree of diligence to prevent it from plunderage by others. Any negligence in this respect if not visited with an entire forfeiture of salvage, will be remembered in fixing the amount." The John Perkins [Id. 7,360]. The supreme court, in the case of The Blaireau, 2 Cranch [6 U. S.] 240, reduced the share of the mate to that of a common seaman, because he had neglected to use due diligence to prevent pilfering from the cargo saved. To encourage good conduct, the maritime law, on grounds of policy, compensates the services of a meritorious salvor, where the amount of property saved is large, with a reward,—a gratuity,—something over and above a quantum meruit for ordinary work and labor. On the same grounds of policy, it diminishes, denies or forfeits the reward, according to the demerit of the salvor. The Blaireau, 2 Cranch [6 U. S.] 240. The reason for this diminution or forfeiture is, not so much that the owner of the property saved may in this way, be indemnified, in whole or in part, for the loss or damage caused by the misconduct, though this is by no means overlooked, as that the misconduct impairs or destroys the merit of the delinquent and renders him unworthy of its reward. Accordingly, the extent of the diminution or forfeiture is measured, not so much by the amount of the loss or damage sustained by the owner of the property saved, as by the moral quality or degree of turpitude of the act complained of. The Cape Packet, 3 W. Rob. Adm. 122. Embezzlement or concealment of a penny's worth of the goods saved, works a forfeiture of the guilty party's share of the salvage, however large it may be (The Blaireau, 2 Cranch [6 U. S.] 240; The Bello Corrunes, 6 Wheat. [19 U. S.] 152; The Boston [supra]), though, at the same time his sincere repentance and tender of amends, will operate as a condonation of the offence, and restore him to his original rights. Laws of Oleron, art. 13; The Rising Sun [Case No. 11,858]; Perkins' Abb. Shipp. pt. 5, c. 3, § 4, in notis. In the present case, gross neglect—a serious offence—works a forfeiture of an amount of salvage exceeding any loss the owner of the money has sustained. In The Glory, 14 Jur. 676; s. c., 2 Eng. Law & Eq. 554, Dr. Lushington diminished the salvage two-thirds on account of the misconduct of the salvors, in preventing the employment of a steam-tug, though no loss or damage accrued to the owner of the property saved, on account of such misconduct. In The Cape Packet, 3 W. Rob. Adm. 122, he diminished the salvage, but how much does not appear from the report, on account of an error of judgment or slight carelessness of the salvors, by reason of which the vessel was got ashore a second time; and in The Duke of Manchester, 2 W. Rob. Adm. 470, he refused all salvage, on account of the vessel having been got aground a second time through gross negligence.

It is contended that the share of Shafer, the other part-owner of the Beckwith, ought, also, to be forfeited, not on the ground of any fault on his part, but on the ground of his legal liability for the faults of his crew. Admitting, for the present, that the owner of a wrecking vessel, like the owner of any other vessel, is liable to third persons for loss or damage caused by the negligence of his crew, yet it does not follow that in addition to this he is also, in such cases, to be denied all compensation for the use of his vessel. It is difficult to extract from the reported cases, any general rule on this subject. I think, however, that none of the cases conflict with the idea, that whenever a valuable salvage service has been performed by the master and crew—a real benefit done to the owners of the property saved—the owner of the salvor vessel, being innocent, is entitled, in equity and good conscience, to be remunerated for the use of his vessel, according to the actual service rendered and benefit conferred, notwithstanding any neglect or misconduct of the master or crew, working a forfeiture of their shares. His claim to salvage is founded on the equity of compensating him for the use of his vessel, when the owner of the property saved has been benefited thereby. It is not the use of the vessel alone that entitles him to be considered as a salvor, but its use producing a benefit to the owner of the property saved—making it thereby equitable that the latter should pay the former a reasonable compensation. Embezzlement of a part of the goods saved by the salvor crew does not work a forfeiture or diminution of the shares of the owner of the salvor vessel, without any fault on his part; for, notwithstanding such embezzlement, a real and substantial salvage service may have been and ordinarily has been rendered, for which it is just that he, being innocent, should be compensated. The Rising Sun [supra]; The Blaireau, 2 Cranch [6 U. S.] 240; The Boston [supra]. The decisions in the cases of The Duke of Manchester, 2 W. Rob. Adm. 470, The Cape Packet, 3 W. Rob. Adm. 122, and a few others of a similar character, in which the salvage was either wholly withheld or diminished in amount, both as to the owner and crew, on account of the misconduct of the latter, seem at first sight to be at variance with the rule as above stated. But upon a more careful consideration of these cases, I think this apparent conflict disappears. In the cases named, the salvors, through carelessness and negligence, got the vessels ashore a second time. Damage was incurred thereby, and further assistance was made necessary. Considering these facts, and taking into account the chances that the vessels might, possibly, have been relieved by their own masters and crews, had no assistance been offered, or that other persons, more careful, might have become the salvors, it becomes doubtful whether the owners of the property were really benefited at all, or

more than a very little by the supposed salvage-services. If the consequences of the fraud, negligence, or carelessness, or ignorance, of the salvor crew, so immediately connect themselves with the rendition of the services, that the value of the latter is thereby greatly diminished or destroyed, little or no benefit is done the owner of the property saved by their services, little or no salvage is earned, and consequently, the owner of the salvor vessel is entitled to little or no compensation for the use of his vessel. But if, on the other hand, a truly valuable salvage service has been rendered, no misconduct of the master or crew ought to deprive the owner of a just reward for the use of his vessel.

In the present case, a real and valuable salvage-service has been performed by the master and crew of the Beckwith. Shafer, the part-owner, is innocent of any participation in their misconduct, either by concurrent connivance or subsequent acquiescence: Immediately on being informed of the loss of the money, he took vigorous measures to recover it, and to detect and punish the thieves. It is true the money was not recovered by means of his exertions; but he did what was his duty to do in the matter. I think that his share of the salvage ought not to be forfeited or withheld, but that he ought to recover a reasonable compensation for the use of his vessel. The men of the sloop's crew who remained behind at the wreck, at work, are, of course, innocent of any participation in the negligence here imputed to the others, and are entitled to their full shares of the salvage.

But it is argued, that whether the shares of Shafer should be forfeited or not, he is, at least, bound to make good the loss or damage occasioned by the larceny of the money; that is to say, to pay the sum which may be awarded to the three fishermen for finding and restoring it. Salvors are not common carriers; and if he is liable at all, it must be upon the ground that the owner of a vessel employed in the business of wrecking, is liable for damage caused by the misfeasance or nonfeasance of the master and crew, acting within the scope of their employment. It is a general doctrine of law, that the principal is held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligence, and other malfeasances, or misfeasances and omissions of duty, of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them. Story, Ag. § 452, and cases there cited. This doctrine obtains in the maritime as well as in the common and civil law. By the maritime law, the owner of a ship is considered as the principal, and the master and crew as his servants or agents. He is, consequently, held liable for damages or losses sustained by the shipper of goods, or other third person, caused by their fraud, negligence, unskillfulness, or tortious act, in the course of their employment. Chamberlain v. Ward, 21 How. [62 U. S.] 548; The Druid, 1 W. Rob. Adm. 391; Stone v. Ketland [Case No. 13,483]; Abb. Shipp. pt. 2, c. 4, § 1; Id. pt. 3, c. 1, § 1; Id. pt. 4, c. 5, § 3; Id. pt. 4, c. 6, § 1. Admitting the law to be so in ordinary cases of merchant or trading vessels, yet, nevertheless, it is argued that the maritime law does not impose so rigorous and so exact a responsibility on the owners of wrecking vessels; that they are not common carriers; are not bound by any charter-party, bill of lading, or other express contract; but are salvors; and that no decision has ever yet been made declaring the owner of a salvor vessel, as such and without an express contract, to be responsible for losses or damages caused by the fraud, negligence, or tortious acts of the salvor crew. It is admitted that within our knowledge, no such decision has been made. But the question now before the court for its decision, is not a general one; it is not whether the owner of every kind of salvor vessel is thus liable, but whether the owner of a particular kind of vessel—a vessel employed in the business of rendering salvage-services as a business,—is thus liable. It is obvious that this question could only arise in districts where wrecking is carried on as a business, as it is on this coast, and among the Bahama Islands. It has never been distinctly presented to this court for its decision, before the present time; and I am not aware that it has ever arisen in the vice-admiralty court of the Bahamas.

There is a plain difference between the nature and extent of the liability of an owner of a trading vessel, which in the course of a voyage accidentally falls in with another vessel, abandoned or in distress, and renders salvage-services, and the nature and extent of the liability of an owner of a vessel employed in the business of rendering salvage-services, as a business. In the case of a trading vessel, the master and crew are not acting within the scope of their employment while engaged in rendering such services, and consequently are not, quoad hoc, the servants or agents of the owner. Their employment is, to navigate their vessel and complete their voyage. And, although, they are permitted, in the master's discretion, to engage in a salvage enterprise which may present itself in the course of their voyage, yet such enterprise is wholly beyond and outside of the range of their employment, and not in the contemplation of the owner or themselves at the time of their engagement. Consequently, the owner is not liable for their misfeasances, or nonfeasances while engaged in such enterprise. But in the case of a vessel employed in the business of rendering salvage-services as a business, the performance of such services, the accomplishment of such enterprise, is the very object for which the master and crew are engaged by the owner. As this busi-

ness is conducted on this coast, the owner furnishes and supplies the vessel, and appoints and removes the master, and through him, the crew. The salvages earned are divided among them into shares—the owner drawing one-half, the master and crew the other half. It is a regular business—a steady employment. But it is argued that inasmuch as according to this arrangement the owner does not pay the crew wages, and they work for themselves as well as for him, they are not his servants or agents, but are acting in their own right and upon their own independent responsibility. But I think it too plain for argument, that the payment of wages is not at all essential to the relation of master and servant. This relation grows out of the fact of the employment, independent of the mode of payment. The case is analogous to that of a privateer. The owner of a privateer, in time of war, fits out and supplies the vessel, and engages the crew. The object of their employment is, to capture the vessels of the enemy, as prizes of war. They are paid no wages, but are paid in shares of prize-money. They work quite as much for themselves, and quite as much in their own rights, and on their own responsibility, as the persons on board a wrecking vessel do; yet, by the universal maritime law, they are held to be the servants and agents of the owner of the privateer; so that if, in the execution of the business of their employment, loss or damage happens to any third person by reason of their torts, trespass, negligence, fraud, ignorance, or want of proper skill, the owner of the privateer is held liable. The Amiable Nancy [Case No. 331]; s. c., 3 Wheat. [16 U. S.] 546; The Nostra Signora de los Dolores, 1 Dod. 290; The Anna Maria, 2 Wheat. [15 U. S.] 327; The Die Fire Damer, 5 C. Rob. Adm. 357; The Revenge [Case No. 3,877]; Perkins' Abb. pt. 2, c. 2, § 5, in notis. The case of a fishing vessel is also analogous; the owner being held liable for the negligence of the crew, though they are paid in shares of the earnings of the voyage. The Dundee, 1 Hagg. Adm. 109. Indeed, I think it would be a strange anomaly in the law, that the owner of a vessel employed in any kind of business, should not be held liable to third persons for the misfeasance and nonfeasance of the master and crew, acting within the scope of their employment, without any regard to the terms of hiring or mode of payment. His liability in such cases, is, however, limited by a late act of congress to the value or amount of his interest in the vessel. Act March 3, 1851 [9 Stat. 635].

It follows from what has been said, that, the Beckwith being employed, at the time, in wrecking as a business, the owners would have been liable to the extent of the value of their interest in the vessel, for the loss of the money, had it not been found and restored. As it is they are liable for the actual damage, if any, caused by the larceny. But if we take into account the value of the forfeited shares (and I see no good reason why we should not) it will be seen that the owner of the money has suffered no loss by the larceny; but on the contrary, he has been gainer. The value of the forfeited shares, to be restored to the owner of the money, has been ascertained to be $605.62, and the sum intended to be allowed the three fishermen, for finding and restoring the money, is $250. The difference is an actual gain or saving to the owner of the money. But it is argued that he is entitled to the forfeited shares and also to the damages. However this may be as against the actual wrong-doers, I am not prepared to say that, this is true as against an innocent party. Forfeited shares are usually made to enure wholly to the benefit of the owners of the property; but not always. Sometimes they are made to enure to the benefit, in part or in whole, of co-salvors. What interest shall be benefited by the forfeiture, is a question of sound judicial discretion. So that the owner of the money is not entitled, of absolute right, to the forfeited shares. By their being decreed to him, in the present case, he is fully indemnified by the actual wrong-doers, against any loss or damage caused by their negligence. I cannot see the justice of his making a further demand upon the owner of the Beckwith, who is innocent of any blame.

The sloop Globe was among the first vessels at the wreck. She took on board and brought to this port, twenty-six passengers and their baggage, but no cargo nor materials. The schooner Tortugas brought off the ship's crew, when they became no longer of any use on board. Salvage is claimed for these services. Compensation for saving life, except the life of a slave unconnected with the saving of property, is left by the law to the voluntary bounty of individuals. The Aid, 1 Hagg. Adm. 84; The Zephyrus, 1 W. Rob. Adm. 330. Indeed, if no property is saved, no means are supplied by which the court can reward the salvor. A suit in personam, for salvage for saving the life of a free person, would be a novelty and probably could not be maintained, unless under very special circumstances, of an express contract. But if life is saved in connection with property, it is proper for the court to take notice of that fact, and increase the salvage accordingly. The Emblem [Case No. 4,434]; The Queen Mab, 3 Hagg. Adm. 242; The Aid, supra; Abb. Shipp. pt. 4, c. 12, § 5. The fact that the property has been saved by other vessels, does not Deprive the Globe and Tortugas of a right to a just compensation for their services in saving the lives of the passengers and crew. If this could be so—if any advantage in the salvage could be obtained by saving the property rather than the lives—a strong temptation would be held out to salvors, in many instances, to gratify their avarice at the expense of their feelings of humanity. In cases of shipwreck, if one set of salvors saves life and another property, each is to be com-

pensated out of the property saved, according to the merit of their respective services. The Genesee Chief [12 How. (53 U. S.) 443]. As to the right to compensation it can make no difference, in principle, whether the set of salvors who saves life, saves property also or not; for the sum allowed for saving life, ought not to be charged wholly upon the particular goods, if any, that may happen to have been saved by the same salvors in immediate connection with the saving of life, but upon all the goods saved from the wreck, by all the different salvors, in proportion to their value. It is, in such cases, in the nature of a general-average charge.

As regards the demand of the Globe, the proof shows that she was in a leaky and unseaworthy condition at the time the service was rendered, and that the crew, except the master and cook, were unfit for duty, on account of their being in a state of intoxication. The passengers were obliged to keep the pump going, nearly or quite all the time, to prevent the vessel's sinking. Under these circumstances it may well be doubted whether reciprocal services were not performed—whether the passengers did not in fact, save the Globe, quite as much as the Globe saved the passengers. But, be this as it may, the owners of the Globe are not entitled to compensation for this service, on account of the unseaworthy condition of the vessel. In considering this point, it is necessary to revert to the distinction before noticed, between the liability of a transient or trading vessel, performing salvage-services in the course of its voyage, and the liability of the owner of a wrecking vessel employed in the business of rendering salvage-services. In the case of the transient or trading vessel, there is no implied understanding or obligation on the part of the owner, that his vessel is seaworthy or fit for the service. Wrecking is not his business. Yet, his vessel may be the only one which can be had to render the assistance required. Its employment may be the best or only thing that can be done. If, therefore, in the absence of a better vessel, and without misrepresentation or concealment, as to its condition, his vessel renders beneficial services, he ought to be compensated. Nor ought he to be held liable for damage to the goods saved caused by the leaky condition of his vessel, without any fraud or negligence on his part. But in the case of a vessel employed in the business of performing salvage-services, there is an implied undertaking on the part of the owner, that his vessel is seaworthy, and fit for the business she is engaged in. It was accordingly held by this court, in the case of the bark Pacific [Case No. 10,642], that the owner of a vessel employed in the business of wrecking was liable for damage happening to goods, taken on board from a wreck, caused by the leaky condition of his vessel. Indeed, he has no right, legal or moral, to engage in this business with an unseaworthy vessel. It is an act of recklessness and carelessness, wholly inconsistent with that good faith and meritorious conduct which entitle the salvor to a reward. The act of congress, too, requires the vessel to be seaworthy, before it can be licensed to engage in the wrecking business. The passengers concur in saying, that the master and Cook of the Globe were sober, and energetic in the discharge of their duties. I think it proper therefore, to allow the master, who had been but recently appointed, and who knew nothing of the unseaworthiness of the vessel, fifty dollars for his services in saving the passengers, and for his polite and kind attentions to them. And I allow the cook twenty dollars. Salvage to the rest of the crew must be disallowed, on account of their being unfit for duty, in consequence of their being drunk.

Touching the services rendered by the schooner Tortugas, in bringing the ship's crew to the port, it is to be remarked that this vessel was, at the time, a transport vessel belonging to the United States. This fact, however, does not deprive the master and crew of a right to a just compensation for their services, though it does diminish the amount below what would, ordinarily, be allowed for similar services performed by a trading or wrecking vessel. For, as they risked no property of their own, and their time was paid for by the public, a less sum than would be allowed other persons not so situated, for similar services, would be a reasonable compensation. They are entitled to no advantage from the use of the vessel, but the benefit of its use enures solely to the owners of the property saved. They are paid for their own personal services only. The Mary Ann, 1 Hagg. Adm. 158; The Wilsons, 1 W. Rob. Adm. 172; Robson v. The Huntress [Case No. 11,971]; The Amistad, 15 Pet. [40 U. S.] 518. Under the circumstances, I think one hundred dollars divided between the master and crew, is a reasonable salvage.

MULLANY (UNITED STATES v.). See Case No. 15,832.

Case No. 9,911.

In re MULLEE.

[7 Blatchf. 23;[1] 1 Am. Law. T. Rep. U. S. Cts. 123; 8 Int. Rev. Rec. 89; 1 Chi. Leg. News, 129; 3 Am. Law Rev. 386.]

Circuit Court, S. D. New York. Oct. 20, 1869.

CONTEMPT—POWER TO DISCHARGE FROM PRISON—PARDONING POWER—APPLICATION TO PRESIDENT.

1. Where a fine was imposed upon a person by this court, as a punishment for a contempt of this court, committed by violating an injunction issued by this court, and it was ordered that he should stand committed until the fine should be paid, and he applied to his court to be discharged from imprisonment, on the ground that he was unable to pay the fine: *Held*, that

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

this court would not exercise the power invoked, at least until the president should disclaim the power to relieve the applicant by a pardon.

[Cited in Fischer v. Hayes, 6 Fed. 73, 74. Disapproved in Hendryx v. Fitzpatrick, 19 Fed. 811.]

2. A contempt of this court is an offence against the United States, an adjudication by the court that the contempt has been committed is a conviction, and a commitment thereon is execution.

[Cited in Ex parte Gould, 99 Cal. 362, 33 Pac. 1113.]

3. This court has no power to discharge or remit the sentence, but it falls within the pardoning power vested in the president by the constitution.

4. The power of granting a pardon in such a case has been claimed by the executive department as a part of its constitutional prerogative.

5. Disobedience to lawful process of a court of the United States is, equally with misbehavior in its presence, as a contempt of court, within such pardoning power.

[Cited in Kirk v. Milwaukee Dust Collector Manuf'g Co., 26 Fed. 506.]

6. Where a fine is imposed by this court, as a punishment for a contempt, the case is none the less within the pardoning power of the president, because the amount of the fine is directed by this court, in the order imposing the fine, to be paid to the plaintiff in a suit in which an injunction was issued, a violation of which constituted the contempt, towards the reimbursement of his expenses in the attachment proceedings in respect of such contempt.

[Cited in Searls v. Worden, 13 Fed. 717; Wells v. Oregon Ry. & Nav. Co., 19 Fed. 23; Hendryx v. Fitzpatrick, Id. 811; Kirk v. Milwaukee Dust Collector Manuf'g Co., 26 Fed. 508.]

7. If the right to such fine be regarded as a vested private right in such plaintiff, existing in the shape of a judgment, this court has no right to discharge it.

[This was a suit by Henry B. Goodyear and others against William Mullee and John Miller for infringement of patent for improvement in manufacture of hard rubber. There was a decree and injunction for the plaintiffs. Case unreported. Attachments were subsequently issued against the defendants for violating the injunction. Case No. 5,577. Subsequently, the defendant Mullee was released upon his own recognizance. Case No. 5,578. At a still later date he was again arrested on attachment and fined $2,500. Case unreported. The case is now heard upon his application to be released from confinement.]

This was a renewal of an application, heretofore made to this court, to relieve the applicant from imprisonment.

John L. Overfield, for applicant.

William J. A. Fuller and Mr. Abbett, opposed.

BLATCHFORD, District Judge. On a motion for an attachment against the applicant as a defendant in a suit in equity in this court, he was adjudged to have been guilty of a contempt of this court, by violating an injunction issued by this court, and, on the 27th of June, 1868, a fine of $2,500 was imposed on him, as a punishment for such contempt, and it was ordered that he should stand committed until the fine should be paid. After having been imprisoned for some time under such sentence, he presented a petition to this court, praying for his discharge, on the ground that he was unable to pay the fine. The decision of the court thereon was that it had no jurisdiction or power to grant the prayer of the petition, and that relief must be sought by an application to the president of the United States. I then said: "By the constitution (article 2, § 2, subd. 1) the president is invested with power 'to grant reprieves and pardons for offences against the United States, except in cases of impeachment.' No such power is conferred upon any other officer or upon any court. A contempt of court is an offence against the United States. In the present case, there is a judgment judicially declaring the contempt and offence. In Ex parte Kearney, 7 Wheat. [20 U. S.] 38, 43, the supreme court says: 'When a court commits a party for a contempt, their adjudication is a conviction, and their commitment in consequence is execution.' After a conviction and a commitment for a contempt, the court has no more power to discharge or remit the sentence than it has in the case of a conviction and commitment for any other crime or offence against the United States. And such has been the practical construction of the provision of the constitution in regard to pardons. In the case of one Dixon, a fine was imposed upon him by the circuit court of the United States for the district of Mississippi, for a contempt of court. He applied to the president for a pardon. The attorney general, Mr. Gilpin, (3 Op. Attys. Gen. 622,) decided that the pardoning power extended to such a case, and that the contempt was an offence within the language of the provision of the constitution. I fully concur in this view; and it necessarily follows, that, if the power of relieving from the sentence imposed on Mullee falls within the pardoning power of the president, it is exclusive in the president, and cannot be exercised by this court."

After this decision was made, the applicant applied to the president for a pardon, and his application was entertained and denied. The denial was not put on any want of power in the president to grant the pardon asked for, but was based on the facts shown in the case. The application to this court to discharge the prisoner is now renewed. No new views are presented as to the power of the court to grant the relief asked, and I must decline to exercise the power invoked, at least until the executive department of the government disclaims its power to relieve the party by a pardon. From what took place in the Case of Dixon, and what has transpired in this case, I must hold that the power of granting a pardon in a case like the present is claimed by the executive department as a part of its constitutional prerogative. From the report of the Case of Dixon, it appears

that the pardon was recommended by Mr. Justice McKinley, the associate justice of the supreme court of the United States whose circuit embraced at the time the district of Mississippi, and Judge Gholson, who was at the time the district judge of the United States for that district. As the report states that the contempt was committed by an affray between Dixon and another person in the presence of the judges of the circuit court of the United States, at Jackson, in the state of Mississippi, it must be inferred that Mr. Justice McKinley and Judge Gholson were those judges. The punishment they inflicted was a fine, and, as they recommended the case to the president as a proper one for a pardon, they must necessarily have been of the opinion that they had no power to relieve the party. Nor is there any distinction to be drawn between the Case of Dixon and the present case, growing out of the fact that, in the Case of Dixon, the offence was an affray in the presence of the court, while in the present case it was a disobedience to a lawful process of the court. By the 1st section of the act of March 2d, 1831, (4 Stat. 487,) misbehavior in the presence of a court and disobedience to lawful process of a court are placed on the same footing, in respect of being contempts of court. The inquiry made of the attorney general, in the Case of Dixon, was, whether the executive authority to pardon properly extended to that case. In his opinion, given to the secretary of state, in February, 1841, the attorney general says: "If we adopt, as the supreme court of the United States has decided we should do, the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the president. I am, therefore, of opinion, that, should the president consider the facts such as to justify the exercise of his constitutional 'power to grant reprieves and pardons for offences against the United States,' there is nothing in the character of this offence which withdraws it from the general authority."

In the Case of Rowan, 4 Op. Attys. Gen. 458, in 1845, Attorney General Mason concurred in the opinion of Mr. Gilpin in the Case of Dixon. In the Case of Drayton and Sears, 5 Op. Attys. Gen. 579, in 1852, Drayton and Sears had been indicted and convicted in the criminal court for the District of Columbia and county of Washington, under a statute, on seventy-four indictments, each of them founded on the transportation of a single slave. On these convictions Drayton was sentenced to be fined in the aggregate, with costs, $11,802.26, and Sears to be fined in the aggregate, with costs, $8,686.12. By the statute, one-half of the fine in each case was to be to the use of the master or owner of the slave, and the other half to the use of the county school or of the county. On the rendition of the judgments, Drayton and Sears were committed by the court to prison until payment of the fines and costs adjudged against them respectively. In pursuance of that commitment they were imprisoned in 1848, and they were still in prison when, in 1852, an application was made to the president for their pardon. The question being referred to the then attorney general, Mr. Crittenden, as to the constitutional power of the president to pardon the men and discharge them from the penalties and imprisonment therefor to which they were sentenced, he decided: (1.) That the pardoning power of the president extended over the whole case, and that by his pardon he might discharge them from prison and remit the fines for which they were imprisoned; (2.) That, if the president could not remit the fines because they had become private property, he could still pardon and release the offending parties from imprisonment, because such imprisonment was part of the proceedings against them as criminals, and at the instance of the United States, and was a thing distinct from any individual right of property in the fines; (3.) That the president might pardon the offence and imprisonment, with an exception or saving as to the fines, in which case the fines would remain as a debt to the United States, or to those to whom the United States had granted or transferred it, and would be recoverable accordingly by the appropriate legal remedies, which remedies the distributees of the fines would have if they were entitled to any absolute right or property in the fines. The statute, in the Case of Drayton and Sears, imposed only a fine, and the commitment to prison was ordered by the court to enforce the payment of the fines and costs. Mr. Crittenden examines the whole question with fullness, and adopts the view, that the imposition of the fines, into whosoever pockets they might go when collected, was a punishment inflicted, on a public prosecution, for an offence against the United States, and must be regarded as having for its primary, if not its sole, purpose, the vindication of public law and public justice.

I have referred to this Case of Drayton and Sears, because it was suggested on the argument, that, in the present case, the pardoning power of the president could not be invoked, for the reason that, by the judgment of this court, the fine imposed on the applicant is to be paid to the plaintiffs in the suit out of which the attachment proceedings arose. The judgment of this court was, "that the said William Mullee has been guilty of a wilful and persistent disobedience to the order and injunction of this court, and that he be fined therefor the sum of twenty-five hundred dollars, the same to be paid to the complainants towards the reimbursement of their expenses in and about such attachment proceedings, and that he stand committed until

the said fine be paid." In this particular, the present case is like that of Drayton and Sears. The contempt of court was an offence against the United States, and the fine was inflicted as a punishment therefor.

If the right to the fine should be regarded as a vested private right in the plaintiffs in the suit, existing in the shape of a judgment, this court would have no right to discharge it.

In view of the action of the executive department in the cases referred to, I must again refer the applicant to the president. If the president shall disclaim all right and power, as a part of his constitutional prerogative, to grant any relief in this case, the matter may be again brought before me.

MULLEE (GOODYEAR v.). See Cases Nos. 5,577-5,579.

Case No. 9,912.

In re MULLER et al.

[Deady, 513; [1] 3 N. B. R. 329 (Quarto, 86); 2 Am. Law T. Rep. Bankr. 33.]

District Court, D. Oregon. Jan. 11, 1869.

BANKRUPTCY—SECTION 40 OF ACT—WARRANT OF POSSESSION—INJUNCTION—CERTAINTY OF PETITION—CONSTRUCTION OF ACT.

1. The prohibition of "further proceedings" in the last clause of section 40 of the bankrupt act [of 1867 (14 Stat. 536)] applies only to the direct proceedings upon the petition, and not to collateral proceedings by or against third persons, or even the debtor.

2. Under a warrant to take possession of the property of the debtor, the messenger is authorized to take such property in whosoever hands he may find it; and if by mistake, or otherwise, he should take property not belonging to the debtor, it is no ground for discharging the warrant or vacating the order for its allowance; but the party aggrieved by such wrongful seizure has his remedy against the officer making it.

[Cited in Re Briggs, Case No. 1,869.]

3. Injunctions and warrants may be allowed and issued under section 40 of the bankrupt act without notice to the adverse party.

4. The court takes judicial notice of the acts of congress, and they need not be set forth or referred to in any proceeding before it.

5. The warrant provided for in section 40 of the bankrupt act may issue against the person and property of the debtor, or either of them.

6. The jurisdiction of the bankrupt court to enjoin third persons from interfering with the goods of the debtor, or to issue a warrant to take provisional possession of them, does not depend upon the service of a debtor of a proper order to show cause why he should not be adjudged a bankrupt, but upon the filing of a petition in bankruptcy against such debtor.

7. A petition which states that the debtor committed the alleged acts of bankruptcy, "within six calendar months next preceding the date thereof," and on or about a certain day therein, is sufficiently certain in this respect; and as to third persons, in collateral proceedings, the allegation is sufficient without the mention of a particular day.

8. The allegations in the petition concerning the existence of the debt, or the commission of the acts of bankruptcy, need not be made upon the personal knowledge of the petitioner; but semble, that the deposition thereto should be made upon the knowledge of the deponent, or disclose the grounds of his belief, or the sources of his information.

[Cited in Re Raynor, Case No. 11,597.]

[Cited in Re Butterfield, 6 N. B. R. 258.]

9. The bankrupt act should be construed so as not to permit a petition in bankruptcy to be maintained by a creditor, who became such after the commission of the act of bankruptcy complained of.

10. It is sufficient if the debt of the petitioner existed at the date of the commission of the act of bankruptcy, although not then due.

11. Upon a motion to dissolve an injunction in bankruptcy against third persons, such persons cannot be heard to object to the sufficiency of the petition or the proof of debt, or acts of bankruptcy.

12. The bankrupt act is remedial, and should be construed "with a view to effect its objects, and promote justice" between a debtor and his creditors.

[Quoted in Silverman's Case, Case No. 12,855. Cited in Re Carrier, 47 Fed. 442.]

[In the matter of Max Muller and Max Brentano, bankrupts.]

Lansing Stout, for the motion.

M. W. Fechheimer and William Strong, contra.

DEADY, District Judge. On December 7, 1868, a petition was filed in this court by Benjamin Price, a creditor of the above named M. and B. praying that they be adjudged bankrupts. The claim is stated to be for goods sold and delivered to the alleged bankrupts "within the last two years past," of the value of $3,907.

Three acts of bankruptcy are charged: (1) That said M. and B. being traders under the firm name of Muller and Brentano, and being bankrupt, etc., on November 7, 1868, sold, transferred, etc., their merchandise, accounts and assets to Baum and Wolgennant with intent to defeat, etc., the operation of the bankrupt act. (2) That said M. and B. on the date aforesaid, made the transfer aforesaid to B. and W. with intent to delay, defraud and hinder their creditors; and (3) That said M. and B. on November 10, 1868, paid John Anderson, one of their creditors, with intent to thereby give a preference to such Anderson, and defeat and delay the operation of the bankrupt act.

The proof of debt is made by the petitioning creditor, and states that the debt was due on and before November 23, 1868. The proof of the acts of bankruptcy is made by the attorney in fact of the petitioner (who resides in San Francisco), William J. Hyland. It states that on or about November 7, 1868, M. and B. had in store at Jacksonville, Oregon, merchandise of the value of $35,000, and that at the same time there was due them from solvent persons in the vicinity of Jacksonville, debts of the value of $12,000; and that on said last mentioned date, said M. and

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

B., with the intent and purpose alleged in the petition, fraudulently sold and transferred all their stock in trade and things in action to B. and W. aforesaid. That said B. and W. were the cousins of M. and B., and the latter was their clerk, and without means, save a small sum due him from M. and B. for services as clerk; and that the means of Baum were not at all adequate or sufficient to make the purchase aforesaid. That such sale and transfer was without consideration, except the small sum due Wolgennant, and that said B. and W. conspired with M. and B. by means of such pretended and fraudulent sale and transfer, to defraud the creditors of said M. and B. and defeat the operation of the bankrupt act. That said B. and W. are wholly irresponsible, that they are disposing of such merchandise below its value, and at auction, and are collecting the debts due M. and B.; and if not prevented, will dispose of said property, so that the creditors of said M. and B. will receive no benefit therefrom. That M. and B. are indebted to persons in San Francisco to the amount of about $35,000, and to other persons in the state of Oregon, a further large sum, to affiant unknown. That these parties all reside at Jacksonville, within a day's journey of California, and that if B. and W. are suffered to remain in possession of the property it will be disposed of, and the parties will leave the state and go beyond the jurisdiction of the court with the proceeds; and that said M. and B. are about to depart from the state and will do so, unless prevented by the order and warrant of this court.

On December 9, on the application of counsel for the petitioning creditor, an order to show cause—form No. 57— was allowed; and also an order directing the issuance of a writ of injunction, forbidding M. and B. and B. and M. from interfering with or disposing of the property and accounts of the alleged bankrupts, and also of a warrant commanding the marshal to take possession of such property, and keep the same until the further order of the court. On December 29, B. and W. by their attorney, filed a motion to dissolve the injunction, and to discharge the property from the warrant. The motion is made upon the papers already mentioned in the case, and the affidavit of O. Jacobs, of Jacksonville. The affiant states that he knows the parties, and that the injunction and warrant herein were served about December 15, 1868. That the goods and merchandise formerly belonging to M. and B., were at the service of said injunction in the exclusive possession of B. and W., as purchasers from said M. and B., and had been in such exclusive possession since November 7, 1868; and that said goods and merchandise were taken from the possession of B. and W. by the messenger, under the warrant aforesaid; and that they are of the value of about $25,000.

The grounds of the motion are set forth therein as follows: (1) There was no authority for the marshal or messenger to seize property in the hands of these parties. (2) The writ of injunction and order to take possession were issued without notice. (3) The order to take possession of goods was not made under any law of the United States. (4) The notice to show cause was and is returnable in January, 1868—a date prior to the act of bankruptcy complained of. (5) The petition fails to show at what time the act of bankruptcy was committed. (6) The charge of bankruptcy is made upon information and belief—there being no positive charge. (7) The proof of indebtedness does not show that the debt of petitioning creditor existed at the time the alleged act of bankruptcy was committed.

Counsel for the petitioning creditor objects to the hearing of the motion at this time, because, the order to show cause not being returned, there is no proof before the court that it has been served upon the debtors. In support of this objection, he cites the last clause of section 40 of the act. I do not think the clause supports the conclusion. The prohibition of "further proceedings" is intended of direct proceedings upon the petition and against the debtor, and not of collateral proceedings by or against third persons or even the debtor.

The only evidence before the court as to the service of the injunction or the execution of the warrant, is contained in the affidavit of Jacobs. Neither of these writs has been returned. The order to show cause is not returnable until January 7. The order allowing the warrant to take possession, to issue, speaks of the goods and effects of the alleged bankrupts, and not those of B. and W. The warrant, I presume, conforms to the order in this respect. I must also presume that the messenger has obeyed the warrant and taken into his possession, the goods and effects of M. and B. in whosesoever hands he found them, and not otherwise. If by mistake or otherwise he took the goods of another, he is liable to the party injured, upon his official bond. This is no more than the responsibility which the common law devolved upon every officer to whom an execution against property was directed. He had to determine at his peril what was the property of the defendant in the writ, and what was not.

Under section 40 of the act, the messenger, under the direction of the warrant, is "to take possession provisionally of all the property and effects of the debtor." And it makes no difference in whose hands he may find them. This is a question of fact for the officer to determine for himself, subject to his responsibility. Taking the affidavit of Jacobs, it appears that this property was in the possession of B. and W. when seized by the messenger, but it does not follow that it was not at the same time the property of M. and B. This question cannot be made or

decided upon this motion. But certainly, upon the statements in the petition and accompanying proofs, it was not the property of B. and W. and the affidavit of Jacobs, considering what B. and W. are called upon to show, rather confirms this conclusion than otherwise. The first ground of the motion is thus disposed of.

The second ground is well founded in fact, but immaterial in law. Injunctions in bankruptcy, at least when issued in the primary stage of the proceedings, under section 40 of the act, may be allowed and issued without notice. The provision in the act of March 2, 1793 (1 Stat. 334), forbidding the writ to be granted in a suit in equity, without notice to the adverse party, does not apply to proceedings in the district court under the bankrupt act. Ex parte Smith [Case No. 12,994]; Ex parte Carlton [Id. 2,415]; cited in Brightly, Fed. Dig. 456; Ex parte Donaldson [Case No. 3,981]; In re Wallace [Id. 17,094]. In re Wallace was decided in this court, upon able argument and careful consideration. Upon further argument the conclusion seems to be sound in principle and upon authority. The rule in the judiciary act requiring notice in all cases of injunction is an arbitrary and anomalous one, and if applied to the summary proceedings under the bankrupt act, would in most instances render it nugatory. Notice to B. and W. of the application for the injunction in this case, would have been notice to them to leave this jurisdiction with the property or its proceeds, which they could have done, if so disposed. Doubtless the court may require notice to be given to the adverse party, and even that the applicant shall give security for damages, whenever it thinks the ends of justice or the security of parties require it.

Possession of the goods was not taken under the order, but the warrant which issued pursuant to the order. To authorize the allowance of this order or the issuing of this warrant, notice to the adverse party was not necessary. On the argument nothing was shown in support of this objection, neither can there be.

In support of the third ground of the motion, counsel shows that the order allowing the issuing of the warrant, excepts from its operation such "goods as are exempt from the operation of the act of congress entitled, 'An act to establish an uniform system of bankruptcy throughout the United States,' approved March 2, 1868." There being no bankrupt act of this date, the conclusion is, that the order for the warrant to take possession was not made under any law of the United States. This is an extremely technical objection, and admits of a sufficient and equally technical answer. The order for the warrant does not profess to be made under the act of March 2, 1868, but it only excepts from the operation of such warrant the goods exempt by that act. There being no bankrupt act of such date, the exemption is nugatory, and the warrant to take possession is without qualification in this respect. But the recital of the title of the bankrupt act in any proceeding, is mere matter of form. The recital in this order gives the date of the act incorrectly—1868—for 1867. But this immaterial mistake can in no way affect the legality of the order. The order would have been sufficient without stating the title or date of the act. The court takes judicial notice of the acts of congress, and they need not be set forth or specially referred to in any proceeding before it.

In support of this ground of the motion, it is also urged that the act (section 40) does not authorize the issue of a warrant against the goods of the alleged bankrupt alone, but that the warrant cannot issue unless it be against his person, and also "to take possession provisionally of all the property and effects of the debtor," as well. This construction of the act does not seem to me to be warranted by the language or object of the section. If the showing be such as section 40 requires, the warrant may issue against the person and goods or either of them. The greater includes the less, and neither the alleged bankrupts or B. and W., can or ought to be heard to complain that the petitioning creditor has been satisfied to take process against the goods only, because he was entitled to it against the person also. If, in fact, the order and warrant had been for the arrest of both the person and goods, the latter might have been executed against both or either, as the petitioning creditor might direct.

The fourth ground of the motion is based upon the assertion therein, that the order to the debtor to show cause, is by mistake made returnable in January, 1868, instead of 1869. The order has not yet been returned, and there is no evidence before the court that it is returnable at an impossible date. Nor is it apparent, if it be admitted that the order is erroneous in this respect, how the fact can in any way affect the merits of this motion. The jurisdiction of the court to enjoin B. and W. from interfering with the goods of the debtor, or to issue a warrant to take provisional possession of them, is not dependent upon the service on the alleged bankrupts of a proper order to show cause.

As to the fifth ground of the motion, the petition avers that the several acts of bankruptcy complained of, were committed "within six calendar months next preceding the date of the petition," and on or about a certain day in November, 1868. This is sufficient; and, if it were not, to show the actual day, it certainly is, to show that they were committed within six months before filing the petition, and that therefore, this court has jurisdiction to adjudge M. and B. bankrupts on account of them. Whether the particular day within this six months is stated or not, does not matter so far as this motion is concerned. When the alleged bankrupts appear

to make defense to this petition, the question can be made as to whether the particular day is sufficiently stated, and not otherwise or before.

As to the sixth ground of the motion, it is not well founded in fact. The charge of bankruptcy is not made upon information and belief. The allegation in the petition is positive and unqualified as to the transfer of the stock of merchandise and book accounts to B. and W., and also the payment to Anderson, with intent to prefer him. The same is true of the deposition to the acts of bankruptcy. True, the petition states that in addition to the merchandise and accounts, there was transferred "all the available assets" of M. and B. and this averment as to the assets is upon information and belief. This averment is a mere make-weight, and it is perfectly immaterial whether it is in the petition or not. The allegations as to the transfer of the merchandise and accounts, and of the payment with intent to give a preference, are all or either of them sufficient allegations of acts of bankruptcy. Nor is there anything in the act, or the orders and forms, or the nature of the proceeding, which requires that the allegations in the petition either as to the debt or the acts of bankruptcy, should be made upon the personal knowledge of the petitioner. The petition must be made by the creditor, and in most instances, can only be made upon information and belief. In addition to the petition there must be a deposition to the debt and the act of bankruptcy. In these it may be proper that the witness should speak from his own knowledge, or at least disclose the grounds of his belief, or the sources of his information. Much will depend upon the circumstances of the particular case.

By the seventh ground of the motion, it is asserted that the debt of the petitioning creditor was not in existence when the acts of bankruptcy complained of were committed. Under the English bankrupt act, it was held that a commission ought not to be granted on the petition of a creditor whose debt was not in existence when the act of bankruptcy was committed. 1 Bac. Abr. 558. This statute (6 Geo. IV. c. 16, § 12), allowed the commission to issue upon the petition of any creditor or creditors of the alleged bankrupt (1 Bac. Abr. 552). The act of March 2, 1867, allows any creditor whose debt is of sufficient amount, and provable under the act to maintain the petition to have his debtor adjudged a bankrupt (section 29). A debt contracted after the act of bankruptcy is provable under the act (section 19). The letter of the English and American statutes is not materially different in this respect. Taken literally, they both would permit a petition to be maintained by a creditor whose debt arose after the commission of the act of bankruptcy complained of. The American statute ought, I think, to be construed as the English one, so as not to permit a petition to be maintained by a creditor whose debt was contracted after the act of bankruptcy happened. This is in accordance with the decision of this court in Re Burk [Case No. 2,156] that a creditor should not be heard to object to the discharge of a voluntary bankrupt for matters which occurred before he became such creditor. The construction is supported by the familiar principle, that no one ought to be allowed to complain of that which does not injure him. In case the act of bankruptcy was secret and unknown to the creditor at the time of contracting his debt, the rule might not apply.

The proof of debt in this case, and the petition substantially shows that M. and B., on November 23, 1868, and before, were indebted to the petitioner in the sum of near $4,000. The petition was verified on the last mentioned date, and the acts were committed some days before in the same month. The indebtedness arose upon the sale and delivery of goods prior to, and within two years of the date of the petition, to be paid for upon request. The allegations of the petition are framed upon the idea that the debt did not become due until payment was requested, and that the commencement of this proceeding was a request. This is probably a correct conclusion in the premises. But the question is not when the debt became due and payable, but when did it commence to exist. It commenced with the delivery of the goods, or any portion of them equal in value to the sum of $250. The proof and petition were made in San Francisco, and they are very slovenly and unskillfully prepared in this respect, as well as some others. But I think it a fair inference from the facts stated, and the nature of the transaction that the debt of the petitioner or at least $250 of it existed before November 7, 1868—the date of the first acts of bankruptcy.

This disposes of the motion. It is disallowed. I have considered this motion as if Baum and Wolgennant were entitled to make these objections. But as to the 4, 5, 6 and 7 grounds of the motion, I do not think they have any right to be heard. The questions raised on these points are between the petitioning creditor and the alleged bankrupts, and not B. and W. In the course of the argument, counsel for B. and W. have insisted that this is a special proceeding, purely statutory, and that the act must be taken most strictly against the creditor, and in favor of the bankrupt. In my judgment this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, to whom in justice it belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life

anew. The power to pass bankrupt laws is one of the express grants of power to the national government; and history teaches that the want of a uniform law on this subject throughout the states, was one of the prominent causes which led to the assembling of the constitutional convention and consequent formation and adoption of the federal constitution.

Such a statute is not to be construed strictly, as if it were an obscure or special penal enactment, and this was the sixteenth instead of the nineteenth century. The act establishes a system and regulates, in all their details, the relative rights and duties of debtor and creditor. Such an act must be construed—as indeed should all acts—"according to the fair import of its terms with a view to effect its objects and to promote justice."

Case No. 9,913.

MULLER'S CASE.

[20 Leg. Int. 301; [1] 5 Phila. 289; 5 Leg. & Ins. Rep. 146.]

District Court, E. D. Pennsylvania. Sept. 14, 1863.

EXTRADITION—PUBLIC PROSECUTION—DEPOSITIONS TAKEN—CRIMES NAMED IN TREATY—DISCHARGE UNDER PREVIOUS APPLICATION.

1. The treaties between the United States and certain Europeon states for the mutual extradition of fugitives charged with certain crimes, do not require that an application for extradition shall have been preceded in the country of the government making it, by a charge, or public accusation, of equivalent effect with an indictment. It suffices that there has, within the jurisdiction of the country making the application, been an authorized proceeding under which evidence has been, or might lawfully have been, taken there, with a view to a criminal prosecution, or to deciding whether to institute one.

2. Depositions preliminarily taken there with such a view should, if certified according to the act of 22d June, 1860 [12 Stat. 84], or otherwise duly attested, be admitted in evidence if they would be receivable in evidence there in support of a charge of a crime cognizable under such a treaty.

3. The crimes are named in the treaties with reference to known definitions in the system of general jurisprudence. But the specific applications of the definitions are determinable in particular cases, by the jurisprudence and legislation of the respective places of arrest.

4. In the United States, the jurisprudence and legislation must, under a charge of the forgery of a private writing, be those of the state of the Union in which the arrest is made.

5. The application for extradition may be sustained under a law of the state enacted after the date of the treaty, but in force at the time of the commission of the offence, and at the time of the hearing under the application.

6. A discharge of the accused party, under a previous application for extradition upon the same charge, heard in another state, does not preclude the renewal of the application, where the case does not appear to have been fully investigated and considered under the former proceeding.

[1] [Reprinted from 20 Leg. Int. 301, by permission.]

[This was a proceeding in the case of Trangott Muller, a forger and fugitive from justice.]

CADWALADER, District Judge. Of the treaties now in force on the subject of extradition, the earliest is that of 1842, with Great Britain. [8 Stat. 576.] Its form has, in general, been followed in the others. An occasional recurrence to it will prevent their phraseology from being applied with too much latitude. But an adherence to it so close as to exclude reasonable cosmopolitan interpretation of them should be not less avoided as too narrow.

In this case, at the hearing in July last, the proofs of identity showed that the person arrested was the party against whom the charge is made on behalf of the government of Saxony. There could be no doubt that he was the person who, under a former application made on the part of the same government, on the same grounds, before the judge of like jurisdiction for the Southern district of Ohio, had there been discharged from custody. Except the proofs of his identity, the evidence offered there and rejected, was the same as that which has been adduced and admitted. The jurisprudence and legislation of Ohio on the subject of forgery, were, for all the purposes of the case, the same, in effect, as the jurisprudence and legislation of Pennsylvania. The sufficiency, also, of evidence, to justify an apprehension and commitment for trial, would, in each state, as may be assumed, have been determinable by the same rules, if the offence had been charged as committed within her limits. I was, nevertheless, of opinion that the discharge in Ohio had not precluded a renewal here of the application. But this opinion was not founded upon any such literal interpretation of the treaty as would make its meaning dependent upon simple and rigid analogies to cases of commitment for trial by magistrates here and in England, on preliminary charges of crime, after previous refusals of magistrates to commit. I thought, on the contrary, and still think, that the personal status of an inhabitant of, or a sojourner in, the United States, might be too irrevocably involved in the result of a question of extradition to make so narrow a rule of decision sufficient for the exigencies of such a question. I therefore thought that there might be a case in which the previous rejection of such an application by such a judge would perhaps preclude its renewal—especially in the same judicial district or in another judicial district of the same state—but that this was not such a case.

The other questions were those of the sufficiency of the charge, and of the sufficiency of the proofs.

How, and how far, the crime in question must have been the subject of a charge or public accusation, in the country whose government asks the extradition, does not appear distinctly in the treaties, or in any opinion of

the supreme court of the United States. The subject has been discussed elsewhere, but not satisfactorily. Its difficulties are, in part, removed by the acts of congress of 1848 [9 Stat. 302] and 1860 [supra]. The argument that there must have been some authorized public accusation of equivalent effect with what is here, and in England, called an indictment, cannot prevail. To adopt such a rule, would interpolate in the treaties a condition requiring what might, in some countries, be considered objectionable as a partial prejudication of guilt in cases to be afterwards tried. The treaty with Great Britain certainly requires no previous indictment or presentment. Between the United States and that country, such a condition, if intended, would have been expressed. In Kaine's Case the only process had been a warrant issued in Ireland under an ex parte deposition. The warrant had not been executed, service of it having been successfully evaded. This warrant and a copy of the deposition, certified and attested under the second section of the act of 1848, appear to have been thought sufficient, together, to satisfy the requirements of the treaty. 14 How. [55 U. S.] 105, 108, 109, 115, 116. These requirements might, on either side of the Atlantic, be satisfied without even a warrant. Thus, in Pennsylvania, as in England, a constable or other officer may make an arrest for murder or robbery, on the spot, without a warrant, and may bring the party arrested at once before a magistrate, by whom depositions under the statutes of Philip and Mary may be taken forthwith. 6 Bin. 318; 8 Serg. & R. 49; Johnson v. Tompkins [Case No. 7,416]; 4 Coke, 40b; 9 Coke, 66a; Ld. Raym. 1297; Dougl. 358; 6 Barn. & C. 635; St. 1 & 2 Phil. & M. c. 13; and St. 2 & 3 Phil. & M. c. 10; 3 Bin. 621. The party thus arrested may, before any commitment, or any process against him, escape, and may afterwards be found on the other side of the Atlantic, within the jurisdiction of one of the contracting governments. Under the latter jurisdiction, the depositions, or duly attested copies, with proof that they were taken under such a summary proceeding, would sustain an application for extradition, if they sufficiently proved the commission of the offence. Copies of such depositions taken in England would, if certified under the act of congress of 1860, be receivable in evidence here, under this act, if not independently of it. So far as concerns mere accusation in the country whose government makes the application, any proceeding in that country under which evidence has been, or might lawfully be taken there, with a view either to a future criminal prosecution, or to deciding whether to institute one, satisfies the requirements of the treaty. Under the act of 1860, depositions preliminarily taken with such a view should be admitted in evidence here, if they would be receivable in evidence there. In this case, the proceedings in Saxony, through the verification of the Saxon authorities, attested by the consul general of the United States at Leipsig, were duly authenticated; and it sufficiently appeared that before the Saxon tribunals having cognizance of the question whether this party should be apprehended and committed for trial, the depositions of which copies were certified would have been receivable in evidence.

The remaining question was whether these depositions would, within the meaning of the treaty, have sufficed to justify his apprehension and commitment for trial under a charge of forgery, if the offence had been committed here. They fully sufficed to prove the act which was charged. Such an act, wherever punishable as a crime, is properly classed as a specific offence under the general head of "forgery." In the jurisprudence of Pennsylvania, at the date of the treaty with Saxony, this act would not have been punishable as a crime. But before its commission in Saxony, the Pennsylvania statute of March 31, 1860, § 169 [Laws, 1860, p. 423], had made such an act indictable and punishable as a misdemeanor. In the series of treaties which have been mentioned, certain offences, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case, on the part of the Saxon government had, therefore been made.

There is no jurisprudence or common law of the government of the United States. See [U. S. v. Hudson] 7 Cranch [11 U. S.] 32; [U. S. v. Coolidge] 1 Wheat. [14 U. S.] 415; [Wheaton v. Peters] 8 Pet. [33 U. S.] 658; [Kendall v. Stoker] 3 How. [44 U. S.] 104. No legislation of their government, independently of the jurisprudence and legislation of the several states, can have been expected by those who made the treaties ever to give specific definition of certain crimes mentioned in them. No such legislation as to forgery or private writings, which is the offence here charged, can have been expected. As to crime, and others, local definitions and rules might be not less different in Ohio and Pennsylvania and in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations. I thought that the decision of the case could not be affected by the date of the Pennsylvania statute. It was

posterior to the treaty with Saxony, but anterior to the commission of the offence charged. Local specific definitions of an offence, which may be safely applied, are those in force, both when it was committed and at the time of hearing. If their application is not ex post facto, the question whether they were in force at the dates of the respective treaties cannot be material. Diplomatic arrangements whose effect may depend upon internal regulations of the contracting states are almost necessarily dependent more or less upon prospective legislation. Such regulations are almost always liable to change in the course of internal administration. They may also undergo modification in order to meet occcasional requirements of international comity, or of the conventional arrangements themselves. These requirements may be only honorary, and the legislation consequently optional. But the treaties require that such definitions and rules as are from time to time observable under the local jurisdiction of each contracting government shall be applied by it in favor of the other.

The questions which have been reviewed, whether difficult or not, were important; and upon one, if not more of them, differences of opinion were supposed to exist. At my request, the case has been reargued on all the points before the judge of the supreme court for the circuit and myself. The only question which has caused us any embarrassment is that of the effect of the party's discharge in Ohio. Had that been a decision upon the legal merits of the case, pronounced after full investigation and consideration of them, our opinion might probably have been that a renewal of the Saxon government's application should not be entertained. But the proceeding there, as far as we know, consisted in the mere summary rejection of the evidence offered, for what reason we are not informed. The same evidence, with the proofs of identity, has been, so far as appears, considered for the first time under the present application. The act of 1848 should be interpreted, and the regulations prescribed in it administered, with reference to the international character of the obligation of extradition. The conventional obligation is not fulfilled where an application for extradition is, in any mode or degree, slighted by one of the contracting governments, to which it has been properly addressed. This must be considered in a case like the present, where provisions of the treaty are executed through judicial organs of the latter government. We therefore think, that until a decision founded upon adequate investigation and full consideration, the proceedings under successive applications for extradition are, in effect, if not in character, analogous to successive preliminary hearings before local committing magistrates under ordinary charges of crime. On all the other points of the case we are of the opinion which I entertained at the close of the former hearing.

The prisoner was accordingly remanded into custody, to await the order of the president.

Case No. 9,914.

MULLER v. BOHLENS.

[2 Wash. C. C. 378.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

PRINCIPAL AND AGENT—DEL CREDERE AGENT—REMITTANCE IN BILLS—LIABILITY.

The defendants sold goods consigned to them by the plaintiff under a del credere commission, and received in payment, for part of the sales, the bill of exchange of W. They were authorized by the plaintiff to remit in bills, and with the other proceeds of sales, they purchased a bill drawn by I. Both bills were protested. The court *held* the defendants liable for W.'s bill, it having been received in payment for a debt guarantied by them; but not for the bill drawn by I., which was remitted according to order.

[Cited in brief in Lewis v. Brehme, 33 Md. 421.]

The defendants received consignments from the plaintiff, and engaged to sell them on a del credere commission, and to guaranty the debts. He sold, to one Walter, part of the goods, and when the money for which the goods were sold became due, he took his bill of exchange for the amount, which he remitted to the agent of the plaintiff. The defendants also purchased another bill of a Mr. Imbert, which they remitted to the plaintiff, in part of the sales of his goods. Both bills were protested, and Walter and Imbert very soon after became insolvent, but the latter remained in good credit until he stopped. The defendants relied upon a receipt in full, and a discharge, given by one Muller, the attorney of the plaintiff, to the defendants, in which these two bills were charged to the plaintiff. But, having only a notarial copy of the letter of attorney, the court refused to let the copy be read. The law of this state authorizes the recording letters of attorney, upon their being acknowledged or proved before a notary; but this was neither.

WASHINGTON, Circuit Justice (charging jury). The guarantee of the defendants extended no farther than to the sales and receipts of the money arising from them. As to Imbert's bill, therefore, there is no pretence for charging the defendants with that, as it was a bill purchased by the defendants from a man in good credit, and was purchased for the purpose of a remittance, as the defendants had been directed. But the guarantee extends to Walter's bill, which was not purchased with the proceeds of the plaintiff's goods, but was given by a purchaser of those goods instead of the money. If the defendants were bound to guar-

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

anty the payment of this debt when contracted, the guarantee continues, because a bill which is dishonoured, is no payment. The only objection to the plaintiff's recovery of the amount of this bill, is his neglect in not returning the bill, or giving notice of the protest, or rather, the defect of the plaintiff's evidence in accounting for this bill. It does not appear whether Walter's estate made any dividends; if it did, the defendants would have been entitled to come in, if the bill had be returned. This point is left to you, on the evidence.

Verdict for the plaintiff, for the amount of Walter's bill, and interest.

Case No. 9,915.

MULLER v. ERICH.

[See Case No. 9,916.]

Case No. 9,916.

MULLER v. HENRY et al.

[5 Sawy. 464; 7 Reporter, 772.] [1]

Circuit Court, D. California. May 1, 1879.

INJUNCTION—CONTEMPT—ACTING UNDER AUTHORITY OF ORDINANCE.

1. Certain parties having been injoined from grading a street until the hearing of the cause, or the further order of the court, subsequently proceeded to grade the street under authority of a city ordinance, passed after the issuing of the injunction, without first presenting the ordinance to the court and procuring a dissolution or modification of the injunction: *Held*, that they were guilty of contempt.

2. A party can only be relieved from the operation of an injunction, absolutely prohibiting the performance of a specific act, by the court granting the injunction.

The bill, supported by numerous affidavits, alleged that the defendants [Joseph Henry and others], without lawful authority, were depositing earth upon certain streets in Napa City and filling them up in such a manner as to dam up water which comes from high ground beyond, upon complainant's lot, occupied as a residence, which water will, by such retention on the lot, create a nuisance, producing irreparable injury by destroying the flowers, shrubbery, and a large number of ornamental trees which have been some twenty years growing upon the lot, and by becoming stagnant and unhealthy, render the lot uninhabitable. The defendants answered denying the effect attributed to the work, and alleging that they were lawfully grading the streets in question in pursuance of an ordinance of the city of Napa. Upon the hearing of an application for a temporary injunction upon the bill, answer, affidavits and charter of the city, the court held that the proceedings of the board of trustees under which the defendants were doing the work were void, by reason of not having been taken in accordance with the requirements of the city charter, and that defendants were unlawfully filling the streets; and being of the opinion, from the facts disclosed by the pleadings and affidavits, that a private nuisance was likely to result from the work, injoined the defendants from "depositing any rock, earth, clay, gravel or other material" on said streets until the hearing, or till the further order of the court. After the issuing of the injunction the board of trustees passed another ordinance authorizing the doing of the same work, which for the purposes of the decision is assumed to have been done in pursuance of the provisions of the charter. Under the authority of these proceedings, without bringing them to the attention of the court, and while the injunction was still in force, the defendants again commenced to fill in the streets as they were doing before they were stopped by the injunction. Upon this proceeding instituted by the complainant [Hermon Muller] to punish them for contempt in violating the injunction, the defendants set up the said subsequent proceedings of the board of trustees as a justification.

B. S. Brooks, for complainant.

T. I. Bergin and Geo. W. Towle, for defendant.

SAWYER, Circuit Judge. After a full examination of the question submitted in this case, in the matter of contempt, and of the authorities bearing on the subject, I am confirmed in the impression, which I had at the hearing, that the parties are in contempt. The order of this court forbids the defendant doing certain specific acts, and those very acts they have performed.

The first question presented upon the application for the injunction, was, as to the validity of the ordinance authorizing the grading of the streets mentioned. The court held that ordinance to be invalid in consequence of a failure on the part of the board of trustees in passing it to pursue the methods prescribed by the statute. Then, there was another question, as to whether or not the work ordered by that ordinance to be done would create a private nuisance. The court was of opinion, from the evidence adduced, that the case was one in which an injunction should be issued until that question could be determined. After the injunction issued, the board of trustees of the city of Napa took proceedings (which, for the purposes of the decision, may be assumed to have been regular) to authorize the grading of the street—the thing which the defendants were prohibited from doing by the injunction of this court; and, under authority of that action on the part of the board of trustees, without moving this court to modify the injunction, or to release them from the restraints which it imposed, the parties proceeded with the work.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Reporter, 772, contains only a partial report.]

In Williamson v. Carnan, 1 Gill & J. 184, I find a case which I think is directly in point, and which fully sustains the impression which I had at the hearing, and which has been deepened and confirmed by subsequent investigation. In that case, the levy court, as it was called, had authorized, by proceedings had for the purpose, the closing of a public road which ran over the lands of the defendant in the injunction suit. The defendant was about to close the road, and an injunction was obtained from the Baltimore county court, sitting in equity, restraining him from so doing. A writ of certiorari had been issued, and a review of the proceedings of the levy court had in the meantime. It turned out that the proceedings of the levy court were invalid for want of formality, and, in consequence of that informality, the proceedings of that court were reversed. The parties interested then again applied to the proper court by petition, in the regular course, and obtained another order for the closing of the road, all the parties interested having notice of this application, and appearing to contest it. In pursuance of this authority, supposing that it would protect him from the operation of the injunction, the party injoined again proceeded to close the road. This, substantially, is an outline of that case. It is rather long, and I shall only cite sufficient of it to show that it is a parallel case with the one now before me. The chancellor says (page 194): "At the March term, 1828, the complainants again by their petition stated, that the defendant, disregarding the said injunction, did by his agents, servants and himself, cause the road mentioned in the injunction to be obstructed on or about the thirteenth of December last, by causing a fence, etc., to be erected, and placing other obstructions on and across the same, etc., as will appear by the affidavits filed at the last term. That although an attachment issued, and was duly served on the defendant, it had not had the effect of causing him to remove the obstructions then existing; but, as would appear by the annexed affidavit, he had additionally obstructed the said road, etc. Prayer for an attachment against defendant, and that he be compelled to place the said road in the same situation as it was previously to his closing the same on or about the thirteenth of December last. An attachment was again ordered and issued, returnable forthwith; and was duly served, etc. The defendant appeared and filed his petition, in which he stated, that the proceedings of the levy court, in reference to the said road having been set aside by the Baltimore county court, upon the hearing and examination thereof, under the writ of certiorari, which had been issued, etc., as will appear by a transcript of the proceedings exhibited, not upon the merits of the case, but for defect of form"—which is the ground upon which these very proceedings are held to be invalid—"as will appear by a copy of the opinion of said court. That the petitioner being advised that that part of the said road called the 'Garrison Forest Road,' mentioned in the proceedings, having become a public road and highway, he, together with other petitioners, taxable inhabitants of the county, made a new application to the levy court, to alter and close the said part of said road; and that the complainants had notice thereof, and attended a meeting of the commissioners appointed under the said application, and opposed the confirmation of the return made by the said commissioners. That on the thirteenth of December, 1827, an order was passed by the commissioners of the county, to whom the powers and duties, heretofore exercised by the levy court, have been transferred, that all that part of the before-mentioned road be shut up and closed; and that the petitioner, or any other person or persons, through whose lands the said old road may have been departed from, by such altering, etc., are authorized to shut up and close the same, as by reference to a copy of the said proceedings exhibited will appear. That the complainants had knowledge of said order of the said commissioners, and that the said order being final and conclusive, without appeal, and no writ of certiorari having been applied for, and the said road so authorized to be closed passing transversely through the farm of the petitioner; and the complainants, by the altering of the said road, having another, and a better and shorter road, and the petitioner being greatly aggrieved by the passing of the said road through his lands, and conceiving himself fully authorized to do so by the said order, he, by virtue of the said order, and not, as he avers, in contempt of the court, did proceed to close the said road; and that he shut up and closed the same without force, etc., and before any attachment had issued against him. That since he has closed the said road he hath removed his inner fences, and planted an orchard on either side of and through the bed of the said road; and that the removal of his fences will be attended with great and irreparable damage to him. Prayer that the said road may be suffered to remain closed, and that he may be released from custody, and that the attachment may be quashed."

There is a long opinion upon the case, of which I shall quote small portions. After stating the circumstances of the case, the chancellor says: "It appears, then, by the defendant's petitions of the third of January and twenty-second of April, that he had conceived himself fully and legally authorized to close this highway, by virtue of the order of the levy court, notwithstanding the injunction of this court, which had positively prohibited him from closing or obstructing it in any way whatever; or, in other words, that the final order he had obtained had virtually, yet effectually and completely, dissolved and annulled the injunction heretofore granted by this court. The defendant made

no application or motion to have the injunction dissolved after the second of December, 1826, until the twenty-second of April last. He has not even deigned to speak of the injunction, in the body of either of those petitions, in which he acknowledges and attempts to justify the closing of the road; and yet, in the first, he asks to be permitted to file an amended answer, and to have the bill dismissed; and in the second, he prays that the road may remain closed, and that he may be discharged from the attachment. If the prayer of his first petition had been literally and fully granted, and the bill dismissed, yet that would not have dissolved the injunction, unless it had been so expressly ordered. By the second petition, this court is, in effect, gravely asked to make a most extraordinary transit over all its own proceedings, into those of the levy court; to approve, and act upon them, and totally disregard its own. For, an order of this court, as prayed, that the road should be suffered to remain closed, and that the defendant should be discharged from the attachment, most manifestly, could stand upon no other foundation than a complete affirmance of the proceedings of the levy court, and an entire disregard of all the previous proceedings of this court. I never before heard of such an indirect mode of obtaining a virtual dissolution of an injunction, by bringing to bear upon it a judicial decision of another and totally different tribunal, not exercising or having any appellate jurisdiction over the court whence the injunction issued. An injunction, emanating from a competent authority, is a command of the law; and the citizen is, as I have always understood, bound to yield implicit obedience, until the restriction has been removed by the authority which imposed it."

So, in this case, these parties were injoined from doing a specific thing—from grading this street and filling it up—and they go and get authority from another tribunal, the board of trustees of the city of Napa, to go to work and fill it up, which, if permitted, will virtually work a dissolution of the injunction of this court by the said board.

The court, in the case cited, proceeds to say: "But, if the position assumed by this defendant be correct, then, instead of obeying or moving to dissolve an injunction, a party may avail himself of various modes of getting around, or under, or over it, without being chargeable with the slightest contempt of the law. The judgment of this court, continuing the injunction, was founded upon the proof or admission of certain facts, after hearing both parties, as to the very point whether it ought to be continued or not. But, if it could be indirectly and virtually dissolved by a judgment of the levy court, upon a different case, then it might be evaded by one party without hearing the opposite party as to the former, or any new facts or equity, which he might be able to show, as a most solid ground for its further continuance. The court, commanding obedience to an injunction, might thus be brought into collision with another court, alleged to have sanctioned, or as this defendant has said, ratified the acts in disobedience of it, in which conflict of jurisdiction, the rights of persons and of property, it is evident, must suffer, while he who produced the scuffle might escape with the spoils. Surely, such principles, which, to say the least of them, lead so directly to disorder and confusion, ought not to be tolerated for a moment."

So, in this case, if these parties are to go to another tribunal and get an order which may be legal in itself, and thereby are enabled to "escape with the spoils," and are to experience no trouble from this injunction, certainly disorder and confusion must result from such a state of affairs. "There is absolutely nothing in the prayer of the bill, nor in the writ of injunction itself, which limits the prohibition to a shutting up under the order of the levy court, or under any other particular and specified authority whatever." So, in this case, there is nothing in the injunction that refers at all to the particular action of the board of trustees; it is simply an injunction preventing them from grading that street—"from depositing any rock, earth, clay, ground or other material on" said streets, is the language of the writ—no reference whatever being made to the order of the board. It is not limited to that; it is not an injunction restraining these parties from doing this work under that order, but an injunction positively and absolutely forbidding their proceeding with it at all.

The court proceeds: "Neither the terms of the prayer, nor of the writ, make any allusion whatever to any judicial proceedings of any kind then pending, or thereafter to be instituted. The restriction imposed upon the defendant is as general and comprehensive as it could well be expressed, the clear and unequivocal sense of which is, that the road shall continue to be considered as a public road or highway, which the defendant shall not be permitted to close until he shall produce and show to this court that he had obtained a legal authority to do so. Therefore, the only question now is, whether the acts done by this defendant are such as he was prohibited from doing by the injunction? These acts are the erection of obstructions upon this highway; now these are the very acts which this injunction does most positively and distinctly prohibit."

And so in this case, the injunction was to prohibit these parties from filling up the streets; that is what is stated in distinct terms.

The court continues: "It is true, that if the injunction had prohibited acts of one description from being done, and the party restrained had done acts of another description, he could not, as the defendant has alleged, be charged with a contempt. The injunction did not prohibit him or any other person from in-

stituting any proceedings, or making any application for the purpose of obtaining a legal authority to close the road." So, in this case, the injunction did not prohibit the board of trustees from passing the proper order for the grading of this street. But they did not stop at that. The order having been passed, instead of coming to this court and presenting that order, and showing the fact that they were now in a position to proceed legally and regularly, and obtaining the order of this court allowing them to proceed, the defendants assumed the authority to go further, and, without the authority of the court, to do the very thing which this court enjoined them from doing.

The chancellor then proceeds to say: "Most unquestionably, this defendant cannot be allowed to do so, upon his obtaining an authority to close it, until he has first shown that authority to this court, and upon motion and notice to the opposite party, according to the established practice, obtained a dissolution of that general and unqualified restraint which has been imposed upon him by the injunction. This first cause shown by the defendant for his discharge, being based upon an assumed position not warranted by the proceedings, is therefore deemed insufficient. Indeed, the showing itself seems tacitly to admit the correctness of the charge of contempt, but for that qualification of the injunction which it has assumed, and which has, in fact, no real existence."

Now, that is precisely the position of this case. The parties were grading, or about to grade, this street, assuming to act under the authority of the city board of trustees. By injunction issued from this court they were restrained from carrying on the work—from doing a specific thing. They then went and got another order from the same authority under which they were first acting, as was done in the case from which I have just read; and then, without coming to this court and asking to be relieved from the injunction, on the ground that they now have proper authority, and are proceeding regularly, they undertook to go on and do the specific thing prohibited, and therefore dissolve the injunction granted by this court, by virtue of proceedings of the board of trustees of the city of Napa.

The injunction should be obeyed until it is dissolved by the authority which granted it. Undoubtedly, if a proper showing were made, if the court were satisfied that the injunction should be dissolved, it would be dissolved; but until that is done, the party himself has no right to determine the fact that he has authority to proceed, in violation of the injunction of this court, to perform the acts which have been prohibited.

For the purposes of this motion, it is assumed that the later proceedings of the board of trustees are regular in form—that the ordinance upon its face is valid. From an examination of the ordinance, and of the papers submitted, I understand that no provision has been made for draining off the water when this grade shall be carried out, and thus obviating what is claimed will be a nuisance. If such is the case, although the proceedings of the board may be regular in form, and an ordinance passed strictly in accordance with the provisions of the statutes, there still might result a private nuisance which the authorities of the city of Napa would not be permitted to create. That is one of the questions which is still left for the determination of the court, and the only question left for consideration in the case upon which the injunction issued. If it had been made to appear to the court, after the passage of this recent ordinance, that the grading of the street, without providing for drainage, would not create a private nuisance, the injunction would have been at once dissolved. The court granted the injunction, because it appeared that a private nuisance was likely to be created, and because it appeared that the work was not being done under proper authority; but it does not follow, that even the board of trustees of the city of Napa could take proceedings, even though regular in form, and passed in accordance with the modes provided by the statute, to create a private nuisance. In the case of Spokes v. Banbury Board of Health, L. R. 1 Eq. Cas. 49, the board of health, proceeding strictly in accordance with the terms of the law, proceeded to, and did, cut into a stream which ran through the land of a party below, drains which were necessary to the health of the town, to carry off water and filth, thereby rendering the said party's place uninhabitable. The injured party applied for an injunction, and the court held, in very decided terms, that even though the cutting of the drains were necessary to the health of the town, the authorities could not create such a nuisance, to the destruction of private property.

I only call attention to that case, at this time, in order to show that there are authorities holding that a private nuisance cannot be committed even by municipal authority, as that is one question still undetermined in this case, assuming the proceedings of the board of trustees to be regular in all other particulars. I leave this point open, however, till the hearing. The defendants must, therefore, be adjudged to be in contempt.

They, however, deny any intention of committing any contempt of this court, and assert that they resumed and proceeded with the work under advice of counsel that this later action of the board of trustees was sufficient authority to justify them in proceeding. I do not suppose that the contempt was willful, and I do not propose to be vindictive in inflicting a penalty. The question of punishment for the contempt was not particularly discussed on the hearing, and I do not know what the actual damage to the complainant has been, as there is no special evidence upon that point, and I am, therefore, not prepared

at present to announce the penalty which should be inflicted. In order to enable counsel to prepare and produce evidence as to the amount of damage resulting from the performance of this work, which has been done since the issuing of the injunction, I will continue the matter until Monday, the twelfth instant, at 11 o'clock in the forenoon.

Case No. 9,917.

MULLER et al. v. The IGINIA.

[N. Y. Times, Jan. 7, 1863.]

District Court, S. D. New York. Jan., 1863.

CARRIERS—MARITIME TORT—DAMAGE TO CARGO—PRESUMPTION OF NEGLIGENCE—PRESSURE—PERIL OF THE SEA.

[1. Damage to cargo raises an inference that it was caused by the carrier's negligence, rather than by perils of the sea.]

[2. Pressure of one part of a cargo upon another is not a peril of the sea.]

[This was a libel by George J. Muller and others against the ship Iginia, her tackle, etc., for damage to cargo.]

This was a libel filed to recover the value of two casks of wine, shipped, with others, on board the vessel at Antwerp, consigned to the libelants at New York. These two casks, on the arrival of the vessel, were found to be empty. The bill of lading was in the usual form, having the usual exception of losses by perils of sea. These casks were stowed in the ground tier. The evidence was, that the casks themselves were sound, and that they did not shift on the passage over. The respondents proved that the vessel experienced heavy weather, which lasted most of the time for forty days, and that during this time the water brought up by the pumps had a smell of wine. The port warden here certified that the leakage was "apparently caused by working, or pressure of the cargo."

Kaufman, Frank & Wilcoxson, for libelants.

Dukes & Sullivan, for respondents.

Before SHIPMAN, District Judge.

HELD BY THE COURT. That the burden of proof that the loss was occasioned by the perils of the sea is upon the carriers. The Martha [Case No. 9,145]; Bearse v. Ropes [Id. 1,192]; The Emma Johnson [Id. 4,465]. That if the loss of the wine can be fairly attributed to the force of the gale, which the master of the vessel took every precaution to provide against, but failed from no fault of his own, then it falls within the exception of the bill of lading. That on the evidence the proximate cause of the damage was the too heavy pressure to which the casks were subjected by the weight of the cargo upon them. That this was a danger which could and should have been provided against, and the consequences of which must be charged to the ship, and not to the sea.

Decree for libelants for $170.25, the value of the wine, with interest from date of filing the libel.

MULLER (JENNINGS v.). See Case No. 7,282.

MULLER (POTTER v.). See Cases Nos. 11,333 and 11,334.

MULVANEY (UNITED STATES v.). See Case No. 15,833.

Case No. 9,918.

MUMFORD v. MUMFORD.

[1 Gall. 366.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1812.

PARTIES—ALIEN ENEMY.

An alien enemy cannot sustain a suit in the courts of the United States.

This was a bill in equity [by Joseph Mumford against Henry Mumford], upon the face of which it appeared, that the complainant was an alien enemy, to wit, a subject of the king of the United Kingdom of Great Britain and Ireland, resident within the realm thereof. It was admitted by the counsel on each side, that the fact was truly stated, and thereupon THE COURT ordered the bill to be dismissed, being of opinion that an alien enemy has no persona standi in judicio, and cannot prosecute any suit in the courts of this country. Daubigny v. Davallon, 2 Anstr. 462. Bill dismissed.

Mr. Burrill, for complainant.

Mr. Crapo, for respondent.

Case No. 9,919.

MUMM v. OWENS.

[2 Dill. 475.] [2]

Circuit Court, D. Iowa. 1873.

EVIDENCE—COMPETENCY OF PARTIES—ACT MARCH 3, 1865, CONSTRUED.

A servant brought an action against his master for negligence, and during its pendency died. Under the statute of the state by which the action survived, his administrator was substituted as plaintiff, and the action continued in his name, and came on for trial. The servant, before his death, was fully examined, and cross-examined as a witness in his own behalf, and his examination was reduced to the form of a deposition, and, on the trial, was read in evidence to the jury by the administrator against the defendant: *Held*, under the act of congress of March 3, 1865 (13 Stat. 533), that the defendant should be allowed to testify on his own behalf as to the matters embraced in the deposition of the plaintiff's intestate.

This action was originally instituted by John Johnson in his life time, to recover

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

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

for injuries caused, as alleged, by the defendant's negligence. The defendant was a contractor, under the government, for building locks in the canal near Keokuk, and Johnson was employed by him as a laborer. The defendant gave orders to fifteen or twenty men to lift a heavy box, or turntable, and remove it to a designated place, and, in the course of executing this order, Johnson was seriously injured. For the injury thus occasioned, this action was brought by Johnson. Johnson's deposition, after issues settled, was taken upon the whole case, and he was fully examined and cross-examined as to all matters in controversy. Subsequently he died, and, under the statute of the state, his administrator was substituted as plaintiff, and the cause proceeded in his name. On trial, the plaintiff Mumm, as administrator, read in evidence to the jury the above-mentioned deposition of his intestate, the said Johnson, and produced other evidence to the jury in relation to the accident, its cause, and the extent of Johnson's injury. When the plaintiff had rested, the defendant's counsel offered the defendant himself as a witness in his own behalf. The plaintiff's counsel objected, on the ground, that as the plaintiff was an administrator, the defendant was not a competent witness for himself.

Craig & Gibbons, for plaintiff.
Gillmore & Anderson, for defendant.

DILLON, Circuit Judge. This action was brought by Johnson in his life time, for personal injuries to himself, caused by the alleged negligence of the defendant, and pending the action he died, and his administrator was substituted as the party plaintiff, and he seeks to recover for the same injuries for which the action was commenced by Johnson. Under the statute of the state, the action survives, as will be seen by the case of Shafer v. Grimes, 23 Iowa, 550.

It is to be noticed that this is not an action by the administrator, under the statute of the state, to recover damages for the death of Johnson; but it is the original action, brought by Johnson, which did not abate by his death, but, under the statute, survived to his administrator. Johnson, before his death, was examined as a witness in his own behalf, and his examination was reduced to writing, in the form of a deposition, and this deposition has been read in evidence by the plaintiff.

Now, is the defendant, under these circumstances, precluded from testifying to the matters covered by Johnson's evidence, as contained in the deposition read to the jury? Under the act of congress of July 2, 1864 (13 Stat. 351, § 3), and of March 3, 1865 (13 Stat. 533, § 1), it is my opinion that the defendant should be allowed to testify, if the plaintiff insists upon keeping the testimony of his intestate before the jury.

The first act above cited makes parties competent witnesses in all civil cases; and the second act does not pronounce an absolute disqualification against the living party when the adverse party is an administrator, but enacts that he "shall not be allowed to testify against the other as to any transaction with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the court." In this case, the intestate has testified, and his testimony is before the jury; to exclude the defendant from giving his version of the same transaction would be manifestly unfair, and in contravention of the purpose and spirit of the legislation of congress.

Evidence admitted.

Case No. 9,920.

MUNCASTER v. MASON et al.

[2 Cranch, C. C. 521.] [1]

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

EXECUTION — COUNTERMANDED AT REQUEST OF DEFENDANT—NEW EXECUTION.

If the plaintiff has countermanded his execution at the request of the defendant, to give him time, or if he has been delayed by injunction obtained by the defendant, he may take out a new execution after the expiration of the year and day.

Rule to show cause why four executions, in favor of John Muncaster against J. Mason and W. Jones, should not be quashed, because issued more than a year and day after judgment.

E. J. Lee, for plaintiff, showed for cause, as to two of the executions, that the plaintiff had been delayed by injunction obtained by the defendant Mason, and finally dissolved under a mandate from the supreme court of the United States, and, as to the two other executions, that the plaintiff had issued his executions in due time, but had countermanded them at the particular solicitation of the defendant. See Mitchell v. Cue, 2 Burrows, 660; Phillipps v. Lowndes [Case No. 11,103], in this court, Dec. term, 1805; Craig v. Johnson, Hardin, 529.

Mr. Key, contra, cited Winter v. Lightbound, Strange, 301; Booth v. Booth, 1 Salk. 322, 6 Mod. 288; Salmon v. Yates, 1 Har. & J. 488.

THE COURT (MORSELL, Circuit Judge, contra), upon the authority of the cases cited by Mr. Lee, refused to quash the executions, upon the ground that the first executions had been countermanded at the request of the defendant, and by way of indulgence. See, also, the case of Noland v. Seekright, 6 Munf. 185, 187.

[See Case No. 9,248.]

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

MUNCASTER (MASON v.). See Cases Nos. 9,247 and 9,248.

Case No. 9,921.

MUNCH et al. v. The SUCKER STATE.

[4 Chi. Leg. News, 201.]

District Court, D. Minnesota. 1872.

COLLISION—OWNERSHIP OF VESSEL—MEASURE OF DAMAGES—REPAIRS—LOSS OF SERVICES.

1. The ownership of a boat, at least so far as to make out a prima facie case, may be proved in the same manner as of any other chattel.

2. The court states the facts relating to the collision, and finds that the steamer was managed with carelessness and must pay the damage.

3. The amount paid for repairs is a proper item, and the owners of the barge are entitled to recover damages for the loss of her services while she was undergoing repairs, and the court allows the highest rate of interest permitted in Minnesota during the time the barge was undergoing repairs, upon her value as a measure of damages for her detention.

[This was a libel by Emil Munch, Gustave Munch, and Adolph Stierle against the steamer Sucker State.]

H. J. Horn, for libellants.

C. K. Davis, contra.

NELSON, District Judge. The owners of the barge Eveline filed a libel against the steamer Sucker State, her engines, machinery, boat's tackle, apparel and furniture, claiming damages for a collision through the fault of the steamer whereby the barge was severely injured and rendered unserviceable for a long period. The barge was lying safely moored at the levee at the city of Hastings on the Mississippi river when the collision occurred. The steamer was coming down the river on Sept. 1st, 1870, at mid-day, and approaching the city of Hastings headed towards the shore, the current being rapid and the wind blowing fresh and quartering upon the levee, to effect a landing a short distance above the place where the barge was moored. It is claimed that owing to the gross negligence and mismanagement of the steamer, she swung around against the barge as her bow struck the shore with great force, and crushed and broke in her side, so that she rapidly filled with water and was only prevented from sinking by dragging her out upon dry land. The barge was clearly visible by those in charge of the steamer, and it is alleged that the collision took place without any fault of the barge or of her owners. Damages to the amount expended in making necessary repairs are claimed and loss of services at the rate of five dollars per day for forty-seven days. The steamer was arrested pursuant to the process issued and the claimants appeared and entered into a stipulation for an amount sufficient to cover the damages claimed. The claimants in their answer put in issue the ownership of the barge as claimed in the libel, and allege that the barge was old, rotten, leaky and unseaworthy, and they deny that any repairs were rendered necessary or that the libellants lost the use of her by reason of any act committed by the steamer. They allege that a landing was effected at Hastings skillfully and in a seamanlike manner, and that they run alongside of the barge carefully, and deny that the steamer swung around with such force as to crush the barge or injure her as stated in the libel. They charge that if any injury happened, it was owing to the fact that the barge was rotten, old and leaky and unseaworthy.

The right of libellants to enforce their claim as owners was raised on the hearing. The respondents objected to any parol evidence of ownership. An executory contract entered into in writing before the collision for the sale of the barge to two of the libellants was offered, and also the enrollment with a bill of sale accompanying it, but the bill of sale was dated subsequently to the time when the collision occurred. Parol evidence was then offered to show that the barge was really delivered at the date of the executory contract, and that the other libellant purchased an interest in her, and was part owner at the time of the injury. This testimony is admissible as also the further evidence that the bill of sale attached to the enrollment was dated by mistake to conform to the time of enrollment, instead of a period anterior to the collision. The ownership of the boat, at least so far as to make out a prima facie case, may be proved in the same manner as of any other chattel, and the testimony offered showed, unrebutted, a right in the libellants to maintain this action.

The witnesses on both sides testify that the steamer struck the barge in landing, and the weight of evidence sustains the charge in the libel, that it was with great force and accompanied with a crushing sound, that indicated a breaking in of the sides of the barge. The captain of the steamer appears to have appreciated the danger of attempting a landing above the barge, and cautioned the pilot about hazarding it, who in obedience to orders, backed her so as to pass below, but subsequently learning that freight was to be taken on at a warehouse just above, moved up ahead of the barge. In doing this the steamer, when her bow was turned out into the stream, touched the stern of the barge, swung in and lapped her. She struck, according to the testimony of those on shore, with such force as to attract their attention. The mail agent says: "She struck harder than she would have done on still water," but thinks the injury resulted from the barge being rotten and weak. The testimony of those on shore and near the barge, and who went to her assistance and relieved her from water with the pumps, is decisive upon the fact of damage done by the collision, and it is also clear that a landing could have been easily made above or below, without any diffi-

culty, as the levee is some four hundred feet long. The barge also proved to have been unseaworthy. She was built of oak in 1867, just three years previous, and although leaking some, was serviceable, and capable of being used daily. She was safely moored at a public landing, and it was incumbent on the steamer to keep out of her way. By landing as she did she took all of the risk of damage. It was dangerous to swing the steamer against the barge with the wind blowing fresh upon the shore and the current running strong, and she must be held responsible for the loss sustained. The steamboat having the power to be moved and stopped at pleasure, was presumptively managed with carelessness, and must pay the damage.

I am not so clear upon the extent of the liability. The amount paid for repairs is a proper item of allowance, and is sustained as claimed.

Upon the claim for loss of service, there is great difficulty in laying down a certain and safe rule. The doctrine of restitutio in integrum must govern in all cases; but the difficulty is as to the proper application of the maxim. In the case of The Narragansett [Case No. 10,017], the court says: "That it is impossible to fix with exactness the time indispensable for the repair of the injured vessel or the value of her services during the period of her disablement. These particulars must necessarily rest in a great degree upon estimates," but an allowance was made and sustained by the appellate court, with the remark, "that such an allowance for loss of services while the vessel is undergoing repairs, seems proper according to the maritime law." It does not appear in this case, how the amount was arrived at. In the case of The Rhode Island [Id. 11,744], an allowance was made by the commissioner to whom it was referred of a per diem compensation for each day after the collision until after the damaged vessel was repaired, for an amount which, according to the evidence, would have enabled her owners to supply her place with a vessel to perform her work. No vessel to perform her work during the interval was hired, and that was the case here. The court sent the report of the commissioner back disallowed, and ordered six per cent. interest per annum upon the value of the vessel before the damage, to be allowed during the detention, instead of the former allowance. On appeal the action was sustained, and the court say: "The allowance was for a supposed or apparent loss incident to the damage done by the collision in regard to which no settled rule can be found; opinion being conflicting whether anything should be allowed, and if anything, by what measure the allowance should be determined. * * * We sustain it not because it was founded upon any established principles, but because no principle could be found that would justify the adoption of a higher measure of damages in the case." In the case of Williamson v. Barrett, 13 How. [54 U. S.] 101, which was a case at common law, and tried before a jury, in the court below, an exception had been taken to the charge of the court that in addition to damages for an amount expended in repairing the boat, the jury should give damages for the use of her during the time necessary to make the repairs and fit her for business. The court says: "The general rule regulating damages in cases of collision is to allow the injured party an indemnity to the extent of the loss sustained, * * * but there is a good deal of difficulty in, stating the grounds upon which to arrive, in all cases, at the proper measure of that indemnity. * * * The difficulty lies in estimating the damage sustained by the loss of the service of the vessel, while she is undergoing repairs." The question is discussed at some length, and it is said that "the market price for the hire of the vessel which can be determined by the demand in the market for vessels of the same description, and the price which the owner could or might have obtained for his vessel," is as fair a test as can be applied to ascertain the damage. This, no doubt is the ordinary and safe rule, but as was stated by Mr. Justice Catron in his dissenting opinion, "the supposition that the amount of damages can easily be fixed by proof of what the injured boat could have been hired for during her detention, will turn out to be a barren theory on our Western rivers." The claim for the service of the barge in this case, is too high, and I am not satisfied with the testimony offered to sustain it. Her value is fixed at eight hundred dollars as the highest figure. The damage for loss of service claimed, is nearly equal to one-fourth of this sum; and that too for only forty-seven days' service. I do not think it is sufficiently clear that her service was equal to such an amount. She was leaky before the collision and the oakum was out of the seams for some distance along her sides. She stood in need of thorough repair, although her owner might have used her in carrying lumber through the season of navigation. There was a loss of service, however, to the owners, and they are entitled to compensation. It seems to me to be a just and fair indemnity, inasmuch as her owners did not deem it necessary to hire any boat in her place to enable them to continue the business, to allow the highest rate of interest permitted in this state, during the time she was undergoing repairs, upon her value, as a measure of damages for detention. This recognizes the barge as so much capital unemployed and incapable of producing income on account of the collision. I regard this rule of damages justifiable on account of the insufficiency of the testimony to warrant any other estimate. The clerk will make the computation and enter a decree accordingly, with interest and costs.

MUNCIE NAT. BANK (BARNETT v.). See Case No. 1,026.

Case No. 9,922.

MUNCIE NAT. BANK v. BARNITS et al.

[See Case No. 1,026.]

MUNDELL (UNITED STATES v.). See Case No. 15,834.

MUNFORD (ALSTON v.). See Case No. 267.

MUNFORD v. BALCH. See Case No. 790.

Case No. 9,923.

In re MUNGER et al.

[4 N. B. R. 295 (Quarto, 90).] [1]

District Court, W. D. Michigan. 1870.[2]

BANKRUPTCY — FRAUDULENT INTENTION — INSOLVENCY—COMPROMISE—BONA FIDES.

1. Where there is no fraudulent intention, a dealer may, although insolvent, continue to sell his stock at retail, and endeavor to effect, if possible, a compromise with his creditors.

2. Where a trader makes a compromise with his creditors by making a sale of his stock, giving to the creditors part cash and part notes of the purchaser, the same being done in pursuance to an arrangement made with some of the creditors directly, and others through an agent, there is no fraud on the part of the debtor if an agent of one or more of the creditors exceeds his authority in accepting the compromise and the debtor is ignorant thereof.

3. When one debtor accepts a certain sum as a compromise, and he is not led to believe that he was getting as much as others, and he accepts the notes of his debtor's purchaser in part payment, he cannot be sustained in a petition against the debtor alleging a preference thereby under the bankrupt act [of 1867 (14 Stat. 517)].

In bankruptcy.

Dickinson & Dickinson and George Gray, for petitioners.

L. S. Hodges, for respondents.

WITHEY, District Judge. Curren, Goodwin, Walker & Co., petition to have Munger & Champlin, copartners, declared bankrupts. There are five acts of bankruptcy charged, which I shall consider as involving but three questions. The first act charged is, that respondents, being insolvent, sold and transferred to divers persons, from time to time, portions of their stock in trade with intent to defeat the operation of the bankrupt act, in this; they ascertained, January 3d, 1870, by taking account of stock, that their liabilities exceeded their assets by about sixteen thousand dollars, and thereafter, in January, February, March, and up to about the 18th day of April, they were endeavoring to effect a compromise of their debts, but were unsuccessful, and at the same time were selling goods from their store to customers in the ordinary way of trade. It is claimed that they thus conducted their business with intent to prevent proceedings against them in bankruptcy, and with intent to defeat the operation of the law. The proofs show that respondents were not only insolvent, but knew they were; that some time in February they endeavored to effect a compromise of their debts at fifty cents, and were not successful, and afterwards in March and April, they sought again to effect a compromise at thirty-five cents, during all which period they continued trading at their store in Kalamazoo as usual, selling to customers at retail from day to day. But there is no proof of intent to defeat the operation of the bankrupt act, unless that kind of management of their business raises the presumption of such intent. In my opinion it does not; on the contrary, their efforts to settle with creditors without going through bankruptcy in court, was entirely legitimate, not prohibited by any provision of the bankrupt law; and continuing to sell goods in the usual way of trade, pending such negotiations, was entirely proper and justifiable, and what they ought to have done, so long as their intention was not fraudulent. Undoubtedly if the proofs showed an intention by the debtors to so conduct their business as to avoid paying their debts, or to prevent their property being applied to the payment of their debts under the provisions of the bankrupt law; preventing proceedings in bankruptcy against them with a view to defeat the provisions of the act, then would be shown such an intent as to require that they be decreed bankrupts. But I find no such fraudulent purpose from the proofs in this case.

Then follows three distinct acts of bankruptcy, but as they raise but one question, I shall consider them together. That question is whether a transfer made by respondents of all their assets not exempt, to George M. Colt, on or about April 18th, 1870, Colt being liable for them as indorser, was with intent either to prefer Colt, or to defeat the operation of the bankrupt act. It is shown that when respondents failed to effect a compromise at fifty cents, they made an effort to get a settlement at thirty-five cents. To this end one of the firm went to New York City, secured a meeting of a majority of their creditors there, stated to them their assets and debts, and asked a settlement at thirty-five cents. Nothing definite was then accomplished, but some of the creditors thought the debtors better keep their store open for the time being, and keep their stock replenished, and do the best they could until something definite could be done. Not long subsequently to that visit to New York, Tefft, Griswold & Kellogg of that city, filed against them a petition to have them declared bankrupts, Mr. Hodges, of Chicago, being attorney for such petitioning creditors. After filing the petition and procuring an order against respondents to show cause, he went to Kalamazoo, saw respondents and Mr. Colt, as a merchant of that place, and then learned that Colt was willing to purchase

[1] [Reprinted by permission.]

[2] [Reversed in Case No. 3,487.]

their assets at a sum which should not exceed forty cents on a dollar of respondents' liabilities, by his notes at six and twelve months, provided respondents could be freed from all their liabilities. Colt was the father-in-law of the respondent Champlin, was fully advised as to their assets and liabilities, was indorser on some of their paper; no question is made but that Colt is perfectly responsible. Hodges thought that the debts could be arranged on that basis, and was employed by respondents to secure the best terms he could from creditors. He accordingly visited New York, Chicago, and other places, and obtained such terms from a portion of the creditors, that although some of them demanded full pay, the aggregate did not exceed forty cents on a dollar of respondents' liabilities. Hodges now visited Kalamazoo again, and informed respondents and Colt of the result of his negotiations, exhibiting his authority from most of the creditors who accepted less than one hundred cents on a dollar of their claims. The result was satisfactory to Colt, inasmuch as by paying a sum equal to forty cents of respondents' debts, they could be released from liability, and his title to the goods be thereby unquestioned. He accordingly took a transfer of their assets, gave his notes payable at six and twelve months to the respective compromising creditors, and agreed to settle with and pay all others of their creditors who had not made compromise terms. Munger & Champlin also signed the compromise notes. Hodges took the notes, transmitted them to creditors, and discontinued the proceedings in bankruptcy against respondents. Colt has settled, or arranged with all the other creditors satisfactorily, at least there is no proof of dissatisfaction on their part. The only difficulty arising out of that sale, and the transactions connected with it, and affording the foundation for this case is, that Curren, Goodwin, Walker & Co., of New York, who bring forward this second petition against respondents, and on which this trial is had, authorized Hodges to take for their claim thirty-five cents cash, and Munger & Champlin's note for fifteen cents, making fifty cents; whereas, Hodges accepted thirty-five cents by Colt's and Munger & Champlin's notes at six and twelve months. Hodges informed Munger & Champlin and Colt of the terms named by these creditors on his second visit to Kalamazoo, but he was then and there shown a letter written by a Mr. Clark, from New York, to Mr. Colt, in which he states that Curren, Goodwin, Walker & Co. had informed him, after Hodges left New York, that they would take thirty-five cents. Clark was a partner of Colt's, and this letter induced Colt to believe that these creditors had authorized a settlement of their claims at thirty-five cents. It also seems to have induced Hodges to accept that sum. Hodges now said to Colt, and to Munger & Champlin, who also knew of Clark's letter, that he was the attorney of Curren, Goodwin, Walker & Co., authorized to act for them, and he would accept for them thirty-five cents in Colt's, and Munger & Champlin's notes at six and twelve months. Hodges received all the notes, and transmitted them to the respective creditors. The petitioners returned to Hodges the notes sent them, saying that they did not sanction the settlement, and should now expect payment in full, and they soon after filed their petition in this case.

The question is whether Munger & Champlin, in view of these facts, are shown to have intended, by their sale to Colt, either to prefer Colt or to defeat the operation of the bankrupt act. Hodges was agent for Munger & Champlin, for the sole purpose of receiving from creditors the best terms they would respectively make, and, if possible, such terms as would enable them to sell to Colt, and, with the proceeds of the sale, satisfy their entire debts. He was agent of Curren, Goodwin, Walker & Co., to accept for them thirty-five cents cash, and M. & C.'s paper for fifteen cents. When he accepted anything less or different, his action did not bind them, and therefore it is undoubtedly true that there was no authorized settlement of this particular claim. Nevertheless, Hodges informed both the respondents and Colt that he was authorized to act for Curren, Goodwin, Walker & Co. outside of the restricted terms he at first announced, and they believed him, and acted in pursuance of such representation in good faith. Are respondents guilty of an act of bankruptcy in making that sale to Colt, when they acted in the belief that the terms made by a large majority of their creditors would enable them to satisfy all demands against them? If so, it must be because they can justly be said to have intended thereby either to prefer Colt or defeat the operation of the bankrupt act. Mr. Justice Swayne, in Langley v. Perry [Case No. 8,067], says: "The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the bankrupt law, unless it was meant to be so." Now the real question is, whether, in fact, Munger & Champlin meant to accomplish either of the guilty acts charged, or whether, in judgment of law, they must be held to have so intended, because the transfer necessarily had the effect to prefer Colt, or to defeat the operation of the law.

My opinion, as already intimated, is that, in fact, they had no such intention; on the contrary, they acted upon the representation of Hodges in good faith, and in the full belief that he was authorized to settle for Curren, Goodwin, Walker & Co. at thirty-five cents, by Colt's notes at six and twelve months. And I am not able to say they must have known the effect of acting upon Hodges' representations that he was authorized to settle at thirty-five cents, would be to prefer Colt, or to defeat the operation of

the law. If they had believed that Hodges was not authorized to take thirty-five cents for Curren, Goodwin, Walker & Co., then, in judgment of law, they should be held to have known that the effect of this sale would be a fraud on the law. In no other view should such rule be applied to them. They cannot, therefore, as it seems to me, be held to have intended a fraud. How can they be said to have known that Curren, Goodwin, Walker & Co. would not accept thirty-five cents, unless they first knew that Hodges was not authorized to settle for thirty-five cents? If they believed what Hodges represented as to his authority, how can they be said to have intended a fraud on the act in any particular? It might be claimed, as Hodges was acting as their agent in procuring terms of settlement from creditors, any fraud or misrepresentation on his part, by which one or more creditors were not settled with, would be the act or fraud of his principals, and the effect of the agent's fraud being to give a preference and to defeat the operation of the law, respondents should be held to have intended the act charged against them. But, if such be the rule, there are two objections in my mind to its application here. One I have already stated, that Hodges was not the agent of respondents in anything wherein he assumed to act for creditors. Curren, Goodwin, Walker & Co. saw fit to authorize Hodges to accept a certain sum, viz., thirty-five cents cash and fifteen cents in notes, making fifty cents, by verbal authority. He was their agent to do this, and, when he exceeded his authority, he did not thereby become the agent of the debtors. He was the agent of both parties: for one to obtain the best terms he could; for the other to accept a stipulated amount; so that, if Hodges acted with a fraudulent intent in accepting thirty-five cents, he cannot be said to have been the agent of the debtors in so doing. When it came to the transaction of transferring the goods and taking Colt's paper in payment, Munger & Champlin acted for themselves. In accepting that paper for creditors, Hodges acted for those creditors whose agent he was, and not for the debtors. The other objection is, that the proofs do not show that Hodges intended any fraud; on the contrary, although he exceeded his authority, I incline to the opinion that he regarded Clark's letter as justifying his acceptance of thirty-five cents for Curren, Goodwin, Walker & Co.

The remaining act of bankruptcy charged is that the transfer of Colt's notes to the compromise creditors, was with intent to prefer one or more of them. I have already stated that the notes given by Colt for the stock of goods were made payable to the respective creditors who had agreed to terms of compromise, and were passed over to Hodges by Munger & Champlin for those creditors, and that he did transmit to such creditors the notes. In turning such notes over to creditors, respondents were carrying out their proposed plan of settling their debts, and in the belief that thereby, and by Colt's assumption of the uncompromising debts, all their liabilities would be settled. If Curren, Goodwin, Walker & Co.'s debt had in fact been settled as respondents supposed it was, there could be no claim that a fraud on the provisions of the law had been intended, by preference or otherwise, for all debts would then have been satisfied or arranged for, on just the terms creditors had respectively seen fit to make. Now, clearly to my mind, respondents believed they had accomplished just that result. True they have not, as it turns out, settled their indebtedness to petitioning creditors, because the agent exceeded his authority in making terms, but there was good ground for them to believe that Hodges was authorized, and that this debt, like their other debts, was arranged. So that when they turned Colt's notes over to creditors, there was evidently no intent other than to consummate the arrangement of all their liabilities, on what they regarded as an agreed and accepted basis.

It should be remarked that there is no testimony tending to show that terms were obtained from creditors upon any misrepresentation or concealment; each creditor seems to have made terms without reference to the amount any other creditor was to receive. There is no evidence to show that any creditor was led to believe he was getting as much as others. There is no pretence that there was any such representation by Hodges or the debtors. A creditor may make as favorable terms with his debtor as he pleases, and if less is accepted, in view of the debtor's circumstances than others receive, the creditor is nevertheless bound by his settlement. This feature of the proof is not unimportant with reference to the questions in controversy, and has led me to regard the compromise and arrangements of the debtors with their creditors precisely as though each creditor had compromised at the same rate per cent. The charges are not, in my opinion, sustained. The petition is dismissed.

[Upon appeal to the circuit court the decree dismissing the petition was reversed, and an adjudication of bankruptcy ordered. Case No. 3,487.]

MUNGER (CURRAN v.). See Case No. 3,487.

MUNGER (POSTMASTER GENERAL v.). See Case No. 11,309.

Case No. 9,924.

MUNGOSAH v. STEINBROOK.

[3 Dill. 418.][1]

Circuit Court, D. Kansas. 1875.

INDIAN LANDS IN KANSAS—MODE OF CONVEYANCE.

The laws of the state of Kansas have no application to the mode of alienation of lands granted to the Miami Indians (10 Stat. 1093; 11 Stat. 430), so long as the title remains in the patentees. Case of Kansas Indians, 5 Wall. [72 U. S.] 737, applied.

[Cited in U. S. v. Payne, Case No. 16,014.]

Ejectment. Plaintiff [James Mungosah] claims the title under a patent dated November 1st, 1859, issued to him in his Indian name as a member of the Miami tribe of Indians. The patent recites the 2d article of the treaty with the Miamis of June 5, 1854 (10 Stat. 1093), and contains the condition prescribed by the secretary of the interior under section 11 of the act of March 3, 1859 (11 Stat. 430), that the land patented "shall never be sold or conveyed" by the grantee without the consent of the secretary of the interior. The defendant [Daniel Steinbrook] is the grantee of the patentee under a deed made by the guardian of the grantee appointed by the probate court of Miami county, Kansas, and approved by the secretary of the interior November 5, 1868. The records of said probate court show that the guardian was appointed on the application of the grantee, who was a minor, and that the probate court ordered the guardian to make sale of the land; that the sale was reported to and approved by the probate court; but the said records do not show that the guardian executed a bond as required by the laws of the state in the case of the sale of the real estate of a minor.

A. Ennis and C. M. Foster, for plaintiff.

B. F. Simpson and Mr. Snoddy, for defendant.

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

DILLON, Circuit Judge. Under the treaty and the legislation of congress applicable to the lands patented to the Miami Indians, it is our opinion that, as to the mode of alienation so long as the title remained in the patentees, the laws of the state had no application or operation. This is obvious from Case of Kansas Indians, 5 Wall. [72 U. S.] 737, 757, 759. The regulations of the secretary of the interior in respect to the mode of alienation of these lands have been introduced in evidence; and the sale and conveyance to the defendant were made in conformity with those regulations and were approved by the secretary, whose approval appears on the deed. If the guardian of the minor had been appointed by the council of the Indians and the sale and deed had been approved by the secretary, it would have been sufficient. It is objected that the sale in question is void because the probate court did not require a bond of the guardian before making the sale; this objection might or might not be good if the validity of the sale depended upon the laws of the state, but it does not. Judgment for the defendant.

See Gray v. Coffman [Case No. 5,714]; Hicks v. Butrick [Id. 6,458].

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

Case No. 9,925.

In re MUNN.

[3 Biss. 442; 7 N. B. R. 468; 7 Am. Law Rev. 751.][1]

District Court, N. D. Illinois. Jan., 1873.

BANKRUPTCY—NON-PAYMENT OF COMMERCIAL PAPER—DEFENSE—TRANSFER TO COPARTNER—SECRET PARTNER.

1. A man should not be adjudged bankrupt for non-payment of commercial paper if he has reasonable ground to believe that he is not liable upon it.

2. If he can satisfy the court that he has good reason for disputing his liability, especially where he is in fact solvent, and has paid all other just claims, this court should not entertain jurisdiction, but should remit the parties to the ordinary remedies.

3. A transfer of firm property from one member of a solvent firm to another is not an act of bankruptcy within section 39 of the act [of 1867 (14 Stat. 536)]. Such a transfer is not a fraud upon the creditors of the firm, nor does it hinder or delay them, or constitute a preference contrary to the provisions of the act.

4. In order to charge a secret partner for the debts of the firm, it is necessary to show that such debts were contracted in the name and business of the firm, or that he had an interest in the contract or profits.

5. Where the purchaser of a note did not know that there were any secret partners with the persons whose names appeared upon its face and for whose individual benefit it was given, and placed the proceeds to the credit of the holder, the secret partners would not be liable.

6. The fact that such purchaser afterwards proved his claim in bankruptcy against the signers of the note alone tends to show that he understood them alone to be liable, and discounted it upon their responsibility.

7. Where firms composed of different members were doing business under the same firm name, circumstances stated under which dormant partners may not be liable.

This was a petition in bankruptcy filed by the Cook County National Bank of Chicago, against the firm of Munn & Scott, alleging that such firm was composed of Ira Y. Munn, George L. Scott, George Armour, Albert A. Munger, Hiram Wheeler, Charles W. Wheeler, George H. Wheeler, James R. McKay, Perry H. Smith, and George L. Dunlap, and charging that those parties were indebted to the bank upon two notes of $5,000 each, executed by and in the name of Munn & Scott, one dated August 14, 1872, due in ninety days,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Am. Law Rev. 751, contains only a partial report.]

payable to George R. Chittenden or order, the other bearing date on the 14th day of October, 1872, due in ninety days, payable to said bank, indorsed by Munn & Scott. The petitioner charged as acts of bankruptcy: 1. That the firm of Munn & Scott being traders, etc., had stopped payment of their commercial paper, the notes described, and had not resumed within a period of fourteen days, nor up to the time of filing the petition. 2. That the firm of Munn & Scott, on the 23d day of September, 1872, transferred its property and effects to George Armour & Co., a firm alleged to be composed of all the parties constituting the firm of Munn & Scott, except Ira Y. Munn and George L. Scott, with intent to delay and hinder the creditors of the firm of Munn & Scott. 3. That the firm of Munn & Scott, on the 23d day of September, 1872, transferred to George Armour and others, for its use, all its property and assets to hinder and delay the creditors of Munn & Scott. The prayer of the petition was that the firm of Munn & Scott, consisting of the parties named in the petition, might be adjudged bankrupts. All the parties named, except Ira Y. Munn and George L. Scott, appeared and filed answers denying their liability upon the notes set up, denying that they executed the notes, or that they ever were members of the firm of "Munn & Scott" who executed the notes, and denying all the acts of bankruptcy stated in the petition.

George C. Campbell, for petitioning creditor.

John N. Jewett, Wm. C. Goudy, and Wirt Dexter, for respondents.

Before HOPKINS and BLODGETT, District Judges.

HOPKINS, District Judge. By the testimony introduced, it appears that Ira Y. Munn and George L. Scott, previous to the year 1864, owned and were interested in various elevators in this city, and were doing, under the name of Munn & Scott, the business of receiving, storing, and selling grain, and a general commission business. It also appears that a portion of the other parties were doing a like business under other names, and different from Munn & Scott; that in September, 1864, Munn & Scott, and the parties owning and doing business at the other elevators in this city, entered into a contract whereby they agreed to "stock the use of such elevators and to engage as partners" in receiving, storing, and shipping grain, and to divide the profits of such business according to certain terms, mentioned in the agreement. That agreement relates only to the business of "receiving, storing and shipping grain," including the keeping in repair of the elevators and machinery, and paying the expense of such repairs, and the rebuilding of the elevators in case of destruction.

The business was to be carried on under two names: That at the elevators known as the Northwestern, the Munn & Scott, the Union and the City, in the firm name of Munn & Scott, and at the elevators on the north side of the river, under the name of Munger, Wheeler & Co. Receipts for grain received at the elevators first named were to be issued in the name of Munn & Scott, and the others in the name of Munger, Wheeler & Co.; the earnings of all to be treated as belonging to one firm, or "pooled," as it was called, and after paying the expenses of transacting the business, divided as agreed between the parties. It appears that the business of receiving, storing and shipping grain was done in that way by the firm of Munn & Scott, until the 23d of September, 1872, some new parties having been introduced into the firm from time to time, so that at the time of the date of the notes first mentioned in the petition, the parties named in the petition were members of and composed that firm. After the formation of the partnership to do the elevator business, Ira Y. Munn and George L. Scott continued to do business outside of the elevator business, and were engaged in buying and selling grain and produce, and in other speculations wholly distinct from the elevator business, and in which the parties composing the firm doing the business of receiving and storing grain at the elevators had no interest or connection whatever. It also appears that in 1865 or 1866, Munn & Scott entered into a partnership with other parties under the firm name of Munn, Norton & Scott, engaged in a general commission business. The firm of Munn & Scott, composed of Ira Y. Munn and George L. Scott, alone, continued to do business until the bankruptcy proceedings were commenced against the firm of Munn, Norton & Scott, on or about the first of November last. It does not appear that it was known outside of its members who composed the firm doing the warehouse and elevator business, until after bankruptcy proceedings against Munn, Norton & Scott. A portion of the warehouse receipts was signed "Munn & Scott," and another portion "Munger, Wheeler & Co." There is no evidence that the public or the dealers with that firm knew that any other persons were interested in that business than the parties whose names appeared upon the receipts, or that the two firms were composed of the same persons. Mr. Munn swears he never gave a note for that firm in the elevator business, or a note that he meant or understood bound anybody but himself and Mr. Scott, and Mr. Armour, another member of the firm, says none were given by Munn & Scott, to his knowledge, except two, one being for supplies and the other for machinery to be used in and about the business. Nor does it appear that the elevator firm ever did any other business or was interested in any business except the receiving, storing and shipping of grain, as mentioned in the articles of copartnership. So far as the evidence produced goes, that company never incurred any

liability in any other manner or form than by giving warehouse receipts for grain stored in the elevators, except such as they incurred for freight on grain stored in the elevators, or for expenses incurred in conducting the business; while Munn & Scott, as a separate firm, were doing a business of buying and selling grain in the market, and in that way and business were using their firm and individual credit to quite a large extent, as was also the firm of Munn, Norton & Scott. Both of these firms were in good credit until the latter part of August last, when they became involved in a wheat "corner," which broke them up and rendered them insolvent.

These are the facts as established by the evidence in relation to the partnership of the respondents, and the business done by them as such partners. The evidence as to Perry H. Smith and Geo. L. Dunlap's connection with the firm is very slight, but in view of the course pursued upon the trial, it may, in the absence of any rebutting testimony, be considered sufficient. It is preferable, also, to dispose of the case upon its merits rather than upon a technical objection of that kind taken after the close of the trial. If the counsel for the petitioners had omitted to inquire of the parties as to Messrs. Smith and Dunlap's relation to the firm, under the impression that this had been proven, the court would have allowed him to do so even after the commencement of the argument in the case. From these facts it would seem that all the members of the elevator firm, except those whose names were used, were silent or dormant partners, and can only be held liable as such. On the face of these notes the only names are "Munn & Scott." The other respondents are strangers to the transaction. The contract of discount was made with Munn & Scott, and does not, per se, create any liability as to the others. The liability of a partner arises from pledging his name, if his name is introduced into the firm, thereby holding it out as a security to the community, or from receiving profits, if he be a silent partner. The principle upon which the liability of secret partners rests is essentially different from that of a known and open partner whose name appears in the business. A secret partner is liable not because credit is supposed to have been given to the firm by reason of his connection with it, but because he is one of the contracting parties, and is benefited by the profits of the contract, so that in order to charge a secret partner for debts contracted in the name of the firm of which he is a dormant member, it is necessary to show that such debts were contracted in the name and business of the firm, or that he had an interest in the contract or profits. Winship v. Bank of U. S., 5 Pet. [30 U. S.] 529; 1 Pars. Cont. 167; Bank of Alexandria v. Mandeville [Case No. 851]. The evidence in this case shows that although they had been in business for about eight years, no commercial paper had ever been given by the firm in the name of Munn & Scott, except the two notes before referred to. It would seem from this that the business did not require the use of credit in that way, and that it was not within the general scope of the business to give such paper, so that the liability of the contestants, if ostensible partners, might be a question of serious doubt.

In view of these questions, can it be pretended that the contestants are guilty of an act of bankruptcy in not paying these notes within fourteen days after maturity? Had they not reasonable grounds to believe they were not liable upon these notes? If they had, the non-payment for a period of fourteen days does not bring them within the spirit or meaning of the bankrupt act. They deny in good faith, we think, their liability upon these notes, and their non-payment, under such circumstances, should not be deemed an act of bankruptcy as against the contestants, especially as it is shown they are worth at least $1,500,000. It would not be sufficient to defeat the operation of the bankrupt act to simply deny liability upon the notes, but the party must satisfy the court that he has good reason for disputing his liability, and that his liability is involved in doubt. The existence of a valid note or claim is fundamental. Without that the bankrupt court cannot proceed; and when a party shows there is reasonable doubt upon that point, accompanied with evidence of a condition of solvency in fact, and of the payment of all other just claims and commercial paper, and shows that the non-payment complained of was simply because he did not owe the note or was not liable upon it, and also the further fact (which appears in this case,) that no demand had ever been made for the payment, a court of bankruptcy should not entertain jurisdiction, but should dismiss the petition and turn parties over to pursue the ordinary remedies provided in cases to collect debts of solvent parties. A different construction would make it necessary for parties engaged in trade to pay every note presented, or upon which it might be claimed they were liable, at the risk of being thrown into bankruptcy during the trial and investigation of the alleged liability, to the utter destruction of their credit. Such a construction would be subject to great abuse and would often lead to a perversion of the true objects and intents of the act. This construction has been generally given by the other courts to the provisions of the act under consideration. This court also has heretofore so construed it, and this case it not of such a character as to induce it to change its previously expressed opinion. There is no necessity for extending or straining the construction to protect the rights of the parties here, as these contestants are abundantly able to

pay the claim of the petitioners if it should be declared that they are liable for it, and the idea of adjudging such men bankrupts is asking of the court a judgment founded upon altogether too technical a construction of the bankrupt act. The courts have real bankrupts enough to deal with without extending their examination to include supposititious of fictitious cases. The contestants having shown, therefore, a sufficient reason for not voluntarily paying the notes described before their liability should be judicially determined, the suspension of payment on them for fourteen days is not an act of bankruptcy within the meaning of the bankrupt act.

The question of the contestants' liability is not intended to be absolutely determined in this case. The view taken of the bankrupt act renders that unnecessary. There was some evidence given tending to show that Chittenden, who procured the notes to be discounted by the petitioner, represented that the "elevator ring" were all bound, and that Mr. Munn so stated when the last note was given, and so Mr. Spencer, the president of the bank testifies. But Mr. Munn contradicts Spencer's testimony on that point. The evidence, therefore, as to what occurred between Mr. Munn and Mr. Spencer being balanced, and Mr. Chittenden not being called, we do not regard the fact as established. But if Mr. Spencer's account is correct, Mr. Chittenden did not disclose the names of the parties constituting the "ring," and there is no evidence that Mr. Spencer knew who they were. So conceding the facts to be as stated by Mr. Spencer, these parties, or a portion of them, were still silent partners; and as it appears that the proceeds of the notes did not go to the use of the firm of which they were members, and that they were not given for the benefit of that firm, nor in the business of that firm, it would not, in our opinion, materially change the question of the liability of such partners.

There are some additional circumstances calculated to excite a suspicion and raise a doubt as to the real business transacted by the elevator firm: Such as allowing Munn & Scott to keep the firm business in the same book in which they kept the other business of Munn & Scott; allowing the warehouse receipts to be signed in the name they used in their separate business. But they are not sufficient to authorize us to hold the other partners so clearly liable as to have required them to pay these notes without contest. We have considered these questions, but they have not impressed us as of sufficient importance to warrant us in holding that the respondents are liable so as to be proceeded against in bankruptcy for non-payment of these notes. It was very imprudent and hazardous on the part of the elevator firm to allow a portion of the business to be done under the circumstances in such a manner by Munn & Scott. It naturally provoked just such claims as this, which they might have anticipated. The petitioners themselves could not have supposed these parties liable, we think, until quite lately, for they proved up their claim upon these notes as against Munn & Scott in the bankruptcy proceedings against Munn, Norton & Scott. If the president, Mr. Spencer, had understood that the persons proceeded against in this case were liable, why prove up the claim against Munn & Scott alone, who were insolvent? This conduct of the president, who now undertakes to establish the liability of these contestants, bears very directly upon the question as to who he understood at the time were liable, and has a direct tendency to show that when he discounted the notes he supposed Munn & Scott alone were liable upon them. The counsel for the petitioners claimed as having an important bearing upon the question of liability, the fact that these contestants, under the name of George Armour & Co., took up all of Munn & Scott's notes, which had as collateral the warehouse receipts of Munn & Scott. He argued that by so doing they admitted their liability. They did, undoubtedly, as to those receipts. They took up the receipts held as collateral to the notes of Munn, Norton & Scott, and it might as well be claimed that they admitted their liability upon those. By so doing they admitted their liability on the receipts, but they dispute their liability on the commercial paper of Munn & Scott, and we think they have cast such a doubt upon their liability thereon as to take the non-payment of these notes out of the operation of the bankrupt act.

The other acts of bankruptcy are not proven as alleged. The allegation is that the firm of Munn & Scott, (meaning all the parties to this proceeding,) transferred its property and effects to the firm of George Armour & Co., another firm. The proof is that Ira Y. Munn and G. L. Scott transferred their interest in the elevators and other firm effects to George Armour for the use of the firm. It was a simple transfer, by two of the partners, of their interest in the firm property to the other partners. That does not support the allegation in the petition, and we do not see how such a transfer could be maintained as within the meaning of the bankrupt act. We are not prepared to hold such a transfer to be a fraud upon the creditors of the firm, or as hindering or delaying the creditors of the firm, or as constituting any preference contrary to the provisions of the bankrupt act, particularly when the firm or the members composing the firm are solvent. From these views it follows that the petitioner has failed to prove the facts stated in the petition and the proceedings must be dismissed with costs.

NOTE. That non-payment of commercial paper to which the maker has, or in good faith

believes he has, a valid defense, is not an act of bankruptcy. In re Hercules Mut. Life Assur. Co. [Case No. 6,402]; In re Thompson [Id. 13,936], and cases there cited.

As to liability of secret partners, consult Waugh v. Carver, 1 Smith, Lead. Cas. 1289, and cases there cited; T. Pars. Partn. 61–67; Bank of Alexander v. Mandeville [Case No. 851]; Ex parte Warren [Id. 17,191]; Bigelow v. Elliott [Id. 1,399]; Story, Partn. §§ 63, 373.

As to rights of creditors on transfer of firm property to one of the partners, consult, also, Howe v. Lawrence, 9 Cush. 553; Ladd v. Griswold, 4 Gilman, 25; Ketchum v. Durkee, 1 Barb. Ch. 480. As to such transfer by insolvent partners, see In re Cook [Case No. 3,150].

Case No. 9,926.

MUNNS v. DE NEMOURS et al.

[3 Wash. C. C. 31;[1] 4 Hall, Law J. 102; 1 Am. Lead. Cas. 200.]

Circuit Court, D. Pennsylvania. May, 1811.

MALICIOUS PROSECUTION — MALICE — PROBABLE CAUSE—REASONABLE GROUND OF SUSPICION—EVIDENCE—SECONDARY—PAPERS—SUBSCRIBING WITNESS—DEPOSITION.

1. Action for damages, for a malicious prosecution—1. In charging the plaintiff with having stolen certain articles used in the manufacture of gunpowder, and causing the plaintiff to be imprisoned thereon. 2. In bringing a civil action against the plaintiff, and demanding excessive bail. 3. In causing the plaintiff to be indicted in the state of Delaware, as the receiver of certain articles used in making gunpowder, knowing them to have been stolen; all of which charges were alleged to have been maliciously made, and without probable cause.

2. Of the malice of a charge which is the ground of a prosecution for a crime, the jury are exclusively the judges.

[Cited in Gee v. Culver, 12 Or. 228, 6 Pac. 776; Vinal v. Core, 18 W. Va. 27.]

3. Probable cause for such a prosecution, is a mixed question of law and fact. What circumstances are sufficient to prove a probable cause, must be decided by the court; but to the jury it must be left to decide, whether these circumstances are proved by credible testimony.

[Cited in brief in Beach v. Wheeler, 30 Pa. St. 70. Cited in Vinal v. Core, 18 W. Va. 35; Casperson v. Sproule, 39 Mo. 40. Cited in brief in Hill v. Palm, 38 Mo. 17.]

4. Probable cause, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing that the accused was guilty.

[Cited in Wilmarth v. Mountford, Case No. 17,774; U. S. v. The Recorder, Id. 16,130; Stacey v. Emery, 97 U. S. 645; Sanders v. Palmer, 5 C. C. A. 77, 55 Fed. 220; Re Ezeta, 62 Fed. 981.]

[Cited in Ash v. Marlow, 20 Ohio, 129; Boyd v. Mendenhall, 53 Minn. 278, 55 N. W. 45; Casperson v. Sproule, 39 Mo. 40; Coleman v. Heurich, 2 D. C. 206; Cooper v. Hart, 147 Pa. St. 597, 23 Atl. 833; Hooper v. Vernon, 74 Md. 138, 21 Atl. 557. Cited in brief in Kidder v. Parkhurst, 85 Mass. (3 Allen) 395. Cited in Mitchell v. Wall, 111 Mass. 498; Richey v. McBean, 17 Ill. 65; Rosenkrans v. Barker, 115 Ill. 333, 3 N. E. 93; Scott v. Shelor, 28 Grat. 905; Spengler v. Davy, 15 Grat. 388; Stone v. Stevens, 12 Conn. 225–232. Cited in brief in Vansickle v. Brown, 68 Mo. 630. Cited in Vinal v. Core, 18 W. Va. 29.]

5. The declaration stated, the writ on which the plaintiff was held to bail in $6000, to have been returnable the first Monday in December, 1809; whereas it was returnable the first Monday in March, 1809: *Held*, that the record does not support the declaration, and cannot be given in evidence to support the count in the declaration for damages for the civil action, and holding to bail, but it may be used as evidence of malice, on the other counts.

[Cited in Stone v. Lawrence, Case No. 13,484.]

6. A letter from P. which went to show the plaintiff had not seduced him from the service of the defendants, was not admitted in evidence, as the testimony of P. might have been obtained.

7. A joint commission to take a deposition must be executed by all the commissioners, although the commissioner named by the party against whom the witness is offered, after proceeding some length in the examination, withdrew, and refused to complete it.

8. Papers taken from the person of the party, by the alderman before whom he was brought upon a criminal charge, the parties making the charge having no agency in taking the papers, may be read in evidence by those who have possession of them, having received them from the alderman.

9. The subscribing witness to a paper, who stated that he was called in to sign the paper as a witness, but did not see the parties execute, or acknowledge it, although they both told him it was their agreement, was admitted to testify.

[Cited in Dooley v. The Neptune Car, Case No. 3,997.]

[10. Cited in Stacey v. Emery, 97 U. S. 645, to the point that if malice is proved, yet if probable cause exists, there is no liability. Malice and want of probable cause must both exist.]

[11. Cited in Sanders v. Palmer, 5 C. C. A. 77, 55 Fed. 220, to the point that, however malicious may have been the private motives of the defendants in prosecuting the plaintiff upon the criminal charge, they were protected in doing so, provided there was probable cause to believe him guilty of the offense.]

[12. Cited in Scotten v. Longfellow, 40 Ind. 30, to the point that, in order for the advice of counsel to afford protection, it must be given upon a full and true statement of the facts within the knowledge of the person seeking the advice, and must be acted upon in good faith, for an honest purpose.]

[13. Cited in Vinal v. Core, 18 W. Va. 57, to the point that if in the transaction itself, out of which the charge of felony arose, the plaintiff was guilty of a gross fraud, though such fraud could not justify or excuse the defendants, unless they had probable cause, or were entirely free from malice or improper motives in so doing, still the damage to the plaintiff's reputation would thereby be much diminished, and he could set up no claim to punitive damages.]

[This action was first brought in the state court. It was removed by petition into this court, and was first heard upon application to have the cause docketed. Case No. 9,931.]

This was an action [against Dupont de Nemours and Peter Bauduy] for a malicious

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

prosecution—1. In charging the plaintiff before Alderman Keppele in Philadelphia, with having stolen a brass pounder, and three draughts of machinery; and causing the plaintiff to be imprisoned. 2. In bringing a civil action, and demanding excessive bail. 3. Causing the plaintiff to be indicted in the state of Delaware, as the receiver of five pieces of parchment sieves, knowing them to have been stolen. All charged to have been done maliciously, and without probable cause.

WASHINGTON, Circuit Justice (charging jury). The plaintiff, having some skill in the mystery of making gunpowder, engaged with Brown, Page & Co. of Virginia, in November or December, 1808, to superintend a manufactory of that article, which they were about to establish near to Richmond; and with a view to obtain more complete information of the art than he then possessed, or to procure workmen, or certain parts of machinery, he came to the northward early in December. On the 9th, he put up at an inn called the Buck, within half a mile, or thereabouts, of the powder manufactory of the defendants, on the Brandywine [about four or five miles from Wilmington, in Delaware].[2] The powder of this manufactory had obtained great celebrity, and commanded the market, in consequence of the skill employed in making it, and probably from the use of certain parts of the machinery employed, particularly the parchment sieves. The plaintiff, immediately after his arrival at the Buck, opened a correspondence with some of the defendants' workmen, and had frequent interviews with them at the tavern; at which times he made them considerable offers to induce them to leave the service of the defendants, and to go to the manufactory at Richmond. He also made them pecuniary offers, to procure for him patterns or models of the different parts of the machinery used by the defendants, and particularly to procure for him a sight of one of the brass pounders, or a pattern of it.

The defendants, hearing of the plaintiff's conduct, called upon him at the tavern; and after offering considerable violence to his person, ordered him to quit the neighbourhood, which he did on the 14th. It is proper to remark, that pains were taken by the defendants to preserve the secrets of their art, and that strangers were not, without leave, admitted into the factory. Shortly after the plaintiff had left the neighbourhood, two of the defendants' workmen secretly went off, and at the same time, one of the brass pound ers was missing. The plaintiff came to Philadelphia, and a few days afterwards, the defendants arrived here. On the 22d, they applied to Alderman Keppele, for the warrant stated in the first count of the declaration, and, on their oath, valued the property charged to have been stolen, at 10,000 dollars. The officer to whom the warrant was delivered, met with the plaintiff the next day, and inquired of him, if his name was not Munns? The plaintiff denied it, and assumed a fictitious name. The officer, however, being satisfied that he answered the description, carried him to the house of the high constable, where he acknowledged himself; and after he was informed of the nature of the charge against him, he put to the officer this question: "If I was in the company of one who had stolen certain articles, am I guilty?" The officer declined giving an answer, and conducted his prisoner to the office of Mr. Keppele. There he was examined, and by order of the alderman, his person was searched; when certain letters were found in his pocket-book, from him to Brown, Page & Co., and from them to him; by which it appeared, that the plaintiff, previous to his arrest, knew that the defendants were in Philadelphia, and suspected that they were following his steps—that he had obtained all the information he wanted, to enable the Richmond, to equal the Brandywine powder manufactory; and that some of the hands, belonging to the defendants, had left them and gone to Richmond. The alderman committed the plaintiff to the jail of Philadelphia, having required bail to the amount of 15,000 dollars, which the plaintiff could not give. On the 27th, the plaintiff was carried before Judge Rush, on a habeas corpus, who reduced the bail to 1000 dollars; but this he could not get, and he was again committed. On the 29th, the defendants sued out the writ mentioned in the second count, for seducing the defendants' workmen and servants, and demanded bail in 6000 dollars, which, on citation before Judge Rush, was reduced to 600 dollars. The defendants, having obtained from the governor of Delaware, a requisition to the governor of Pennsylvania, for the removal of the plaintiff to the former state, as a fugitive from justice, he was, upon the warrant of the governor of Pennsylvania, removed, on the 6th of January, to the jail at New-Castle. The defendants discontinued their civil suit in Pennsylvania, and renewed it in Delaware, laying their damages at 4000 dollars. On the 4th of February, the plaintiff, upon a habeas corpus, obtained from the chief justice of Delaware, was discharged from confinement under the criminal charge, upon the ground, that he ought to have been committed under a warrant from some magistrate of that state, and not under the warrant of the governor of Pennsylvania, which only authorized his removal [from the one state to the other].[2] But he was remanded [by the chief justice of Delaware] [2] to answer [in the bail of 2,000 dollars] [2] to the civil action. Thinking now to correct this error, the defendants obtained a second warrant against the plaintiff, from a justice of the peace of Delaware; charging him with a suspicion of having stolen a brass

[2] [From 4 Hall, Law J. 102.]

[2] [From 4 Hall, Law J. 102.]

stamper, and sundry other articles, of the value of forty dollars, or having caused the same to be stolen. It is admitted that the stamper is the same instrument with the pounder, mentioned in the warrant issued by Mr. Keppele. On the 11th of March, the plaintiff was again discharged upon a habeas corpus, on the ground, that by the law of Delaware no person can be committed by a judge or justice, who has once been discharged upon a habeas corpus from confinement, on account of the same offence. In May, a bill was sent to the grand jury, charging the plaintiff as the receiver of five pieces of parchment sieves, the property of the defendants, knowing them to be stolen. The jury found the bill, and the trial being postponed, upon the motion of the plaintiff, until December, (during all which time he remained in confinement,) upon a trial before the petit jury, the defendant was found not guilty. The attorney general, then moved the court to certify probable cause, in order to compel the plaintiff, Munns, to pay the costs of that prosecution, under the constitution of the state. But the counsel for Munns agreed that his client should pay the costs, if the court would not grant the certificate; in consequence of which, the certificate was not granted.

The balance of the evidence, except such parts of it as will be more particularly noticed hereafter, relates to the plaintiff's sufferings, which, it must be acknowledged, were very great. But as to these, it is to be observed, that except where they were produced by the immediate agency or interposition of the defendants, no inference of malice can be drawn from them, to charge the defendants, although they may be considered in estimating the damages, if the plaintiff has made out such a case as to entitle him to a verdict for anything. For the assault and battery at the Buck, the defendants have been indicted and punished, by a fine of fifteen dollars each, so that that transaction is no otherwise to have influence on your minds, than as it may become an item in the account of malice charged upon the defendants. So, too, the high value affixed to the articles charged to have been stolen, in the Philadelphia warrant, and the low value fixed to the same articles, in the Delaware warrant, and the amount of damages claimed in the civil suit, brought in Pennsylvania, are only to be considered in relation to the question of malice. The question, then, is, are the defendants liable for damages, on account of the warrant issued by Mr. Keppele, and the consequent confinement of the plaintiff under it? and 2d, are they liable in consequence of the indictment in Delaware, and the injuries to which it exposed the plaintiff?

The question upon which this cause must be decided, is not whether the plaintiff has suffered from a charge of which the defendants were the authors, and which was not founded in truth, but whether the charge was made maliciously, and without probable cause. In trials of actions of this nature, it is of infinite consequence to mark with precision, the line to which the law will justify the defendant in going, and will punish him if he goes beyond it. On the one hand, public justice and public security require, that offenders against the laws should be brought to trial, and to punishment, if their guilt be established. Courts and juries, and the law officers, whose duty it is to conduct the prosecutions of public offenders, must in most instances, if not in all, proceed upon the information of individuals; and if these actions are too much encouraged,—if the informer acts upon his own responsibility, and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found bold enough, at so great a risk, to endeavour to promote the public good. The informer can seldom have a full view of the whole ground, and must expect to be frequently disappointed, by evidence which the accused only can furnish. Even if he be possessed of the whole evidence, he may err in judgment; and in many instances a jury may acquit, where to his mind the proofs of guilt were complete. It is not always the fate of those to command success, who deserve it. On the other hand, the rights of individuals are not to be lightly sported with; and he who invades them, ought to take care that he acts from pure motives, and with reasonable caution. For the integrity of his own conduct, he must be responsible; and his sincerity must be judged of by others, from the circumstances under which he acted. If, without probable cause, he has inculpated another, and subjected him to injury, in his person, character, or estate, it is fair to suspect the purity of his motives, and the jury are warranted in presuming malice. But though malice should be proved, yet, if the accusation appear to have been founded upon probable ground of suspicion, he is excused by the law. Both must be established against him; viz. malice, and the want of probable cause. Of the former, the jury are exclusively the judges—the latter, is a mixed question of fact and law. What circumstances are sufficient to prove a probable cause, must be judged of, and decided by the court. But to the jury it must be referred, whether the circumstances which amount to probable cause, are proved by credible testimony or not. What, then, is the meaning of the term "probable cause?" We answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged. What, then, were the grounds of suspicion, upon which the defendants acted in relation to the warrant of Alderman Keppele, under which the plaintiff was apprehended and committed? The plaintiff was a stranger, and his character totally unknown to the defendants.

He took up his abode at an obscure tavern, in the neighbourhood of the defendants' manufactory, where he contrived to procure frequent interviews with the workmen employed there, for the purpose of seducing them from their engagements with the defendants, and of obtaining from them a knowledge of the machinery and process, used in the manufacture of gunpowder, which the defendants had carefully endeavoured to keep secret. He offers one of them in particular, Bowman, a reward for bringing to him a brass pounder, or a pattern of it. The pounder was brought, was afterwards concealed, and about the same time, Bowman secretly absconded. The plaintiff came to Philadelphia, and although he soon afterwards knew that the defendants were also in this city, and suspected that they were following his footsteps, as he expresses it in a letter to his employers, yet, when arrested by the constable, he denied his name, and put to that officer a question, by no means calculated to allay the suspicions which existed against him. The letters taken from him by the alderman, developed fully the objects which had carried him to the neighbourhood of the defendants, and contain allusions to the article of machinery which the defendants had missed.

Called upon to declare an opinion, whether these circumstances, if proved to your satisfaction, afforded a probable cause for the prosecution in relation to the brass pounder, the court feels no hesitation in saying, that they did; and still further, that the plaintiff has no person but himself to blame for that prosecution, and the sufferings it has produced. A man may undesignedly and innocently become the object of suspicion, and of unmerited, though justifiable prosecution. In such a case, he may with great propriety call upon his accuser to acquit himself, by strong evidence, from the charge of rashness and malevolence, before he can claim to be excused from the consequences of his conduct. But, if he has intentionally acted in such a manner as to connect himself with the supposed guilt, and has, in fact, participated in it, shall he be permitted afterwards to complain that he had become an object of suspicion, and to claim the assistance of the law, to compensate him for the losses to which he had thus exposed himself? In this case, the brass pounder was taken and carried away, at the instigation of the plaintiff; was in his possession, as he afterwards acknowledged; and was then concealed by the person who took it, and who afterwards ran off:—and does it now lie in the plaintiff's mouth to say, that the defendants had not probable cause for suspecting him as the felon? But, it is said, that still there is no proof, that a larceny was committed by any person; and the proof of this, is essential to the defence. Without determining conclusively upon the soundness of the doctrine contended for, we must be permitted to express the hesitation of the court, in approving it. It would seem to demolish the whole ground of defence, allowed to the defendant in this action; if, notwithstanding the strongest circumstances of guilt, the motives of the action should, upon a full examination of the evidence to be furnished by the person suspected, turn out differently from what they appeared;—if probable cause shall excuse, in relation to the person suspected, and yet afford no protection as to the offence supposed to have been committed. But, it is by no means to be admitted that a larceny was not committed, in relation to the brass pounder. Baron Eyre defines larceny to be "the wrongful taking of goods, with intent to spoil the owner causa lucri"; and what are the facts of this case? Bowman secretly took, and carried away this instrument, for a reward promised him by the plaintiff, as is proved in the cause; and he concealed, or otherwise disposed of it, so that it was lost to the owner. Whether his intention was to spoil the owner, or to convert the article to his own use, would be a proper subject of inquiry with a jury, upon all the circumstances of the case. But, it is proved by two witnesses, that the plaintiff afterwards acknowledged that Bowman had stolen the pounder; and whether, in technical language, he had done so or not, the plaintiff cannot, in this action, make it an objection, that in point of strict law, a larceny was not committed. As to the three draughts of machinery, charged to have been stolen by the plaintiff, it must be admitted, that the defendants proceeded not only without probable cause, but without any cause at all. It does not appear, by the evidence, that the defendants ever possessed such draughts, and consequently, they could not have been deprived of them. This charge, (which is certainly unfounded,) being connected in the same warrant with another which was founded, may or may not have produced injury to the plaintiff; and if in your opinion it did so, and was maliciously made a ground of prosecution, the plaintiff is entitled to a verdict on that account, for such damages as you may think right.

We shall notice the warrant taken out by the defendants in Delaware, merely for the purpose of observing, that it is not made a distinct ground of charge against the defendants, and is only relied upon as a circumstance to prove malice. Of course, no damages could be given on account of that prosecution, even if it had been made without probable cause; and if the defendants had probable cause for obtaining the first warrant, the grounds of suspicion had received additional strength, before the second was granted; the plaintiff having previously acknowledged that the pounder, or stamper, (which means the same thing,) had been stolen by Bowman, brought to him, and afterwards concealed.

2. The second ground of complaint is, the indictment against the plaintiff in Delaware, for having received five pieces of parchment,

four of them perforated with holes, knowing them to have been stolen. How stands the evidence, in relation to these articles? It is in full proof, if the witnesses are believed, that Peebles, one of the workmen in the defendants' manufactory, by the plaintiff's procurement, cut from the parchment sieves belonging to the defendants, without their knowledge or consent, a number of pieces of different sizes, which the plaintiff afterwards had in his possession, and which were produced at his trial. And if this evidence required any support, the finding of the bill of indictment, and the agreement of the plaintiff's counsel to pay the costs of that prosecution, which the law excused him from doing, unless a certificate of probable cause was granted, are strong indeed upon the point of probable cause.

Upon the whole, if the jury think that the facts above stated are proved, the plaintiff is not entitled to a verdict, as to the two charges which respect the pounder and sieves; because, though he should have proved malice to your satisfaction, the defendants have justified themselves, by proving probable cause for those prosecutions. And as to the three draughts of machinery, you are to decide, whether that charge was maliciously made, and was productive of injury to the plaintiff.

The plaintiff suffered a nonsuit.

NOTE. One of the counts in the declaration, is for maliciously bringing a civil action against the plaintiff in Pennsylvania, and holding him to bail in 6000 dollars; to support which, the plaintiff offered the record, in which the writ appeared to be returnable to 1st March, 1809, whereas, the declaration stated it to be returnable the first Monday in December, 1809.

BY THE COURT. The evidence does not support the declaration; and, therefore, the record cannot be read, in order to support a claim for damages under this count. But it may be used as evidence of malice, in support of the other counts.

2. THE COURT refused to suffer a letter written by Peebles to Brown, Page & Co., to be read, to prove that the writer had offered his services to Brown, Page & Co., and thus to repel the charge, that he was seduced by the plaintiff; because it is not the best evidence, since Peebles might have been examined under a commission.

3. A commission to Delaware, was directed to two commissioners, nominated by the plaintiff, and to two or three nominated by the defendants. They met to execute the commission, and after having proceeded some length in the examination, the defendants' commissioners withdrew, and refused to go on with the execution of it. The other two executed and returned the commission.

BY THE COURT. The commission being joint, it could not be executed by two only of the commissioners, although the others refused to act.

4. The papers taken from the person of the plaintiff by the alderman, without the request or interference of the defendants, and which were used on the trial of the indictment in Delaware, were offered in evidence by the defendants, and objected to.

BY THE COURT. We give no opinion as to the propriety of the conduct of the alderman, in taking these letters from the person of the plaintiff. But, having been taken, and being in the defendants' possession, there is no reason why they should not use them.

5. The subscribing witness to an agreement between the plaintiff and Bowman, stated that he was called into the room to sign the paper as a witness, but did not see them execute the same, or acknowledge that they had done so; but they both told him it was their agreement. This was objected to, but admitted by THE COURT.

[See Case No. 9,931.]

MUNNS v. DE WEMOURS. See Cases Nos. 9,926 and 9,931.

MUNRO (PAGE v.). See Case No. 10,665.

Case No. 9,927.

MUNRO v. ROBERTSON.

[2 Cranch, C. C. 262.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.

DEED—VALUABLE CONSIDERATION—EVIDENCE.

If a deed purports to be made "for a valuable consideration," it is competent, for a person claiming under it, to give evidence of a money consideration.

This was an attachment, under the Maryland act of 1795, c. 56, levied upon the lands of an absent debtor [Samuel Robertson]. Part of the lands had been conveyed by the debtor, to certain trustees, to secure certain creditors, by a deed of bargain and sale, the consideration of which was stated in the deed to be "for value received," and in consideration of certain trusts in another deed mentioned to be performed by the trustees, &c. The deed referred to was not a legal conveyance, because not recorded in time, but it was upon a money consideration.

Key & Dunlop, for plaintiffs [Munro's executors], contended that the deed, being a bargain and sale, was void, because not stated to be in consideration of money paid, and cited 2 Bl. Comm. 296, 338, and Gittings' Lessee v. Hall, 1 Har. & J. 14.

Mr. Lear, for creditors secured by the deed, contended that it was competent for him to prove a money consideration. Cheney's Lessee v. Watkins, 1 Har. & J. 530.

THE COURT (MORSELL, Circuit Judge, absent) refused to render judgment of condemnation, and said that, the consideration being stated in the deed to be "value received," a money consideration may be averred and proved; especially as the second deed refers to the first, in which a money consideration is stated.

[Subsequently the attachment was quashed. Case No. 9,928.]

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

Case No. 9,928.

MUNROE v. COCKE et al.

[2 Cranch, C. C. 465.][1]

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

ATTACHMENT—AMOUNT OF DEBT—AFFIDAVIT.

In order to obtain an attachment under the Maryland act of 1795, c. 56, the affidavit must be positive as to the amount of the debt.

[This was an attachment by Robert Munroe against the effects of Samuel Robertson in the hands of Buller Cocke and others. It was first heard as to the sufficiency of the attachment upon certain lands of the debtor conveyed by him to secure creditors. The deed was claimed to be void. Case No. 9,927.]

Attachment under the Maryland act of 1795, c. 56 (1 Dorsey's Laws, 320). The affidavit upon which the justice of the peace made his warrant to the clerk of this court to issue an attachment, states "that Samuel Robertson, not being a citizen of the District of Columbia, and not residing therein, is bona fide indebted to him, the said Robert Munroe, the sum of $2,053.37 over and above all discounts, and the said Munroe at the same time produces the account current which is hereunto annexed, by which the said Samuel is so indebted; and the said Robert likewise states that he has drawn on the said Robertson for the sum of $1,500, and also for the sum of $2,223.10, which drafts, though not due, the said Robert understands from the said Robertson, and verily [believes] will not be paid, and further, that the latter draft for $2,223.10 hath never been accepted by the said Robertson, and the said Robert had therefore allowed no credit or discount for said drafts. He further states that said Robertson informed him, some time ago, that he would be entitled to a charge against said Robert's account, for some loss that he expected would accrue in the sale of certain flour on their joint account; no account has been exhibited stating the amount of such loss, and therefore he had allowed said Robertson, in stating his account, no credit." The warrant of the justice of the peace to the clerk of this court, says, "upon the receipt of this, together with the annexed proofs, you are required to issue an attachment against the goods and chattels, lands and credits of Samuel Robertson, and for so doing this shall be your warrant, as witness my hand and seal," &c. Upon the return of the writ of attachment—

J. Dunlop, for plaintiff, moved for judgment of condemnation.

THE COURT (nem. con.) was of opinion, that judgment could not be granted, on account of the uncertainty and irregularity of the affidavit and warrant. Attachment quashed.

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

MUNROE (DEXTER v.). See Case No. 3,863.

MUNROE (DUNLOP v.). See Case No. 4,167.

MUNROE (GRAY v.). See Case No. 5,724.

Case No. 9,929.

MUNROE v. MANDEVILLE et al.

[2 Cranch, C. C. 187.][1]

Circuit Court, District of Columbia. Nov. Term, 1819.

NOTES—DEMAND OF PAYMENT—PROTEST—NOTICE.

A demand of payment of a note on the third day of grace, after bank hours, and notice to the indorser and protest on the same day, are not too soon, if the note is in bank for collection, and the maker has been notified thereof; such being the usage of the banks.

Assumpsit [by Munroe's executors] against the defendants [R. & J. Mandeville], as indorsers of J. F. Caldwell's promissory note. The note was deposited in a bank in Alexandria, for collection. The maker had notice, before the expiration of the days of grace, that it was so deposited. Payment was demanded of the maker, after bank hours on the third day of grace, and notice given to the defendants, on the same day, that the maker had not paid. The general usage to deposit notes in the bank, for collection, was known by the defendants, and that bank hours closed at 3 o'clock p. m. The note was not made payable at any bank. It was protested on the third day of grace, after the demand and notice aforesaid.

Mr. Taylor, for plaintiffs, had cited Parker v. Gordon, 7 East, 385.

THE COURT (THRUSTON, Circuit Judge, absent), after taking time to consider till the next term, rendered judgment for the plaintiffs, upon the case stated.

Case No. 9,930.

MUNROE v. TOWERS.

[2 Cranch, C. C. 187.][1]

Circuit Court, District of Columbia. Nov. Term. 1819.

BAIL—PRINCIPAL DISCHARGED IN INSOLVENCY—SCIRE FACIAS.

Bail will not be exonerated upon scire facias, by the discharge of the principal under the insolvent act [2 Stat. 237], unless the discharge was before the appearance-day of the first scire facias returned executed, or of the second returned nihil.

The scire facias, in this cause, was issued on the 15th of September, 1818, returnable to the next November term.

At November term, 1819, Mr. Mason, for defendant, Towers, moved the court to discharge the bail because the principal, McLaughlin, had been discharged under the insolvent act, in Washington, on the appear-

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

ance-day of the first scire facias, returned executed. That as the defendant was in actual custody in Washington during the whole of that term, and had petitioned for relief under the insolvent act, upon showing that fact the court might have ordered an exoneretur; and the court may now consider that as having been done, which might have been done. The court here would not have ordered the principal to be brought from Washington by habeas corpus to be surrendered here. 1 Bac. Abr. (Am. Ed.) 343, D; Colem. cas. 66; Donnelly v. Dunn, 1 Bos. & P. 450; Robertson v. Patterson, 7 East, 405, 3 J. P. Smith, 556.

Mr. Taylor, contra. The bail should not be discharged, unless they could have surrendered the principal at the time of his discharge under the insolvent act; and the appearance-day of the scire facias was too late. The act of Virginia, of the 12th of December, 1792, § 31, p. 79, is peremptory that the surrender must be before the appearance-day of the first scire facias returned executed, or the second returned nihil. The court would not have entered an exoneretur before the actual discharge of the principal because they could not know that he would be discharged.

THE COURT (MORSELL, Circuit Judge, absent) refused to discharge the bail.

MUNROE (UNITED STATES v.). See Case No. 15,835.

Case No. 9,931.

MUNS v. DE NEMOURS.

[2 Wash. C. C. 463.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

REMOVAL OF CAUSES—AMOUNT INVOLVED—ACTION FOR DAMAGES.

1. In a case removed by the defendant from the state court to the circuit court, on the ground that the defendant was an alien, the damages laid in the writ exceeded five hundred dollars, and bail to a much larger amount was given, which were *held* sufficient to give jurisdiction.

2. It has been frequently determined, that the damages laid in the declaration, give the jurisdiction as to the matter in dispute.

[Cited in Ladd v. Tudor, Case No. 7,975; Kanouse v. Martin, 15 How. (56 U. S.) 208.]

[Cited in Abbott v. Gatch, 13 Md. 335.]

3. The damages laid in the writ, and in the plaintiff's affidavit, are equally conclusive, as to the amount in controversy, for the purposes of jurisdiction.

This was an action brought in the state court, and sounds altogether in damages. The damages laid in the writ exceeded five hundred dollars, and bail to a larger amount was given there, and had been given here. The state court having, upon the petition of the defendant [Dupont de Nemours], directed the cause to be removed to this court, the defendant being an alien, the only question was, whether it ought to be received and docketed, the damages being uncertain.

BY THE COURT. It has been frequently determined, that the damages laid in the declaration, gives the jurisdiction as to the matter in dispute. The damages laid in the writ, and established by the affidavit of the plaintiff, on which bail has been taken, is equally conclusive, or else no suit could be removed from a state to a federal court, where the claim is for damages; since the petition to remove must be at the time of entering an appearance, before the declaration is usually filed. Action ordered to be docketed.

[At the trial of this cause the plaintiff was nonsuited. Case No. 9,926.]

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

Case No. 9,932.

MUNSELL et al. v. MAXWELL.

[3 Blatchf. 364.] [1]

Circuit Court, S. D. New York. Nov. 30, 1855.

CUSTOMS DUTIES—APPRAISEMENT—CHARGE FOR COMMISSIONS—USUAL RATES.

1. Under section 16 of the act of August 30, 1842 (5 Stat. 563), which requires "a charge for commissions at the usual rates" to be added, on the appraisal of goods, to make up their dutiable value, the rates of the commissions must be ascertained in the same manner as the value of the goods, and a collector has no authority, even under instructions from the treasury department, to charge an arbitrary rate of commissions.

2. The case of Lennig v. Maxwell [Case No. 8,243] cited and approved.

This was an action [by Henry H. Munsell and another] against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties. The jury found a verdict for the plaintiffs, subject to the opinion of the court on a case.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, for defendant.

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

BETTS, District Judge. The plaintiffs imported an invoice of goods from China, in December, 1851, upon which were charged two per cent. commissions, and the entry was made accordingly. The defendant, under instructions from the treasury department, raised the commissions to two and one-half per cent., and exacted duties upon the difference, making an increase of duties upon the shipment, of about $2,000. The plaintiffs paid the duties so charged, under a protest sufficient in law, and brought this action to recover back the alleged excess.

It was clearly proved, on the trial, that the

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

usual and established rate of commissions on goods purchased in China and imported into the United States had, for the last fifteen years, been two per cent., and no more. It was further proved that, since 1847, instructions had been given by the government to collectors, to charge, in all cases, two and one half per cent. commissions upon invoices on which less than that rate was charged.

It is directed, by the 16th section of the act of August 30, 1842 (5 Stat. 563), that "the appraisers, in making up the dutiable amount of an importation of goods and merchandise, shall add to the valuation in the entry a charge for commissions at the usual rates." These rates, by the plain implication of the act, are particulars "to be appraised, estimated and ascertained" in the same manner as the value of the goods imported. The 2d section of the act of August 10, 1846 (9 Stat. 96), authorizes the secretary of the treasury to prescribe general and uniform rules to appraisers, for the prevention of fraud or undervaluation. But that provision does not, in our opinion, impart a power to determine the usual rates of commissions prevailing in a foreign country, any more than a power to fix the values of the goods themselves in the foreign market. This direction to the collector to compute duties on a basis of adding two and one-half per cent. commissions, does not legalize a levy of duties on more than the usual rates of commissions. Lennig v. Maxwell [Case No. 8,243]; Greely v. Thompson, 10 How. [51 U. S.] 225, 234. Judgment for plaintiffs.

Case No. 9,933.

Ex parte MUNSON.

[3 App. Comm. Pat. 253.]

Circuit Court, District of Columbia. Dec. 12, 1859.

PATENTS—DUTY OF COMMISSIONER IN FURNISHING INFORMATION—TUCKING GAUGE FOR SEWING MACHINES.

[1. Munson's claim for a tucking gauge for sewing machines is anticipated by Nichols patent (No. 11,615) of August 29, 1854, which produces the same effect in substantially the same manner.]

[2. While the law imposes on the commissioner of patents the duty, yet it leaves it to his discretion to determine from the circumstances how often, and to what extent, he shall furnish information and suitable references to an applicant, to aid him in remedying a defective specification, or to assist him in deciding whether he will withdraw or persist in a rejected claim, and no supposed omission in the performance of such duty will furnish cause of appeal to the judge of the circuit court.]

[Appeal by George C. Munson from a decision of commissioner of patents denying him a patent.]

MERRICK, Circuit Judge. In this case, after carefully examining the models, drawings, and specifications, and reading the reasons of appeal, together with the commissioner's response and the written argument of the claimant's attorney, I also interrogated Examiner Baldwin, under oath, in presence of the claimant's counsel, touching the principles of the machine in question. A very great difficulty in the case has been to determine from the specifications what is the precise matter of novelty claimed in the instrument described by the applicant. Upon considering the original specification it would appear that the novelty relied upon consisted in the arrangement of the diagonal ridge, a, fitting into the groove, b, of the clamping surfaces, which occasions the cloth, urged on by the feed motion of the sewing machine, to bear up against the jaws, e, e, of the guide, thereby necessitating its passage under the needle in a line of undeviating parallelism to the outer edge of the guide, and hence sewing the seams of the tucks at a uniform distance from the outer edge of the fabric. The reference given by the office to the "binding folder" of I. B. Nichols, patented Aug. 29th, 1854, is a complete answer to the case in that aspect, the diagonal grooves and sliding or adjustable guide being both found in this reference, as was freely admitted by the counsel on the trial. Hence the amendment of Aug. 24th, 1859, in the specifications, by which, for the first time, the claimant advances as the distinctive feature of his invention that arrangement of the clamping surface by which they not only gripe the cloth at their front or lips where the diagonal ridge and groove are provided, but they also exercise a steady yet yielding hold on the material beyond and in the rear of the ridge and up to and especially at the exterior edge of the cloth in close proximity to the sliding guide, E, by means of which uniform pressure throughout the extent of that portion of cloth embraced by the clamps it is prevented from puckering; which puckering, if it occurred, would choke up the machine and defeat the whole operation when a very thin and flexible fabric is sewed. Upon turning again to the invention of Nichols, it will be discovered to possess this feature also. In his specification he uses these words: "The blade of the upper guide bar, A, is elastic, so that it accommodates itself to any variation in the thickness of the material, and holds it and the binding firmly in position while they are sewed together by the machine." An inspection of the instrument will make this manifest; for unless the binding and the edge of the cloth are pressed smoothly and firmly together by the clamping plates in the rear of the grooved lips, and to such a degree that the onward motion imparted by the feed wheel to the cloth is by that pressure communicated to the binding in contact with it, there is no operative force to carry the binding through the folder, and hence the cloth urged on by itself would be driven away from the binding as it left the guide, instead of being moved along, as it is, in perfect parallelism with, and in contact

with the back part of the binding. In this connection it will be remembered that there is nothing in the structure or operation of Nichols' binding folder to limit its adaptation to fabrics which are rigid or thick, but it will effect the binding of ribbon or braid upon a fabric of silk as well as a worsted band upon a piece of felt; varying of course the size and thickness of the clamps as the size and strength of the needles and thread also would vary with the material used. The contrivance of Nichols has a further arrangement in the barrier which the turned edges of the clamps present against the escape of the binding towards the body of the cloth; but if the operation of the diagonal grooves with thin and flexible materials, as well as with stiff fabrics, be to force them up against the jaws of the guide (and this certainly is the principal feature in both inventions), then the most which can be said of these barriers is that they are useless, and their presence or absence does not vary the operation of the principle of the continuous pressure of the clamp from front to rear. There being then no other difference between the clamp of Munson and that of Nichols, than the little curve at the end of clamp forming this barrier, and the absence of this little curve not even being pointed out, much less relied upon as distinguishing the claim, I have failed to discover in the application any patentable novelty. The views above expressed are further sustained by the sworn explanations of Examiner Baldwin, taken at my instance, as already stated.

Besides the several reasons of appeal, which present substantially the one question of patentable novelty, above described, there are others, the 4th, 5th, and 6th, designed to submit to my consideration certain alleged errors or irregularities in the manner of examining and deciding this case by the office. I have, upon a former appeal (that of Matthew Chambers, in June, 1859), expressed an opinion which must control the present case, to this effect: That while the law imposes on the commissioner the duty, yet it leaves to his discretion to determine from the circumstances how often and to what extent, he shall furnish information and suitable references to an applicant to aid him in remedying a defective specification, or to assist him in deciding whether he will withdraw or persist in a rejected application, and, being a duty resting in sound discretion, that no supposed omission in its performance will furnish cause of appeal to a judge of the circuit court.

Now, for the reasons aforesaid, I hereby certify to the Hon. William D. Bishop, commissioner of patents, that having assigned the 1st of December, 1859, for hearing the above-entitled appeal, the applicant was fully heard by his counsel, and the reasons of appeal and the office response to those reasons were duly considered, together with all the papers and proceedings in the cause, and, being of opinion that there is no error in the decision of the commissioner, his judgment is affirmed, and a patent is refused to the applicant.

MUNSON (BLACK v.). See Case No. 1,463.

Case No. 9,934.

MUNSON et al. v. GILBERT & B. MANUF'G CO.

[3 Ban. & A. 595; 18 O. G. 194; Merw. Pat. Inv. 362.] [1]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

PATENTS—ANTICIPATION—TWO PATENTS TAKEN TOGETHER—AIR-BLAST APPARATUS.

1. A claim for: "The application and use of the meter-wheel with its case and contents as an air-blast apparatus, operated by weights or otherwise, not meaning to claim the method of using the meter for measuring gas," construed in connection with the specification, is not for a mere use or result, but for the meter itself.

2. Two prior patents which, taken together, would have made up the invention of the patentee, will not anticipate the patent, where neither of them alone shows the complete invention.

[Cited in Washburn & Moen Manuf'g Co. v. Fuchs, 16 Fed. 669; Washburn & Moen Manuf'g Co. v. Griesche, 16 Fed. 671.]

3. The fourth claim of letters patent No. 12,535, granted to John C. Pedrick, assignor of Charles Cunningham, March 13, 1855, for benzole vapor apparatus, *held* valid.

[This was a bill by Norman C. Munson and others against the Gilbert & Barker Manufacturing Company to restrain the infringement of certain letters patent.]

T. L. Livermore and G. W. Morse, for complainants.

William Stanley, for defendant.

LOWELL, District Judge. Patent No. 12,535, dated March 13, 1855, was issued to John C. Pedrick, assignor of the plaintiffs through a chain of title not disputed. The inventor was Charles Cunningham, and we may say here that it is proved to our satisfaction that he made the invention as early as May 7, 1851. In the specification Cunningham begins with the statement that he has invented a new and useful machine or apparatus for driving a current of air through a reservoir containing benzole or other hydrocarbon for the purpose of generating an illuminating gas or vapor therefrom. He then says his invention consists in the use of a common gas-meter wheel, or its equivalent, revolving in water or other liquid, or of other equivalent apparatus, for forcing a current of air through a reservoir containing either of the aforesaid hydrocarbons or admixtures, etc. He then describes the mode of

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 362, contains only a partial report.]

preparing and using the gas-meter by driving it with a weight or spring, and by admitting the air through an opening, A, of the meter-case, and forcing it out of the end thereof by a pipe into a reservoir. He then describes the mode of charging the current with the hydrocarbons and conducting it to the burner.

The first three claims are for combinations or parts of the machine, which are none of them used by the defendants. The fourth claim is for: "The application and use of the meter-wheel with its case and contents as an air-blast apparatus, operated by weights or otherwise, not meaning to claim the method of using the meter for measuring gas."

It is admitted that two persons in this country invented a similar mode of furnishing an air-blast for making illuminating-gas not far from the time of the patent. One of them was refused a patent, and with the other, who had obtained one before Cunningham's application was filed, an interference was declared, in which the patent office decided in favor of Cunningham as, in fact, the first inventor. This is the patent of O. P. Drake. From the evidence in the record we agree with the conclusion reached at that time, and are of opinion that the invention of Cunningham was earlier. Similar remarks will apply to Adams.

Two English patents are produced which, taken together, would have made up, perhaps, the air-blast apparatus of Cunningham. In Lowe's patent he recommends the use of a weight to drive a gas-meter; but his purpose appears to us to have been to increase and regulate the action of the gasometer, and not to make an air-blast apparatus. Critchett, on the other hand, admitted air into his apparatus for certain purposes, but did not have an air-pump at all resembling the plaintiffs'.

We think the slight change, obvious perhaps to an inventor, of admitting air into a meter, and using the meter-wheel as an air-pump, although it had before been used with similar machinery to increase the force of the gasometer, was a patentable invention.

The claim itself is attacked as too broad. It is said to claim a mere use or result. The language is not very well chosen, but we think, taking the claim and specification together, it is intended to claim the meter itself as described, and for the purposes set forth, as contradistinguished from an ordinary meter for measuring the flow of gas. Possibly it may have been intended to claim such a meter used as an air-pump in other combinations of machinery, if it should be found useful in any such, and there is nothing in the record to show that such a claim might not be supported. Infringement is clearly proved. The patent having expired, no injunction is asked for. Interlocutory decree for the complainants.

[For another case involving this patent, see Drake v. Cunningham, Case No. 4,060.]

Case No. 9,935.

MUNSON v. LYONS.

[12 Blatchf. 539.] [1]

Circuit Court, N. D. New York. June 15, 1875.[2]

RAILROAD COMPANIES—MUNICIPAL AID—VALIDITY—ESTOPPEL.

1. Bonds were issued, purporting, on their face, to have been issued by three persons as commissioners in behalf of the town of Lyons, appointed for that purpose by the county judge of Wayne county, in which such town was situated, and to be part of a series authorized by the determination of such county judge, duly rendered and entered of record pursuant to a petition of the taxpayers of the town, and pursuant to chapter 907 of the Laws of the State of New York of 1869, and the amendments thereto. The statute authorized the county judge to determine, on proof, whether the persons petitioning for the issue of the bonds represented a majority of the taxable property of the town. The bonds were issued in aid of the construction of a railroad. The petition contained conditions, that the terminus of the road should be at a specified point, and that the stock of the corporation which was to construct the road, which should be taken in exchange for the bonds, should include certain stock already taken by individuals residing in the town. In a suit against the town to recover the amount of unpaid coupons on the bonds, it was set up, in defence, that the bonds were void, because, as the petition contained said conditions, the county judge acquired no jurisdiction of the proceeding: *Held*, that, although the objection might be a good one, if raised on a direct review of the proceeding, it was of no avail in this suit.

[Cited in Bailey v. Lansing, Case No. 738; Smith v. Yates, Id. 13,131.]

[See Bailey v. Lansing, Case No. 738.]

2. When a petition is presented to the county judge, which sufficiently conforms to the statute to call for the exercise of judicial judgment, it is delegated to him to determine whether or not it is sufficient, and no error on his part can affect the validity of the bonds, when the question is raised collaterally.

[Cited in Rich v. Town of Mentz, 19 Fed. 726.]

3. The act of 1869 was amended by an act passed in 1871. The latter act introduced important changes in the proceedings, by amending various sections of the act of 1869, and substituting the new sections in place of the old sections, without in terms repealing the old sections. The proceedings in this case were begun before the act of 1871 was passed, and conformed to the old act up to the time of the passage of the new act, and after that were continued under the new act. It was objected, that the proceedings under the old act were deprived of all vitality by the passage of the new act: *Held*, that the objection was not a good one.

4. The town, having received and retained the stock which was issued in exchange for the bonds, cannot raise the objection, that the bonds and coupons were not made payable at the times directed by the statute.

On the trial of this action, the court ordered a verdict for the plaintiff [Edgar Munson] for $14,042.41 and reserved the case for further consideration. The plaintiff moved for judgment on the verdict, and the questions considered were presented upon requests on the part of the defendant, and exceptions taken upon the denial thereof.

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

[2] [Affirmed in 99 U. S. 684.]

W. F. Cogswell and S. C. Collins, for plaintiff.

H. L. Comstock and C. H. Roys, for defendant.

WALLACE, District Judge. This action is brought to recover the amount of certain coupons for payment of interest upon bonds issued in aid of the construction of the Sodus Bay, Corning and New York Railroad Company. The bonds, upon their face, purport to have been created and issued by David F. Cole and two others, as commissioners in behalf of the town of Lyons, appointed for that purpose by the county judge of Wayne county, and to be part of a series authorized by the determination of such county judge, duly rendered and entered of record, pursuant to a petition of the taxpayers of the town, and pursuant to chapter 907 of the Laws of the State of New York of 1869, and the amendments thereto. By the act of 1869, referred to, whenever a majority of the taxpayers of any municipal corporation, whose names appear upon the last preceding assessment roll of the corporation, as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall, by a petition, verified, make application to the county judge of the county in which such corporation is situated, representing that such majority of taxpayers desire that the corporation shall create and issue its bonds to an amount specified, and invest them in the stock of a railroad company in the state, it shall be the duty of such county judge, after causing notice to be published, &c., to take proof as to the allegations in the petition, and, if it appear satisfactorily to him, that the petitioners do represent such majority, he shall so adjudge and determine, and cause his determination to be entered of record, and such judgment and the record thereof shall have the same force and effect as other judgments and records in courts of record in the state; and, if such county judge does so adjudge, it shall be his duty forthwith to appoint and commission three persons, taxpayers and residents of the corporation, to be commissioners, and thereupon such commissioners shall cause the bonds of such municipal corporation to be made and executed, and attested by their individual seals, and are empowered to subscribe, in the name of the municipal corporation, for the stock of the railroad company, and pay for the same by exchanging therefor the bonds so executed by them.

On the 6th of February, 1871, a petition was presented, duly verified, to the county judge of Wayne county, representing that the subscribers constituted the requisite majority of taxpayers of the town of Lyons, and desired that such town should create and issue its bonds to the amount of $150,000, and invest the same in the stock of the Sodus Bay, Corning, and New York Railroad Company, "provided that the terminus of said road be made at Nicholas Point, in the town of Huron," and praying that such proceedings be had for the purpose as are authorized by the statutes of the state in such case provided. The petition contained, also, this clause: "It is understood, that the stock so to be taken is to embrace and include the stock now already subscribed and taken by persons residing in said town of Lyons, amounting to the sum of $16,400." The county judge caused the requisite notice to be given, and proceeded to take proofs of the allegations in the petition, and, during the progress of taking the proofs, and, on May 12th, 1871, the legislature passed an act (chapter 925) to amend chapter 907 of the Laws of 1869, by which certain sections of that act were changed in important particulars, while, in other sections, no changes were made. None of the sections of the prior act were repealed in terms, but the sections referred to were modified by the words, "are amended to read as follows." All proceedings after the amendatory act was passed were conducted pursuant to the requirements of that act, and, on May 17th, 1872, the county judge adjudged that the allegations of the petition were proved, and appointed as commissioners the persons who executed the bonds, the coupons of which are those in suit. The act of 1871 required that the petition should be filed by the county judge, as part of the judgment roll, and that his judgment be entered of record in the clerk's office of his county. It also made provision for a review of the proceedings by certiorari, by which the appellate courts were authorized, "in appeals now pending, and in all future proceedings, to reverse, affirm, or modify the determination of the county judge, or remand the proceedings back to be reheard by him, or direct that he proceed de novo as if he had taken no action therein."

The statute under which the bonds were issued requires that they shall bear interest at the rate of seven per cent. per annum, payable semi-annually, and bear interest warrants corresponding in number and amounts with the several payments of interest to become due. The bonds issued are dated May 17th, 1872, and were issued on that day. The coupons are made payable on the first days of April and October in each year, and are for $35 each. At the time of issuing the bonds, the commissioners subscribed for stock of the railroad company, and, when they delivered the bonds, received in exchange certificates of stock. The plaintiff purchased the coupons in suit after they became due.

It is insisted, on behalf of the defendant, that the bonds in question are void, because the county judge never acquired jurisdiction of the proceeding pursuant to which the commissioners were appointed, as the petition was not in conformity to the statute, in that it contained conditions which were unauthorized. Of these, one required the railroad

company to locate the terminus of its road at a place named, and the other provided for the application of a portion of the bonds to be created to the purchase of stock then held by individuals resident in the town. Decisions of the courts of the state of New York are cited, which hold that the petition in such proceeding must be an unconditional one, and that, if it contains conditions, the entire proceeding is void. The decision of the court of appeals in the case of People v. Adirondac Co., countenances this position. It is there said, in the opinion: "If the petition is in a form not warranted, or is subject to any condition not authorized by the statute, it is simply void, and the officer acquires no jurisdiction under it." It is not to be denied, that this conclusion accords with the general doctrine, that all proceedings which, like the one under consideration, may impose a charge upon the property of the citizen without his consent, must be strictly pursued; and it is also to be conceded, that such conditions as were incorporated into the petition here are contrary to public policy, as they tend to subject measures which should be adopted solely from considerations of public welfare to the improper influences of personal or mercenary interests. Butternuts & Oxford Turnpike Co. v. North, 1 Hill, 518; Ft. Edward & Ft. Miller Plank-Road Co. v. Payne, 15 N. Y. 583. But, the cases referred to arose upon a direct review of the proceeding, and although, in the exercise of a revisory or appellate jurisdiction, it might well be held that unauthorized or vicious conditions in the petition were fatal to the proceeding, it does not follow that the county judge had no right to entertain the proceeding, and that his action under it was so wholly nugatory that his judgment was a nullity, and the bonds which were issued and negotiated void. It was not necessary so to decide; and such conclusion would seem to be antagonistic to the theory and spirit of the legislation under which such bonds are issued, and of the particular statute under consideration.

If it is true that the county judge never acquired jurisdiction because of the character of the petition, the bonds issued by the commissioners he appointed are invalid in the hands of innocent holders, because, in law, no commissioners were ever appointed, and no agents were ever empowered to represent the town. The supreme court of the United States has sustained, with steady hand, the rights of innocent holders of municipal bonds, which have been issued by agents in disregard of the limitations of their authority, but it has also recognized and enforced the distinction which exists between the want of power to act in behalf of the municipality and irregularities in the exercise of a power that has been conferred; and, if the bonds can be assailed collaterally, and defeated in the hands of innocent holders, whenever the officer upon whom jurisdiction is conferred to take cognizance of the proceeding errs in deciding that the proceeding is properly before him, this statute, and kindred legislation in many of the states of the Union, will prove highly discreditable, because, as will be seen, it is calculated to invite investment in these bonds with entire confidence in their validity, and this legislation will fail to meet the end for which it is designed, because the value of the bonds will be so precarious, that it will be difficult, if not impossible, to negotiate them advantageously. The object of such legislation is, to enable enterprises of public utility to be promoted, by obtaining the necessary means from municipal corporations interested in their success. As large sums are usually required, such legislation contemplates the creation of a class of obligations which will readily find their way to all the financial marts of the world, and will command the confidence of capitalists abroad and at home. As they are to be the obligations of municipalities of ample pecuniary ability to pay them, they will effectuate the end in view, if their validity is assured. To secure this, therefore, is a paramount consideration, for, otherwise, such legislation would be fruitless. Accordingly, by this legislation, these obligations are invested with ostensible indications of validity. They bear the attestation of public officers clothed by the legislature with apparent power to bind the municipalities of the state, whose malfeasance would cast dishonor not only upon the communities which they immediately represent, but also upon the state at large; and they bear the guaranty of a judicial determination that they are created in conformity with law. In short, these obligations are designed for negotiation, to a large extent, with those who are strangers to the merits of the particular enterprise for which they are created, and to the history of the particular proceedings under which they are issued, and who rely simply upon their value and their validity as obligations of municipalities of pecuniary ability, bearing the stamp of legislative sanction and official responsibility. To imply the intent that such obligations, after they are negotiated, shall be vulnerable to objections of the character here urged, would be to impute bad faith to the authors of such legislation towards those who are to be induced to invest in such bonds.

The provisions of the statute in question, as well as considerations of general application to similar legislation, favor the conclusion that all errors in the proceeding pursuant to which the bonds are issued are to be corrected in the proceeding itself. This statute invests the county judge, a responsible judicial officer, with power to determine whether the requisite majority of the taxpayers of a municipality within his county desire that it shall issue its bonds in aid of a railroad. It affords opportunity for a full investigation, by public notice to all who are concerned. It creates a proceeding capable of review by the highest tribunals of the state. It establishes ample

safeguards for the protection of the taxpayers. These provisions invest the bonds, when issued, with high assurances of their validity, and they indicate the intent that all errors in the proceeding shall be detected and defeated in the proceeding itself. It is, therefore, a reasonable construction of the statute, to hold, that, when a petition is presented to the judicial officer who is invested with cognizance of the proceeding, which sufficiently conforms to the statute to call for the exercise of judicial judgment, it is delegated to him to determine whether or not it is sufficient, and, while any error on his part may be the subject of revision by the appellate courts, it cannot affect the validity of the bonds, when raised collaterally. The injustice and inexpediency of permitting such defects as are here involved to invalidate the bonds when issued, has received legislative recognition by the amendments incorporated into the statute in 1871, after some of the state courts had held that the insertion of conditions in the petition was fatal to the proceeding, by which it is provided, that the petition may be absolute or conditional, and that non-compliance with any condition in it shall not invalidate the bonds. For these reasons, a conclusion is reached adverse to the defendant, on this branch of the case.

It is urged, as another objection to the validity of the bonds, that the proceeding under which they were issued became defunct because of the act of 1871. That act introduced important changes in the legislation regulating the proceedings for bonding municipal corporations, by amending various sections of the preceding act. It did not, in terms, repeal the former act, but, by amending various sections, substituted them in place of those in the former act. It is contended, for the defendant, that, although the proceedings taken for bonding prior to the act of 1871 were regular and complied with all the requirements then in force, and although those taken subsequent to the new act were in conformity with its requirements, nevertheless, the former act, as to the sections modified, was repealed by implication, to the same extent as though the sections had never existed, and proceedings under them were deprived of all vitality. This position cannot be sustained. While, doubtless, the legislature could have accomplished such a result, their intent to do so is not to be presumed, for, no construction will be tolerated that will give a retrospective operation to a statute. If the act of 1869 had been repealed by express terms, of course, all proceedings taken under it would have been as nugatory as if the legislature had said that all proceedings pending should be arrested and annulled. The subject of legislation was procedure, which was in every stage of progress at the time the amendments were passed. Many proceedings were pending at that time, doubtless before county judges and in appellate courts; and, that the legislature did not intend to suspend or annul such proceedings, is evident from some of the provisions of the new act. It is there provided, that, in case of review, in "appeals now pending, and in all future proceedings," the appellate court may reverse or modify the proceeding, or remand it back to the county judge to be reheard and determined, and may direct that he proceed de novo, as if he had taken no action. If it was intended to arrest and annul all proceedings which had not been terminated, why was the power conferred to permit the county judge to rehear the case under the original proceedings? The effect of such amendments upon pending proceedings is very satisfactorily determined by the court of appeals of this state, in considering a statute relating to procedure, which was amended in a manner similar to the act in question. The part which remains unchanged is to be considered as having continued the law from the time of its original enactment, and the new or changed portion to have become law only at and subsequent to the passage of the amendment. Judge Denio says: "The rule contended for would lead to the grossest absurdities. Proceedings which were quite regular when taken would be made irregular or void by force of the subsequent statute; and confusion of every kind would be introduced." Ely v. Holton, 15 N. Y. 595. These considerations dispose of the second objection to the plaintiff's recovery.

The other defences which have been urged may be disposed of briefly. It is in proof that the defendant's bonds were delivered to the railroad company in exchange for stock for which the defendant had subscribed, and it does not appear that the defendant has ever offered to surrender the stock which it or its agents received. The defendant will not be heard to allege that it has not made its bonds, or the interest coupons, payable at the times directed by the statute, while it retains the stock it received in exchange for them. The doctrine of an equitable estoppel applies. Sedg. St. & Const. Law, p. 90. It results, that judgment must be entered for the plaintiff, on the verdict.

[Affirmed in 99 U. S. 684.]

MUNSON (TILLOTSON v.). See Case No. 14,051.

Case No. 9,936.

MURATI v. LUCIANI.

[1 Baldw. 49.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1827.

EVIDENCE — HANDWRITING — PROOF — COMPARISON OF HANDWRITING.

Difficulty of giving satisfactory proof of handwriting. Is a comparison of hands evidence in a civil case?

[1] [Reported by Hon. Henry Baldwin, Circuit Judge.]

The declaration in this case stated: 1. That in consideration of 600 dollars, advanced by the plaintiff [G. Murati,] to the defendant [T. Luciani,] the defendant undertook to send from Philadelphia, by the ships Florian and Langdon Cheves, to the plaintiff, then residing in Charleston, South Carolina, the value of the said 600 dollars in goods, on or before the 25th of December, 1826. Charges that he did not perform this promise. 2. For 600 dollars lent and advanced. 3. On a promissory note, dated 24th December, 1826, for 600 dollars, to be paid in April, 1827, given in consideration of 200 dollars received by the defendant from the plaintiff in August, 1825, and 400 dollars, the plaintiff's part of the profit in a mutual business carried on between them. 4. The same sum lent and advanced, paid, laid out and expended by the plaintiff for the defendant. 5. On an account had and settled between the parties.

Mr. Stroud, for plaintiff.

This suit is brought on two promissory notes; one for the delivery of goods, the other for the payment of money. These notes were given at Charleston on the 26th of November, 1826, at which time the plaintiff resided there, and the defendant was there on a visit.

Mr. Perkins, for defendant, denied that the signatures to the notes were genuine; they were not the handwriting of the defendant; said that the plaintiff never had the command of 60 dollars; that he arrived here from Europe in the fall of 1825, and had married the defendant's mother; that he was entirely destitute of money, and could not pay his passage. If the signatures are genuine, we shall show that there is a balance due from the plaintiff to the defendant of 1971 dollars 45 cents.

A great number of witnesses were examined, letters read, and other evidence given on the question of the genuineness of the signatures to the notes, the ability of the plaintiff to be possessed of so much property, &c.

Stroud & Ingraham, for plaintiff.
Perkins & Peters, for defendant.

HOPKINSON, District Judge (charging jury). In this case the labouring oar will be with the jury. There is no question of law to be decided; but you must endeavour to come at the truth of the transactions between the parties, from the evidence they have respectively laid before you. You have a considerable mass of incongruous testimony to separate and compare, and contradictory witnesses to reconcile, if you can, or to credit or discredit, as you shall believe or disbelieve them. It is one of the grievances that courts and juries may complain of, that men enter into transactions of business with a most unguarded confidence in each other, or a careless inattention to the forms and proofs which would at all times show the true nature of their dealings; and when afterwards, as it frequently happens, they fall out and criminate each other, they come to you to settle their differences and do justice between them, without bringing with them the means by which you can discover with any satisfactory certainty what is the real truth of their case. They assert and deny, they criminate and recriminate, with equal confidence and equal deficiency of proof, and ask from you a just decision, without affording the means of arriving at it. In this situation you must do the best you can between the parties, and will at least do them the service of putting an end to the controversy, which is, perhaps, the best part of the decision of nine cases in ten. This action is brought on two promises in writing: The first, dated the 24th of November, 1826, for the payment of 600 dollars in money; the other, dated on the 26th of the same month, for the delivery of goods at Charleston of the value of 600 dollars.

The defence consists of two parts: 1. A denial of the genuineness of the signatures to the notes: the defendant says they are not his handwriting; that he never signed or gave to the plaintiff any such notes. 2. An account against the plaintiff, as a set-off to his demand, which, if proved, will make a balance in favour of the defendant. The first ground is by far the most important, as it involves questions of the character of the parties of the most serious consequence. On the one side, it is neither more nor less than a charge of forgery; and the other, of a false and fraudulent denial of a true and genuine instrument to escape from the payment of a just debt. You must decide this grave question: Are these signatures, or either of them, in the handwriting of the defendant? Witnesses have been produced on the part of the plaintiff to prove the truth of the writing; and on the other hand, the defendant supports his denial also by the testimony of witnesses, and by circumstances which he alleges render it improbable, if not impossible, that he should have given these notes to the defendant, or could be indebted to him. For the plaintiff, Jacob W. Lehr has testified, "that he believes the signature to the note of the 26th November, for the delivery of the goods, is the handwriting of the defendant; that he has frequently seen his writing and copied it." The witness being shown a list of goods to be sent by the defendant to the plaintiff, dated 29th November, 1826, says, "It looks like the signature of defendant, but he is not certain of it; he will not say any thing about it:" so of the signature to the note of the 24th of November, it looks like his signature, but would not like to say any thing about it. You have observed that the plaintiff offered an application made by the defendant to the insolvent court, dated 12th January, 1824, having to it three signatures of the defend-

ant; that the jury might compare them with the signatures to the notes. Farmers' Bank v. Whitehill, 10 Serg. & R. 110. This evidence was admitted to go to you, other evidence having been given in support of it; but I would not be understood to have expressed any decided opinion upon the question; it may be more deliberately examined hereafter should it be necessary. The plaintiff rested his proof of the genuineness of those writings on the testimony of J. W. Lehr, afterwards supported by Mr. Cope, and signatures of the defendant to his application to the insolvent court. The defendant has produced to you, in the first place, witnesses to prove the destitute poverty of the plaintiff on his arrival in this country in the fall of 1825; that he had no money to pay his passage, for which his goods were retained by the captain of the ship; with other circumstances indicative of poverty. A witness also proved the handwriting of the plaintiff to a note dated at Charleston, 27th November, 1826, payable to the defendant for 300 dollars. The same witness proved a certain memorandum to be in the handwriting of the plaintiff; that he saw him write it. It was a memorandum or list of goods that the defendant sent to Charleston by the plaintiff. The goods were put in the storehouse of plaintiff in Charleston, until a store was procured to put them in. Other goods were afterwards received from the defendant. The witness left Charleston in November, 1826, after the arrival of the defendant there. John Baker, captain of the Langdon Cheves, testified that he took the plaintiff a passenger to Charleston, with goods belonging to the defendant; that the plaintiff had no property in them; that plaintiff was supplied at Charleston with goods by the defendant; that the defendant paid for the freight of the goods, and for the passage of the plaintiff. Several witnesses testified their belief that the signatures to the notes were not in the handwriting of the defendant. All of which evidence is now before you, and from it you are to say whether these notes are true or false. Your task is a difficult one. The skill in imitating the writing of another is sometimes so perfect, that the most experienced are at fault in detecting the falsehood. You know that the bank notes are often so well imitated as to deceive the most wary, and that the officers of the very bank defrauded have been deceived, and received them as genuine. In a late interesting case tried in the state of New York, the question arose on the genuineness of the signature of the defendant to a promissory note, on which the action was brought. The defendant was a lady of the highest respectability and of independent fortune. Nearly one hundred witnesses were examined, comprehending clerks and cashiers of banks, particularly skilful in the examination of writing; also the intimate friends and acquaintances of the party, having long and repeated opportunities to become acquainted with her writing; and yet no certainty was arrived at, as the witnesses expressed contradictory opinions and belief, and were, if I recollect rightly, about equally divided. Such is the proof of handwriting, when made either by the direct testimony of witnesses professing to be acquainted with it, or by a comparison with other writing admitted to be genuine. But it is upon such proof that jurors are often called upon to decide, and they must do so by a careful consideration of all the evidence, and of the circumstances attending the transaction, weakening or strengthening the probability of the truth of the instrument, and keeping in mind, that the burthen of proof lies on the party producing the instrument.

The defendant has given in evidence some circumstances to support his denial of these notes, which will probably have no inconsiderable weight on your mind, if you shall not be satisfied by the more direct testimony. In the first place you have proof of the absolute poverty of the plaintiff, from his arrival in this country down to his passage to Charleston with Captain Baker, who took him to Charleston, then in the employment of the defendant, and taking his, the defendant's goods to be disposed of in that city; and but a short time before it is alleged that these notes were given. We have seen no means he had in that short period to acquire property. While in Charleston, even by his own account, he sold but little; hardly more than was required for his daily expenses. He could not pay some small bills, nor his passage, or the freight of the goods he took with him. His marriage does not relieve him from this difficulty, as we have no account of any property obtained by his wife; indeed, after his marriage, he writes that he is unable to get any money to remit. One of the items making up the note of the 24th of November, and expressly mentioned in it, refers back to the 25th of August, and the rest is said to have been the profits of the mutual business carried on by the plaintiff and defendant. But where did he get the 200 dollars first mentioned, and what was the business which produced him the remaining 400 dollars? We have no account of either. His journey to New York was, clearly, solely on Luciani's account. The case of the plaintiff is certainly very deficient in proof of the means by which the defendant could become indebted to him; but, nevertheless, if you are satisfied that the notes are true and genuine instruments, it will be enough for you, as they, prima facie, prove their own consideration. Another fact is a proof to you which thickens the mystery of these transactions, and increases your difficulty in comprehending them; I refer to the note for 300 dollars given by the plaintiff to the de-

fendant, dated on the 27th of November, 1826. This was but three days after the first note, and one day after the second on which the plaintiff brings this suit! Why should the plaintiff give his note to the defendant for 300 dollars when he held his notes for a much larger amount? Why not credit the 300 dollars against these notes? The plaintiff charges this note as a forgery by the defendant: thus they charge each other. It is really unreasonable in these men to expect that you can discover the truth of their dealings, when they have involved them in so much contradiction and obscurity. If you shall fail to reach the justice of the case, they will have no reason to complain. So far, it would seem to me that on the question of the genuineness of these notes, the preponderance of evidence is against them; but another paper is produced which puts us all at fault again; I mean the list of goods dated the 29th of November, 1826; this has created the greatest difficulty to my mind. You will recollect that the note of the 26th of November is for the delivery of goods by the defendant to the plaintiff at Charleston, of the value of 600 dollars. The paper or list produced, dated three days after the note, is admitted to be genuine; it is signed by the defendant with his own proper hand. Is this, then, the invoice or list of the goods which he undertook to furnish to the plaintiff by the note of the 26th of November? If it is, then it proves the genuineness of that note, as they must be taken to be parts of the same transaction; yet even if this be so, it does not conclusively follow that the note for the delivery of the goods was given in consideration of the sum of 600 dollars paid and advanced by the plaintiff to the defendant. It affords proof of the genuineness of the note, but not of the consideration on which it was given. What does this paper allude to? How did it come into the possession of the plaintiff? It is headed, "What is to be received by the Langdon Cheves, in Charleston, before the 25th of December, 1826?" and is signed by Luciani. Now the note of the 26th of November promising to deliver the goods, also states that they shall be delivered before the 25th of December, and so far we have a connection between them. The defendant avers that it was nothing more than a memorandum of the goods he was to send, on his return to Philadelphia, to the plaintiff at Charleston, to be sold by him for, and on account of, him, the defendant. If this were so, why was it signed by the defendant? As a mere memorandum to govern him in the selection of the goods he was to send, this was not necessary. But the greater difficulty is, how came it in the hands of the plaintiff? for if it was to assist the memory of the plaintiff, he should have brought it with him to Philadelphia. The counsel of the defendant have charged the plaintiff with bold fraud in getting possession of this paper, they do not know how, and using it as the means of perpetrating the still bolder fraud in fabricating these notes. It is, they allege, by copying the signature of the defendant to this list of goods, that he has been able to forge the name of the defendant to the notes. This argument certainly assumes that the notes are false; and if they be so, it is of little importance by what means or assistance the forgeries were committed. This is the question submitted to you, with a remarkable deficiency of evidence to guide you in the decision of it for the one side or the other. If you shall be finally satisfied that these notes are genuine, and that they are bona fide evidences that the debts and claims mentioned in them are due from the defendant, you will then take up the account which the defendant has produced, under his plea of set-off, against the plaintiff, and strike the balance as it shall appear to you to be just between them. If you shall reject the notes as false and spurious, the defendant will then be entitled to your verdict for so much as you shall find to be due to him. You must do this, under the provisions of the act of assembly of this state, by finding a verdict for the defendant, and certifying the amount you find to be due to him.

Verdict for the defendant, with a certificate that there is due to him from the plaintiff the sum of 404 dollars 53 cents.

It would seem that the jury admitted that the notes were genuine, for the account of the defendant against the plaintiff was upwards of 1700 dollars, exclusive of the 300 dollar note.

MURDAUGH, Ex parte. See Cases Nos. 11,297 and 11,298.

MURDOCH (KEITH v.). See Case No. 7,652.

MURDOCH v. SHACKELFORD. See Case No. 9,937.

MURDOCH (UNITED STATES v.). See Case No. 15,836.

MURDOCH (WHETMORE v.). See Case No. 17,509.

Case No. 9,937.

MURDOCK et al. v. SHACKELFORD.

[1 Brock. 131.]

Circuit Court, D. Virginia. May Term, 1808.

WILLS—EXECUTORY DEVISE—CONTINGENCY.

A testator lent to his son W. a tract of land for life, "and if he has children, at his death, he may dispose of it to them as he thinks proper, reserving to his now wife the use of the land during her life, as long as she remains his widow; but if she marry, then she is to have only one-third part; the whole or part, whichever she has, is to be held without committing waste. If

my son W. dies without heirs of his body, then the land, with the consideration above-mentioned, to go to my son Z.," &c. This is an executory devise to W. in tail, after an estate for life to himself, remainder in fee to his children living at the time of his death, which executory devise in tail is to take effect on the contingency of his dying without children living at the time of his death.

The complainants [Murdock, McDonald & Co.], English merchants, exhibited their bill in 1803, against the defendants, heirs of William Shackelford, deceased, stating that they had recovered a judgment in an action of debt against the said Shackelford, in the county court of King and Queen, in 1773, still remaining due and unsatisfied at the institution of this suit; that the said Shackelford died intestate on the —— day of ——, seized and possessed of a considerable property, real and personal; that the said Shackelford left a widow and several children, among whom his property was divided, and that his widow was still in possesion of a tract of land of which William Shackelford died seized. The bill further states, that letters of administration on the estate of William Shackelford had been granted to a certain John Harwood, who had removed from the state, and had since died. The plaintiffs also seek to charge the land of William Shackelford with the amount of a bond for £168 15s. 8d., executed by William Shackelford, and which they allege is lost or mislaid. The defendants denied all knowledge of the claim asserted in the complainants' bill, and pleaded the statute of limitations in bar of a recovery. They admit, that William Shackelford died intestate in 1783, possessed of a certain tract of land derived from his father, Richard Shackelford; but insist, that he had only a life estate in the land sought to be charged. They refer to the clause in Richard Shackelford's will, under which the title of William Shackelford was derived, in proof of the position, that the interest of William Shackelford was limited to a life estate; and they further deny, that they have ever derived any other estate, real or personal, from their intestate William Shackelford. The following opinion of the court contains the clause of Richard Shackelford's will, upon the construction of which the right of the plaintiffs to charge the land devised by it to William Shackelford, with his debts after his death, depended.

MARSHALL, Circuit Justice. This cause depends entirely on the construction of the will of Richard Shackelford. The following is the material clause of that will:—"I lend to my son William during his life, the tract of land whereon I now live; and if he has children at his death, he may dispose of it to them as he thinks proper, reserving to his now wife the use of the land during her life, as long as she remains his widow; but if she marry, then she is to have only one-third part; the whole or part, whichever she has, is to be held without committing waste. If my son William dies without heirs of his body, then the land, with the consideration above-mentioned, to go to my son Zachariah; and if he should die without heirs of his body, then it is my desire, that it be equally divided between my two daughters, Elizabeth and Frances, to them and their heirs for ever." William died leaving children, and the question is, whether he took an estate for life, or in fee, in the lands devised to him. That the intention of the testator was to give William only an estate for life, has not been, and cannot, with any semblance of reason, be controverted. The will was most probably drawn by a lawyer, who appears to have sought for terms of art which should secure this intent. 1st. The estate to William is expressly limited to his life. 2dly. It is not given for that period, but is lent—a distinction to which some importance has been attached. 3dly. The rights of the wife are secured by giving her the whole estate, while she was his widow, and her dower in the event of a second marriage. It is seldom that the intent of a testator, that the first devisee should take only an estate for life, appears as conclusively, as in this case. It is apparent that the testator intended to give to William an estate for life, remainder to the wife of William during her widowhood, with the right of dower in case of marriage, remainder to the children of William in such proportions as he should appoint. Thus, William has an estate for life, with power to dispose of the whole estate among his children living at his death. If the will stopped with these provisions, the intent of the testator would be obvious; and as no rule of law would conflict with that intent, the suit would probably never have been instituted. But the subsequent provisions of the will are supposed to manifest a clear intent, incompatible with, and which must overrule the intent, so plainly expressed in the first clause, to give William only an estate for life. The words which are supposed to evidence an intent, which cannot stand with a limitation of the estate to William for life, are these: "If my son William, dies without heirs of his body, then the land to go to my son Zachariah." These words are said to create an estate tail in William. That it was the intention of the testator, to postpone Zachariah, until there should be a failure of the issue of William, is believed; and that in the event contemplated, William would have taken an estate tail, by implication, is perhaps the sound legal interpretation of the will. But what is that event? The obvious answer is, the death of William, without children. It is obvious, that the testator intended to prefer all the issue of William to Zachariah, and, therefore, that the issue of William, must be exhausted, before the remainder to Zachariah could vest. In that case, the issue of William, if not children, must take in tail, for which purpose, the estate tail must be in William, or it could

not descend on them. But the words of the testator must be totally disregarded, if we do not admit, that the children of William, living at his death, are to take in preference to the issue of such child as may be dead. To enable those children to take, in the manner described by the testator, the estate to William, must be limited to an estate for life: to enable the issue to take, if there be no child, the estate of William must be enlarged to an estate tail. These two intents are said to be incompatible with each other, and it is contended, that the former must yield to the latter. If they are, indeed, incompatible, it would not follow, that the former must yield to the latter. The children living at the death of William, so far as the words of the testator are to be regarded, were the first objects of his bounty. They were preferred to the issue of such, as might then be dead, and as they might take an estate in fee, no good reason is perceived, why this superior object should be made to yield to another, which was, in the mind of the testator, inferior to it. But no incompatibility of intent is perceived. The devises may well stand together. This is an executory devise to William, in tail, after an estate for life in himself, remainder in fee to his children, living at the time of his death, which executory devise in tail, is to take effect on the contingency of his dying, without children living at the time of his death. This construction gives full effect to the whole intention of the testator, as expressed by himself, and is not perceived to be repugnant to any rule of law. This case very strongly resembles that of Roy v. Garnett, 2 Wash. [Va.] 11, which was very maturely considered, both by the bench and bar. The doubt, in Roy v. Garnett, was, whether in the event of the devisee for life, dying without male children, his estate would be enlarged by the implicative devise, so as to enable his issue to take before the remainderman; but it was conceded by the counsel for that issue, that if any male child, or children of the devisee for life, had been living at the time of his death, such male child or children must have taken under the will, and the estate of the devisee for life would not have been enlarged into an estate tail.

DECREE. This cause came on this day to be heard, on the bill and answer, and the last will and testament of Richard Shackelford, deceased, filed as an exhibit, and was argued by counsel; on consideration whereof, the court being of opinion, that the lands in the hands of the defendants are not chargeable to the plaintiffs, it is decreed and ordered, that their bill be dismissed, &c.

Case No. 9,938.

In re MURDOCK.

[See Case No. 8,838.]

Case No. 9,939.

In re MURDOCK.

[1 Lowell, 362; [1] 3 N. B. R. 146 (Quarto, 36).]

District Court, D. Massachusetts. July, 1869.

BANKRUPTCY — DISCHARGE — WHO MAY OPPOSE — RIGHTS OF ONE PURCHASING BANKRUPT OBLIGATIONS—ASSIGNMENTS PREVIOUS TO PASSAGE OF LAW.

1. A creditor whose debt is provable may oppose the discharge of a bankrupt, although it has not been proved.

[Approved in Re Groome, 1 Fed. 469.]

[Cited in Burpee v. Sparhawk, 108 Mass. 114.]

2. It seems, that one who has in good faith bought a debt against the bankrupt after the commencement of the proceedings may prove it in the bankruptcy, the form of oath being varied to conform to the fact.

[Cited in Re Pease, Case No. 10,880. Approved in Re Strachan, Id. 13,519.]

[Cited in McAvity v. Lincoln Pulp & Paper Co., 82 Me, 510, 20 Atl. 82.]

3. Such a debt is not annihilated, and may be proved by the assignor or else by the assignee.

4. Where the bankrupt had made an open and notorious conveyance of land to his wife to hold to her separate use, more than ten years before the bankrupt law was passed; *held*, that such conveyance could not be set up as a fraud to prevent his discharge in the absence of evidence to show that it was held on a secret trust for the bankrupt; nor was the omission of it from the schedule a concealment of property under that act.

[Cited in Re Boynton, 10 Fed. 280.]

5. Where it appeared very doubtful whether the bankrupt had any interest in a certain promissory note held by a third person, and there was no evidence of any wilful concealment, and the assignee had had all the benefit of the title; *held*, the bankrupt ought to be discharged, notwithstanding the note was not on his schedule.

Mrs. Eliza Ventriss, the sister of the bankrupt, [George A. Murdock,] was set down in the schedule as his largest creditor. After the petition was filed and before the first meeting of creditors, she sold the negotiable note which was the evidence of her debt, to George W. Ware, Jr., who did not prove the debt, but appeared to oppose the discharge of the bankrupt, which he did both on his own account and as attorney for Mrs. Ventriss.

E. Merwin, for bankrupt, contended that neither Mrs. Ventriss nor Mr. Ware could prove the debt, because neither could take the oath prescribed by the supreme court in form No. 22; and that even if the debt were provable it must be proved before the creditor could be heard.

J. S. Abbott, for creditor.

LOWELL, District Judge. I have repeatedly decided that a creditor whose debt is provable may oppose the discharge. It is to be regretted that the district courts should not agree upon the construction of the statute in all its parts; though considering the

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

multitude of questions which arise in the administration of this new branch of jurisprudence, such disagreement can be no matter for surprise. We may rather congratulate ourselves that upon many of the most important points there has been great unanimity of opinion. I shall not state the reasons for my opinion at large, because there is a reported decision of Judge Hall, of the Northern district of New York, in which the arguments and authorities are collected and stated with great care, and the conclusion arrived at is the same that I have always acted on. Re Shepard [Case No. 12,753]; see acc. Re Boutelle [Id. 1,705]. On the other side, see Re Levy [Id. 8,297].

The argument is briefly this: A creditor who has not proved his debt has no standing in the bankrupt court for most purposes, because he has no interest in the settlement of the estate, in the dividend, or in the acts or omissions of the assignee. His assent is not necessary under sections 30, 33, [of the act of 1867 (14 Stat. 532)], but he is interested to oppose the discharge because he will be bound by it. He may have many sufficient reasons for not proving his debt; as, for instance, that he would be obliged to either relinquish or realize a security which, though inadequate, is not in a state to be advantageously sold. Yet he is bound by the action of the court, and is in effect a party to the discharge. On principle therefore he ought to be admitted to contest it. We may admit that "any creditor" in section 31 is ambiguous; but on its face it includes all creditors, and the ambiguity can only be raised by construction. Now the statute itself, at section 29, and the form prescribed by the supreme court, both contemplate notice to creditors who have not proved, for the former requires notice by publication, in addition to a written notice to all who have proved, and the latter notifies all creditors who have proved, and all other persons interested, to appear and show cause. But section 34 is to my mind quite decisive of the intent of congress, because it authorizes any creditor whose debt was provable, though not proved, to apply to the court and have the discharge set aside at any time within two years after its date, on proving certain frauds to have been committed, and that they were not known to him before the granting of the discharge. Now it seems a forced, not to say absurd, construction of the statute that the knowledge which could not be availed of by the non-proving creditor to oppose the discharge, should yet be a complete answer to his application to set it aside.

Of course the opposing creditor must have a provable debt, and must give evidence of that fact, and this brings us to the second point, which was so ably argued, that there is no such debt here, because neither of these supposed creditors can take the oath that the bankrupt was, both at the commencement of proceedings, and still is, justly indebted to him or her. I do not find any thing in section 22 to avoid a real and honest transfer of a negotiable debt made after the petition is filed, and without any purpose of influencing the proceedings, but rather an implication that it may be done if there be no such purpose. And I can conceive of no reason why it should not be. It is true that every thing is to be settled as of the commencement of the proceedings, and the rights of the parties are fixed at that time; and by the express language of section 20 a debtor of the bankrupt cannot buy up a claim against him after that time and use it in set-off; but a set-off is payment in full of the debt set off to the extent of the debt against which it is set off; and a creditor who obtains payment in full has an unjust advantage over the rest. There is nothing that I can discover in the statute or in its policy to restrain the negotiability of debts, or to require an honest debt to be annihilated because it has been honestly transferred; and this must be the result if neither party can take the oath necessary to prove it.

The form of oath prescribed by the supreme court does indeed appear to contemplate that there has been no transfer. It is: That the bankrupt was, at and before the filing of the petition, and still is, justly and truly indebted to the creditor. But this form is made for the most usual cases, and is not intended to change the statute, but may itself be varied to meet the exigency of different cases. Taken literally, it would exclude administrators or other assignees by mere operation of law, which certainly cannot have been the purpose. The oath required by the Massachusetts statute was like that prescribed by the supreme court, and I am informed that it was understood to prevent an assignee of a debt acquired after notice of the warrant was published from proving it, and that the practice in courts of insolvency was to advise the assignee of a debt to transfer it back to his assignor, who then took the oath and retransferred the debt. This was a circuitous way of arriving at justice, and one that required a false oath to be taken, and I am not aware that any superior court of the state ever passed upon the necessity of such action. The form of oath, at any rate, was prescribed by the law itself, and our law passed later has not adopted it. My own impression is pretty decided that the debt may be proved by the person who owns it at the time of proof, the oath being modified to conform to the fact. This precise point is not passed upon because both Mrs. Ventriss and Mr. Ware oppose the discharge, and I am clear that one or the other may do so.

[Another point I have often decided, but the decision appears not to have become generally known. I hold that any creditor who has a provable debt may oppose the bankrupt's discharge. In general, no one is a

creditor who has not proved his debt; and such an one has no interest in the mode of settling the estate, nor in the dividend, nor in the acts or omissions of any of the parties to the proceedings. But he has an interest in the discharge, because if it is granted he will be barred. He may hold security which is inadequate for his full payment, and yet is not in a condition to be advantageously liquidated; or there may be no dividend expected; or he may have many other good reasons, or reasons which he considers good, for not proving his debt or concerning himself with the proceedings; and yet it may be of the greatest importance to him that the debtor should not receive his certificate. Upon principle, therefore, he ought to be heard on that issue. The statute evidently contemplates it, because it gives every creditor whose debt was provable, whether proved or not, the right to set aside the discharge within two years, on proving fraud, and that he had no knowledge of the fraud until after the discharge was granted. Now, it is very difficult to maintain that the statute debars a creditor from opposing the discharge before it is granted, when it allows him to do so afterwards, upon showing good cause why he did not do it before. I am aware that there are decisions both ways on this point, but my own was earlier than any of them, and I have seen nothing in the decisions opposed to this view which requires me to change it. Of course, the opposing creditor must show, as matter of fact, that he has a debt which is provable, and this will be one of the issues to be tried.

[This whole case was heard, and both parties argued the merits, and it is not improper that I should decide them, leaving the first point still open for consideration if it should arise in another case.][2]

The allegations of fact are that the bankrupt wilfully omitted from his schedule and concealed from his assignee the equity of redemption of a house and land in Pittsfield, and his interest in a certain promissory note. The house and land were conveyed to the bankrupt's wife in 1856, at a time when he swears he was solvent. The conveyance was open and notorious, and was well known to his sister. Such a conveyance does not stand on the footing of a mere voluntary conveyance to a stranger, or of one made on a secret trust for the grantor, and there is no evidence here of any such trust. The consideration is a good one, and its operation is not secret. No doubt the debtor has always had, and always will have, some advantage from this estate; but it would be a perversion of terms to say that there is any concealment about it. Whether the conveyance could be avoided by the assignee is a different question, and depends on facts not fully developed at this hearing. The conveyance, of course, cannot be alleged as a bar to the discharge, because it was made long before the bankrupt law was passed. The only question before me is that of concealment; and I do not find that any was practised.

The interest of the debtor in the note, if any, is equitable rather than legal, and I am not satisfied that there was any intentional concealment of it, or any evasion in his conduct or schedules or examination. Where property is in fact concealed in specie, or where the title is concealed by a colorable conveyance, the discharge should be refused; but there are many doubtful cases in which justice seems to demand that the assignee should be entitled to try his rights, but in which unfairness on the debtor's part cannot be made out. The assignee in this case has obtained full knowledge of both these interests, and has sold whatever title he has in them; and I do not see that the bankrupt has obstructed him at all in obtaining his full rights, or that he has wilfully concealed anything. Discharge granted.

[2] [From 3 N. B. R. 146 (Quarto, 36).]

Case No. 9,940.

MURDOCK v. The EMMA GRAHAM.

[3 Cin. Law Bul. 1,054.]

District Court, S. D. Ohio. 1878.

INSOLVENCY—DEED OF GENERAL ASSIGNMENT—CLAIM FOR DAMAGES—COLLISION.

Claim for damages for collision of craft passes to assignee under deed of general assignment for benefit of creditors under the Ohio statute.

[This was a libel by J. B. Murdock, assignee, against the steamer Emma Graham, to recover for injuries sustained in a collision.]

Moulton & Johnson, for exceptions.
Hooper & Dyer, contra.

SWING, District Judge. The libel in this case is to recover damages for injuries sustained by a float or barge collided against by the steamer Emma Graham. To this libel, the defendant or claimant, files exceptions upon the following grounds: That since the alleged collision the owner of the barge made an assignment under the laws of Ohio, and that his assignee cannot sue, as the lien is not assignable in admiralty. This brings up the question: Is it assignable, and is it within the terms of the assignment? There is no doubt of the assignor's right to sue for the injury to his personal property, but can the assignee sue? There is much conflict in the authorities upon this point. but I have finally come to the conclusion that a right of action for injuries to personal property may be assignable in connection with the property itself, and that in the case at bar, the assignee under the assignment for the benefit of creditors, may sue for this injury in a court of admiralty. It is different from a personal tort which dies

with the owner. It would be very unjust and inequitable to say that this right is not assignable, and that the creditors should not have the benefit of the lien. See The Sarah J. Weed [Case No. 12,350]; Burrill, Assignm. 70, 355; Rogers v. Spence, 13 Mees. & W. 570. This right and lien is assignable, and together with the property passes to the assignee under the law of assignment for the benefit of creditors.

2. Does the assignment cover or include the right? Not in express terms. The words of his deed of assignment are "his real and personal estate," and this ought to embrace all his rights. If this is to be treated as an assignment under the laws of Ohio, it would convey all his rights and choses in action. See Rev. St. Ohio (Swan & Critchfield's Ed.) p. 697, § 11; Id. p. 709; Burrill, Assignm. 73, 354, 355; 1 Smith, Lead. Cas. 70–75. For some purposes it might possibly not be so taken, but in the present instance, I think, it comes fairly within the meaning of the statute. The exceptions to the libel are overruled, and leave given to answer.

Case No. 9,941.

MURDOCK et al. v. HUNTER.

[1 Brock. 135.]

Circuit Court, D. Virginia. May Term, 1808.

EVIDENCE — PROOF OF HANDWRITING — COURTS — ENGLISH ADJUDICATIONS MADE PRIOR TO THE REVOLUTION — ADMINISTRATOR — RIGHTS OF CREDITOR.

1. The subscribing witness to a bond being dead, proof of the handwriting of the attesting witness, if unaided and unopposed by other evidence, is sufficient to establish the execution of the bond.

2. The decisions of the courts of England, made prior to the Revolution, are of binding authority on the courts of Virginia. Those made since have not that character, but when they are reasonable, conformable to general principles, and do not change a rule previously established, they will not be entirely disregarded.

[Cited in Brewer v. Harris, 5 Grat. 293; Moon v. Stone's Ex'r, 19 Grat. 263.]

3. A bond creditor is not bound to pursue the personal assets of his debtor in the hands of others than his personal representative, if such pursuit threatens to be tedious, intricate, and unproductive. But if the personal estate is in the hands of legatees, who may be easily brought before the court, they ought to be made parties to the suit. See Corbet v. Johnson [Case No. 3,218].

[Cited in McLaughlin v. Bank of Potomac, 7 How. (48 U. S.) 229.]

This was a bill in chancery, filed in August, 1805, by the plaintiffs [J. Murdock & Co.], partners in trade, and subjects of the king of Great Britain, to subject certain lands in the county of Princess Anne, in Virginia, of which William Hunter died seized, in the hands of devisees, to the payment of a bond, purporting to be executed by one Thomas Claiborne, and the said Hunter. The bond was in the penalty of £316 9s., to be discharged by the payment of £158 4s. 6d., and bears date the 23d of September, 1774, payable on the 23d September, 1775, to Archibald Govan, and was attested by Andrew Ronald. At the period of the institution of this suit, both the obligors and the attesting witness were dead, and the plaintiffs adduced proof of the handwriting of Ronald, which was the only evidence offered of the execution of the bond. William Hunter died in 1777, having first made his will, appointing executors, who refused, or failed to qualify, and Elizabeth Tenant took out letters of administration, with the will annexed, of William Hunter; and after her death, Thomas Wishart qualified, as administrator of the estate of Hunter unadministered by Elizabeth Tenant. Wishart died, and Hancock qualified, but before this suit was brought, Hancock was also dead, and no subsequent administration was granted: so that at this period, there was no personal representative of Hunter.

William Hunter devised a tract of land in fee to James Tenant, lying in Princess Anne county, and containing by estimation, 517 acres, who died seized thereof. James Tenant devised the said land to Elizabeth Tenant, his mother, for life, remainder to his eldest sister, living at her death. At the death of Elizabeth Tenant, Elizabeth White, the wife of William White, became entitled to the Princess Anne estate, under the will of James Tenant, and when this bill was filed, the said Elizabeth and William White, the only defendants in this cause, were seized and possessed thereof. The plaintiffs in their bill, allege that the personal estate of William Hunter, deceased, was either exhausted, or could not be reached by the death of his administrators and their sureties, and the insolvency of some of them, and pray a decree for the sale of the said land, to satisfy their debt.

In their answer, filed in 1807, William and Elizabeth White say, that William Hunter died, possessed of a large personal estate, more than sufficient for the payment of all his debts, and refer to an inventory and appraisement of his estate, (which is made a part of their answer,) taken on the 15th day of September, 1777, by which the personal estate of Wililam Hunter is estimated to have been worth £2468 3s.: that many of the negroes of the estate were carried away by the British troops, during the Revolutionary War, and have never since been heard of, and that the residue of the personal estate has been long since distributed among the legatees of William Hunter. They deny the sufficiency of the proof adduced, to establish the execution of the bond by Wiliam Hunter. But if the court should be of a different opinion, they insist, that after the lapse of thirty years, the plaintiffs have no right to subject the real estate of which Hunter died seized, to the payment of this bond, since, at the time it became payable (September, 1775,) there was no legal impediment to the prosecution of this claim, Great Britain and her colo-

nies in America being then politically united, and ever since the termination of the Revolutionary War, the courts of Virginia have been open to the prosecution of suits by British subjects, against citizens of Virginia: that there is now no legal representative of William Hunter, nor can any of his papers or books be found, from which a correct statement of his affairs can be made out; whereas, had the present demand been exhibited in due time, the responsibility now sought to be fixed on these defendants, would have attached to others. They admit, that the real estate which the plaintiffs now seek to subject to the satisfaction of this claim, was derived from William Hunter.[1]

MARSHALL, Circuit Justice. In this case, two points are made at the bar: 1st. That the bond on which the suit is instituted, is not sufficiently proved. 2d. That the proper parties are not made.

1st. The bond purports to have been executed by Thomas Claiborne and William Hunter, is attested by Andrew Ronald, who is since dead, and the only proof offered, is that of the hand-writing of the subscribing witness. The question, whether this testimony is sufficient to establish the execution of the bond, without any proof of the handwriting of the obligor, has been argued on principle and on authority, and is of considerable importance in those old cases, which are frequently brought before this court. The general principle is, that the best evidence of which the nature of the case will admit, ought to be adduced. The subscribing witness himself being dead, the best proof that he attested the bond is, that the signature, purporting to be his, is in his hand-writing. This testimony, therefore, proves, that he subscribed his name to the obligation; but whether its execution shall be inferred from this fact, or must be proved by other testimony, so that proof of the death and handwriting of the subscribing witness, simply dispenses with the necessity of producing that witness, is a question, which, on principle alone, might be decided the one way or the other, and the decision would be supported by almost equal strength of reasoning. Positive proof of the execution of a bond is required, where that proof is attainable. Where it is unattainable, the law must be satisfied with circumstantial evidence. If the plaintiff, by proving the death and handwriting of the subscribing witness, was only let in to prove the execution of the bond by other testimony, it would seem to be sufficient to prove the death of the subscribing witness, and to identify his person by any other proof than that of his hand-writing, as, for instance, that he was the only person of that name, in a situation to render it probable that he could have attested the bond. Since it is not only necessary to prove the death, but to prove the hand-writing, of the subscribing witness, it would seem that something further than the mere permission to establish the execution of the bond by other testimony, was gained by this proof. This can only be the inference which is drawn by

[1] No lapse of time bars actions upon instruments, under seal, for the payment of money; but the lapse of twenty years creates a presumption of payment, which may be repelled like any other presumption. Jackson v. Pierce, 10 Johns. 414; Bailey v. Jackson, 16 Johns. 210. An acknowledgment of the debt within twenty years, or a demand of payment, or circumstances explaining satisfactorily why the demand was not made sooner, will repel the presumption; so, where for the portion of the time, the plaintiff was disabled to sue, that portion will be deducted. Id. This doctrine of presumption of payment, arising from the lapse of twenty years, is a very familiar one in our courts. Mr. Robinson has examined the Virginia cases on this subject, in his valuable work. 1 Rob. Prac. 113, 114, q. v. If a shorter period is relied on, the presumption must be corroborated by circumstances. Gordon v. Kerr [Case No. 5,611]. In Dunlap v. Ball, 2 Cranch [6 U. S.] 180; 1 Conn. 383, which, as regards the question of presumption of payment, is identical with the above case of Murdock v. Hunter, the suit was brought in 1802, upon a bond executed in 1773, by the defendant, a citizen of Virginia, to the plaintiffs, British merchants, residing in Great Britain. The case went to the supreme court, on a bill of exceptions to the opinion of the court below, instructing the jury, that from the length of time, stated in the facts agreed on, the bond in law, was presumed satisfied; unless they should find from the evidence, that interest was paid on the bond, within twenty years from the 5th of September, 1775, (the time of the last payment;) or that a suit or demand was made, on the said bond, within twenty years from the last mentioned time, exclusive (in both cases,) of five years, five months, and twenty days, taken out of the act of limitations. The supreme court said (Marshall, C. J., delivering the opinion of the court,) that the only circumstance which could create a question in the case was, that twenty years had not elapsed, exclusive of the period, during which the plaintiffs were under a legal disability to recover before the action was brought: that the doctrine of the presumption of payment arising from lapse of time, was a reasonable one, and might be rebutted by any facts that would destroy the reason of the rule. That no presumption could arise, during a state of war, in which the plaintiff was an alien enemy, was too clear to admit of doubt. But it was not so clear, that upon a bond so old as this, the same length of time, after the removal of the disability, was necessary to raise the presumption of payment, as would be required if the bond had borne date at the time of such removal. It being satisfactorily shown to the court, that it was the general understanding in Virginia that British debts could not be recovered there, earlier than 1793, when the first decision of the superior courts, establishing the right of recovery was rendered; the only question was, whether, in case of an old debt, the same time was required to raise the presumption, as in the case of a debt accruing since the impediments had been removed? In such a case, it was not easy to establish a new rule, and the court thought it best to adhere to the old decisions, that twenty years must have elapsed, exclusive of the period of the plaintiff's disability, and were of opinion, that the court below erred, in directing the jury, that payment ought to be presumed. The cause was remanded to the circuit court, to be there tried, with directions, that there was no presumption of the payment of the said bond, as directed by the said circuit court.

the law, that if the person who attested the bond was present, he could and would prove its execution. This, however, is only circumstantial proof, and may certainly be strengthened by other circumstances, as by proof of the hand-writing, or the acknowledgment of the obligor. I was, myself, at first, inclined to think that, on principle, this additional proof was indispensably necessary, but an observation made by the plaintiff's counsel in argument has considerable influence. It is, that if the obligor acknowledges, and thereby adopts the signature as his, in the presence of the subscribing witness, he is as much bound as if his name had been written by himself. It would seem, then, that the positive necessity of proving the hand-writing of the subscribing witness, although he be dead, would justify the opinion, that the law infers from this proof, that the subscribing witness would, if present, prove the execution of the bond, and that a naked case, standing singly on this proof, would be in favour of the plaintiff. But this evidence, which is merely circumstantial, may be met by other circumstantial evidence. Whatever deducts from it, may, and ought to be, weighed against it. It is, therefore, always advisable to support it by other testimony, if such other testimony be in the power of the plaintiff.

On passing from principle to authority, it may not be improper to premise, that as the common law of England was, and is, the common law of this country, and as an appeal from the courts of Virginia lay to a tribunal in England, which would be governed by the decisions of the courts, the decisions of those courts, made before the Revolution, have all that claim to authority, which is allowed to appellate courts. Those made since the Revolution, lose that title to authority, which was conferred by the appellate character of the tribunal which made them, and can only be considered as the opinions of men distinguished for their talents and learning, expounding a rule, by which this country, as well as theirs, professes to be governed. An opinion, avowedly changing a rule, would certainly deserve much less consideration, than one declaring the rule on a point which appears not to have been well settled.

The first decision of this question, which has been cited at the bar, is that reported by Viner, which appears to have been made at nisi prius, and is in favour of the opinion, that the proof of the hand-writing of the subscribing witness, who is dead, is sufficient, if unopposed, to establish the execution of the bond.[2] Previous to this, however, the point would seem to have been noticed by Lord Holt, at nisi prius, in a case reported in 1 Ld. Raym. 734. "A deed was produced, to which there were two witnesses, one of whom was blind. It was ruled by Holt, that such deed might be proved by the other witness and read, or might be proved, without proving that the blind witness is dead, or without having him at the trial, proving only his hand. And so it was done in this case." Wood v. Drury, 1 Ld. Raym. 734.

This report is too indistinct, and too short, to be satisfactory. It would rather seem, however, that the deed was proved, by proving the hand-writing of the blind witness. Perhaps, in addition to this, the execution of the deed was proved by the other witness, and that which would indicate the contrary, may be ascribed to the inaccuracy of the reporter. I am inclined to think it is. In the cases cited from Strange, Peere Williams, Atkyns and Douglass, supplemental proof was offered and received, but the question, whether without that supplemental proof the execution of the bond would be established, by proving the death and hand-writing of the subscribing witness, was not made to the court, nor decided. It would seem that considerable weight was given to this additional testimony. In 1790, in the case Wallis v. Delancey,[3] at nisi prius, Lord Kenyon decided this question directly, and decided it against the sufficiency of the proof of the hand-writing of the subscribing witness, if unaided by other testimony. The case of Barnes v. Trompowsky, 7 Durn. & E. [7 Term. R.] 265, which was decided in 1797, while Lord Kenyon was on the bench, turned upon the necessity of proving the hand-writing of the subscribing witness, not on the sufficiency of that proof; for in that case, the hand-writing of the obligor was proved. The case of Adam v. Kerr, 1 Bos. & P. 360, was decided in 1798, and dispenses with other proof than that of the hand-writing of the subscribing witness. Such proof was declared to be evidence of every thing on the face of the paper. In this case, the rule for a new trial was refused by the court of common pleas, so that the point was not permitted even to be argued. The case of Prince v. Blackburn, reported in 2 East, 250, and decided in 1802, was upon the question of the admissibility; not of the sufficiency of the proof. But Judge Le Blanc, before whom the cause was tried at nisi prius, reported the testimony, and takes no notice of any supplemental evidence. If none was given, this case confirms that of Adam v. Kerr. Whether it was given or not, does not certainly appear. In his Law of Evidence, Mr. Peake supposes the law to be now settled in England, in conformity with the decision of Adam v. Kerr. He states the determination

[2] "Where there are two witnesses to a deed who are dead, if there be full evidence to prove one of their hands, and any evidence that endeavours have been used to find one to prove the other's hand, it is sufficient; for perhaps the witness might be a stranger, and it would be a hard task to prove his hand; per cur. Comb. 248; Pasch. Term 6 W. & M. in B. R., in case of Smart v. Williams," 12 Vin. Abr. 223, § 3, tit. "Evidence."

[3] Reported in a note to Barnes v. Trompowsky, 7 Durn. & E. [7 Term R.] 266.

to have been made in a case where the subscribing witness was dead; but does not say the law would be otherwise in any other case, where the disability of the subscribing witness was permanent, nor is there any reason for distinguishing such a case from one where he was actually dead.

From this review, the law appears to be now settled in England, that if the subscribing witness be dead, proof of his hand-writing is sufficient to establish the execution of the paper he has attested; but it has been decided by cases since the Revolution, which are not authority in the United States. When, however, they are reasonable, are conformable to general principles, and do not change a rule previously established, such decisions cannot be entirely disregarded. The decisions upon this point appear to be of this character, and the court is inclined to the opinion, that in a case unsupported and unopposed by any other circumstance whatever, this proof would be deemed sufficient to establish the execution of the bond.[4]

In the case formerly decided in this court, there were circumstances which rendered the proof of the hand-writing of the witness unsatisfactory. It was proved that there were two men of the same name, and it could not appear from the hand-writing of the witness, by which of them the bond was executed. That there are in this case two obligors, does not seem sufficient to take it out of the rule. It is, however, possible, that a signature may have been added after the attestation, and consequently, circumstances less decisive may outweigh the inference drawn from the hand-writing of the subscribing witness, than would be required in the case of a single obligor. The face of the paper is not absolutely free from suspicion. The signature of Hunter bears such a resemblance to the character of the writing in which the bond is filled up, and with which the name of Claiborne is signed, as to excite some suspicion. If this circumstance stands alone, it cannot be much regarded, but if it should be aided by others, it may deserve consideration. In a case where the parties originally managing the cause are dead, and the person now looked to for testimony has been induced by his counsel to suppose that his testimony would not be required at this term, such light suspicion may induce a suspension of the decision until another term.

The second point is, that proper parties are not made in this cause. In the case of Corbet v. Johnson [Case No. 3,218], it was decided in this court, that a bond creditor was not bound to pursue the personal assets into the hands of others than the representative of the debtor, if such pursuit threatened to be tedious, intricate, and unproductive. This case is supposed to have established the principle, that in no case whatever, is the bond creditor bound to go beyond the legal per-

[4] The cases cited by the chief justice, with some more modern English decisions, have all been reviewed by Mr. Starkie, in his treatise on the Law of Evidence. 1 Starkie, Ev. (Metcalf's Ed.) 337–343, inclusive. He lays down the general rule, as deduced from that review, to be, that where there have been sufficient attesting witnesses, whose absence is satisfactorily accounted for (as that they are dead, out of the country, infamous, have become interested, &c.) the proper proof is by giving evidence of the hand-writing of the attesting witnesses; and it is usual, he says, in such cases, to give evidence also of the hand-writing of the obligor. And where there are two attesting witnesses, one of whom is dead, and the other out of the country (as in the case of Adam v. Kerr, supra), proof of the hand-writing of the deceased witness is sufficient evidence of the execution of the paper, without proof of the hand-writing of the absent witness, or of the obligor; so, where one of the attesting witnesses, after diligent inquiry made, could not be found, and the other had become interested since the attestation, it was held that evidence of the hand-writing of the latter witness was sufficient proof (Cunliffe v. Sefton, 2 East, 183); and where one was dead and the other denied his signature, Lord Holt admitted evidence of the hand-writing of the former (Blurton v. Toon, Skin. 639). For a reference to the leading American decisions, as to the proof of hand-writing of the subscribing witness, where he is dead, &c. and its sufficiency, see Mr. Metcalf's note 1, 1 Starkie, Ev. 342. See, also, opinion of Carr, J., in Gilliam's Adm'r v. Perkinson's Adm'r, 4 Rand. [Va.] 327, and of Green, J., in Gregory v. Baugh, Id. 636, and the authorities there cited. It is said in Spring v. South Carolina Ins. Co., 8 Wheat. [21 U. S.] 268, 5 Pet. Cond. R. 434, to be the practice of that court, to require proof of the hand-writing of both the dead or absent witness, and of the obligor. That this has not been, however, the invariable practice of that court, at least in the case of old bonds, is obvious, from the case of Coulson v. Walton, 9 Pet. [34 U. S.] 62. In that case the genuineness of a bond thirty-five years old at the filing of the bill was drawn in question. The obligor and obligee, and one of the attesting witnesses were certainly dead, and the other attesting witness was supposed to have been killed by the Indians many years before. Three witnesses deposed to the hand-writing of the first mentioned witness, but no proof was offered of the hand-writing of the obligor, or of the other witness. The court cited the doctrine laid down in Barr v. Gratz, 4 Wheat. [17 U. S.] 231, "that where a deed is more than thirty years old, and is proved to have been in possession of the lessors of the plaintiff in ejectment, and actually asserted by them, as the ground of their title in a chancery suit, it is, in the language of the books, sufficiently accounted for, and it is admissible in evidence, without regular proof of its execution by the subscribing witnesses:" and held the bond sufficiently proved, by the proof of the hand-writing of the deceased attesting witness. See, also, Winn v. Patterson, 9 Pet. [34 U. S.] 663; where, under the circumstances of the case, even a copy of a recorded power of attorney, forty years old when it was offered as evidence, (the loss of the original having been accounted for), was admitted on proof of the hand-writing of one of the attesting witnesses, the other being presumed to be dead after thirty years. The proof of the hand-writing was the deposition of the deputy clerk of the court where the power was recorded. The deponent stated that he was familiar with the hand-writing of the witness (who was a justice of the peace, and who signed it as such); that he was dead; that he must have believed the official signature of the witness to have been genuine at the time, or he would not have admitted the paper to record, and that the paper offered was a true copy from the record, he having compared it with the record of the original made by himself.

sonal representative of the debtor. In support of this construction of that opinion, the plaintiff relies on these expressions. "With respect to the creditor, unless it be for his advantage, the personal estate may be said to be exhausted, when there are no longer assets in the hands of the executor." These words are used with reference to general dicta, found in cases cited by the heir, which declare, that the personal estate must be first exhausted, before the creditor would receive the aid of a court of equity against the real assets, and are intended to show the sense in which those dicta ought to be understood. They do not lay down a substantive, independent principle. If, in the case of Corbet v. Johnson [supra], the personal estate, instead of being wasted, had been in the hands of legatees, who could with ease have been brought before the court, I should have directed them to be made parties to the suit, and if such was the fact in this case, the opinion delivered on that occasion, would not be considered as opposed to a similar direction. But such does not appear to be the fact. The answer of the heir does not allege personal property in the hands of the legatees. On the contrary, it seems to rely on the waste of that property, as an objection to the recovery of the plaintiff; because, the resort of the heir against the personal fund is lost. The fact of an existing personal fund is not proved, and if it was proved, we are not sure that the court could notice it, in contradiction to the allegations of the parties. The case then, appears to stand on the same principles in this particular, with that of Corbet v. Johnson, and the court adheres to the opinion given in that case. But no decree will be given at this term, because the court is not satisfied under the particular circumstances of the parties, to declare, that this is the deed of William Hunter, although, perhaps, the difficulty will not be deemed sufficient at the next term, to prevent a termination of the suit.

There is at present certainly one conclusive impediment to a decree, which has not been mentioned, because it is presumed, that the plaintiff is able to remove it, and because, should it be removed, the court would still suspend its decision on the obligation, for further proof from the defendants. That impediment is the want of title in the plaintiff. There is no evidence, that the bond was taken for his benefit.[5] An issue may be directed, if the plaintiff has no objection. If he has, it will probably be directed at the next term, provided the defendant then exhibits circumstantial testimony against its being the deed of William Hunter.

MURDOCK (WHETMORE v.). See Case No. 17,510.

[5] The bond purports to have been executed by Thomas Claiborne and William Hunter, in favour of Archibald Govan, and there is no assignment endorsed upon it to the plaintiffs, or to any other parties whatsoever.

Case No. 9,942.

MURDOCK et al. v. WOODSON et al.

[2 Dill. 188.][1]

Circuit Court, W. D. Missouri. June 16, 1873.[2]

RAILWAY MORTGAGE—POWER OF TRUSTEES TO SUE—JURISDICTION OF FEDERAL COURT OVER STATE OFFICERS — CONSTITUTIONAL LAW — SPECIAL ACTS—TITLE OF ACT—CONSTRUCTION OF THE CONSTITUTION OF MISSOURI AS TO RELEASE OF THE STATE'S LIEN ON RAILROADS.

1. The trustees in a railway mortgage for the benefit of numerous and widely scattered bondholders secured thereby, have sufficient authority and interest to enable them to bring a bill in equity to enjoin an alleged illegal proceeding which will injure the value of the bonds and cast a cloud upon the security, or a bill to have a controverted priority of lien settled before an irredeemable sale is made under another mortgage, which is claimed to be prior to that made to the trustees.

[Cited in Mercantile Trust Co. v. Texas & P. Ry. Co., 51 Fed. 537.]

2. The circuit court of the United States may, in a proper case, enjoin the agents or officers of a state, whatever may be their grade, and this although the state may be the real party in interest; this doctrine applied in this case against the governor of Missouri acting as the special agent of the state in the foreclosure of a mortgage lien for the benefit of the state.

[See Bancroft v. Thayer, Case No. 835.]

3. In 1868, the state of Missouri, holding a first mortgage lien upon the Pacific Railroad of that state as indemnity for state bonds issued for the benefit of that company, passed an act by which, in consideration of $5,000,000, to be paid by the company to the state, and which was paid, the state released and discharged the company from the lien and all liability in respect of said bonds; and on the faith thereof the company mortgaged its roads to raise money to pay the state, undertaking to give the lenders a first lien. In 1873, the legislature of the state directed the foreclosure of the state's mortgage which had been released: *Held* (construing various provisions of the constitution of the state), that, under section 27, art. 4, of the constitution of the state, the act of 1868 was not invalid because it was a special law.

[Cited in Trask v. Maguire, Case No. 14,145.]

4. Under section 32, art. 4, of the state constitution, it was not invalid because it related to more than one subject; and it was also held that the subject was sufficiently indicated by the title of the act.

5. The state legislature was not prohibited by section 15, art. 11, of the state constitution, or by the railroad constitutional ordinance of the state from discharging its mortgage or lien on receiving the full value of its security, and of that value the legislature was the judge; so held in favor of bondholders who in good faith advanced to the company the money with which to make payment to the state.

[Cited in Ketchum v. Pacific R. Co., Case No. 7,740.]

[Cited in brief in State v. Chappell, 74 Mo. 337.]

6. It seems that the statutory lien reserved by the state was for its indemnity, and was under its control as between it and the holders of its bonds.

The case came before the circuit judge at his chambers on an application by the plain-

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

[2] [Affirmed in 22 Wall. (89 U. S.) 351.]

tiffs [Uriel A. Murdock and Luther Clark], trustees in a mortgage made by the Pacific Railroad of Missouri, dated July 15, 1868, for a preliminary injunction to restrain the defendants—[Silas] Woodson, who is the governor, and [H. Clay] Ewing, who is the attorney general, of the state of Missouri—from advertising and selling the said Pacific Railroad and its franchises under a statutory lien thereon claimed by the state of Missouri. The bill is very voluminous, but the following abstract will suffice to show its general nature and scope. It sets forth that the plaintiffs are citizens of New York, and that Woodson and Ewing, named above, are governor and attorney general of the state of Missouri, and that the Pacific Railroad is a corporation created by and under an act to incorporate the Pacific Railroad, approved March 12, 1849, to construct and operate a railroad from St. Louis to a point near Kansas City, and that it did in 1851 commence the construction of the said road, and that now said road is two hundred and eighty-three miles in length; that during the progress of the work of construction the state loaned its credit to the company by issuing its bonds to the aggregate amount of $7,000,000; that of the bonds so delivered to the company the sum of $2,000,000 was under the act of February, 1851, entitled "An act to expedite the construction of the Pacific Railroad, and of the Hannibal & St. Jo. Railroad." The bill then recites the terms and conditions upon which the bonds were to be paid, and also the conditions upon which bonds were granted to the railroad in 1855, and also that by authority of acts of the legislature subsequent to the act of 1851, bonds to the amount of $5,000,000 were issued by the governor and delivered to the railroad company, and negotiated, the proceeds being used in the construction of the road—said bonds constituting a mortgage or first lien on the road and its appurtenances. It is stated that the entire amount of bonds thus issued was $7,000,000, the first $3,000,000 being redeemable at the pleasure of the legislature at any time after the expiration of twenty years from date of issue, and the remainder payable in thirty years from date of issue. The bill then sets forth the disastrous effect of the war of the Rebellion on the road, then completed from St. Louis to Sedalia, one hundred and eighty miles; that no work of construction was done between the years 1861 and 1864, nor was work resumed until after the legislature had empowered the company to borrow money to complete its line authorizing it to issue 1,500 bonds of $1,000 each, bearing interest at the rate of seven per cent, payable in four, five, and six years after date, to secure the payment of which the company was authorized to place a mortgage constituting a first lien on the line of its road west of Dresden for a distance of sixty-five miles, it being required that the proceeds of said bonds should be applied to the completion of that part of the road. By the same act, the state of Missouri relinquished its first lien and mortgage, and right of forfeiture on all that part of the road west of Dresden, retaining, however, a second lien or mortgage thereon, with condition that on the payment of the $1,500,000 the state's second lien should become a first lien. By the provisions of the act it was made obligatory on the company to apply all its net profits to the extension and equipment of such part of its road until fully completed, reserving sufficient only for the payment of interest on the bonds actually issued by the company known as the Dresden bonds. The company obtained the money on these bonds, and was extending the line in 1864, when "a large army of insurgents" entered the state and marched along the line from Franklin, thirty-five miles from St. Louis, to the western terminus of the line at Warrensburg, a distance of one hundred and eighty-three miles, and destroyed bridges, cars, engines, and other property to an amount exceeding $1,000,000, rendering the road unfit for use for many months thereafter, and hence the road was not completed to the state line within the time, or at such reasonable cost as was contemplated by the Dresden bonds. In consequence of these serious losses, and the inability of the state to extend any more aid, the people of the city and county of St. Louis, by authority of law, loaned their credit, in 1865, to said company in the sum of $700,000, for which bonds of the county for that amount were issued, payable in twenty years from date, and delivered to the company on its obligation to pay the interest as it matured, and redeem the bonds themselves when due.

The road was finally put in running order to the western boundary of the state, in 1866, but the Dresden bonds and the county credit proved insufficient to pay for such extension and for the repairs and equipment, and at the time of the completion there remained due, chiefly to citizens of Missouri, a large floating debt, which in equity and good conscience, together with the loan by St. Louis county, possessed claims for payment not inferior to those possessed by the state under its statutory mortgage. In 1868, the said floating debt amounted to $1,092,848, besides an unaudited debt of $290,000, and the first installment of the Dresden bonds, $500,000, was not paid. At this time a large portion of the stock, $3,614,500, was held by citizens of Missouri, and by counties and cities therein—$2,280,000 being held by St. Louis city and county. So the company appealed to the general assembly and people of the state for protection—since if the governor sold the road, according to the terms of the bond acts, all of the stock would be foreclosed, and the purchaser would hold the road and appurtenances uncontrolled by the said stock, or any part of

it, and a loss of over $3,500,000 would be inflicted on the state—and great losses on other people. The state came to the rescue, and proceeded to legislate on the subject of a settlement and payment by the company of all claims due the state, the foreclosure of its mortgage, and a sale and conveyance of its rights in the property. An act was passed in 1868, entitled "An act for the sale of the Pacific Railroad and to foreclose the state's lien thereon, and to amend the charter thereof," the first section of which required the governor to sell the Pacific Railroad according to the provisions of the act of 1851, it being provided that the price for which the road might be sold at public auction should not be less than $8,350,000, payable to the state treasurer in bonds of the state or in money, within ninety days from the day of sale, and if such sum should not be realized, the governor should buy the road for and in the name of the state. And it was provided that if any other person than the state should purchase the road, then the state should assume and pay the principal and interest due, or to become due, on the $700,000 bonds issued by the county of St. Louis, and also $650,000 of the floating debt of the company. The purchaser must also bind himself to change the gauge of the road its entire length within ten years from the date of sale, so as to conform to the gauge of the Union Pacific Railroad Company; it was further provided, that if the company should, within ninety days from April 1, 1868, pay into the state treasury the sum of $350,000 in bonds of the state or in money, then the governor should not advertise the road for sale—and on the payment of $5,000,000, in cash or state bonds, within ninety days thereafter, then the governor was to deliver to the road a release of all state claims. These amounts were paid at the time specified, and Governor Fletcher delivered the release as provided by law. The orators then declare that the price paid by the company in liquidation of the debt was largely in excess of the true value of the property mortgaged, and as a means of paying the Dresden bonds, of purchasing iron and rolling stock, and paying off the floating debt, and especially to raise the funds to pay the balance of the sum due the state, $4,650,000, the company, July 15, 1868, mortgaged to complainants and one James Punnett (now deceased), the entire line of the Pacific road from Fourteenth street in St. Louis, to Kansas City, to hold in trust for the use and benefit of the holders of the bonds to be issued according to conditions of the said mortgage, on condition that if the company should pay said bonds and interest, the mortgage should be void, but on failure to do these things, they should be authorized, on the written request of any one bondholder, to cause the property to be advertised and sold in St. Louis, for cash, on ninety days' notice. Said trustees accepted the trust, but since that time Mr. Punnett died, and his vacancy has not been filled. These purchasers, it is averred, would not have purchased said bonds had they entertained any doubt as to the constitutionality of the law authorizing them so to do—and the general assembly has held five sessions since that conveyance, and has raised no objections to the act aforesaid; and during that time the railroad bonds were being sold and transferred from hand to hand until half of them were gone; so the investment made by the complainants was made in full confidence as to the good faith of the state. The mortgage was executed to complainants in July, 1868, and since then the railroad company have issued other bonds amounting to $3,000,000, at seven per cent, the proceeds being used to make valuable improvements, besides which the company have purchased valuable real estate in the city of St. Louis, and made several other large expenditures in good faith.

The bill charges Governor Woodson and Attorney General Ewing, with combining and confederating with parties unknown to your orators, "how to injure and wrong your orators and the bondholders, whom they represent under the deed aforesaid, have threatened and do now threaten to cause the whole of said railroad to be advertised for sale, to satisfy supposed claims due the state under the acts granting aid as aforesaid; and that the governor's acts have already caused great decline in all the bonds and other securities issued by said company, and have aroused the most serious apprehensions and alarm among the holders thereof—all this on the ground that the lien of the state on said road exists in full force, notwithstanding the provisions of the act of the 31st of March, 1868; also pretending that the authority to advertise the road for sale as conferred by the act of 1851, is still in force, and that the act of 1868 only repeats its authority so to do. The orators declare that these pretensions are unfounded, as also is the claim that the company is indebted to the state for interest paid on the bonds of the state issued as aforesaid to the company. The governor also pretends he is authorized to sell the road by the provisions of a resolution passed by the general assembly, March 21, 1873, by which the attorney general is authorized to institute proceedings for the purpose of testing the constitutionality of the law of March 31, 1868, before the supreme court of the state. And so the orators pray the court to grant them a writ of injunction restraining defendants from advertising or selling the road, or any part thereof, and to grant such other relief as the necessities of the case require. To this bill the governor and attorney general filed an answer, in substance, alleging that ten millions and a half of state bonds of Missouri were loaned to the Pacific Railroad Company, under the acts of 1851–53–55–57, some of them having twenty years to run, and others thirty

years, with coupons attached for the payment of semi-annual interest, at six per cent per annum. That the company had never paid either principal or interest on said bonds; that the company had sold said bonds to bona fide holders, for value, in 1852-53-54-55-56-57-58, all of said bonds being secured by a first lien on said railroad and its appurtenances, the company being bound to pay all the coupons and the bonds when they respectively become due. That the state was not liable for any damage or loss of the company by reason of the war of the Rebellion. That the fifth section of the act of the 31st of March, 1868, is unconstitutional and void, being in direct conflict with the fourth section of an ordinance for the payment of state and railroad indebtedness, adopted by the convention on the 8th of April, and by the people of the state on the 6th of June, 1865, and also in conflict with the constitution adopted at the same time. That the bona fide holders of said state bonds could not be prejudiced by the said act of 1868, or any other act of legislation affecting the validity of a contract created by the said acts, loaning the said ten and a half millions of state bonds to the railroad company, secured by a statutory mortgage, which was the first lien upon the said Pacific Railroad and its appurtenances. That said bondholders were entitled to said first lien, and to insist that the road should be sold by the governor of Missouri to provide means for the payment of said bonds. That the five million dollars paid by the company to the state, under the act of 1868, should be applied to the liquidation of the interest then due the state on the coupons that had been paid by the state. That the interest due the state was then largely in excess of the sum of said five million dollars, and that the governor was bound to sell the said road and its appurtenances under the statutes of Missouri.

James Baker and John B. Henderson, for plaintiff.

H. Clay Ewing, Atty. Gen. of Missouri, and Hill & Bowman, for defendant.

DILLON, Circuit Judge. In 1851, and at various times between that year and 1855, the general assembly of the state of Missouri passed acts loaning the credit of the state to the Pacific Railroad, to the Southwest Branch thereof, to the Hannibal & St. Joseph Railroad, to the Iron Mountain Railroad, and other railroad companies. The present case relates alone to the (Missouri) Pacific Railroad, whose line extends from St. Louis to Kansas City. The object of the legislation was to secure the completion of the roads. The form in which the aid was extended was this: The state made its bonds, promising to pay the amounts thereof to the company or its order, with coupons attached; and by the act "the faith and credit of the state were pledged for the payment of the interest and the redemption of the principal of the said bonds." Act of February 22, 1851 (Laws 1851, p. 265).

The company was, by the act, to make provision for the punctual payment of the interest and principal of the bonds so issued by the state, so as to exonerate the state from advances of money for that purpose. To secure this undertaking on the part of the company, the act provided that the net tolls and income of the road should be pledged for the payment of interest, and that the acceptance of the bonds by the company "should become and be, to all intents and purposes, a mortgage of the road of the company, and every part and section thereof, and its appurtenances, to the people of the state, for securing the payment of the principal and interest of the sums of money for which such bonds shall, from time to time, be issued and accepted as aforesaid."

This was to be the first lien, or mortgage on the road, and it was further provided by the act that if the company should make default in the payment of either principal or interest, no more bonds should be issued to it, and it should be lawful for the governor to sell the road and its appurtenances, at auction, to the highest bidder, on six months' notice; or to buy in the same, at such sale, for the state, subject to such disposition of the road or its proceeds as the legislature might thereafter direct. Act of February 22, 1851.

Under these provisions as to security, it is admitted in the bill, that state bonds were, from time to time, issued for the benefit of the Pacific Railroad, to the extent of $7,000,000. The answer asserts that the amount thus issued was over $10,000,000. The acts of the legislature referred to would seem to show that about $10,000,000 of bonds were issued to the Pacific Railroad, but part of this amount was for the Southwest Branch (now the Atlantic & Pacific Railroad), and secured on that road alone, leaving $7,000,000 to the Pacific road proper. It is not regarded as necessary on this application to determine whether the averment of the bill or of the answer as to the exact amount of bonds issued to the Pacific Railroad is correct.

In 1864, the road not being completed, the legislature of Missouri authorized the company to borrow $1,500,000, payable in four, five, and six years, and to secure it by a first lien on the road west of Dresden—the state waiving, for this purpose, and to this extent, its priority of lien.

In 1866 the road was finished and put in running order to the west line of the state, but in order to effect this the company had, in 1865, received aid from St. Louis county to the amount of $700,000. On the 31st day of March, 1868, the act was passed the validity of which so far as relates to its fifth section is the only question which this case on its merits presents. At this time the road is stated in the bill to have been in bad condition as to repairs and equipments, and the com-

pany owed a floating debt of $1,092,848, an unadjusted debt of about $200,000, and the first instalment of the Dresden bonds, amounting to $500,000. Of its stock, $3,614,500 was held by citizens and municipalities of Missouri—over $2,000,000 by St. Louis city and county, or tax-payers therein. The company had failed, since July, 1859, to pay interest on the state bonds.

Meanwhile the new constitution of the state had been adopted, which went into effect July 4, 1865. In the body of the constitution (article 11, § 15), is this provision: "The general assembly shall have no power, for any purpose whatever, to release the lien held by the state upon the railroad." In addition to this a constitutional "ordinance for the payment of state and railroad indebtedness" had been adopted which went into effect June 6, 1865. This ordinance provided for the levy of a heavy annual tax upon the Pacific Railroad and other roads, to be "appropriated to the payment of principal and interest now due, or hereafter to become due, upon the bonds of the state, or the bonds guaranteed by the state, issued to the aforesaid railroad companies."

By the fourth section of the ordinance it is provided, that "should either of said companies refuse or neglect to pay said tax as herein required, and the interest or principal of any of said bonds, or any part thereof, remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property, and the franchises of the company that shall be thus in default, under the lien reserved to the state, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company." And the fifth section of this ordinance provides that "whenever the state shall become the purchaser of any railroad, or other property, or the franchises sold as hereinbefore provided for, the general assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the railroad company in default, but no railroad or other property, or franchises purchased by the state, shall be restored to any such company until it shall have first paid in money, or in Missouri state bonds, or in bonds guaranteed by the state, all interest due from said company; and all interest thereafter accruing shall be paid semi-annually in advance, and no sale or other disposition of any such railroad or other property, or their franchises, shall be made without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid; and all payments therefor shall be made in money or in the bonds or other obligations of the state."

With these provisions of the constitution and constitutional ordinance in force, and in this condition of the company as respects its road and its indebtedness to the state and to others, the legislature passed the act of March 31, 1868. Laws 1868, p. 114. This act is entitled "An act for the sale of the Pacific Railroad, and to foreclose the state's lien thereon, and to amend the charter thereof."

"Sec. 1. The governor is hereby directed and required to sell the Pacific Railroad and its appurtenances, and all property belonging thereto, in accordance with the provisions of section 5 of this act, and an act entitled 'An act to expedite the construction of the Pacific Railroad and of the Hannibal & St. Joseph Railroad,' approved February 22, 1851.

"Sec. 2. Upon the sale of the road, as provided in the foregoing section, the price and the sum for which the same shall be sold shall not be less than eight millions and three hundred and fifty thousand dollars, payable to the state treasurer, in bonds of this state or in money, within ninety days from the date of sale. No bid, except the bid of the governor on behalf of the state, shall be accepted, unless there is paid to the state treasurer, who shall attend the sale, an amount of not less than three hundred thousand dollars in such bonds or money, as a part of the purchase money, to be paid when the road is stricken off; and such bonds or money shall be forfeited to the state in case the purchaser or purchasers shall fail to pay the amount of purchase money bid within the time above provided for. Such sale shall take place at the east front door of the court house, in the city of St. Louis, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon.

"If said sum of eight millions three hundred and fifty thousand dollars is not realized at such sale, the governor shall, by himself or agent, buy in the same for and in the name of the state of Missouri."

Section 3 is not important in the questions before the court.

"Sec. 4. Upon the payment of all the purchase money as specified in section 2 of this act, and upon the delivery of an obligation in conformity with section 3 of this act, the governor shall execute a deed to the purchaser or purchasers, conveying all such right, title, and interest, in and to said Pacific Railroad, its franchises, appurtenances, and the property belonging thereto, as are subject to the lien of this state."

Then follows section 5, which is the one on which the principal question made in this case turns:—

"Sec. 5. If the Pacific Railroad shall, at any time within ninety days after the first day of April, 1868, pay into the treasury of the state the sum of three hundred and fifty thousand dollars, in the bonds of this state or in money, then, and in that event, the governor shall not advertise said road for sale; and if the said company shall, within ninety days thereafter, pay into the state treasury an additional sum equal to five millions of dollars in all (the same being either in cash or Missouri state bonds), the governor shall, upon the

production of the receipts of the state treasurer for said amounts, execute and deliver to the said Pacific railroad company a deed of release for all claims, title, and interest, which the state of Missouri has in and to the said Pacific Railroad, its property and appurtenances; and the said Pacific Railroad Company shall, from and after the delivery of said deed, be fully discharged from all claims or debts due to the state, and all liability growing out of the issue of the bonds of the state to aid in the construction of said road, and no sale shall, in that event, take place under this act. If, however, for any cause, the said company shall be unable to pay the additional sum as herein provided, the governor shall proceed to advertise said road; but if the said company shall, during the pendency of said advertisement, pay into the state treasury the additional sum, with interest thereon from the first day of October, 1868, at the rate of six per cent. per annum, then, and in that case, no sale of said road shall take place, and the governor shall execute and deliver to the said Pacific Railroad Company the deed of conveyance and release provided for in this act, and the said Pacific Railroad Company shall be exempt from all the liabilities and obligations herein specified; but in case the said company shall, after the payment of three hundred and fifty thousand dollars above stated, fail to pay the additional sum specified (being the remainder of the five millions), then, and in that case, the sum first paid shall be forfeited to the state."

It is admitted that the company within ninety days paid into the state treasury the $350,000, and within ninety days thereafter, the balance of the $5,000,000, and received a deed from the governor in pursuance of the act releasing and discharging it and its property from all liens and claims on the part of the state, and from all liability growing out of the issue of the bonds of the state to aid in the construction of its road.

In order to retire the Dresden bonds and to raise the $5,000,000 to be paid to the state and to put its road in repair, the company, on July 15, 1868, made a mortgage to the plaintiffs as trustees, to secure $7,000,000 of bonds. This mortgage recites the act of March 31, 1868, and it was the professed intention to make it after the payment of the $5,000.000 to the state, and upon payment of the Dresden bonds a first lien on the entire Pacific road, its property and franchises. Subsequently, on July 1, 1871, a second mortgage was made by the company for $3,000,000, the proceeds of which it is alleged were exclusively used in improving the road and in purchasing rolling stock. Both of these mortgages are outstanding and unpaid, as also another mortgage for $800,000 secured upon certain lands in St. Louis purchased for depot purposes.

In March, 1873, the general assembly of Missouri adopted a concurrent resolution reciting that grave doubts had arisen as to the constitutionality of the act of March 31, 1868, and directing the attorney general of the state "to institute and prosecute all suits and other proceedings at law and in equity requisite and necessary for the purpose of testing and causing to be determined by the supreme court of the state of Missouri, the constitutionality of said act, and to institute and prosecute such suits and proceedings at law and in equity as may be requisite and necessary to protect and enforce all the rights, interests, and claims of the state against the Pacific Railroad (of Missouri)."

Under this authority, the governor, by the advice of the attorney general and his associate counsel, has resolved to proceed, not by suit, but by advertising the road and its appurtenances for sale under the original statutory lien in favor of the state. This proceeding on the part of the state authorities assumes that the fifth section of the act of March 31, 1868, is unconstitutional; that the statutory lien of the state is yet in full force, and that it is the first lien on the Pacific road, its property, and appurtenances; and if this assumption is well founded in point of law, the proposed sale, if made, would cut off the mortgage to the plaintiffs, and the rights of the holders of the seven millions of bonds secured thereby. On the other hand, if the fifth section of the act of March 31, 1868, is not unconstitutional, then the state has no lien to be enforced, and the proposed sale, if made, would be wholly nugatory.

On the merits, the controlling question in the case, therefore, is, whether the fifth section of the act of 1868 violates some provision of the constitution or constitutional ordinance of the state.

Before reaching this question, some objections of a preliminary nature to the case made by the bill must be determined.

1. It is insisted by the attorney general of the state and his associate counsel that the plaintiffs have no sufficient authority, interest, or title, to enable them to maintain this suit or ask the relief sought. The plaintiffs are the trustees of the bondholders under the mortgage of July 15, 1868, for $7,000,000. The bondholders are numerous and widely scattered, and the plaintiffs holding the title to the railroad and property mortgaged to secure the bonds have a right, as representing the bondholders, to apply for judicial intervention to have the respective rights of the state and of themselves settled before any sale is made or attempted. If they are right in the position they take in the bill the state is wrong, and has no right to sell the road or offer to sell it. The effect of advertising the road for sale by the governor, under the advice of the attorney general and the able counsel associated with him, could not be otherwise than seriously to depreciate the value of the bonds secured by the mortgage to the plaintiffs; and this injurious effect would be greatly increased if a sale were

actually to be made in advance of a legal determination of the respective rights of the parties.

2. The next objection relates to the parties defendant.

It is insisted that "the governor and attorney general of Missouri cannot be enjoined in the federal court from proceeding under the statutes of the state to foreclose the state lien, unless those statutes are in conflict with the constitution of the United States."

This statement of the objection, taken from the brief of the learned counsel for the state, concedes, by implication, that if the statutes of the state do conflict with the federal constitution then the federal courts may, in a proper case, enjoin the agents or officers of the state. The mere fact that a state officer, whatever may be his grade, is a party, does not defeat the equity jurisdiction of the United States circuit court, although the state may be the real party in interest, and cannot, as such, be brought before the court. This was decided by the supreme court of the United States in the case of Osborne v. Bank of U. S., 9 Wheat. [22 U. S.] 783, and the doctrine has been frequently reaffirmed. It was asserted and applied by that tribunal during the present year, in the case of Davis v. Gray [16 Wall. (83 U. S.) 203]. The cases are there cited by Mr. Justice Swayne, and there is no call upon us to go over the same ground. In the case before us the state of Missouri is asserting simply the right of a creditor, or lien-holder, and not any right in her sovereign character. In the language of the supreme court of Missouri, "The governor, in the sale of the roads, is not acting in his political or executive capacity; he is not carrying out any of the powers delegated by the constitution; he is simply acting as a special agent, in obedience to power committed to him by an act of the legislature, which saw proper to intrust him with the particular function; but it might have devolved the duty upon any other person as well." State v. McKay, 43 Mo. 599.

If the fifth section of the act of March 31, 1868, is constitutional, it, and the proceedings had under it, and the deed of the governor, do constitute a contract between the state of Missouri and the company, which is under the protection of that provision of the constitution of the United States which prohibits a state from passing "any law impairing the obligation of contracts." Article 1, § 10. If that contract is valid, or the deed of the governor in 1868 to the company is effectual, any attempt by the governor, under the concurrent resolution of March 21, 1873, to enforce a lien which was satisfied, would be in violation of the rights of the company and its mortgage bondholders, and presents a fitting and proper case for the cognizance of the federal tribunals.

3. We are thus brought to the substantial question in the case, viz: the constitutionality of the fifth section of the act of 1868. We proceed to notice the several grounds upon which the state claims this section to be in violation of the constitution. It is urged that it is void because it was a special law, in contravention of the last clause of section 27 of article 4 of the constitution, by which it is provided that "the general assembly shall pass no special law for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable."

It is a sufficient answer to this objection to state that this is not one of the enumerated cases, and that the supreme court of the state of Missouri has recently decided that it is for the legislature, and not for the courts, to determine when a general law can be made applicable: State v. County Court of Boone Co., 50 Mo. 317. And such seems to be the prevailing view elsewhere taken: Cooley, Const. Lim. 129, note; Dill. Mun. Corp. § 26, and cases cited.

It is next insisted that the fifth section of the act of 1868 is void, because it violates section 32 of article 4 of the constitution of Missouri, which provides that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed." The title of the act of 1868 is, "An act for the sale of the Pacific Railroad, and to foreclose the state's lien thereon, and to amend the charter thereof." Similar provisions exist in many of the state constitutions, and they have been often construed to require only the general purpose (which must be a single one) of the statute to be fairly indicated by its title. Cooley, Const. Lim. 141–144; Dill. Mun. Corp. § 28, and cases cited. Different and incongruous subjects are not brought together in the act of 1868, but the provisions as to the sale of the road, and the foreclosure of the state's lien thereon, relate to but one subject within the meaning of the constitutional provision, and this subject is expressed in the title. The manner in which the lien of the state may be foreclosed will be considered hereafter.

It is next urged that the statutory lien in favor of the state was reserved by it, not exclusively for its own indemnity, but for the benefit of the holders of its bonds, and therefore the state, holding the lien merely as a trustee for its bondholders, could not release such lien while its bonds were outstanding, as they still are. None of the holders of these bonds are here, and it is not needful that we should inquire what equities they might have should the state refuse to pay them, and should they apply for relief against the railroad company or its property. I am inclined to think, however, that the form of the transaction indicates the intention of the parties. The state issued its bonds, and these

were negotiated and taken upon the state's "faith and credit," without any accompanying security. To indemnify itself, the state provided for, and received, a mortgage upon the road of the company, and a pledge of its net tolls and income. Then comes the further provision that the companies shall punctually pay the interest and principal of the bonds, but if they fail to do so, the state may sell the road to others, or buy it in itself, to be thereafter disposed of as the legislature may direct.

It could not be maintained, we think, that if a sale were made by the state to a third person, that he would take it subject to a lien in favor of the holders of the bonds of the state. Such a view seems to be inconsistent with the provisions of the act under which the aid was given, and the lien reserved to the state, with the provisions of the fourth and fifth sections of the constitutional ordinance, as expounded by the supreme judges (37 Mo. 129, 134), and with the entire state legislation on the subject of disposing of roads purchased by the state under the lien reserved to it. The judges, in their answer to the governor, distinctly say, that "when the state becomes the purchaser of the railroad, under the lien reserved, both the lien and the former company are extinguished. The state remains liable for her own bonds, and owns the railroad, and the state may sell it without reserving a lien for the whole indebtedness of the former company, but only for the unpaid balance of the purchase money." 37 Mo. 134.

But the principal objection to the fifth section of the act of March 31, 1868, is, that it is in conflict with section 4 of the constitutional ordinance, and with section 15 of article 11 of the constitution, before quoted. The constitutional ordinance, in the event of the default therein specified, directs that "the general assembly shall provide by law for the sale of the railroad, and other property, and the franchises of the company that shall be thus in default under the lien reserved to the state." Section 15 of article 11 of the constitution is, that "The general assembly shall have no power, for any purpose whatever, to release the lien held by the state upon any railroad."

By force of these provisions, it is insisted by the counsel in the interest of the state: (1) That the state legislature is thereby prohibited from making or authorizing any sale, unless by public auction; (2) that such sale must be for the whole amount of the bonds of the state; and (3) that the sale or disposition to the company, under the fifth section of the act of 1868, of the interest of the state under its lien is a release of the lien contrary to the fifteenth section of the eleventh article of the constitution, above quoted, and that it would be so, even though the state should receive from the company the full value of the property and interests covered by its statutory mortgage.

In neither the fourth nor the fifth sections of the constitutional ordinance, nor in the body of the constitution, can be found any provision fixing the price at which the roads shall be sold, either to third persons or to the state, and if bought by the state, at what price they shall be resold to others. Of this opinion, it seems, were the state supreme judges, for, in their official answer to the governor, they say: "If the state could never sell the road without reserving a lien for the whole indebtedness of the former company to the state, she might never be able to sell at all, and so be in a worse condition than she was before." 37 Mo. 134. There being no restriction in the constitution or organic law as to the amount at which the roads might be sold, it follows that this was a matter wholly within the control of the legislature, and that counsel are mistaken in supposing that any sale by the state must be for the whole amount of bonds issued or guaranteed by the state, and the interest thereon. No such construction, so far as I can discover, has ever been adopted in any legislative act, but always the contrary one; and sales for vastly less than the lien of the state have been legislatively authorized or confirmed, and such confirmation approved by the supreme court. See, on this point, the case of State v. McKay, 43 Mo. 594, relating to the sale by the state of the Iron Mountain road. Accordingly this very act of March 31, 1868, provided, if $8,350,000 should not be bid or realized at the sale, that the governor should buy in the road in the name of the state; and the state, in case a sale was made, assumed $700,000 and interest due on the bonds issued by the county of St. Louis, and also $650,000 of the floating debt of the company. The state therefore authorized a sale of this road for $7,000,000 net, which was confessedly some millions less than the amount for which the company is liable on account of the state bonds. It can scarcely be doubted if such a sale had been made that the purchaser would have obtained, as against the state, a perfect title, and yet the state would have received but $7,000,000.

The practical effect of such a sale would have been to annihilate all the stock and all the interest of the stockholders in the road. The stock of counties and municipalities of the state, obtained in exchange for their bonds, would have been sacrificed, except the amount assumed for St. Louis county. The floating debt of the company, except the portion assumed by the state, would never have been paid.

But such a sale was not made, for by the fifth section of the act the company, in consideration of $5,000,000 paid to the state, received a "full discharge from all claims or debts due the state, and all liability growing out of the issue of the bonds of the state to aid in the construction of its road." This left the corporation in esse—preserved the stock and the interest of the stockholders—and gave to the unsecured creditors of the

company the opportunity to obtain payment from it. If it were in the province of the court to pass judgment as to whether it were better to have sold to others outright for $7,000,000 net, with the consequences above pointed out, or to the company for $5,000,000, could we say that the legislature acted unwisely in adopting the fifth section?

In examining the transaction, we must look at substance rather than form—and in effect it was a sale of the state's interest to the company for $5,000,000. The legislature had the power to order a sale, and not being restrained by the constitution, it necessarily had the power to fix the price and terms of the sale. It could have authorized the sale for $5,000,000 to a third person—why not to the company for the same amount? There being no limitation in the constitution as to the price at which the general assembly might authorize the state to sell the road or to buy it in, or to re-sell it, the amount which the state would fix upon as the value of its security would, after all, depend upon legislative judgment. If the state had purchased for the $8,350,000 it might afterwards have sold it for any price it might see fit to take, whether more or less than that sum. The state agreed to take and did receive from the company the $5,000,000. The money was raised upon the mortgage and bonds which the present plaintiffs are here to protect. This mortgage was made and the money borrowed on the faith of the action of the state, and it was by this that the $5,000,000 were secured which was paid to the state and which it still retains. It was by this means that $1,500,000 of the Dresden bonds secured by a first lien on the west sixty-five miles of the road were paid. A second mortgage for $3,000,000 was made, and the money thus borrowed is alleged, and the answer does not deny the allegation, to have been used in ironing, repairing, and equipping the road. It is plain that this money was advanced on the faith of the legislation of 1868, and this appears on the face of the mortgage to the plaintiffs. These mortgages would have been worthless securities if it had been understood that the state still had a lien upon the road for the $7,000,000 and the nine or ten years' interest thereon, and this fact the state must be taken to have known when it received the $5,000,000, which was really the money of the bondholders and not of the company. Five sessions of the general assembly of Missouri met before any steps were taken to question the validity of the transaction in 1868; and it is manifest that that transaction cannot now be overthrown except by sacrificing the interest of men who have in good faith parted with their money on the strength of the legislation, acts, conduct, and acquiescence of the state. Looking back upon the transaction, I cannot say that the agreement to release the security of the state for $5,000,000 should, under the circumstances, and as respects the innocent mortgagees of the company, be held to be such a release as was forbidden by the constitution. The state had released or waived its first lien on the North Missouri Railroad, receiving no consideration therefor, and agreed to take a second lien. This was at or about the time the constitutional convention was in session, and undoubtedly it was such a transaction that was in the contemplation of the convention and the people when they adopted the provision prohibiting the state from releasing its lien on any railroad. It was not intended to prohibit the release of a lien for full value; and of such value the legislature was left to be the judge, and with its judgment the people of the state must be content. It is urged by counsel that this view makes the constitutional provisions of little value, since it leaves it in the power of the legislature to sacrifice the interests of the people by corrupt or injudicious bargains, and the court is appealed to to prevent the sacrifice which, it is claimed, the act of 1868 decreed. But we have only to deal with the question of legislative power; and the legislature, as the representative of the state as a mortgagee, and as the representative of her other interests, has full power except so far as restrained by the constitution. If it had been thought that the legislature could not have been trusted with the sale or disposition of the state's interest as to the amount to be received, undoubtedly additional restraints would have been imposed.

The state was not disabled from releasing its security on receiving full value for it, and of its value it was left by the constitution to be the judge—so left because there was nothing to restrain it.

I feel quite clear in the conviction that the equities of the bondholders under the plaintiffs' mortgage are superior to those of the state, and on this ground (reserving all questions of rights as between the company and the state), and on the ground that in case of controversy as to priority of lien, the priority ought to be settled before an irredeemable sale is made, I award a temporary injunction; but with leave to defendant to move to dissolve it before Mr. Justice MILLER and myself, should he be present at the September term of the court in St. Louis, or before Judge KREKEL and myself at the regular term at Jefferson City. Meanwhile, the issues may be made up and proofs taken under the rules.

NOTE. Provision of constitution requiring subject to be expressed in title of legislative act: State v. Miller, 45 Mo. 495; State v. Lafayette County Court, 41 Mo. 39; People v. Hills, 35 N. Y. 449; People v. Commissioners of Highways, 53 Barb. 70; Chiles v. Monroe, 4 Metc. (Ky.) 72; Dill. Mun. Corp. § 28, and cases cited; Cooley, Const. Lim. 81, 141, and cases cited.

The New York constitution of 1846 (section 4, art. 7) contained the following provision: "The claims of the state against any incorporated company, to pay the interest and redeem the principal of the stock of the state loaned or advanced to such company, shall be fairly en-

forced, and not released or compromised." In the case of Darby v. Wright [Case No. 3,574], this provision was construed, and subsequent legislation, authorizing, on certain conditions, a railroad company to issue its bonds to relay the road and complete certain improvements, and providing that such bonds should have priority of lien over the mortgage to the state, was sustained. The opinion of Hall, J., tends to sustain the conclusion reached in the principal case.

[NOTE. A perpetual injunction was granted. Case unreported. The cause was taken, on an appeal, to the supreme court, where the decree of this court, awarding the injunction, was affirmed; Messrs. Justices Miller and Davis dissenting. 22 Wall. (89 U. S.) 351.]

MURGATROYD (DUSAR v.). See Case No. 4,199.

Case No. 9,943.

MURGATROYD v. McLURE.

[4 Dall. 342.]

Circuit Court, D. Pennsylvania. April Term, 1800.

PRIZE—CONDEMNATION IN FOREIGN COURT—REPLEVIN.

Replevin, for the ship Mt. Vernon. The defendant claimed property, under a capture and condemnation as prize; in the French court of prizes, established at the city of St. Domingo, in the island of St. Domingo, under the circumstances stated in the reports of the trials, relative to the same ship. Murgatroyd v. Crawford, 3 Dall. [3 U. S.] 491; Duncanson v. McLure, 4 Dall. [4 U. S.] 308.

CHASE, Circuit Justice, declared, that the whole transaction, between Murgatroyd and Duncanson, was a mere cover, to evade the laws of the United States; that the former was a mere trustee for the latter; and that, having been paid the full price for the ship, he had no property, on which the replevin could be maintained.

The plaintiff suffered a non-suit.

Case No. 9,944.

The MURIEL.

WILLIAMS v. SHALLCROSS.

[7 Wkly. Notes Cas. 147.]

District Court, E. D. Pennsylvania. Nov. 14, 1877.

AFFREIGHTMENT—PERIL OF THE SEA—FREIGHT—PARTIAL LOSS OF CARGO—BURDEN OF PROOF—"OUTPUT."

1. A claim for freight on a part of a cargo, ruined by sea water so as to lose its character entirely, not sustained; the libellant failing to show the quantity so ruined.

2. Quaere as to the liability of a consignee in such a case, where the quantity is ascertainable.

(1) Libel by Shallcross, owner and consignee of a cargo of potatoes, against the brig Muriel, for loss of a part of the cargo by wetting by sea water. (2) Libel by Williams, master, against the cargo, for freight. In December, 1876, Hyndman shipped a cargo of potatoes upon the brig, to be carried to Philadelphia, freight at the rate of twenty cents per Winchester bushel, payable on the "output" by consignee. The master signed bills of lading by their terms exempting the ship from liability for loss arising from "perils of the sea," and receipting for 8,390 bushels, "more or less." Upon arrival, the master delivered to Shallcross, who had purchased the bill of lading, 6,937 bushels in good condition, but the balance had become utterly destroyed by the action of sea water, and was a mere mass of mash. The consignee refused to receive this part or to pay freight therefor. The master then shovelled the mash overboard, without any measurement of its quantity, and sued for his freight. The suit for damage, being the first of the above actions, was first heard, and involved principally questions of fact in respect to storage.

Mr. Roney, for libellant in first case, and for respondent in second.

Mr. Flanders, for respondent in first case, and for libellant in second.

THE COURT (CADWALADER, District Judge). We have here a perishable cargo, with a voyage of extraordinary duration, and weather, which, however described by the witnesses, appears by the log to have been at a certain period tempestuous. The preponderating tendency of the proofs is that the cause of the damage suffered was wetting by water. The occurrences of the voyage suffice to explain this. The master of the vessel is therefore not liable to the merchant unless by reason of bad stowage. The question as to stowage is two fold: First. Was there proper and sufficient dunnage? On this point I do not think that the case of the libellant is made out on the law and the facts. Secondly. Is the proof of the grounding and shipping of water in the East river sufficient to show that the cargo therefore taken in was wetted so that it was improper to complete the lading without reference to that occurrence? On this point, if the decision depended on the examination in chief of the steward, the decree should, I think, be for the libellant. But in the steward's cross-examination, he says that he did not see any shipping of water, and the master and the mate testify that no water was taken in. The case of the libellant is one of great hardship, but the libel must be dismissed with costs.

Decree accordingly.

An appeal was taken, but subsequently discontinued, whereupon the suit for freight proceeded (being the second of the above actions).

Mr. Flanders, for libellant.

The purpose of the shipowner is to be paid for the space occupied, and for the transportation of the cargo. If its condition was un-

sound, that, it has already been decided, was no fault of the ship. And if its condition, whether arising from a peril of the sea, or from its intrinsic nature or character, is such that the quantity cannot be determined at the port of destination, then the criterion is, the quantity taken in at the port of shipment. Upon that quantity the freight is to be paid. Steelman v. Taylor [Case No. 13,349]; Dakin v. Oxley, 33 Law J. C. P. 115; Garrett v. Melhuish, 4 Jur. (N. S.) 943; Gibson v. Sturge, 10 Exch. 622; Frith v. Barker, 2 Johns. 327; 1 Pars. Shipp. & Adm. 218.

Mr. Roney, for respondent.

The cargo not remaining in specie, and not having been lost by an intrinsic defect, but by a "peril of the sea," the vessel is relieved from liability, but the consignee is relieved in like manner from the payment of the freight.

April 12, 1879. THE COURT (BUTLER, District Judge), after referring to the former case, said, in substance:

We are now called upon to determine whether the respondent is liable for freight on this part of the cargo. He says it was not delivered, was lost on the voyage; that this rotten mass of slush was not in any sense potatoes. If this is true he is not liable. But the libellant denies that it is true. He contends that no part of the cargo was lost in the sense here involved, urging that the change in form and character of the part under consideration, and the consequent deterioration in value, is unimportant; that although the potatoes assumed a different shape, they, nevertheless, continued to be potatoes.

The legal principles involved are familiar and simple, but the novelty of the facts renders their application difficult. There is, however, a preliminary question to dispose of before this point is properly reached. As before stated, the freight was to be paid, at the rate named in the charter party, viz. twenty cents per Winchester bushel, on the "output." This involved a measurement at the port of delivery. The proofs show a measurement of only 6,937 bushels, on which the freight has been paid. The remainder (here involved) was shovelled into the river, without ascertainment of the quantity, neither party treating it as if liable to freight. It was susceptible of measurement —could have been weighed—without difficulty. How are we to ascertain the quantity? The able counsel for the libellant saw this difficulty, and very candidly acknowledged its seriousness on his attention being called to it. He endeavors to surmount it by taking the number of bushels stated in the bill of lading, and deducting therefrom the 6,937 which were measured here. The difference, he argued, represents the quantity that was not measured. To this there are two objections: First, that the bill of lading itself is indefinite. It states the quantity shipped to be 8,390 bushels, "more or less"; and, second, that the freight is to be paid, as we have seen, on the "output," giving to the shipper all advantages from shrinkage and diminution from every cause. If we knew the exact quantity shipped, we could not know or even approximate with certainty the quantity brought here, treating the decayed mass thrown away as potatoes. For, both in bulk and weight, there was serious decrease. Necessarily this must have been so.

The case of Gibson v. Sturge, 10 Exch. 622, is readily distinguished from this. There a quantity of wheat was shipped, to be paid for per bushel, without an exact ascertainment of quantity, but naming a given number of bushels as an approximate amount. Before reaching the port of delivery, it had so swollen from contact with water as to render ascertainment of the exact quantity shipped impossible. From the necessities of the case, the court was compelled to take the approximate amount named, and charge the shipper accordingly. Aside from other differences between that case and the one before us, it is quite sufficient that the necessity which called for and alone could justify what was there done does not exist. The extent of this cargo, as before observed, could readily have been ascertained.

No ascertained amount of "output" being shown beyond that already paid for, we may postpone a consideration of the important question first stated until its decision becomes necessary. The libel must be dismissed.

Decree accordingly, with costs. Oral opinion.

MURNEY v. The SYLVESTER HALE. See Case No. 13,712.

MURPHEY (WILKINGS v.). See Case No. 17,663.

Case No. 9,945.

MURPHREY et al. v. OLD DOMINION INS. CO.

[5 Ins. Law J. 297.]

Circuit Court, E. D. North Carolina. June Term, 1875.

FIRE INSURANCE—APPLICATION—FALSE REPRESENTATIONS.

[1. Where the beneficiaries of an estate make application for insurance on buildings constituting part of the trust estate, representing themselves, in the application, to be the absolute owners of the property, this is a false representation which will vitiate the policy, where the representations are expressly declared to be warranties.]

[2. Where the assured have signed the application, either personally or by their agent, they are bound by the representations contained in it, although the same are shown to be in the handwriting of the insurance company's agent, unless they prove that the answers to the ques-

tions therein stated are not their answers, and were not assented to by them.]

On petition from superior court of Greene county.

Faircloth & Granger, for plaintiffs.

The plaintiffs in the above-named action, complaining of the defendant, allege:

1. That the plaintiffs, S. J. Murphrey and M. O. Murphrey, were on the 1st of July, 1874, and still are, partners, trading under the name and style of Murphrey & Co., and the plaintiff B. F. Murphrey was then and still is the trustee of the said M. O. Murphrey.

3. That on the first day of July, 1874, in consideration of the payment by the plaintiffs to the defendant of the premium of forty dollars, the defendant, by their agent duly authorized thereto, made their policy of insurance in writing, a copy of which will be filed as a part of this complaint, and thereby insured the plaintiffs, Murphrey & Co., against loss or damage by fire to the amount of two thousand dollars upon their stock of general merchandise, such as is usually kept in a country store, contained in a one and a half story frame shingle roof storehouse, occupied by said Murphrey & Co. as such, situated on what is known as the "Murphrey Farm," near Hookerton, Greene county, North Carolina.

4. That on or before said July 1, 1874, the plaintiffs, Murphrey & Co., made in writing, and filed with the defendant, an application for said policy of insurance, which is filed as a part of this complaint.

5. That at the time of making said application and insurance, and from then and until the fire hereinafter mentioned, the plaintiffs, Murphrey & Co., had an interest in the property insured as aforesaid, as the owners thereof, as follows: The said S. J. Murphrey one-half absolutely in her own right; the said M. O. Murphrey the other half absolutely as cestui que trust, and the plaintiff B. F. Murphrey holding the legal title absolutely to the latter half as trustee, for the sole use and benefit of the said M. O. Murphrey, to an amount exceeding the amount of said insurance.

6. That on the 24th of July, 1874, said storehouse, goods, and stock of general merchandise were totally destroyed by fire, the plaintiffs on their part having duly performed all the conditions and stipulations of said application and of said policy of insurance.

7. That the plaintiffs duly fulfilled all the conditions and stipulations of said application and of said policy of insurance on their part, and more than sixty days before the commencement of this action gave to the defendant due notice and proof of the fire and loss aforesaid as required, and demanded payment of the said sum of two thousand dollars, which was refused before this action was commenced.

8. That on said 1st of July, 1874, the property of the estate of J. T. H. Murphrey, deceased, independent of the property included in said insurance, was and still is more than sufficient to pay all debts and demands against said estate and the expenses of administering the same.

William F. Dortch, for defendant.

The defendant, answering the complaint herein, says:

1. That it is not true, as defendant is informed and believes, that the plaintiffs, S. J. Murphrey and M. O. Murphrey, were on the first day of July, 1874, and still are, partners. On the contrary, the defendant is informed and believes that they were then and are now married women, and the defendant is informed and believes that they have never become free traders. That defendant is informed and believes that the said S. J. Murphrey was on the first day of July, 1874, and is now, the wife of D. A. Murphrey, and that said M. O. Murphrey was at said date, and is now, the wife of B. F. Murphrey, her trustee.

3. That paragraph third is true, except that the payment of forty dollars was made by the plaintiff B. F. Murphrey, as defendant is informed and believes, and defendant insured, not the plaintiffs, but Murphrey & Co., whom the agent of the defendant supposed to be the said D. A. Murphrey and B. F. Murphrey, the latter having made the application for insurance, and having signed the same, and fraudulently concealed from said agent the fact (if it was a fact) that the said S. J. Murphrey and M. O. Murphrey were interested in said goods, and having further fraudulently concealed the fact that the title to one-half of said goods was in himself as trustee of said M. O. Murphrey, as defendant has been informed and believes he did.

4. That paragraph fourth is admitted to be true, except that defendant is informed and believes that the application was made by B. F. Murphrey, and was signed by him in the name of Murphrey & Co.

5. That defendant is informed and believes that paragraph fifth is not true. On the contrary, defendant is informed and believes that said property insured was, in part the property of the said D. A. Murphrey and B. F. Murphrey, and that a portion thereof belonged to the estate of J. T. H. Murphrey, who had recently died leaving a will, to which the said D. A. Murphrey qualified as executor.

6. Defendant believes it to be true that said storehouse, and the goods and merchandise which were then in said storehouse, were destroyed at the time stated; but defendant says it is not true that plaintiffs, on their part, have duly performed all the conditions and stipulations of said application and policy of insurance.

7. That no part of paragraph seven is true, as defendant is informed and believes, except that plaintiffs demanded payment, which was refused, before this action was commenced. Defendant admits that more than sixty days' notice was given, but says that due notice

and proof of the fire and loss as required was never given.

8. Defendant is informed and believes that paragraph eighth is not true. On the contrary, defendant is informed and believes that the personal estate of the said J. T. H. Murphrey is largely insufficient to pay his debts.

10. Defendant further says, upon information and belief, that the plaintiff B. F. Murphrey, at the time of the application for said insurance, not only concealed the true ownership and value of said goods, but fraudulently represented the ownership thereof, and fraudulently represented the value thereof to be much more than they were really worth; that plaintiffs fraudulently claim to have lost goods by said fire, of much larger value than were in said store at the time of said fire. Wherefore the defendant demands judgment for costs, etc.

The plaintiffs ask the court to instruct the jury as follows: 1. That the delivery over to the plaintiffs of the goods bequeathed in the testator's will vested in them the title thereto, and this without regard to the sufficiency of personal assets to meet the testator's liabilities. 2. That the defendant, not being a creditor, nor having any interest in the testator's estate, cannot question the title as derived under the delivery and assent of the executor. 3. That the plaintiffs having the goods, and the right thereto, have an insurable interest therein entitling them to maintain the action. 4. That the plaintiffs had a perfect title, within the meaning of the conditions of the policy. 5. That if the jury believe that the defendant's agent, R. S. Shields, only made inquiry as to the name of the firm to be insured, and the value of the goods, and upon that prepared the application and policy, there was no misrepresentation or concealment vacating the policy. 6. That if no fraudulent representations or concealment were made, and the representations were honestly made as to the property insured and its value, the plaintiffs are entitled to recover the value of the goods, not exceeding the sum insured at the time of the fire.

The defendant prays the court to instruct the jury: 1. That, under the contract contained in the policy of insurance mentioned in the complaint, the plaintiffs, Murphrey & Co., have expressly warranted that all the statements made in their application for insurance, filed with said complaint, are absolutely true. Bobbitt v. Liverpool & London & Globe Ins. Co., 66 N. C. 70. 2. That the burden of proving, to the satisfaction of the jury, that all of said statements are true, rests upon the plaintiff. 3. That if the jury find that any one or more of said statements were not true at the date of said application, to wit, on the 1st day of July, 1874, the plaintiffs are not entitled to recover. 4. That the plaintiffs having positively stated in their said application that an account of stock had been taken within four months just before the said 1st day of July, 1874, and having admitted on the trial that no such account had been taken since the month of February, 1873, they cannot maintain this action. 5. That the plaintiffs having positively stated in their said application that their title in the goods insured was "absolute," if the jury find that their said title was on the said 1st day of July in any respect less than absolute, they cannot maintain this action. 6. That what constitutes an "absolute title" is a question of law arising upon admitted facts, and the correctness of the copy of the will of J. T. H. Murphrey, introduced in evidence by the defendant, not being disputed, and the title to said goods being admitted to have been in the said J. T. H. Murphrey previously to his death, the plaintiffs' title in said goods was on the said 1st day of July not absolute, and they cannot maintain this action. 7. That the plaintiffs have not even offered to prove all the statements contained in the said application to be true, and must therefore fail in this action. 8. That the plaintiffs having, in their proof of loss, arrived at the value of the goods destroyed by a calculation which estimates the goods bought from Spiser to have been worth $3,200, when in fact they only cost J. T. H. Murphrey $2,200, which value they state in their said proof to have been $2,700, the defendant is entitled to have the said value reduced by $1,000, and in no case can the plaintiffs recover to exceed $1,700.

BOND, Circuit Judge (charging jury). If the jury find from the evidence that the title of the plaintiffs to the property insured was derived from the testator, Josiah T. Murphrey, who by his last will and testament devised the same to his son, B. F. Murphrey, to be held in trust solely for the use and benefit of Mary O. Murphrey, wife of said B. F. Murphrey, and her children by him, and, in case she should die without such children, then in trust for the rest of his children and their representatives at the time of such death, and shall further find that the plaintiffs, by their agent, represented in their application for said insurance that their title to the property insured was absolute, then the plaintiffs are not entitled to recover in this action; and if the jury find from the evidence that the said application for insurance was signed by the agent of the plaintiffs, though the same may be in the handwriting of the agent of the insurance company's agent, they are bound by it unless they can show that the answers to the questions therein are not their answers or those of their agent, and that he did not assent thereto. And the measure of damages is the value of the goods destroyed at the time of the fire, not exceeding the sum insured by the policy.

Verdict for plaintiffs of $1,500, with interest. On motion of defendant a new trial was granted, after which the case was compromised by payment of $800 and costs by defendant.

Case No. 9,946.

In re MURPHY.

[10 N. B. R. (1874) 48.][1]

District Court, M. D. Tennessee.

BANKRUPTCY—INSANITY—REOPENING THE ADJUDICATION.

Creditor of B. files a petition against him asking his adjudication in voluntary bankruptcy. The order to show cause was served on him, and on his default to answer he was adjudged a bankrupt, and after the appointment of an assignee, the property of B. was turned over to him, but no distribution among the creditors was ever made. Sometime thereafter, B. comes into court with a petition, supported by affidavits, showing that he was non compos mentis at the time the debts of the petitioning creditors were created, as well as at the time of the institution of proceedings and the adjudication, and until a very recent period. *Held* that under the above state of facts, the application to set aside the default and subsequent adjudication should be granted, and B. now allowed to show cause why he should not be adjudged a bankrupt.

[Doubted in Re Weitzel, Case No. 17,365.]

In bankruptcy.

TRIGG, District Judge. Creditors of Alonzo Murphy filed a petition against him, asking his adjudication in involuntary bankruptcy, some time in the year 1872. The order to show cause was served on him, and on his default to answer he was adjudicated a bankrupt, and his property turned over to an assignee. The property in the hands of the assignee has never been distributed among the creditors. Alonzo Murphy now comes in with a petition supported by affidavits, showing that he was non compos mentis at the time the debts of petitioning creditors were created, as well as at the time of the institution of proceedings, and the adjudication of bankruptcy, and until a very recent period. Under this state of facts, I cannot refuse the application to set the default and subsequent adjudication aside, and to allow Alonzo Murphy to show cause why he should not be adjudicated a bankrupt.

NOTE. A jury trial was subsequently had, and a verdict of insanity at the time of the adjudication rendered; whereupon the court ordered the assignee to restore the property to Murphy. [Case unreported.]

Case No. 9,947.

In re MURPHY.

[1 Woolw. 141.][2]

Circuit Court, D. Missouri, Oct. Term, 1867.

CONSTITUTIONAL LAW—CRIMINAL OFFENSES—EX POST FACTO LAW—CIVIL RIGHTS.

1. A person arrested in New Orleans in 1865, charged with offences committed in Mobile in 1863, and tried at St. Louis, must be discharged from confinement, in which he is held by sentence of a military commission, if the grand jury organized next after a list of prisoners so held is furnished to the judges, do not present him to the court for trial.

2. The act of March 2, 1867 (14 Stat. 432), was intended to validate punishment of offenders, which would otherwise be invalid; to protect from civil process persons who, under the president's orders, had, in striving to suppress the Rebellion, rendered themselves amenable to prosecutions. The provision to secure the first of these objects is unconstitutional, because it is ex post facto.

[Cited in Moore v. State, 43 N. J. Law, 222.]

3. So far as that act relates to civil rights, and affords protection against civil suits, it was within the competency of congress. Per Miller, Circuit Justice.

The petitioner, William Murphy, was charged with the commission of grave offences in 1863 at Mobile, in Alabama, and in 1864 at Memphis. He was arrested in 1864 at New Orleans, and in 1865, at St. Louis, was tried by a military commission, found guilty, and condemned to imprisonment in the penitentiary of Missouri. The president approved the finding of the commission, and issued his order that the punishment be inflicted. After he was confined under this authority, a grand jury in the federal courts of the district had been organized and attended the term, and been discharged without a bill of indictment against the prisoner. At the succeeding term, he presented this petition for a writ of habeas corpus, directed to the warden of the penitentiary. The above facts appeared by the return.

Mr. Noble, Dist. Atty., in support of the return.

Mr. Garesche, for petitioner.

MILLER, Circuit Justice. The prisoner is held by virtue of an order of the president of the United States, under and in conformity with the sentence of a military commission, which assembled in the city of St. Louis, in the fall of 1865, upon three charges. The first substantially charges him with having, in 1863, conspired, in the city of Mobile, Alabama, with sundry persons, to destroy, within the Federal lines, steamboats and other property. The second charges him with the destruction of the Champion, at Memphis, in September, 1864. The third charges him with the destruction of the Mepham, between Memphis and Cairo, in September, 1864. Upon the first two, he was found guilty, and sentenced to a servitude of ten years in the Missouri penitentiary. Upon the third, he was acquitted.

This class of questions has lately been thoroughly discussed by the supreme court, to the decision of which, this court, whatever be the individual opinions of its members, will ever pay the greatest respect. In the case decided last winter, of Milligan, Bowles, and others, 4 Wall. [71 U. S.] 2, the principles of the law relative to the trial of the citizen by a military tribunal were elaborately examined. The present, however, differs from that case in this particular—that the offences for which Milligan and his companions were tried had

[1] [Reprinted by permission.]

[2] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

been committed in Indiana, where martial law had never prevailed, and where the courts were always open for the trial of offences. Here this is not the fact. The record shows that the offences for which Murphy was tried were committed, among other places, at Mobile, where the federal courts were then closed. They were open at the time and place of his arrest, that is, at New Orleans, and also at the time and place at which he is alleged to have committed one of the offences, that is, at Memphis. But in our view of the matter, this is unimportant here. This court must take notice of the fact that, at the time of his trial, the federal courts had resumed their functions, and in any of them the petitioner could have been tried for any of the offences of which those courts had jurisdiction.

The question, then, to be decided is, whether the offence charged comes within the provisions of the act of the 3d of March, 1863 [12 Stat. 755]. The supreme court of the United States unanimously concurred in the opinion that the act of 1863 authorized the president of the United States by proclamation to suspend, during the then existing Rebellion, the writ of habeas corpus in any portion of the United States. Previously he had exercised this power, and the contest had arisen as to whether it had been vested in him or in congress. By this act, congress intended to assert its own right. Conferring the authority upon the president to exercise the power, they intended to imply that they thought he did not possess it by virtue of his own functions. But the 2d section of the act limits the power conferred, and imposes conditions upon its exercise. It provided that while the president, in defence of the public safety, might arrest a person and not be required by a writ of habeas corpus to give the reason for the detention, yet such person was not to be detained beyond a limited period, unless proceedings in the courts of law were instituted against him. The secretaries of state and of war were required to furnish to the judges of the courts of the United States a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were, or afterwards should be, held in custody by the authority of the president, and were citizens of the states where the courts were open. If the grand jury organized next after the list was furnished, failed to find a bill against a party confined upon the president's order, it was the duty of the court to discharge him. In the construction of this act, majority and minority opinions were given by the supreme court of the United States in the Milligan Case, 4 Wall. [71 U. S.] 2. I quote from the opinion of the minority, rendered by Mr Chief Justice Chase: "Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in states where these tribunals were not interrupted in the regular exercise of their functions."

The opinion of the majority of the court goes still further, and must be binding upon every member of that court, whatever be his individual opinion. It says: "The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts; and in pursuance of the power conferred by the constitution, congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which congress has created for their government; and while thus serving, surrenders his right to be tried by the civil courts; and all other persons" (and these words are emphasized in the decision), "citizens of the states where the courts are open, if charged with crimes, are guaranteed the inestimable privilege of trial by jury." This petitioner was arrested at New Orleans in 1865, charged with offences committed at Memphis in 1864. In both of these places the courts of the United States were open, and perfectly competent to the trial of any offences within their jurisdiction. He was tried at St. Louis, in a state where the process of the courts had never been interrupted. Under the above construction of the act of the 3d of March, 1863, his discharge must be accorded to the petitioner, unless the point made by the district attorney, under the act of congress of the 2d of March, 1867 (14 Stat. 432), be valid. That act provides as follows: "All acts, proclamations, and orders of the president of the United States, or acts done by his authority or approval, after the 4th of March, A. D. 1861, and before the 1st of July, A. D. 1866, respecting martial law, military trials by courts martial or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late Rebellion against the United States, or as aiders and abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels against the authority of the United States, and all proceedings and acts done or had by courts martial or military commissions, or arrests and imprisonments made in the premises by any person, by the authority of the orders or proclamations of the president, made as aforesaid, or in aid thereof, are hereby approved in all respects, legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings, and acts had been done, under the previous express authority and direction of the congress of the United States, and in pursuance of a law thereof previously enacted, and expressly authorizing and directing the same to be done; and no civil court of the United States, or of any state, or of the District of Columbia,

or of any district or territory of the United States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid; nor shall any person be held to answer in any of said courts for any act done, or omitted to be done, in pursuance of or in aid of any of said proclamations or orders, or by authority or with the approval of the president, within the period aforesaid, and respecting any of the matters aforesaid; and all officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises, shall be held prima facie to have been authorized by the president; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." If this act be valid, the prisoner must be detained. It is evidently intended to make two provisions—the one, to validate the punishment of offenders, which would otherwise be illegal; the other, to protect from civil process the officers and others who, as subordinates of the president, have striven to put down the Rebellion, but whose acts have rendered them amenable to legal proceedings. So far as the first point is concerned, the law is unconstitutional; undoubtedly so. No clearer case of an ex post facto law could be framed. Its effect is to hold men in confinement for offences not punishable at the time they were committed, and to detain such persons in a servitude imposed by a court which had no jurisdiction to try them.

I had the honor of presenting the minority view in the cases decided last winter, generally known as the "Test Oath Cases." Ex parte Garland, 4 Wall. [71 U. S.] 382. In that opinion I entered into an exposition of the characteristics of an ex post facto law; and though I sought to qualify the positions held by the majority, yet, even under my views, as there expressed, this act, so far as its penalties are concerned, is clearly ex post facto. All laws which decree the punishment of an act not punishable at the time of its commission are ex post facto. The prisoner, up to the time of the passage of this law, was certainly illegally imprisoned, because tried by and held under the sentence of a court which had no jurisdiction of his person or of his offence. If he be remanded, it will be under an act passed subsequent to his offence, and even to his conviction. Can any law be more clearly ex post facto? However unpleasant it may be to declare an act of congress unconstitutional, yet, in a case so clear as this, we have no hesitancy as to our duty. We are of opinion that this petitioner is entitled to his discharge, and that the act of congress cannot be invoked to prevent it. But while declaring the invalidity of a part of that law, I deem it my duty, speaking only on behalf of myself, and not for any other member of the court, in order to prevent misapprehension, to say, that it is not necessary to the decision of the present cause to pass upon the validity of that part of the act of congress which gives immunity to the officers of the government. To that provision of the act, the views expressed in respect of its other provision have no application, and I am not required to pass upon it. My own impression is, however, that so far as it relates to civil rights, and affords a protection merely against civil suits, it was within the competency of congress to protect the officers of the government, by the exercise, as in this instance, of all its power. The prisoner will be discharged from the custody of the warden of the penitentiary. But inasmuch as the finding of the military court must be regarded by this court as prima facie evidence of his guilt of the grave offences with which he is charged, we will reserve the judgment until to-morrow, in order to enable the district attorney to inquire whether he should be remanded to the custody of an officer, to be sent to Tennessee or Louisiana for trial.

MURPHY (BENSUSAN v.). See Case No. 1,329.

MURPHY (BRUCE v.). See Case No. 2,047.

Case No. 9,947a.

MURPHY v. BYRD.

[Hempst. 211.] [1]

Superior Court, Territory of Arkansas. Jan., 1833.

APPEAL—TERRITORIAL COURTS OF ARKANSAS—SUM UNDER ONE HUNDRED DOLLARS.

An appeal does not lie to the superior court in cases where the sum in controversy is less than one hundred dollars.

Appeal from Conway circuit court.

[This was a suit by Benjamin Murphy against Richard C. Byrd.]

Before JOHNSON, ESKRIDGE, and CLAYTON, JJ.

OPINION OF THE COURT. This is an appeal from the Conway circuit court, and a motion has been made by the appellee to dismiss it on the ground that the sum in controversy between the parties being under one hundred dollars, the appeal was improperly granted, and this court has not jurisdiction. Whether this court has jurisdiction in cases in which the sum in controversy in the court below is under one hundred dollars, depends upon a proper construction of the several acts on the subject. The act of 1807, (Geyer's Dig. § 54, p. 261,) the act of congress of 1812, (Geyer's Dig. p. 34,) and the organic law of Arkansas, (Acts of 1818,) all in substantially the same language, provide that the superior court shall have appellate jurisdiction in all civil cases in which the amount in controversy shall be one hundred dollars or up-

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

wards. The language of the several acts cited are too plain to admit of a doubt. It is manifest that this court has not jurisdiction by appeal when the sum in controversy is under one hundred dollars. But it is contended that the act of congress of the 17th of April, 1828 [Bioren & Duane's Laws, vol. 8, p. 34], gives an appeal to this court in all cases without regard to the amount in controversy. The language of the act is, that "the party aggrieved shall be at liberty, by appeal, writ of error, or certiorari, to remove his suit to the superior court for further trial." This language, it is true, is very broad, but it is not incompatible with the provisions of the several acts before cited, and cannot be understood as having repealed them. The object of the act of 1828 was to legalize certain acts of the legislature of Arkansas, and to provide for the appointment of a fourth judge for this territory; and though the appellate jurisdiction of this court is provided for, it could not have been the intention of congress to repeal the act of 1807 regulating appeals, nor could it have been designed to repeal the provisions of the acts of 1812 and 1818 fixing the jurisdiction of this court in cases of appeal. This appeal must be dismissed. This court is governed in its proceedings by the rules of the common law and the act of 1807. The act of 1807 expressly allows a writ of error, as a matter of right. Cases in which the sum in controversy is less than one hundred dollars, may be brought to this court by writ of error, but not by appeal. Geyer's Dig. 263. Appeal dismissed.

[For another action between the same parties, see Case No. 9,947b.]

Case No. 9,947b.

MURPHY v. BYRD.

[Hempst. 221.] [1]

Superior Court, Territory of Arkansas. Jan., 1833.

PLEADING AT LAW—PAYMENT—SURPLUSAGE—PLEA OF FRAUD.

1. A plea of payment referring to the instrument sued on, as a "supposed writing obligatory," is nevertheless good, and those words may be rejected as surplusage.

2. General plea of fraud is not admissible.

Appeal from Conway circuit court.

[This was a proceeding by Benjamin Murphy against Richard C. Byrd.]

Before ESKRIDGE, CROSS, and CLAYTON, JJ.

OPINION OF THE COURT. This case comes up by appeal from Conway circuit court. It is contended that the court below improperly sustained the demurrer to the defendant's two pleas of payment and fraud. The action is founded on a writing obligatory due the 11th of March, 1832, for the sum of one hundred and thirty-five dollars and twenty-two cents. By the defendant's plea it is alleged that "on the 11th day of March, 1832, in the county aforesaid, he paid to said plaintiff the said sum of one hundred and thirty-five dollars and twenty-two cents, according to the form and effect of said supposed writing obligatory." It is said that this plea is repugnant and inconsistent with itself, because it admits the writing by necessary implication, and afterwards denies it by referring to it as having only a hypothetical existence, and consequently the demurrer was properly sustained. Repugnancy will, in many instances, vitiate a plea, but not when the matter is nonsense, by being contradictory and repugnant to something precedent. In such cases the inconsistent matter will be rejected as surplusage. 1 Chit. 211; 1 Salk. 324. In the case before us, the allegation of payment in the plea, is a clear admission of the instrument upon which the action is founded, and the statement afterwards allowing it a supposed existence only, is contradictory and should be rejected as surplusage. It certainly could not be taken advantage of on a general demurrer, and special demurrers are not allowed under the provision of our statute. We think, therefore, that the circuit court erred in sustaining the demurrer to the plea of payment. A general plea of fraud has heretofore been decided by this court to be inadmissible, and clearly is so. Judgment reversed.

[For another action between the same parties, see Case No. 9,947a.]

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

Case No. 9,948.

MURPHY v. CAMAC.

[4 Wash. C. C. 307.] [1]

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

JUDGMENT—SOUNDING IN FOREIGN MONEY—RATE OF EXCHANGE.

Judgment confessed, with liberty to the defendant at a future term to prove discounts. The judgment being for sterling money, the exchange is to be settled as of the day when the judgment was confessed.

Judgment was confessed in this case for $1100, Irish sterling, at the November term 1820 [see Case No. 2,226], with liberty to prove any discounts at a future session of the court. The plaintiff now admitted that the defendant was entitled to a credit against the judgment to the amount of $——, and the only question submitted to the court was, whether the rate of exchange should be settled as of the day when the judgment was confessed, or as of the present time. The court decided, that the rate of exchange when the judgment was confessed ought to govern.

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

MURPHY (COMMONWEALTH v.). See Case No. 3,067.

MURPHY (DUDEN v.). See Case No. 4,113.

Case No. 9,949.

MURPHY et al. v. EASTHAM et al.

[Holmes, 113; 5 Fish. Pat. Cas. 306; 2 O. G. 61; Merw. Pat. Inv. 130.] [1]

Circuit Court, D. Massachusetts. Feb. 23, 1872.

PATENTS—PRIOR INVENTION—EXPERIMENTS—DIFFERENT FORMS IN WHICH INVENTION MAY BE COPIED—RUBBER BRUSH-HEAD.

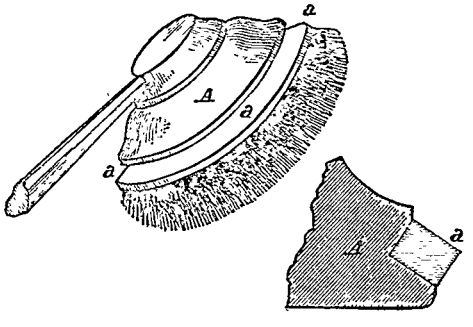
1. The fact that articles were constructed as experiments, but never made public, and ultimately abandoned and lost, does not affect the right of a subsequent original inventor of substantially the same article to take out a patent for his invention.

2. In contemplation of law, a patentee is deemed to claim the thing patented, however its form and proportions may be varied.

3. A patentee described and claimed a brush, having around the head, near the bristles, an angular groove, in which was placed a band of rubber made in the form of a parallelogram or rhombus, with one of its angles projecting outwards, so as to prevent the hard brush-head from coming in contact with the glass or other surface to be washed or dusted; the defendants' brushes had around the head, near the bristles, a semi-circular groove, in which was fitted a round rubber band, for the same purpose as the patentee's band. *Held*, that, as the operative part of the band could come in contact with the surface to be brushed only on one line in the periphery of the band, it was immaterial whether the band was round or angular in shape, or whether the groove was semi-circular, or polygonal, or triangular; and that the defendants infringed.

Final hearing on pleadings and proofs.

Suit brought [by Thomas E. Murphy and others against William W. Eastham and George G. Morris] upon letters patent [No. 98,787] for an "improvement in brush-head,"



granted to Francis McLaughlin, January 11, 1870, and assigned to complainants. The invention is fully described in the opinion, and is illustrated in the accompanying drawing, in which A represents the brush-head, and a, a, a, the band of rubber, with its projecting edge.

J. E. Maynadier and J. E. Newton, for complainants.

C. T. & T. H. Russell and H. W. Suter, for defendants.

SHEPLEY, Circuit Judge. Letters patent were issued to Francis McLaughlin on January 11, 1870, for an improved brush. The object of the invention was to obviate the danger of breaking glass and injuring the surface of the wood or other substance to be washed or dusted by contact with the brush-head. To obviate this difficulty, the patentee put around the brush-head or stock a circular band of rubber, in the form of a parallelogram or rhombus, with one of its angles projecting outward, and near the bristles or washing material. A groove was made in the brush-head or stock near the bristles, and in this groove was placed a circular band, the band being made in the form of a parallelogram, so that the ring fitting into the groove or furrow, which had a sharp angle in it presented a sharp angle outward.

The patentee claimed as his invention the combination and arrangement of the brush-head, constructed as described in his specification, and provided with an angular groove or furrow around the lower side, with the rubber ring fitting therein, as and for the purpose specified.

The defendants, in their answer, deny that McLaughlin was the first and original inventor of the improvement for which the letters patent issued. and which have been assigned to the complainants, and allege that the improvement claimed by him as new was described in letters patent granted in England to W. T. Monzani, June 25, 1854, and set forth in No. 1348 of the volume of specifications of English patents for that year; also in an application made by W. E. Williams to the United States patent office, rejected April 1, 1868; also in an application made to said office by J. H. Crittenden, rejected May 22, 1868. Defendants also set up prior knowledge and use by said Williams and Crittenden, and by the defendants themselves, and by the firm of Eastham, Harvey & Morris, of which defendants are members. The answer also alleges that the thing patented was in public use and on sale in this country more than two years before the application for the patent.

Monzani's patent was merely for covering with vulcanized rubber those parts of brushes or brooms which in their use are liable to be struck against places or things which are to be dusted or cleaned thereby. It was referred to and described in the specification of McLaughlin, and disclaimed by him.

Crittenden's specification described the same thing substantially as Monzani's. Crittenden claimed the application of rubber, felt, cloth, leather, or any elastic material to the ends and corners of broom and brush-heads, as set

[1] [Reported by Jabez S. Holmes, Esq., and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from Holmes, 113, and the statement from 5 Fish. Pat. Cas. 306. Merw. Pat. Inv. 130, contains only a partial report.]

forth and described. This application was rightfully rejected. There is nothing in these patents or rejected applications to invalidate the McLaughlin patent. They were probably introduced in evidence only as illustrating the state of the art and aiding in the construction of the claims in the complainants' patent.

Respondents also offer evidence tending to show that, prior to the date of the McLaughlin invention, they made, in the fall of 1867, first, a brush with a block or head, with a projecting shoulder, by which a square vulcanized rubber band was attached upon the block for the purpose of keeping the head of the brush from injuring the wood-work; second, a similar brush, with a circular groove and a round band; and, third, a brush with a cork block or head inserted in a tin cover. Around the edges of this cover was a projecting shoulder, and round the edge of this cover, and held in place by this shoulder, a square vulcanized India-rubber band. Brushes made in the similitude of these three forms of brushes are put into the case. No brush made in either of these forms before the date of McLaughlin's invention is produced in evidence, and there is no reason from the testimony to believe that any one is in existence. The testimony is conflicting as to their form and structure; but it leaves no doubt on the mind of the court that, whatever they were, and whenever and howsoever constructed, they were mere experiments. They were never put upon the market; they never came into practical use; they were never sold; they were not even thought worthy of preservation; and can not now be found. Such brushes, if previously constructed in the form contended for by respondents, as experiments, and never made public or brought to the knowledge of McLaughlin, and ultimately abandoned and lost, could be no obstacle to his right to take out a patent.

Considering the patent of the complainants to be good and valid, we proceed to the consideration of the question of infringement. Respondents, by their answer and in the affidavits referred to in the answer, admit infringement by the sale of brushes with the angular groove or furrow, and with an angular rubber ring fitting therein. They also admit that they do make, and claim the right to make, brushes with a circular groove and band, as shown in Exhibit No. 3, which they claim do not infringe the complainants' rights under their patent.

The patentee, in his specification and claim, has only described one geometrical form of groove or furrow, and three geometrical forms for the rubber ring—i. e., the parallelogram, rhombus, and triangle. Perhaps a strict construction of the language would exclude the triangle from the list of forms of the rubber ring in the claim. The patentee does not, as is sometimes done, claim in terms the thing patented, however its form and proportions may be varied; but the law so interprets his claim without the addition of these words. In contemplation of law, after he has fully described his invention and shown its principles, and claimed it in a form which perfectly embodies it, unless he disclaims other forms, he is deemed to claim every form in which his invention may be copied.

Undoubtedly, in some cases the letters patent include only the particular form described and claimed, not for the reason that the patentee has described and claimed that form only, but because the invention consists in form only, and only in that form can be embodied, so that when the form is not copied, the invention is not used. Winans v. Denmead, 15 How. [56 U. S.] 343.

We must look, therefore, into the nature of the invention, and see whether its form and its substance are inseparable. If they are inseparable, then the respondents, having changed the form, do not copy the substance of the invention; but if they are separable, and the substance of the invention which the patent is designed to secure is to be found in the manufactures of the respondents, although copied and embodied in a form not described, or differing from the form described and specifically claimed by the patentee, then they have infringed. The invention, as described and claimed, is for a brush-head, provided with an angular groove or furrow, with an India-rubber band in that furrow. As the operative part of the rubber band can come in contact with the wood or glass to be dusted or brushed only at one line in the periphery of the band, it can make no difference in the result whether the shape of the rubber is circular or angular; whether a cross-section of the rubber band would be a parallelogram, a rhombus, or —what a circle practically is—a many-sided polygon; or whether the shape of the groove be semi-circular or polygonal or triangular. They would accomplish the same result, in the same manner, and by the same means. Cut away from the defendants' band a segment of the circle on both sides of the line in the periphery of the band where it touches the glass to be brushed, and you have only removed a superfluous and inoperative part; and the same principle, mutatis mutandis, applies to the band in the groove and the groove itself. One geometrical form as much as the other may embody the substance of this invention, and copy and use the invention itself. Decree for injunction and account.

[For another case involving this patent, see Murphy v. Kissling, Case No. 9,950.]

MURPHY (GRAY v.). See Case No. 5,725.

Case No. 9,949a.

MURPHY v. HOWARD.

[Hempst. 205.] [1]

Superior Court, Territory of Arkansas. Jan., 1833.

COURTS — JURISDICTIONAL AMOUNT — ACTION FOR DAMAGES—AMOUNT CLAIMED IN DECLARATION—AMOUNT AWARDED BY JURY.

In actions sounding in damages, those claimed in the declaration, and not those awarded by the jury, constitute the cause of action, and give the court jurisdiction.

Appeal from Conway circuit court.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

OPINION OF THE COURT. [Benjamin F.] Howard declared in an action of assumpsit against [Benjamin] Murphy for the value of a certain keelboat, charged to be of the value of one hundred and fifty dollars, and laid his damages at that amount. Upon the trial of the issue joined, the jury by their verdict assessed the damages to twenty-five dollars, for which the court rendered judgment for Howard, from which Murphy has appealed to this court. The only ground relied upon by the counsel for the appellant for reversing the judgment is, that the circuit court did not possess jurisdiction of the case. By referring to the statute of 1828 (Acts, p. 34), it will be seen that the circuit courts are clothed with "original jurisdiction in all cases of one hundred dollars and upwards." Is this a case of one hundred dollars, or is it a case where the amount in controversy is less? To decide this question we must look either to the declaration or the verdict of the jury. By referring to the former, it will be seen that the amount in controversy is one hundred and fifty dollars, the damages claimed for a breach of the contract. According to the latter, the amount in controversy was twenty-five dollars, the damages assessed by the jury in their verdict. To which of these shall we refer in deciding the question now presented to the court? The doctrine is well settled that in actions sounding in damages, those laid in the declaration, and not those found by the jury, are the cause of action, and give to the court jurisdiction. Hulsecaup v. Teel [Case No. 6,862]; [Sims v. Irvine] 3 Dall. [3 U. S.] 441; 1 Bibb, 345. In these cases the doctrine is expressly laid down that the damages in the declaration furnish the rule to ascertain the jurisdiction of the court. "The absurd and inconvenient consequences that would result from a contrary doctrine, afford a strong argument against its propriety. If a verdict for less than one hundred dollars would oust the court of its jurisdiction, then it would seem to follow, that a verdict for the defendant would equally deprive the court of its jurisdiction, and that no judgment could be given that would bar a future action for the same cause, or that would award to the defendant his costs. In actions sounding in damages, if the verdict is to be the criterion of jurisdiction, in many cases it will be impossible for a plaintiff to know to what tribunal to apply for relief. If he estimates his cause of action either too high or too low, it will be equally fatal. But further, taking the verdict as the rule to ascertain the jurisdiction, and it may be easily conceived that cases may occur in which from a difference of opinion in the amount of damages between the jury and the justice of the peace, neither tribunal will exercise jurisdiction, and the party will be without a remedy. A doctrine resulting in such consequences cannot be correct." Singleton v. Madison, 1 Bibb, 342. Judgment affirmed.

Debt will not lie for a debt under forty shillings (2 Inst. 311, 112), yet the smallness of the sum must appear on the face of the declaration. 3 Burrows, 1592; Barnes, Notes Cas. 497. And though reduced by a set-off, it will not affect the jurisdiction of the court. 3 Wils. 48.

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

MURPHY (JAFFRAY v.). See Case No. 7,172.

Case No. 9,950.

MURPHY et al. v. KISSLING et al.

[1 Ban. & A. 534; Holmes, 432; 7 O. G. 302.] [1]

Circuit Court, D. Massachusetts. Oct., 1874.

PATENTS—IMPROVED BRUSH HEAD—ANTICIPATION—INFRINGEMENT.

1. The patent granted to John Dwyer, administrator, etc., of Francis McLaughlin, deceased, January 11, 1870, for an improved brush head, provided with an angular groove, and a rubber ring fitted therein, *held* valid, and not anticipated by a door-stop provided with a rubber, fitted in an angular groove.

2. The patent held to be infringed by the defendants' brush head, which, though different in form, embodies the patented invention.

[This was a suit [by Thomas E. Murphy and others against Laurent Kissling and others] under letters patent [No. 98,787] for an improved brush, granted to Francis McLaughlin January 11, 1870, being the same patent that was involved in the suit of Murphy v. Eastham [Case No. 9,949]. The object of the McLaughlin invention was to obviate the danger of breaking glass and injuring the surface of wood or other substances to be washed or dusted by contact with the brush head. To this end the patentee proposed to form a groove in the brush head or stock, near the bristles, and in this groove to insert a rubber band, one edge or angle of which should project outward and prevent injurious contact between the brush head and the surface to be cleaned. The novelty of the invention and the scope of the patent were fully discussed in the case above referred to.] [2]

J. L. Newton, for complainants.

J. T. Wilson, for defendants.

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

[2] [From 7 O. G. 302.]

SHEPLEY, Circuit Judge. This bill in equity is brought for an alleged infringement of the letters patent, granted for the invention, by Francis McLaughlin, of an improved brush. So far as the defence, set up, of want of novelty in the invention, relates to the evidence introduced by defendants of the Monzani patent, and the rejected applications of Williams and Crittenden, it has been fully considered in the case of Murphy v. Eastham [Case No. 9,949]. The defendant also sets up, as anticipating the invention of McLaughlin, a door-stop made, and used and sold, by D. C. Smart. Smart's door-stop had an angular groove in it, with a rubber ring fitting therein, in the same manner, as in the brush head in the McLaughlin invention. It was not new, at the date of the McLaughlin invention, to put a rubber ring into an angular groove. What was new, was, his combination of a brush head with an angular groove and a rubber ring fitting therein, whereby the elements of the combination, operated together, and jointly, in the function of the brush. The infringement, in this case, is clear. Defendants use a rubber ring fitting into an angular groove in the brush head, in the same manner as in the McLaughlin patent. They claim, that their rubber ring performs another function also; that, as they extend their rubber ring by a flange between the two surfaces of the two parts of the brush head, where they unite at the bottom of the groove, as their brush is constructed, the rubber forms a packing which makes the joint tight. This would be only an improvement, at best, upon the McLaughlin invention. But, if the groove in the McLaughlin brush, be made square, and an elastic band be used, fitting this square groove, it would act in the same way as a packing to exclude the water from the joint, if the joint was at the bottom of the groove. This is one of the forms of McLaughlin's invention, and is shown in Exhibit G. This is a clear case of an attempt to evade infringement by a change of form merely. Decree for injunction and account.

[For another case involving this patent, see Murphy v. Eastman, Case No. 9,949.]

MURPHY (LENG v.). See Case No. 8,242.

Case No. 9,950a.

MURPHY v. LEWIS et al.

[Hempst. 17.] [1]

Superior Court, Territory of Arkansas. Aug., 1822.

EXECUTION—UNAUTHORIZED BY JUDGMENT—MISTAKE—POWER OF COURT TO CORRECT.

1. An execution issued on a judgment which does not authorize it, may be quashed on motion, and the money made thereon ordered to be refunded; but where there is only a clerical mistake, this cannot be done, for the execution may be corrected by the court, so as to conform to the judgment.

2. The power of the court to correct errors and mistakes in executions is unquestionable, and necessarily belongs to every court of record.

Motion [by Benjamin Murphy against Eli J. Lewis and Daniel Mooney, executors of Samuel Mosely, deceased] to quash an execution.

Before JOHNSON, SCOTT, and SELDEN, JJ.

OPINION OF THE COURT. This is a motion by the defendants to quash the execution and have the money refunded, the amount having been collected by the sheriff and paid over to the plaintiff. We have no doubt the execution issued for a greater sum than the judgment authorized; for instead of six per centum as damages upon the dissolution of the injunction, the execution is for six per centum per annum, thereby making a material difference in the amount against the defendants. For the defendants it has been contended, that, as the execution is erroneous, it ought to be quashed, and the money made thereon refunded. We are, however, of a different opinion. If the judgment had not authorized the emanation of an execution at all; or there had been no judgment, then it would be irregular to sue out one, and in such a case the doctrine contended for would be correct. But when there is only a clerical mistake in the execution, it may be corrected by the court, so as to make it conform to the judgment. Of the power to correct errors or mistakes in executions, there can be no doubt. In the case of Smith v. Carr, Hardin, 308, the court of appeals of Kentucky say: "The power of correcting the ministerial acts of its own officers necessarily and incidentally belongs to every court, and has always been exercised, as well before as since the formation of the present constitution." The case referred to was one of an erroneous execution. In the case before this court, to order the whole of the money to be refunded, would be more than law or justice require. For what purpose should we require the whole of the money to be restored? That another execution might issue, and the true amount again be made and paid over to the plaintiff? We can perceive no good reason for a course of this kind, and no authority has been found to warrant it. We are therefore of opinion, that the mistake in the execution should be corrected, and that Murphy refund to Lewis and Mooney the amount which he has received above the sum for which the execution ought to have issue. Ordered accordingly.

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

Case No. 9,951.

MURPHY v. McVICKER et al.

[4 McLean, 252.] [1]

Circuit Court, D. Michigan. June Term, 1847.

FRAUD—BILL TO RESCIND—OFFER TO RETURN—DEEDS—EXECUTED UNDER DEFECTIVE POWER.

1. A party who desires to rescind a contract on the ground of fraud, must offer to return the thing purchased, whether it be land or personal property.

[Cited in brief in Morrow v. Rees, 69 Pa. St. 372.]

2. The vendor must be placed by the vendee in the condition he was in before the purchase.

3. The deed being defective, being made under a defective power, the court will decree a conveyance, on the payment of the residue of the purchase money.

In equity.

Mr. Backus, for complainant.

Mr. Seaman, for defendant.

OPINION OF THE COURT. This bill was filed, apparently, with the view of rescinding a contract for the purchase of a tract of land in Eaton county. The consideration agreed to be paid was the sum of four hundred and eighty dollars, and the complainant represents the land is not worth half that amount. That fraudulent representations were made to him by the vendor, as to the locality of the land, and its quality, which induced the complainant to purchase it. But there is no specific prayer for a rescission of the contract, no tender of a reconveyance, and no offer to surrender the possession. It is therefore clear there can be no decree, under the bill, to rescind the contract. The chief object of the bill would seem to be to procure an effective deed for the land. It was purchased by the complainant, and a deed was executed to him under an insufficient power of attorney. The defects in the power are stated to be, that it has but one witness, and is not under seal. These defects are radical, as they did not authorize the conveyance that seems to have been executed under it. A power of attorney, to authorize the conveyance of land in fee simple, must have all the solemnities and forms required to make effective the instrument to be executed. The statute requires two witnesses; of course, the power must have two witnesses. And as a deed is inoperative, as such, without a seal, it can not be executed under an authority without seal.

The court, therefore, will decree that a good and effective deed shall be executed by the defendant, of general warranty, and held ready to be delivered on the payment of the balance of the purchase money which remains due.

MURPHY (MARRETT v.). See Case No. 9,103.

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

Case No. 9,952.

MURPHY v. PAYNTER et al.

[1 Dill. 333.] [1]

Circuit Court, D. Nebraska. 1871.

EQUITY—DURESS—PERMANENT IMPROVEMENTS—DELAY.

1. Equity views with disfavor, unreasonable and unexplained delay in the assertion of rights, especially where the rights depend on oral evidence and the situation and value of the property affected have, in the meantime, greatly changed.

2. Accordingly, a bill to set aside a deed for duress, alleged to have been practised twelve years before, was dismissed,—the complainant being without sufficient excuse for the delay, and the defendant having made costly and permanent improvements upon the property, and the evidence as to the duress being conflicting and unsatisfactory.

The bill was filed on the 1st day of October, 1869, and sets forth that on the 17th day of July, 1857, the complainant entered, by virtue of a pre-emption, under the act of 1841, a tract of land in Sarpy county, Nebraska, and received a duplicate therefor, and that on the same day he was forced by one Jesse Lowe (husband of the defendant, Sophia Lowe), and by the defendant Paynter and others, by insolence and by threats of great bodily harm, to execute a deed therefor to Paynter and Sophia Lowe, on receiving, against his will and when under duress, the sum of one hundred dollars. It is alleged that the defendants were aided in their illegal proceedings against the complainant by members of the "Omaha Land Claim Club;" that from fear of this organization the complainant left the state, and was prevented from instituting legal proceedings to recover the land until after the death of Jesse Lowe, in 1868. The prayer is that the deed so made, on the 17th day of July, 1857, be set aside. The answer admits the complainant's purchase of the land at the land office, but alleges it was with money furnished to him by Lowe and Paynter, for whose benefit it was purchased. It denies any coercion, or duress, or fear of bodily harm, but alleges that the deed was voluntarily made in pursuance of a previous understanding between the parties, and in consideration of $100 paid therefor at the time. A large amount of testimony has been taken on either side. It is very conflicting, and many parts of it are incapable of being reconciled.

Baldwin & O'Brien, for complainant.

J. M. Woolworth, for respondent.

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

DILLON, Circuit Judge. In the spring of 1857, the complainant came to Omaha, and soon afterwards hired himself as a laborer, by the month, to Jesse Lowe. There is evidence of plaintiff's admission that he was to have so much per month for his services, and

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

was to pre-empt for Lowe a piece of land. Lowe and Paynter were relatives by marriage, were in business together, and each had pre-emptions in his own name, on other land than that now in question. Hence, neither Lowe nor Paynter could pre-empt this land in his own name. The evidence is very satisfactory that the land now in controversy had been built upon, plowed, and, to some extent, fenced by Paynter and Lowe and those whose claim thereto they had purchased, and that these improvements were made in 1856, and before July, 1857. Lowe, while the complainant was in his service, sent him to this land a short time before July, 1857, and he continued in the service of Lowe down to the date of the entry.

The complainant testifies that this land was vacant when he went there, in May or June, 1857, that he plowed part of it, built a house on it, and bought the lumber therefor of Paynter. In all these particulars the weight of evidence and the circumstances, are strongly against him.

On the 17th day of July he entered the land, Paynter being his witness to prove up the pre-emption. The complainant says he purchased this land with his own money, with gold which he brought to Nebraska with him. On the other hand, the defendants claim that the complainant paid for the land with money furnished by Lowe and Paynter.

The complainant testifies that he paid for it with his own money. On the other hand, Paynter testifies that he saw Lowe pay Murphy the money with which to make payment at the land office, and that the money belonged to him and Lowe together.

The witness, Carlisle, here corroborates Paynter. He testifies that on the day Murphy proved up his pre-emption and made the entry, he saw Lowe give him the money, in Omaha, with which to make the payment at the land office. The payment was made and the certificate received in the name of the complainant. On the afternoon of that day occurred the transaction, in the course of which the complainant made the deed of the land to the defendants, which he is now seeking to have set aside because made under duress. Respecting this transaction the conflict in the testimony is painful and perplexing to the last degree. The complainant's version is, that on the same day on which he made the entry and received the certificate, he was passing the office of Lowe, in Omaha, when Lowe accosted him and demanded the duplicate and a deed, and that, upon complainant's refusal, Lowe, aided by Paynter and others, members of the Land Claim Club, forced him into his office, or forcibly kept him there, stripped and searched him, maltreated him, and threatened his life if he did not make the deed required of him; that they compelled him to receive $100 against his will, and that he received the money and made the deed only to save his life, or his person from great bodily injury.

I feel bound to say that I find some of the features of this version of the transaction not a little confirmed by other witnesses than the plaintiff. The defendant's theory of the transaction is this: that at the time in question the complainant was passing by the office of Lowe as he claims; that Lowe casually saw him and assumed, as a matter of course, that he would carry out the understanding and make a deed for the land; that on his refusal, a dispute arose; that the only crowd that gathered around was that which a dispute and conflict on the street would naturally assemble; that the stand taken by the complainant was, not that he would not make a deed for the land at all, but that he would not do so until he was paid by Lowe his wages in full, and the sum of one hundred dollars for his services in connection with proving up the pre-emption.

The defendants claim that though the complainant at one time endeavored to get out of the office and was forcibly detained by Lowe and some others, yet that he was not put in bodily fear, but on the contrary dictated the terms on which he was willing to make the deed, namely, payment for his services as a laborer for Lowe, and the receipt of one hundred dollars in addition; and that these terms were accepted by Lowe and the deed drawn accordingly, and voluntarily executed by the complainant, and the money voluntarily received by him.

In this account of the transaction the witnesses, Paynter, Miller, Carlisle, and Woolworth each substantially agreed. Against it, are the direct and positive statements of the complainant, in which, as to some particulars, though not in all, he is corroborated by the witnesses, Robertson, Knight, and Hannigan.

In this conflict of testimony, other circumstances must be regarded by the court in determining the cause. One of the most important of these, and, in my judgment, the controlling one, is the long delay of the complainant to seek relief. The deed which he is asking to impeach, was made by him, July 17, 1857. This bill was not filed until October 1, 1869, more than twelve years after the execution of the deed. This delay is not satisfactorily explained. The explanation given is that he feared the club, and was thus prevented from bringing suit until after the death of Lowe in 1868. The club ceased as an organization with the year 1857, and ever since then, if not always, it has been perfectly safe for the plaintiff to seek redress in the courts. This delay tends strongly to confirm the defendant's theory of the case, because if that theory be correct, the delay is consonant with it, while it is inconsistent with the plaintiff's theory of it.

But aside from this consideration, as affecting the probabilities of the transaction occurring when the deed was made, there is another which I confess has had much weight with me in reaching, after some hesitation, the conclusion that the bill must be dismissed.

During the lapse of this long period, not only has the land itself greatly advanced in value, but it has been largely improved by the defendant, Paynter, who has constantly cultivated it, and for the past few years made it his home. These improvements are permanent in their nature, and consist of houses, barns, fences, ditches, fruit trees, and plantations of other trees, &c., and cost and are worth about the sum of ten thousand dollars, an amount much exceeding, it is probable, the value of the land itself.

If the plaintiff gets the land, he gets these improvements as well, to which he has of course no equity, since he is not obliged and cannot be decreed to make any compensation therefor, and since he laid by, without adequate cause, and saw the defendant make them upon the faith of his deed.

From the view I take of the cause, after twice carefully reading all the proofs, I think it quite probable that the plaintiff might have had a decree if he had made the same case upon suit brought recently after the transaction. But where the delay is so protracted, the change in the situation of the property so great, and the conflict in the evidence so radical, engendering doubts so grave as to the real character of the circumstances under which the deed was made, and in view of the clear case which the law ever requires to be established in order to set aside the solemn deed of the party, I can see no course fairly open, but to order the bill to be dismissed. Decree accordingly.

MURPHY v. The SANTIAGO DE CUBA. See Cases Nos. 12,332 and 12,333.

Case No. 9,952a.

MURPHY v. TINDALL.

[Hempst. 10.] [1]

Circuit Court, Territory of Arkansas. April, 1822.

REPLEVIN—UNLAWFUL TAKING—AGAINST WHOM LIES.

It is not essential to the maintenance of the action of replevin that the defendant should unlawfully take the property out of the possession of the plaintiff; but the action lies against all persons in whose possession personal property unlawfully taken may be found, except officers of the law who have possession by virtue of legal process.

At law. Appeal determined before JOHNSON, SCOTT, and SELDEN, JJ.

OPINION OF THE COURT. This was an action of replevin brought by [Benjamin] Murphy against [Thomas H.] Tindall, and upon the trial of the cause a verdict was rendered in favor of the defendant, from which the plaintiff appealed to this court. The only question presented for consideration is, whether the court below erred in the instruction given to the jury, on motion of the defendant, which was that, "unless it was proved that the defendant took the property out of the possession of the plaintiff unlawfully, and against the plaintiff's consent, the jury must find for the defendant." We are clearly of opinion that this instruction was erroneous. It is true, that it was necessary to establish an unlawful taking from the plaintiff in order to support the action; but it was not necessary to prove the unlawful taking by the defendant. It was sufficient to prove it by any other person. This, we apprehend, is the doctrine of the common law, (1 Chit. Pl. 185,) and by reference to the statute of this territory, (Geyer's Dig. 333,) it is clear that the action of replevin is maintainable against any person in whose hands or possession the property may be found. We are of opinion, then, that the action of replevin lies against all persons in whose possession personal property unlawfully taken may be found, except officers of the law, who may have possession by virtue of legal process. In the opinion we have given we are supported by the authorities referred to in 1 Chit. Pl. 185, 186. Reversed.

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

MURPHY (ULLMAN v.). See Case No. 14,325.

MURPHY (UNITED STATES v.). See Cases Nos. 15,837–15,841.

Case No. 9,953.

In re MURRAY et al.

[14 Blatchf. 43.] [1]

Circuit Court, S. D. New York. Nov. 11, 1876.

BANKRUPTCY—DISCHARGE—PETITION FOR REVIEW—DELAY.

A discharge in bankruptcy was granted by the district court, June 22d, 1875. A creditor who had opposed the discharge instituted, on the 15th of November following, proceedings of review. His interest was $6,000 out of $300,000 of debts. On the faith of the discharge, the bankrupt, aided by friends, had resumed his former business, and had entered into contracts with a foreign government to transport mails: *Held*, that, as the delay was unreasonable, and had operated to the prejudice of the bankrupt, the petition of review must be dismissed.

[Approved in Re Herman, Case No. 6,405.]

[In the matter of D. Colden Murray and others, bankrupts.]

Austin G. Fox, for creditors.

John Sherwood, for bankrupts.

JOHNSON, Circuit Judge. The bankrupts obtained a decree of discharge on the 22d of June, 1875, in the district court for the Southern district of New York, where they had been adjudged to be bankrupts on the petition of certain of their creditors. Certain of their creditors, namely, the Marine Na-

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

tional Bank of the city of New York, C. C. Abel and Christian Bors, now apply to have the decree granting the discharge revised and reversed, upon certain grounds on which they opposed the granting of the discharge by the district court. The petition of review bears date October 15th, 1875, but appears first to have been brought to the attention of the court on the 13th of November, 1875, when an order to show cause why the prayer of the petition should not be granted was made. This was served on the attorney for the bankrupts on the 15th of November, 1875, which must, therefore, be taken to be the time of the institution of the proceedings to obtain a review. In excuse for this delay it is alleged, that, on or about the 28th of July, 1875, the papers of the district court were removed from the old clerk's office in Chambers street to the new court house, and that, in the removal, the testimony in the case became mislaid and inaccessible to the petitioners, until a period after the time of the application for a review. This very statement, however, makes it obvious that there is nothing in the excuse, because, when the application was actually made, the same papers were lacking, and yet their absence did not make it either impossible or difficult to make the application for review. For the absence of these papers the discharged bankrupts were in no sense responsible, and, even if, on the petition of review, it had become necessary for the petitioners to apply for a postponement of the hearing, in order that an opportunity should be afforded to obtain the papers, the bankrupts would have had notice that such an application was pending, and might have governed themselves accordingly. The statute which gives the right to the circuit court of general supervision over proceedings in bankruptcy has not fixed any limitation of time within which its interposition must be invoked. In the cases in which appeals are allowed, the time to appeal is fixed at ten days. In the Southern district of Ohio, the circuit court adopted an express rule limiting the time for a petition of review to ten days, or such further time as might be allowed by the district judge, by an order made within the ten days. 2 Gazz. Bankr. Dig. 1128. In the supreme court of the United States, in Bank v. Cooper, 20 Wall. [87 U. S.] 171, that court declared that the review must be sought within a reasonable time, which should generally be fixed with reference to the analogy furnished by the period fixed for appeal. In the case of Littlefield v. Delaware & H. Canal Co. [Case No. 8,400], Judges Clifford and Shepley, in the circuit court for the district of Massachusetts, say: "Discharge was denied on the 12th of May, 1869, and the petition was filed on the 30th of June in that year. Special injury is neither alleged or proved, and the court is of opinion, in view of all the circumstances, that the petition ought not to be rejected because it was not filed at an earlier day. Until some rule is adopted on the subject, the court will not deprive the petitioner of a hearing on that ground, unless the delay is manifestly unreasonable, or has operated to the prejudice of the respondent." Bump, Bankr. (8th Ed.) p. 351. The present case is, in my opinion, such a one as is contemplated in the opinion cited. The discharged bankrupts had a right to assume, in the absence of any notice to the contrary, that their discharge, although it had been opposed, was acquiesced in by their creditors. Acting on this basis, they have, with the assistance of their friends, engaged again in the business of shipping merchants, in which they had previously been engaged, and have entered into, and are performing, important undertakings, of a quasi public nature, in respect to the transportation of the West India mails, with a foreign government. Now to revoke the discharge which was granted to them in the regular course of the administration of the bankrupt law, would involve in misfortune, not only themselves, but others who, relying on their discharge, have aided them or entered into new business relations with them. Under these circumstances, and adverting, also, to the small interest of the objecting creditors compared to the total amount of their debts, some six thousand dollars out of at least three hundred thousand dollars, I think the discretion of the court will be wisely exercised in refusing to entertain the application for a review. The petition is, therefore, dismissed.

Case No. 9,954.

In re MURRAY.

[1 Hask. 267; [1] 3 N. B. R. 765 (Quarto, 187).]

District Court, D. Maine. May, 1870.

BANKRUPTCY—DEBTS PROVABLE—THE PRICE OF LIQUORS TO BE SOLD IN VIOLATION OF LAW.

A claim, for the price of spirituous liquors, lawfully sold in the state of New York to a citizen of Maine, who intended them for sale in this state in violation of law, is here provable in bankruptcy, although it could not be recovered in the courts of this state.

In bankruptcy. Appeal by the assignee in bankruptcy of Murray, from the decision of Mr. Register Fessenden, allowing a claim against the bankrupt's estate for spirituous liquors sold in New York to the bankrupt a citizen of Maine, who intended them for sale in this state in violation of law.

Charles P. Mattocks, for appellant.
Melvin P. Frank, for appellee.

FOX, District Judge. This is an appeal from the allowance by the register of a claim in favor of W. E. Booraem, a citizen of New York, for the sum of $363.45. It is submitted for decision upon an agreed statement of facts, from which it appears that the bank-

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

rupt was an apothecary, resident at Portland, and from time to time sent orders to Booraem at New York for spirituous liquors to be forwarded by steamer to the bankrupt at Portland, by him to be there sold in violation of the laws of Maine. The claim as proved and allowed is for the price of the liquors so furnished. It is further agreed that Booraem did not know that the liquors were to be sold contrary to the laws of Maine, and that by the laws of New York the contract and claim is and was legal and could be there enforced.

The bankrupt having ordered these goods sent to him from New York by the carrier, the delivery to the carrier for his use is a delivery to him, and the sale and purchase must be considered as made and constituted in New York. The case finds that such a sale is legal, and that the price of the articles sold could be recovered of the purchaser in that state.

It is claimed by the assignee, that under such a state of facts a recovery could not be had in the courts of this state for liquors so sold, and the case of Meservey v. Gray, 55 Me. 542, is relied on as sustaining this position; and it is true, that in that case it was decided, that "when contracts made in other states are designed or calculated to aid in violating the laws of the state, where they are attempted to be enforced, the courts of the latter state are not obliged to furnish a remedy;" and that under the act of 1858 [Laws Me. 1858 (No. 2) p. 40], which declares "that no action shall be maintained for intoxicating liquors purchased out of the state, with intention to sell the same or any part thereof in violation of this act," a party, selling liquors in New York to a citizen of Maine, was not permitted to recover for the liquors, although he had no knowledge of the purchaser's intention to sell the liquors in this state in violation of the law.

So long as the act of 1858 continues in force, it may be that the courts of Maine will be justified in denying to citizens of other states any redress on contracts of this nature, although the same are perfectly legal and valid by the laws of the state where the purchase is made; but the question still remains, whether the federal courts in this state are bound by this act and this decision of the court, and are at liberty to refuse all redress to a suitor, because he is thus debarred of remedy in the courts of the state. [The remedy here sought is one provided by the bankrupt act, is under a law of congress, and in one of the courts of the United States, and by a citizen of another state, against the estate of a citizen of this state.] [2] The bankrupt act [of 1867 (14 Stat. 517)] declares all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy may be proved against the estate of the bankrupt, and that in case of an appeal to the circuit court from the decision of the district court, proceedings shall be had in the pleadings, trial and determination of the cause, as in an action at law, commenced and prosecuted in the usual manner in the courts of the United States, and his discharge if obtained, is from all debts, which by the act are made provable against his estate.

If an action could be sustained on this claim before the circuit court on appeal, and if the discharge in bankruptcy could relieve the debtor from his liability therefor, then I hold that it is the duty of the district court to recognize and allow the same as a debt provable against the estate in bankruptcy, although the creditor might fail of a remedy if his action was pending in the courts of Maine; and from an examination of the decisions of the supreme court of the United States, I can entertain no doubt that the demand was provable, and could be recovered before the circuit court by reason of its legality in the place where the purchase was made.

In Suydam v. Broadnax, 14 Pet. [39 U. S.] 74, the court says, "A sovereign state and one of the states of the Union, if the latter were not restrained by constitutional prohibitions, might in virtue of sovereignty act upon the contracts of its citizens wherever made, and discharge them by denying a right of action upon them in its courts. But the validity of such contracts as were made out of the sovereignty or state would exist and continue anywhere else according to the lex loci contractus, and it may be laid down as a safe position, that a statute discharging contracts or denying suits upon them without the particular mention of foreign contracts does not include them. * * * The 11th section of the judiciary act [1 Stat. 78] was intended to give to citizens of another state, having a right to sue in the circuit court remedies coextensive with these rights. These remedies would not be so, if any proceeding under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit could be pleaded to abate a suit in the circuit court."

In Watson v. Tarpley, 18 How. [59 U. S.] 520, the court re-affirms this principle in the following language, "Whilst it will not be denied that the laws of the several states are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and constitution."

In Union Bank v. Jolly, 18 How. [59 U. S.] 507, it is said, "The law of a state, limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state, for the recovery of any property or money there to

[2] [From 3 N. B. R. 765 (Quarto, 187).]

which they may be legally or equitably entitled."

In Hyde v. Stone, 20 How. [61 U. S.] 175, the court says, "This court has repeatedly decided, that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the state which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

The citation of further authorities is certainly unnecessary. The legality of the purchase in the place of the contract being admitted, it appearing that a citizen of another state has in such state sold his property to a citizen of this state, for which he is now indebted, and which can be recovered of him if he is ever found in New York, unless he is discharged therefrom by his certificate in bankruptcy, and the proceedings in bankruptcy being by force and virtue of the acts of congress alone, which authorize proof of all legal accounts against the bankrupt's estate, the laws of the state, denying any remedy for the recovery of this account, cannot in any way control the proceedings of the bankrupt court, and it is therefore ordered: Appeal dismissed, claim allowed.

Case No. 9,955.

MURRAY v. AETNA INS. CO.

[4 Biss. 417.] [1]

Circuit Court, N. D. Illinois. Oct., 1864.

AFFREIGHTMENT — TEMPORARY RETARDATION — WHETHER FREIGHT EARNED — MARINE INSURANCE—FREIGHT MONEY.

1. A temporary retardation, and subsequent sale of the cargo by the owner, does not constitute an abandonment, nor deprive the carrier of his right to the freight money; he therefore, cannot recover from the insurer of the freight money.

2. Where a vessel takes a cargo late in the season, for transportation around the Lakes, and is laid up by stress of weather, it is her duty to complete the voyage in the spring, if practicable, and carry the cargo to its destination.

3. If a cargo is necessarily unloaded at an intermediate point, and the owner sells it there, though the vessel might have carried it in the spring, the carrier has earned his freight.

Assumpsit [by James Murray against the Aetna Insurance Company of Hartford] for loss of freight money.

Robert Rae, for plaintiff.

DRUMMOND, District Judge. I am of opinion as a matter of law that the plaintiff cannot recover in this case.

The contract the defendant made was that the vessel should earn or be entitled to freight, and in the case of loss of freight or if the plaintiff was not entitled to receive freight in consequence of some accident or misfortune within the terms of the policy, then the defendant agreed to become responsible. The question is whether, according to the terms of the contract, the defendant is liable.

Fifteen thousand bushels of corn, in the fall of 1862, were shipped on board the schooner owned by plaintiff to be transported from Chicago to Kingston, and it was the freight list on this corn that was insured by defendant. A marine disaster happened to the vessel. She was dismasted and was towed into the port of Goderich, in Canada. The vessel lay there some time. The hatches were then taken off, and it was found that the corn was damaged more or less. Of course the schooner in the condition in which it then was could not proceed on her voyage without repairs. The corn was unloaded from the vessel, and placed in a warehouse, and the sound corn separated from the damaged corn. Shortly after it was so placed, it being in different stories of the warehouse, the warehouse broke down and the corn became again intermingled. There was a policy of insurance on the cargo by the Corn Exchange Company, and upon the receipt of intelligence of the disaster the agent of that company proceeded to Goderich with a view of determining what was to be done for the best interests of all concerned. The proof shows that about thirteen thousand bushels of the corn were in a sound condition when it was landed from the vessel, the remainder being more or less damaged. There is some conflict of evidence as to the manner and circumstances under which the corn was sold. The captain of the schooner claims that the corn was sold by the agent of the Corn Exchange Company. The latter, on the contrary, claims that the corn was sold by the captain. I do not think it is material which was the fact, but we will assume, what is undoubtedly true, that it was sold by the common consent of both. The plaintiff retained two thousand two hundred dollars, and the balance of the proceeds was paid over to the agent of the Corn Exchange Company. It is immaterial what was the fact as to the manner in which this money was paid or received. Of course if it was paid and received as freight it could not again be recovered; but, according to the view the court takes, it is immaterial whether it was or not. It seems to be conceded that there was no material injury done to the hull of the schooner; that the chief injury was to the spars and rigging. We have to assume, of course, under the finding of the jury, that the vessel could not have been repaired in the port of Goderich that fall, and there is no dispute but it could have been repaired in the following spring or during the winter, and that the vessel would have been ready upon the opening of navigation to proceed on her voyage. The question is, whether, under the circumstances of the case, it was not the duty of the captain to go on and complete his contract, which was to transport the corn from Chicago to Kingston.

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

When a vessel takes a cargo, as in this case, in the fall of the year to transport to a distant point, it is one of the incidents of the navigation that owing to variable weather or freezing up, she may not be able to reach her port of destination. The mere fact that the vessel is not able to do so does not relieve the carrier from completing his contract and thus becoming entitled to his compensation. Neither here does the fact that the vessel was dismasted and was obliged to make a port of safety and the corn had to be unloaded, relieve the carrier from the duty of completing his contract, provided by proper repairs the vessel could have proceeded in the spring of 1863. The corn was in such a condition that it could have been transported in whole or part in specie, and could have reached the port of destination.

This being so, then it follows as a conclusion of law that if the owner of the corn chose to take it or have it sold he could not deprive the plaintiff of the right to the freight.

There is no controversy but that the vessel could have been repaired in the winter of 1862 or the spring of 1863. There can be none under the proof but that the corn could have been transported in specie, in whole or in part at least, to the port of Kingston, in the spring of 1863. Those facts being admitted, upon well-settled principles of law I think the plaintiff cannot recover.

Among the numerous authorities which have been referred to, I will only advert to three. The first is the case of Anderson v. Wallis, reported in 2 Maule & S. 240. That was a case of insurance upon a cargo and in that respect was different from this. The ship sailed from London on the 16th of September, 1811, bound for Quebec. Having encountered heavy gales, so that she made a great deal of water, the master was obliged to return (having proceeded a considerable distance on the voyage) to the port of Kinsale, Ireland, and arrived there October 25th. On the arrival of the ship it was found necessary to make repairs upon the vessel before she could proceed on her voyage. These repairs were not completed until the 25th of March following. On examination it was ascertained that the cargo was damaged, and it was sold as a damaged cargo. Prior to this time the insured abandoned the cargo to the underwriter. The underwriter refused to accept the abandonment, so that the question arose whether there was a loss within the true construction of the policy. The court held there was not. Why? Because the goods were not lost, and because the vessel could have been repaired and could have proceeded on her voyage in the spring of 1812 to Quebec. The time that elapsed was from October 25 until March following, when the vessel should have so proceeded, and it was held—Lord Ellenborough delivering the opinion—that it was a mere retardation of the voyage. Now if in this case the cargo had been destroyed so that it lost its identity, and it did not in point of fact exist in specie, then, as a matter of course, it would have been a loss within the policy, and the court would have held that the insured was entitled to recover; but the cargo remaining in specie, although in a damaged state, the carrier having a right when the repairs were made to go on and complete the voyage, the property being sold as a damaged cargo, there was not a loss within the meaning of the policy.

The principle, although that was a case of insurance on the cargo and the case at bar is a policy on the freight, must necessarily be the same as to the question of loss. Here, as there, the agreement was to indemnify the plaintiff in case of loss—in one the loss of the cargo, in the other of freight—and in that case the court held that there was not a loss within the meaning of the policy, as we must hold here. The language of the court in that case has been cited with approbation in subsequent cases, and no court has ever yet decided that a temporary retardation is a total abandonment. Disappointment of arrival would be a new idea of abandonment in insurance law.

Here the question is, whether the loss of freight was in consequence of a peril of the sea or of the voluntary act of the master, and the answer is, it was the voluntary act of the master.

The next case to which I shall advert is the case of Jordan v. Warren Ins. Co. [Case No. 7,524]. That was a case of a policy upon freight precisely like this. The freight insured was a quantity of cotton, tobacco, and other articles of merchandise from New Orleans to Havre. The freight bill was nearly $10,000. The vessel proceeded from New Orleans down the Mississippi and on her progress to the Gulf of Mexico on the 7th of June she met with an accident which rendered it necessary for the vessel to return to New Orleans for repairs. The vessel was fitted again for sea on the 21st day of July following, a little over a month. On examination it was ascertained that the cargo was injured, and it was taken out; a large portion of it was sold at public auction for the sum of nearly $20,000. The residue, being in a sound state, was shipped for Havre in another vessel. Mr. Justice Story upon these facts says the ship was repaired and capable again of taking a part of the cargo at New Orleans within a reasonable time, and the master had a right to require that it should be so taken on board and carried on the voyage as soon as it might be in a condition to be safely re-shipped, and he had a right to wait until the cargo could be dried, sorted, re-packed and prepared for re-shipment; the delay arising thereby would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter prostration or destruction (prostration is a bad word to be used in that connection I think). If, then, the freight has been lost,

it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole testimony shows the cargo could have been dried, assorted and re-packed for the voyage at the farthest within six months. It is true that the vessel was ready, so far as the repairs were concerned, within about six weeks; but he says the proof shows the cargo could have been ready in six months, and what was the consequence? That the party was entitled to his freight, and consequently the underwriter was not responsible as for a loss of freight. He proceeds: "Mere delay in the voyage or disappointment as to time never constitutes, as we have seen, any ground for the abandonment of the voyage."

The next case is Hugg v. Augusta Insurance & Banking Co., 7 How. [48 U. S.] 595. That was also a case of insurance on freight like this. It went up on a certificate of difference of opinion between the judges below. The vessel in that case took a cargo of jerked beef at Montevideo to be transported to Matanzas or Havana. It was the freight on this cargo that was insured against. The vessel met with a disaster, and was obliged to put into the port of Nassau. Some of the cargo was thrown overboard, and another portion of it was found in so offensive and damaged condition that the authorities at once refused to have it landed. Another portion of it was sold, and the question in this case was, whether the underwriter was liable as for a loss of freight. Various questions were certified to the supreme court. Upon the first question the court held that if the jury found that the beef was a perishable article within the meaning of the policy, the defendant was not liable as for a total loss of the freight unless it appeared that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress, etc.

Admit that in the case at bar it was for the interest of the owner of the cargo or of all parties that it should be sold, still, if the vessel could have been repaired in the following spring, and have proceeded on her voyage from the port of Goderich, and could have transported the corn in specie to the port of Kingston, the plaintiff could not recover against the underwriter for a loss of the freight. The case last cited, and all the other cases, I think settle that.

As to whether it was a reasonable time or not. That question I think is also decided by the authorities and upon principle. Independent of authority the plaintiff cannot recover in this case, because if he could it would be substantially holding that where there was a detention of a cargo shipped in the fall, in consequence of stress of weather, or frost or other causes, so that the cargo could not arrive at the port of destination till the following spring, there was a loss of freight, and that the insured should proceed at once against the underwriter for the freight. That would be an exceedingly dangerous doctrine to hold, so far as the commerce of the Lakes is concerned. So that it resolves itself after all into, what was the reason there was a loss of freight, if there was such a loss? The only answer that can be given is, if there was a loss, it was in consequence of the voluntary act of the master, and not because of a peril of the sea; so that the verdict will have to be, as a matter of law, for defendant in this case.

See further that the master has a right to wait till the cargo is ready for forwarding, and in case of his failure so to do, the insurer is not liable. Herbert v. Hallett, 3 Johns. Cas. 93; Griswold v. New York Ins. Co., 1 Johns. 205; Saltus v. Ocean Ins. Co., 14 Johns. 138; Clark v. Massachusetts Fire & Marine Ins. Co., 2 Pick. 104; M'Gaw v. Ocean Ins. Co., 23 Pick. 405; Lord v. Neptune Ins. Co., 10 Gray, 109; Mordy v. Jones, 4 Barn. & C. 394; Tio v. Vance, 11 La. 199; Adams v. Haught, 14 Tex. 243; The Ship Nathaniel Hooper, 3 Sumn. 542, Fed. Cas No. 10,032.

It seems to be universally held that the master has the power to forward the cargo in another vessel, if his own becomes unable to complete the voyage; but whether he is bound to do this, is unsettled in England, though American authorities hold the affirmative. See Hugg v. Augusta Insurance & Banking Co., supra; and a collection of cases in 1 Pars. Shipp. & Adm. 234, note 2; Hugg v. Baltimore & Cuba Smelting & Mining Co., 35 Md. 414.

For a full discussion of right of the master to deliver the cargo at an intermediate point, on payment of freight for the full passage, and of his obligation to so do on tender of the freight, see 1 Pars. Shipp. & Adm. 231, notes 2 and 3.

Where the insurer voluntarily accepts the damaged cargo at an intermediate point, the master is entitled to freight pro rata itineris. The Mohawk, 8 Wall. [75 U. S.] 153.

MURRAY (AMERICAN BUTTON-HOLE, OVER-SEAMING & SEWING-MACHINE CO. v.). See Case No. 292.

Case No. 9,956.

MURRAY v. ARTHUR.

[13 Blatchf. 429;[1] 22 Int. Rev. Rec. 257.]

Circuit Court, S. D. New York. June 22, 1876.

CUSTOMS DUTIES—FORFEITURE FOR UNDERVALUATION—ADDITIONAL DUTY—FORFEITURE REMITTED BY SECRETARY OF TREASURY—CLAIM OF COLLECTOR.

1. Imported goods were seized by a collector of customs, as forfeited to the United States for undervaluation. Their appraised value exceeded by more than 10 per cent. their entered value, and they thereby became liable to 20 per cent. additional duty. They were proceeded against and taken into custody by the marshal, under process. Under proceedings for a remission of the forfeiture, the secretary of the treasury remitted it, on condition that the importer should pay the costs and the duties on the goods, if they were due, or give bond to export the goods. He elected to give bond, but the collector refused to permit the goods to be delivered until the importer had paid the 20 per cent. additional duty. He paid it and brought this suit to recover it back: *Held*, that the exaction was illegal, and that the plaintiff was entitled to recover.

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

2. Where a forfeiture is remitted by the secretary of the treasury, pursuant to the statute authorizing him to do so, the cause of forfeiture is released.

3. A fulfilment of the conditions imposed in a warrant remitting a forfeiture is equivalent to a satisfaction of the cause of action which constituted the ground of seizure.

[This was a suit by James H. Murray against Chester A. Arthur, collector, to recover duty alleged to have been illegally exacted.]

Stephen G. Clarke, for plaintiff.
George Bliss, Dist. Atty., for defendant.

WALLACE, District Judge. The plaintiff imported certain merchandise into the port of New York, the value of which in the principal markets of the country from which it was imported was found by the appraiser to exceed by more than ten per cent. the invoice or entered value. Thereupon the merchandise was seized by the collector of customs, proceedings were instituted for its condemnation, and it was taken by the marshal into custody, under process. The plaintiff then presented a petition to the district judge, praying a remission of the forfeiture, and, the same having been transmitted to the secretary of the treasury, the secretary, after consideration, issued his warrant, remitting all the right and claim of the United States to the forfeiture, upon condition that the plaintiff pay the costs of the proceedings for forfeiture, &c., and the duties on the merchandise, if any were due, or give bond to export the merchandise without the limits of the United States. The plaintiff elected to give bond to export the merchandise; the defendant, as collector, refused to permit the delivery of the goods until the payment of the penal duty of twenty per centum ad valorem, which accrued by reason of the undervaluation. It is now insisted, for the defendant, that the merchandise, after the remission, was subject, as before the seizure, to the additional duty. In support of this position, it is urged, that the secretary of the treasury had no power to remit this duty, because it was not a fine, penalty, or forfeiture, and that he had no power to authorize the merchandise to be entered or exported for drawback, because it had been withdrawn from the custody of the officers of the customs, and was in the custody of the marshal, under the process of the court.

The proceedings for the forfeiture of the plaintiff's merchandise were predicated upon the same grounds as those which subjected the merchandise to the additional duty. It is conceded by the counsel for the defendant, that, if these proceedings had been prosecuted to judgment and sale, no claim for the additional duty could thereafter have been maintained by the United States. This concession is fatal to the right to insist upon the additional duty, under the facts of this case; because, in my judgment, where the forfeiture is remitted pursuant to the statute authorizing the secretary of the treasury to do so, the cause of forfeiture is effectually released to the claimant. The statute which authorizes the remission proceeds upon the theory, that the property seized has become subject to forfeiture; and the power granted to the secretary of the treasury is given upon the assumption that the United States had acquired title to the property, which may be released to the claimant upon such conditions as the secretary may see fit to impose. The claimant, by petitioning for a remission, concedes that his title has been divested, and appeals to the discretion of the secretary. When he fulfils the conditions imposed by the latter, he is restored to his right of property and of possession, and is entitled to an order of the court, if necessary, to carry the terms of remission into effect. The fulfilment of the conditions of the remission is equivalent to a satisfaction of the cause of action which constituted the ground of seizure. Unless this is the legal effect of the remission, the claimant received his property subject to another proceeding for forfeiture for the same cause—a conclusion too unreasonable to merit discussion. The power conferred on the secretary of the treasury to remit a forfeiture, necessarily includes the authority to discharge the cause of action. If he had seen fit, he could have required the payment of the additional duty as one of the conditions of the remission. If he had done so, and the condition had been fulfilled, it would not be claimed that the merchandise, nevertheless, remained still subject to the duty. If the merchandise would have been released by the imposition and fulfilment of such condition, it is by the fulfilment of any other condition imposed by the secretary. The terms of the remission are confided to his discretion solely. Whether the additional duty be regarded as a penalty upon the importer, or as a duty not in the nature of a penalty, is not material. The power conferred upon the secretary of the treasury to release the cause of action upon such conditions as to him may seem meet, authorizes him to exact or to dispense with payment of penalty or duty. If he exacts it, the amount cannot be again exacted by the collector. If he dispenses with it, he has done so in the exercise of the discretion vested in him by the statute. Judgment is ordered for the plaintiff.

Case No. 9,957.

MURRAY v. BECK.

[2 Cranch, C. C. 677.] [1]

Circuit Court, District of Columbia. May Term, 1826.

REPLEVIN — RETORNO BOND — RETURN OF PROPERTY.

If goods be taken in execution and replevied by a third person, the court, upon the return of

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

the writ of replevin, will order a return of the property upon the usual retorno-habendo bond.

Replevin.

Mr. Morfit, for defendant [Joseph W. Beck], upon the return of the writ, moved for a return of the property. The defendant was a constable, and had levied an execution on a hackney coach and horses, in possession, and as the property, of Michael Murray. His brother Thomas (the plaintiff,) sued out this writ of replevin, claiming title to the property under a bill of sale from Michael, which was, in fact, executed three days after the fi. fa. came to the hands of the defendant, but was antedated fifteen days, with the confessed intention to avoid this execution and to secure a debt due from Michael to Thomas.

THE COURT ordered a return of the property upon the usual retorno-habendo bond.

MORSELL, Circuit Judge, contra, being of opinion that the Maryland act of 1785, c. 80, § 14, did not apply, nor authorize a return in such a case, where an officer, acting under an execution, is defendant in replevin. Ideo quaere.

MURRAY (COX v.). See Case No. 3,304.

Case No. 9,958.

MURRAY v. DONNELLY et al.

[3 Leg. Int. 41.] [1]

District Court, E. D. Pennsylvania. Aug. 7, 1846.

PRACTICE IN ADMIRALTY—LIBEL IN PERSONAM FOR PERSONAL INJURIES—DOUBTFUL MERITS.

[The court will not take jurisdiction of a libel in personam for assault committed against a mariner by the officers of the vessel, if the case is of doubtful merits, and must be established by unquestionable proofs, but will remit libelant to his remedy at common law.].

[Libel in personam by John Murray, a mariner, against Donnelly, master, and Randall, mate, of the brig Rebecca, for assault.]

KANE, District Judge. I have considered this case, and have come to the determination to dismiss the libel. I am not satisfied with the evidence. It is, at best, doubtful, if not contradictory. I take the occasion to say to the gentlemen of the bar, and through them to those whom it may concern more directly, that I am strongly disinclined to favor proceedings like the present. The admiralty jurisdiction of this court, summary and potential as it is, in cases of personal wrong on the high seas, will be exercised impressively whenever a clear case shall be made out in evidence. But the case must not be one of doubtful merits, and it must be established by unquestionable proof. There must be no mutinous provocation on the part of the libelant, no apparent combination among the witnesses, nothing from which the mind can without violence infer an attempt to prostitute judicial forms to purposes of wrong. When the case is made doubtful by the character of the witnesses or the conflict of their testimony, there is safety in the intervention of a jury; and, where the primary investigation of it by the proctor gives him reason to anticipate such a state of things, he will wisely consult the interests of his client by referring him to the courts of common law.

[1] [Reprinted by permission.]

Case No. 9,959.

MURRAY v. DOWLING.

[1 Cranch. C. C. 151.] [1]

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

WITNESS — PRIVILEGED COMMUNICATIONS — ATTORNEY.

An attorney at law cannot be compelled to disclose any fact the knowledge of which has been communicated to him by his client.

Replevin. Avowry for rent-arrear—plea in bar, no rent-arrear—general replication and issue.

Mr. Peacock requested a postponement of the trial on account of the absence of the person who had possession of the original lease.

Mr. Hewitt, for the plaintiff, pressed the trial.

Mr. Peacock waived his application for a postponement, and offered ready.

On the trial Mr. Peacock being sworn as a witness, Mr. Hewitt asked him whether there was a lease in writing. Mr. Peacock stated that his knowledge upon that subject was derived from his client, in his capacity as counsel, and prayed the opinion of the court whether he was bound to answer.

THE COURT was of opinion he ought not to be compelled to answer, and sustained the objection.

Case No. 9,960.

MURRAY v. DULANY.

[3 Cranch, C. C. 343.] [1]

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

WITNESS—MULATTO—PROOF OF FREEDOM.

In assault and battery, the plaintiff, being a mulatto, cannot, at the trial upon the general issue, be compelled to prove his freedom.

Assault and battery. The plaintiff [George Murray] was a mulatto.

Mr. Wise, for the defendant [Henry R. Dulany], contended that the plaintiff should prove his freedom.

But THE COURT (MORSELL, Circuit Judge, absent) said, that the defendant had waived the objection to the person of the plaintiff by pleading the general issue.

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

MURRAY (DUSTIN v.). See Case No. 4,201.
MURRAY (FORBES v.). See Case No. 4,928.
MURRAY (GALLAGHER v.). See Case No. 5,193.
MURRAY (HILL v.). See Case No. 6,495.

Case No. 9,961.

MURRAY et al. v. INSURANCE CO. OF PENNSYLVANIA.

[2 Wash. C. C. 186.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

MARINE INSURANCE — SECOND POLICY — PARTIAL LOSS—ABANDONMENT.

1. The plaintiffs effected insurance in New-York, on the Hope, from Gibraltar to New-York, to the amount of four thousand dollars, valuing her at that sum; and they afterwards effected insurance on her with the defendants, to the amount of four thousand dollars, valuing her at six thousand dollars, without notice to the defendants of the prior insurance. A partial loss occurred, and the plaintiffs claimed to charge a partial loss, upon the whole amount insured by the defendants in the second policy.

2. The defendants are liable for as much of the agreed value of the Hope, as is not covered by the prior insurance, being to the extent of two thousand dollars.

[Cited in Ryder v. Phoenix Ins. Co., 98 Mass. 192.]

3. As the plaintiffs claim only a partial loss, the defendants are not entitled to an abandonment.

4. It is not the incapacity of the assured to abandon, or his failure to do so, which can defeat his right to a recovery, unless he claims for a total loss.

5. It was not necessary to give notice of the first insurance to the defendants.

6. In case of a total loss, when two insurances have been made, the assured may abandon to the second underwriters, and take from them so much as the second policy covers.

This was a case stated for the opinion of the court. The plaintiffs [Murray and Mumford], on the 21st of October, 1803, effected insurance on the ship Hope, from Gottenburgh, to New-York, in the office of the New-York Insurance Company, to the amount of four thousand dollars, valuing her at that sum. On the 20th of December, in the same year, they effected insurance on the same ship and voyage, to the amount of four thousand dollars, in the office of the defendants, valuing her at six thousand dollars. But, at the time of effecting this last policy, the defendants had no notice of the insurance made at New-York. The real value of the ship, when she sailed from New-York, exceeded six thousand dollars. A partial loss, by one of the perils insured against, took place; and the question for the opinion of the court was, whether the defendants are liable, on the last mentioned policy, for the amount reported by the referees, as per report filed; or whether the said last mentioned policy is void, by reason of the prior insurance? The referees reported the sum of —— thousand dollars to be uncovered by the first policy. Both the policies contain the usual printed clause, "that if the assured shall have made any other insurance upon the premises aforesaid, prior in date to this policy, then the said company shall be answerable, only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby insured; and the said company to return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from."

Rawle and Lewis, for defendants, contended, that the first policy being valued, the one in question having been effected without notice of the first, is void; because, in case of loss, the insured had deprived himself of the power of ceding any part of the property saved, to the defendants; the first underwriters being entitled, upon abandonment, to the whole. They relied upon the case of Yard's Assignees v. Murgatroyd [4 Yeates, 161], in the supreme court of Pennsylvania; and the case of M'Kim v. Phoenix Ins. Co. [Case No. 8,862], in this court. Also, that the plaintiff was bound by the valuation of the first policy.

Hallowel and Hare, for plaintiffs, argued, that the first policy created no estoppel, as to the value of the property, except as between the parties to that policy. 1 Marsh. Ins. 200; Emerigon, 275; 1 Johns. 385. That the cases cited on the other side do not apply; because, in those, the question was not whether the plaintiff could recover any thing upon the second policy, but how much he was entitled to: that, although the plaintiffs might have defeated their right to recover in this action, if they had abandoned to the first underwriters, yet as they do not go for a total loss, and have not abandoned, the argument cannot affect them.

WASHINGTON, Circuit Justice. The parties to this suit have agreed, by the policy on which the action is founded, that the property insured was worth six thousand dollars; and the defendants bound themselves to the extent of four thousand dollars, the sum subscribed to cover so much of the agreed value, as had not been covered by any prior assurance. It turns out, that four thousand dollars of that value had been previously insured in New-York. As to that sum, therefore, the defendants are not liable; but they would have been liable to that amount, had the agreed value of the property been eight thousand dollars; because so much of the value was uncovered by any prior policy. But, as in the present case, only two thousand dollars of the value was uninsured when the last policy was effected, the defendants cannot be called upon for a sum exceeding that so left uncovered. This is the plain im-

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

port of the contract between these parties; and why should not the defendants comply with it? The reasons assigned are, that the first policy being valued, the insured, in case of a total loss, must have abandoned the whole property saved, to the first underwriters, and were thereby incapacitated to cede any thing to the defendants; without doing which, they could not demand a total loss from the defendants; and that the omission to communicate to the defendants the existence of the first policy, is such a concealment as renders this policy void in its inception. In answer to these objections, it is sufficient to say, that the plaintiffs do not claim for a total loss; and in point of fact, if this were material, they have not abandoned to the New-York Company. Claiming only for a partial loss from these defendants, they are not entitled to an abandonment. It is not the incapacity or the failure to abandon, which can defeat the right of the insured to recover, unless he goes for a total loss. But if the law were otherwise, still the insured is not incapacitated to abandon to the second underwriter, until he has deprived himself of the power of doing so, by having previously abandoned to some other underwriter. It was correctly observed, by one of the plaintiffs' counsel, that he might, if he chose, and sometimes it might be his interest, abandon to the underwriters on the second policy, and take from them so much as such policy, from the terms of it, covered. It follows from these principles, that whether there was or was not a prior policy, was a circumstance of no consequence to the underwriters on the second, except as to the amount for which the latter, in case of loss, might be liable; and, therefore, notice of such prior policy to them, was unnecessary and idle. Besides, the very terms "in case the assured shall have made any prior assurance" imply, that whether he has made such or not, is a fact unknown to the underwriter on the second policy. The case of M'Kim v. Phoenix Ins. Co. [supra] is, so far as it resembles the present case, against the defendants. In that case, the first policy was underwritten by the Philadelphia Insurance Company, to the amount of twelve thousand dollars, and was clearly open. The Phoenix Company afterwards underwrote fifteen thousand dollars, on the return cargo of coffee, valuing the same at twenty-two cents per pound; and the question before the court was, whether the plaintiff could recover any thing upon the latter policy; and if any thing, how much? The court decided, that the first policy covered as much of the coffee, as twelve thousand dollars would absorb at prime cost, and charges, instead of the value fixed on that article in the second policy; which, of course, would leave to be covered by the second policy, as much less of the cargo, as the difference between the prime cost and charges, at twenty-two cents per pound, would amount to. For so much of the cargo, the Phoenix Company was held to be answerable. The court also decided, that the subsequent agreement of the Philadelphia Company to waive all their right to the property, which might be saved, could not change the nature of the contract entered into by the plaintiff with the Phoenix Company, because, at the moment the latter was made, no more of the cargo was insured than that which the first policy left uncovered, and was void, as to so much as was so covered. If so, the subsequent agreement with the Philadelphia Company was, in relation to the Phoenix Company, res inter alios acta, and could not affect the rights of the Phoenix Company. The notice spoken of, in that case, was not in relation to the existence of a prior policy, but the nature and extent of it. The case of Yard's Assignees v. Murgatroyd, is very imperfectly stated; but it appears, so far as we understand it, to resemble this as little as the one just noticed. The opinion of the court is, that the plaintiffs are entitled to recover the sum reported by the referees.

Case No. 9,962.

MURRAY et al. v. LAZARUS et al.

[1 Paine, 572.] [1]

Circuit Court, S. D. New York. Oct. Term, 1826.

SHIPPING — ADVANCES IN FOREIGN PORT — HYPOTHECATION—TAKING DRAFT—EQUITABLE ASSIGNMENT.

1. The master may hypothecate vessel and freight, in a foreign port, for advances necessary for repairing and provisioning the vessel, if such advances cannot be procured on the credit of the owner.

2. Whether, by the maritime law, the contracts of the master, under such circumstances, for necessaries, create a lien without an express hypothecation? Quere.

3. But if they were admitted to have such effect, an express contract for payment would be a waiver of the implied lien. As where a vessel bound from New-Orleans to New-York, put into Wilmington in a damaged state, where the master, having no other means, obtained advances from the libellants for the necessary repairs, and gave them a draft for the amount on his consignees, which was afterwards protested for nonacceptance. On a libel against the freight, in the hands of the consignees, *held*, that the taking of the draft was a waiver of the lien if any existed.

[Cited in The Amstel, Case No. 339; Phelps v. The Camilla, Id. 11,073; Leland v. The Medora, Id. 8,237; Marshall v. Bazin, Id. 9,125.]

[Cited in Harned v. Churchman, 4 La. Ann. 310.]

4. The draft was expressed to be "for value received in disbursements, and repairs of the brig Hannah," with directions to charge the same to her account, and signed by the drawer as master: *Held*, that the draft was not an hypothecation of the freight, as it wanted all the requisites, such as an express pledge, maritime interest, risk of the lender, of an instrument of hypothecation.

5. Nor has such draft the effect of an equitable assignment of the freight, as a draft on a specific fund.

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

[6. Cited in The William & Emmeline, Case No. 17,687, to the point that in the adjudication of maritime questions United States courts consider the states foreign in relation to each other.]

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

This was an appeal from a decree of the district court of the Southern district of New-York, establishing a lien on freight and general average, for necessary repairs and supplies for the vessel, furnished in a foreign port. The libel stated, that the brig Hannah, Thomas Hillyer, master, of Eastport, in Maine, owned by Jonathan Bartlett, of that place, sailed from New-Orleans for New-York, on the 4th of March, 1826, consigned to John B. Murray & Son, of New-York, having on board a cargo consigned to different merchants in New-York: That she was obliged, on account of damages occurring on her passage in her spars and rigging, to put into Wilmington, North Carolina, in distress: That the master or owners had no funds, nor correspondents at Wilmington, and the vessel requiring repairs and provisions for the voyage, the libellants [Lazarus & Whitmarsh], at the request of the master, expended on her, and to enable her to prosecute her voyage, 536 dollars 30 cents, whereby she was enabled to complete her voyage, and arrive at New-York. That the libellants, as a voucher for their expenditures, and as a mere mode of obtaining payment, took from the master a draft upon the said John B. Murray & Son, the consignees of the vessel, and agents of the owner, for payment to them, or their order, of the amount due them, which payment was expected and intended to be made out of the freight of the vessel, and the contributions for a general average on account of the said damages. That John B. Murray & Son, on the arrival of the vessel at New-York, exacted from the consignees of the cargo an obligation for the payment of their respective shares of the general average which they still held, and claimed or had received the payment of the freight. The libel also stated, that payment of the draft was refused on presentment; that the master was unable to pay the debt, and that neither he nor the owner could be arrested on process; that the vessel had been transferred to Israel Foot, who had not yet paid the whole price, and that all the parties had received notice of the libellants' claim. Process of attachment was prayed against the monies and credits belonging to the master or owner, in the hands of any of the parties.

The answer of John B. Murray & Son set forth the following facts as matters of defence:—That the libellants, while the vessel was at Wilmington, wrote to them, informing them that she required repairs, and desiring to know if the master's bill on them for 300 or 400 dollars, for advances to him for that object, would be accepted: That they replied, through their agent, that it would not be accepted; which reply, they believed, was duly received by the libellants, who, however, made the advances and permitted the brig to depart without waiting for it: That John B. Murray & Son had long done the business of the said owner, Bartlett, and that a balance of 17,000 dollars was now due them from him: That they had received nothing on account of the general average, and only 579 dollars 37 cents of the freight, of which they had paid 122 dollars 38 cents for expenses of the vessel before notice of the libellants' claim, and 337 dollars 32 cents to the master before notice of the attachment, and that a balance of 108 dollars 19 cents, after deducting their commissions, remained in their hands. The balance of freight, in their hands, they insisted on retaining for their general balance against Bartlett.

The bill of exchange drawn in favour of the libellants, as mentioned in the libel, was as follows:—"Wilmington, 25th April, 1826. Exch. $531.55 cts. Five days after sight of this first of exchange, (second unpaid,) pay to the order of Lazarus & Whitmarsh, five hundred and thirty-one dollars, fifty-five cents, for value received in disbursements and repairs of brig Hannah, and charge the same to her account. Your obedient, Thomas Hellyer, master of brig Hannah. Messrs. John B. Murray & Son, New-York." The consignees of the cargo not having appeared, their default was entered.

The court decreed that the libellants were entitled to a specific lien on the contributions for general average; and to such lien on the freight received by John B. Murray & Son, for the amount of said bill of exchange; and that the general averages, and the freight after deducting therefrom 122 dollars 38 cents, being expenses paid at New-York, incurred after the arrival of the vessel, and as payment before notice of the libellants' claim, should be paid into court to satisfy the demand of the libellants. From this decree John B. Murray & Son appealed. The consignees of the cargo submitted, and paid the general average into court.

R. Sedgwick, for appellants, insisted: (1) That Wilmington was not a foreign port within the rule of law, as to maritime liens. Abb. Shipp. 136, pt. 2, c. 2, passim. (2) That by taking the bill, the lien, if any had existed, was lost. Yeates v. Groves, 1 Ves. Jr. 280; Roe v. Dawson, 1 Ves. Sr. 331; M'Menomy v. Ferrers, 3 Johns. 71; Stevens v. The Sandwich [Case No. 13,409]; Mandeville v. Welsh, 5 Wheat. [18 U. S.] 277. (3) That by the payment over before the attachment was laid, the defendants were protected; and that they had a right to retain the balance on their general account with the owner.

D. Lord, for respondents, contended: (1) That by the maritime law, the claim of the libellants formed a lien on the vessel and her freight. The Jerusalem [Case No. 7,294]; Watkinson v. Bernadiston, 2 P. Wms. 367; Hus-

sey v. Christie, 13 Ves. 599; Ex parte Shank, 1 Atk. 234; The Jacob, 4 C. Rob. Adm. (Am. Ed.) 245. (2) That the bill in question was an instrument, on its face importing payment to be made out of the earnings of the vessel, and was therefore to be considered either an assignment or hypothecation of the freight. Ex parte Halkett, 3 Ves. & B. 135; Peyton v. Hallett, 1 Caines, 364; The Rebecca, 5 C. Rob. Adm. 102, 105.

THOMPSON, Circuit Justice. The only inquiry arising upon the appeal in this case, is, whether the respondents have a specific lien upon the freight monies, (received by the appellants.) for the advances made by them for the repairs of the brig Hannah, at Wilmington in North Carolina. That these expenses were properly and necessarily incurred, is not denied; nor can the authority of the master, to hypothecate the freight as well as the vessel for the payment of such expenses, be questioned. He is the agent of the owners, and they are bound by all lawful contracts made by him. It is indispensable that he should have a right to contract for all necessary repairs and supplies for the vessel on the voyage, and may, therefore, indirectly bind the owners to the value of the vessel and freight. It is therefore well settled, that he may for like purposes, expressly pledge and hypothecate the vessel and freight, and thereby create a direct lien upon the same for the security of the creditor. [The Aurora] 1 Wheat. [14 U. S.] 102; Abb. 134. But this being a high and important trust reposed in the master, the authority is to be exercised cautiously, and he is not at liberty to subject the ship or freight to this expensive and disadvantageous lien, if such repairs and supplies can be procured upon the credit of the owner independent of such hypothecation.

The case is not open for the inquiry, whether, by the general maritime law, every contract made by the master for repairs and supplies for his ship whilst on a foreign voyage, does not import an hypothecation. When an express contract has been entered into for the payment of such expenses, that must be resorted to, and will be considered a waiver of such implied lien if any existed. And a party who has waived his right in this respect cannot be permitted, at a subsequent time, and under a change of circumstances to reinstate himself in his former condition to the injury of others.

In this case there was a special agreement between the master and the respondents for the payment of their advances. They took from him a bill of exchange, drawn upon the appellants, for the amount of their advances and commissions. If this is to be considered a regular and ordinary bill of exchange, it was a substitution for any lien that might have existed, and must be considered a relinquishment thereof.

But it is contended, that from the language of the bill, taken in connexion with the condition of the parties, it must be considered a lien on the freight in the hands of the appellants. If such is to be the effect and operation of this bill, it must be either as an hypothecation of the freight, or as a draft upon a specific fund amounting to an assignment of such fund.

The bill is drawn by Thomas Hillyer, as master of the brig Hannah, on the appellants, payable to the order of Lawrence & Whitmarsh, five days after sight, for 531 dollars 55 cents, for value received in disbursements and repairs of the brig Hannah, with directions to charge the same to her account. It is these latter words that are said to give to this bill the operation of an hypothecation. In all other respects it is in the usual form of bills of exchange drawn in sets.

I cannot think that the mere circumstance, of the nature of the consideration's being expressed in the bill, with directions to charge it to the account of the brig, should entirely change the character of the instrument. This was a very natural and proper course for the master, especially when drawing upon the consignees of the brig, that they might understand for what the bill was drawn, and that it was not a private transaction of the master.

It is laid down by Abbot in his Treatise on Shipping (page 143) that there is no settled form for the contract of hypothecation, "but that, whatever be the form, the occasion of borrowing, the sum, the premium, the ship, the voyage, the risk to be borne by the lender, and the subjection of the ship itself as security for the payment, all usually are, and properly ought to be expressed." The bill in this case falls very far short of containing some of the most essential requisites; it does not in terms or by implication pledge the freight for the payment; the freight is not even named in the bill. There is no premium mentioned, nor any thing either in the bill or any of the proceedings showing that maritime interest was allowed. And indeed the contrary is shown by the proofs; for the account annexed to the libel contains the items which made up the amount of the bill, in which the usual commissions alone are charged upon the advances. But what is of still more importance, there is nothing showing what, or that any risk was to be borne by the respondents. The owners of the vessel are still liable for these advances.

The libel does not even contain any allegation of an agreement in any manner, that the freight should be pledged for the payment of the advances; it only alleges, that the bill was taken as a voucher for the expenditures, and a mere mode of obtaining payment thereof; which payment was expected and intended to be made out of the freight, &c. This is no allegation of an agreement between the master and the respondents, that it should be so paid; it is nothing more than the mere expectation and intention of the respondents.

And there is no proof, giving the least colour to an inference, that there was any un-

derstanding between the parties that the freight should be pledged for payment of the bill. And the conduct of the respondents shows, that they did not so understand the transaction; for, on the 14th of April, they wrote to the appellants, that the vessel had put into Wilmington in distress, and that the master wanted advances for repairs, and proposed drawing in their favour on the appellants for the amount that would be required, and requesting to know whether such bill would be honoured. If it had been understood that the freight was to be pledged for these advances, no such letter would have been written. The master having the right to hypothecate the freight, there could have been no necessity for writing at all to the appellants; but if any communication was made, it would have been to inform them of the hypothecation, if such had been the fact, and not an inquiry whether they would honour the master's draft. But before the answer of the appellants was received, the repairs were completed, and the brig had sailed, the master giving to the respondents the draft in question, dated the 25th of April. This draft was endorsed and sent on here, and dealt with as an ordinary bill of exchange, by presenting it for acceptance and payment, and on refusal, having it regularly protested. No part of the transaction will, therefore, warrant the conclusion, that any express hypothecation was agreed upon or intended by the parties.

Nor is there any more foundation for considering this bill of exchange as a draft on the freight as a specific fund, and amounting to an equitable assignment thereof. No fund whatever is mentioned or referred to in the draft. And the direction to charge the amount of the bill to account of the brig, cannot certainly have the operation of an assignment of the freight.

In whatever light, therefore, this case is considered, it appears to me that there is no specific lien on the freight for the advances for repairs. But that the respondents took the draft on the appellants as an ordinary bill of exchange, in payment for their advances; and whatever remedy they may have against other parties for the payment thereof, the appellants cannot be made responsible.

The decree of the district court, therefore, as to them, must be reversed with costs.

Case No. 9,963.

MURRAY v. LOVEJOY et al.

[2 Cliff. 191; [1] 26 Law Rep. 423.]

Circuit Court, D. Massachusetts. May Term, 1863.[2]

WRONGFUL ATTACHMENT—ACTION FOR—RATIFICATION OF ACTS OF ATTORNEY—BAR TO ACTION.

1. An attaching creditor, by giving a bond of indemnity to the sheriff, and ordering him to sell the attached property, thereby ratifies the act of his attorney in directing such attachment, and becomes liable as a trespasser to the owner of the property so attached, if the same is not the property of the debtor; and if such creditor is notified of a suit pending against the sheriff for such property, and appears and assumes the defence of the suit, the judgment rendered therein is conclusive in another suit against him for the same trespass.

[Cited in The Kalorama, 10 Wall. (77 U. S.) 218.]

[Cited in Dempsey v. Chambers, 154 Mass. 334, 28 N. E. 280.]

2. Judgment against the sheriff without satisfaction, is not a bar to a subsequent suit against the attaching creditor.

[Cited in Lightner v. Brooks, Case No. 8,344; Phoenix Ins. Co. v. The Atlas, 93 U. S. 315; Sessions v. Johnson, 95 U. S. 349; Barnes v. Viall, 6 Fed. 671.]

[Cited in Knight v. Nelson, 117 Mass. 460; Elliott v. Hayden, 104 Mass. 181.]

3. Partial satisfaction by the sheriff of the judgment against him, is not an obstacle to a subsequent suit against the attaching creditor, but will go in reduction of the damages.

[Cited in New England Mut. Marine Ins. Co. v. Dunham, Case No. 10,155.]

This was an action of trespass, and the case came before court upon an agreed statement of facts.

Agreed Statement of Facts.

[3] [This is an action of trespass. The writ bears date on the first day of October, A. D. eighteen hundred and sixty. And the writ and declaration are made a part of the case. The plaintiff [Edward D. Murray] is a citizen of Beloit, in the state of Wisconsin, and the defendants are citizens of Boston, Massachusetts. The defendants in this suit, William R. Lovejoy & Co., on the sixteenth day of May, A. D. eighteen hundred and fifty-seven, in a suit wherein they were plaintiffs, and one O. H. Pratt was defendant, in the district court of Dubuque county, Iowa, made an attachment in Dubuque of certain personal property, as the property of said Pratt, for which the plaintiff in this suit now sues. M. M. Hayden was the sheriff who made the attachment. Chapline and Dillon were the attorneys of said William R. Lovejoy & Co., in that suit, and gave a bond, a copy of which is hereto annexed, and which the defendants ratified. The said William R. Lovejoy & Co. recovered judgment against said Pratt, in said suit, and the property attached was sold by said Hayden upon said William R. Lovejoy & Co.'s process, by the direction of their attorneys. The plaintiff in this suit claiming said property, on the thirtieth day of May, in the year eighteen hundred and fifty-seven, sued said Hayden in the district court for said county of Dubuque for the same trespass in so attaching said property that he now sues these defendants for, and recovered, on a verdict of the jury, judgment against said Hayden in that action, on the twentieth day of October, A. D. eighteen hundred and fifty-nine, for six thousand two hundred and thirty-three dollars and three cents damages, and costs of suit, taxed at seventy-seven dollars and fifty-five cents, which judgment has never been reversed, and is still in full force. And the said Hayden satisfied said judgment in part, to wit, for the sum of $830 out of the proceeds of the attached property before the bringing of this suit against the defendants. Either party may refer to a certified copy of said judgment against said Hayden

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

[2] [Affirmed in 3 Wall. (70 U. S.) 1.]

[3] [From 26 Law Rep. 423.]

as a part of this case. The said Hayden notified said William R. Lovejoy & Co.'s said attorneys, Chapline and Dillon, to defend said suit so brought against said Hayden, and said William R. Lovejoy & Co. employed and paid said Chapline and Dillon to defend the same, and they did defend it, and had the exclusive control of the defence of said suit, being assisted therein by Benjamin M. Samuels, Esq., who was employed by William R. Lovejoy & Co., by their said attorneys, Chapline and Dillon, and who was paid by William R. Lovejoy & Co., and said Hayden paid him also $100 out of the proceeds of the attached property. On the twenty-eighth day of April, A. D. 1860, said William R. Lovejoy & Co. paid to said Hayden $1,000, and said Hayden delivered up said bond to them, and it is now in their possession, the plaintiff not admitting that said bond was rightly delivered up. Either party may refer to the printed laws of Iowa. If the court are of the opinion that the plaintiff cannot maintain this action against the defendants by reason of having recovered judgment against the sheriff, Hayden, and by reason of having received part satisfaction of him, judgment is to be entered for the defendants, otherwise the case is to stand for trial before the jury, unless the court shall be of opinion that the defendants are estopped upon the foregoing facts, by the judgment in said suit against the said Hayden, from making further defence in this action, in which case the court are to enter such judgment as shall be proper. Either party may prosecute a writ of error to the supreme court of the United States.

[Brooks and Ball, Plaintiff's Attorneys.
[Hutchins and Wheeler, Defendants' Attorneys.

[Know all men by these presents, that we the undersigned, William R. Lovejoy & Co., of New York, C. J. Cummings, and B. W. Balch, of the city and county of Dubuque, Iowa, are held, and firmly bound unto M. M. Hayden, sheriff of the county of Dubuque, state of Iowa, in the penal sum of nine thousand dollars, well and truly to be paid.

[Dated this 16th day of May, A. D. 1857.

[The condition of this obligation is such, that whereas the said Hayden, as sheriff of Dubuque county aforesaid, has attached and taken possession of certain dry goods and merchandise more particularly described in an inventory hereto annexed, and marked "Exhibit A," at the request of William R. Lovejoy & Co., under and by virtue of a writ of attachment issued out of the office of the clerk of the district court of Dubuque county, aforesaid, in the cause of the said William R. Lovejoy & Co. v. O. H. Pratt, now pending in said court. Now, therefore, if the above bound William R. Lovejoy & Co. shall and will pay all damages which the said Hayden may sustain, or which may be recovered against him by reason of his attaching said property as aforesaid, and shall in all respects save the said Hayden harmless in the premises, then this obligation to be void, otherwise in full force and effect in law.

[Wm. R. Lovejoy & Co., by Chapline and Dillon, Their Attorneys.
[C. J. Cummings,
[B. W. Balch.

[Received, Dubuque, Iowa, April 28, 1860, from A. H. Dillon, Jr., for William R. Lovejoy & Co., one thousand dollars, balance in full of the above bond, all damages which I have, or may sustain, or which may have been, or may be recovered against me by reason of my attaching of property therein set forth.

[M. M. Hayden, Ex-Sheriff of Dubuque Co., Iowa.] [3]

[3] [From 26 Law Rep. 423.]

Brooks & Bell, for plaintiff.

Torts are joint as well as several, and a party can maintain an action against all the tort feasors or against each one separately. Baker v. Lovett, 6 Mass. 80; Smith v. Rines [Case No. 13,100]. If this be true, all the legal consequences must follow, and the injured party may have the right to pursue each tort feasor to judgment and execution.

A judgment against one tort feasor is no bar to a suit against another, unless full satisfaction of the judgment has been obtained. Morgan v. Chester, 4 Conn. 387; Hyde v. Noble, 13 N. H. 501; Hepburn v. Sewell, 5 Har. & J. 211; Calkins v. Allerton, 3 Barb. 173; Curtis v. Groat, 6 Johns. 168; 1 Greenl. Ev. § 533; 2 Kent, Comm. 388, 389.

All the case finds is, that judgment was obtained by the plaintiff against the attaching officer, but no execution issued, and the officer paid a small sum on the judgment. Simonds v. Center, 6 Mass. 18; Ward v. Johnson, 13 Mass. 150; Drake v. Mitchell, 3 East, 258.

A verdict and judgment against the attaching officer are conclusive upon the defendants; the sheriff was their agent. He notified them to defend the suit against them; they were the real parties in interest. Privies as well as parties are concluded by a judgment. 1 Greenl. Ev. § 523; Smith v. Kernochen, 7 How. [48 U. S.] 209–216; Glass v. Nichols, 35 Me. 328; Castle v. Noyes, 14 N. Y. 329; Eaton v. Cooper, 29 Vt. 444; Peterson v. Lothrop, 34 Pa. St. 228; Hancock v. Welsh, 1 Starkie, 347; Farnsworth v. Arnold, 3 Sneed, 252; Griffin v. Reynold, 17 How. [58 U. S.] 609; Carpenter v. Pier, 30 Vt. 88; State v. Colerick, 3 Ohio, 487; Kent v. Hudson R. R. Co., 22 Barb. 278; Bates v. Stanton, 1 Duer, 79; Calhoun v. Dunning, 4 Dall. [4 U. S.] 120; Atkinson v. Purdy [Case No. 616]; Sevey v. Chick, 13 Me. 141; Lanfear v. Sumner, 17 Mass. 112; Kip v. Brigham, 6 Johns. 158; Stevens v. Hughes, 31 Pa. St. 381.

Henry C. Hutchins, for defendants.

The recovery of judgment by the plaintiff in Iowa against the officer who served defendants' process, for the same trespass for which he now sues the defendants, bars the plaintiff from maintaining this action against the defendants. White v. Philbrick, 5 Me. 147; Campbell v. Phelps, 1 Pick. 62; Alexander v. Taylor, 4 Denio, 302; Fox v. Northern Liberties, 3 Watts & S. 103; Davis v. Scott, 1 Blackf. 169; Allen v. Wheatley, 3 Blackf. 332; U. S. v. Cushman [Case No. 14,908]; Trafton v. U. S. [Id. 14,135]; 2 Kent, Comm. 389; Ward v. Johnson, 13 Mass. 148; 1 Greenl. Ev. (3d Ed.) § 533, note 3; Add. Torts, 750, 753; 2 Hil. Torts, 329, 330; Buckland v. Johnson, 15 C. B. 161; King v. Hoare, 13 Mees. & W. 504, 506; Lechmere v. Fletcher, 1 Cromp. & M. 623; Bird v. Randall, 3 Burrows, 1345.

In White v. Philbrick, it was held that recovery of judgment and issue of execution would bar a second suit.

But if the court shall be of opinion that a party may sue and recover separate judgments against co-trespassers, then we say that the recovery of judgment against the officer and the receipt of partial satisfaction of that judgment by the plaintiff, will operate as a bar to this suit. Thomas v. Rumsey, 6 Johns. 26; Livingston v. Bishop, 1 Johns. 290; Page v. Freeman, 19 Mo. 421; Knott v. Cunningham, 2 Sneed, 204; Fox v. Northern Liberties, 3 Watts & S. 103.

To accept partial satisfaction of one judgment is an election, and after that he is not at liberty to commence a new suit for the original trespass. The original trespass does not remain as it was, it has been partially satisfied. The original state of things has been changed, and by the act of the plaintiff. If the party may take a small part, why not take the whole?

How can the court proceed now to try the

original trespass when it has been partially settled for? How would the court proceed at the trial? What becomes of the $800 payment? Must it not be credited in some way, and if so, how? The plaintiff is seeking to recover full damages for a wrong partially redeemed, and if permitted will lead to double satisfaction. Fox v. Northern Liberties, 3 Watts & S. 103.

The fact that payment was made by the sheriff from the proceeds of the goods sold can make no difference as to its effect. It was received as a payment and must operate as a payment. The money used had no ear-mark, and the payment cannot be recalled, and the money was not paid with the assent or knowledge of the defendant.

The defendants are not estopped to defend this suit because the plaintiff recovered judgment against the officer, or because the defendants took part in the defence. If the officer had sued defendants upon their bond of indemnity against that suit, and upon notice or otherwise the defendants had defended the suit, then, perhaps, the defendants, as between them and the officer, would have been concluded by the judgment. But that is not the question here. The question is whether one trespasser is concluded from defending a suit against himself because a judgment has been recovered against a co-trespasser.

The defendants were neither parties nor privies to the plaintiff's judgment against the sheriff. Sprague v. Waite, 19 Pick. 455; 1 Greenl. Ev. § 535; Kinnersley v. Orpe, 2 Doug. 517; Alexander v. Taylor, 4 Denio, 302.

[CLIFFORD, Circuit Justice. This is an action of trespass, and the case comes before the court upon an agreed statement of facts. Referring to the agreed statement, it will be seen that the present defendants, on the sixteenth day of May, 1857, in a certain suit, wherein they were plaintiffs, and one O. H. Pratt was defendant, attached certain personal property as the property of the defendant in that suit. According to the agreed statement, the suit was commenced in the district court for the county of Dubuque, in the state of Iowa, and the writ of attachment was served, and the attachment made by the sheriff of that county; but the case shows, that in serving the writ, and in making the attachment, he acted by the directions of the attorneys of the plaintiffs in the suit, and that they, the attorneys, gave him a bond of indemnity, conditioned that the plaintiffs should pay all damages he might sustain by reason of his making the attachment, and stipulating to save him harmless in the premises, and that the plaintiffs ratified their doing in giving the bond. Agreed statements also show, that the plaintiffs in that suit recovered judgment, and that the property so attached was sold under the process of the plaintiffs, and by the directions of their attorneys. Property so attached and sold, was claimed by the plaintiff in this suit, and he, on the thirtieth day of May, 1857, brought an action of trespass against the sheriff, who had thus attached and sold the property. Due notice was given by the sheriff to the attorneys who brought the attachment suit and gave the directions and executed the bond of indemnity, to appear, and defend the trespass suit, and the present defendants employed counsel and defended the suit. Trial was had, and on the twentieth day of October, 1859, judgment was rendered against the sheriff for the sum of six thousand two hundred and thirty-three dollars and three cents damages, and costs of suit, taxed at seventy-seven dollars and fifty-five cents. No execution ever issued upon the judgment, but the case shows that the sheriff satisfied the judgment against him, in part, to wit, for the sum of eight hundred and thirty dollars, out of the proceeds of the attached property. Present defendants employed the counsel to defend that suit, and had the exclusive control of the defence; and the case shows that they had paid all of the counsel fees, except one hundred dollars, which was paid by the sheriff out of the proceeds of the attached property, and it should be remarked, that both of the payments made by the sheriff out of the proceeds of the attached property, were made prior to the commencement of this suit. Mention should also be made of the fact, that, on the twentieth day of April, 1860, the present defendants paid the sheriff one thousand dollars, and that he on the same day surrendered the bond of indemnity to their attorneys; but it should be remarked, in the same connection, that the admission to that effect is accompanied by a denial on the part of the plaintiff in this suit, that the surrender so made was rightful, and also that the bond is now in the possession of the attorneys to whom it was delivered. Writ is dated the first day of October, 1860; and the agreement is, that if the court should be of opinion that the suit cannot be maintained against the defendant, by reason of the former judgment against the sheriff, and by reason of having received part satisfaction of him, then judgment is to be entered for the defendants; otherwise the case is to stand for trial, unless the court shall be of opinion that the defendants, upon the foregoing facts, are estopped from making further defence in this action, in which event the court is to enter such judgment as shall be proper.] [4]

Practical questions, like those presented in this record, ought not now to be the subject of dispute or doubt, but it must be admitted, that in respect to most or all of them, it would not be difficult to present authorities of an entirely contradictory character. Certain general principles, however, which are applicable to the case may be regarded as settled; and among the number is the rule, that the attachment and sale of the property of a third person, under the circumstances disclosed in the agreed statement, is tortious, as against the person whose property is so taken and converted, and renders the sheriff liable to the plaintiff therefor, as a wrongdoer.

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[4] [From 26 Law Rep. 423.]

Doubt cannot be entertained upon the subject, and it is equally clear that the present defendants rendered themselves also liable to the plaintiff as wrongdoers, by subsequently ratifying the directions given by their attorneys, and by approving what they had done, in giving the bond of indemnity. Indemnification itself must be regarded as a ratification of the attachment, and as the cause of the subsequent sale; and the well-settled rule is, that all persons who direct, or request another to commit a trespass, are liable as co-trespassers, if their directions or request are obeyed and followed. Herring v. Hoppock, 15 N. Y. 409; Castle v. Bullard, 23 How. [64 U. S.] 185. Where the attachment is made by the directions of the plaintiff, he is as much liable as the sheriff making it; and after conversion, the injured party may sue both or each one separately, as in other cases of joint and several liability. More than half a century ago, Parsons, C. J., held, in Baker v. Lovett, 6 Mass. 80, that where a trespass had been committed by several persons jointly, the party injured might sue any or all the trespassers, but he could have but one satisfaction for the same injury. Nothing is more clear, said Judge Story, in Smith v. Rines [Case No. 13,100], than the right of the plaintiff to bring an action of trespass, or trespass on the case, against all the wrongdoers, or against any one or more of them at his election. Undoubtedly, the injured party may proceed against all the wrongdoers, jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue any one of them separately; or if he sues one separately, and has judgment, he cannot afterwards sue them all in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy; but it is no bar to a suit for the same trespass against any one or more of the other co-trespassers. Cases may be found, and have been cited at the bar, which assert a different rule, and which decide, that, where separate actions are commenced against several tort feasors for the same act of trespass, the pendency of the first suit may be pleaded in abatement of all the rest; but the doctrine, as was well said by Prentiss, J., in Sanderson v. Caldwell, 2 Aikens, 201, is opposed to the principle, which runs through all the authorities, that a separate trespass attaches to each of the parties individually, and which asserts that the plaintiff may sue all or any of them, or bring separate suits against each, at his election. Heydon's Case, 11 Coke, 5; Mitchell v. Tarbutt, 5 Term R. 649; Thomas v. Rumsey, 6 Johns. 30; Livingston v. Bishop, 1 Johns. 290; Brooke, Abr. "Judgment," Pl. 98; Cocke v. Jennor, Hob. 66; Corbet v. Barnes, W. Jones. 377; Bird v. Randall, 3 Burrows, 1345. Much discussion, says Mr. Greenleaf, has taken place as to the effect of a former recovery, in cases where different actions of tort have successively been brought in regard to the same chattel; as, for example, where an action of trover is brought after a judgment in trespass. Great diversity of opinion, he says, has existed, whether a plaintiff, after having recovered judgment in trespass without satisfaction, is thereby barred from subsequently maintaining trover, against another person for the same goods. Decided cases, asserting the negative, assume that the recovery of the judgment, in trespass, for the full value, has the effect to vest the title to the property in the defendant in that suit; and consequently, that the plaintiff cannot recover of another for that which he himself has ceased to own. Broome v. Wooton, Yel. 67. Other cases decide that the rule of transit in rem judicatam, extends no further than to bar another action for the same cause, against the same party. Of this latter class, the case of Drake v. Mitchell, 3 East, 258, may be regarded as the most important; and Mr. Greenleaf, after referring to it, states that the weight of authority seems in favor of the latter opinion, and the same views are expressed in numerous cases decided by different courts in the United States. Lord Ellenborough held, in the case last named, that a judgment recovered in any form of action, was still but a security for the original cause of action, until it was made productive in satisfaction to the party; and therefore, until then, that it could not operate to change any other collateral, concurrent remedy which the party might have. Attempt was made by a majority of the court in Campbell v. Phelps, 1 Pick. 62, to maintain that there was a distinction between cases of trespass or trover for goods, and trespass for a personal wrong or injury done to property; but Parker, C. J., who gave the opinion, was compelled to admit, that according to the modern decisions, nothing short of satisfaction of a judgment against one trespasser, for any tortious act, would bar an action against his associates; and Wilde, J., utterly denied that there was any such distinction, and held that a recovery against one person, without satisfaction, was no bar to an action against another, for the same cause, and that there was no difference in this respect between joint contracts and joint torts. Adverting to the maxim solutio pretii emptionis loco habetur, Chancellor Kent says (2 Comm., 10th Ed., 388), that "the books either do not agree, or do not speak with precision on the point, whether the transfer takes place, in contemplation of law upon the judgment merely, or whether the amount of the judgment must be first actually paid or recovered by execution." Three theories, it will be seen, are stated by that author. First, that the mere recovery of judgment transfers the title, and he refers to Broome v. Wooton, Yel. 67, as an example of the cases where that doctrine is held. Secondly, that the recovery of judgment merely, does not have that effect; but if ex-

ecution follow, the two things combined transfer the property. The example given, is that of a case in Jenkins; but the language of the opinion is, that "by the recovery and execution done thereon," the property of the chattel is vested in the trespasser. Jenk. Cent. 189. Language to the same effect is employed in Shep. Touch. tit. "Gift," where it is said, that if one recovers damages of a trespasser for taking his goods, the law gives the trespasser the property of the goods because he has paid for them; but he has not paid for them, unless something has been done besides the issuing of the execution, which is only an incident of the judgment, an act of the clerk. Two cases, however, are cited, which support that view of the law, but neither of them seems to rest upon any substantial basis. Curtis v. Groat, 6 Johns. 168; White v. Philbrick, 5 Me. 147. Thirdly, the reference is to the rule of the civil law, that when the wrongful possessor or movable property, who is not in a condition to restore it, has been condemned in damages, and has paid the same to the original proprietor, he becomes possessed of the title; and the learned author refers to Drake v. Mitchell, 3 East, 251, as an example of the decisions of the common-law courts, where that view of the law is maintained. Commenting upon that case, he concludes by saying, this is the more reasonable, if not the most authoritative conclusion on the question. Some diversity of judicial decision still exists, even in this country; but the great weight of authority in the United States, is on the side of the theory, that nothing short of satisfaction transfers the title, and in that view of the question I entirely concur. Morgan v. Chester, 4 Conn. 387; Hyde v. Noble, 13 N. H. 501; Sharp v. Gray, 5 B. Mon. 4; Hepburn v. Sewell, 5 Har. & J. 212; Barb. v. Fish [8 Blackf. (Fed.) 481]; Calkins v. Allerton, 3 Barb. 173; Jones v. McNeil, 2 Bailey, 474; Sheehy v. Mandeville, 6 Cran. [10 U. S.] 253; Cooper v. Shepherd, 3 C. B. 266; Knott v. Cunningham, 2 Sneed, 204. Recovery of judgment merely, therefore, against one of the several tort feasors, is no bar to a suit against another for the same trespass; and it makes no difference whether the plaintiff did or did not take out execution on the first judgment, unless it also be shown that he received satisfaction. Where no satisfaction has been received, the law is clear, to the effect as stated; but the defendants contend, in the second place, that the recovery of judgment against the sheriff, and the receipt of partial satisfaction of the judgment from him, operate as a complete bar, upon the ground that the receipt of partial satisfaction is an election, on the part of the plaintiff, to seek his redress against that party. But the reason assigned for the conclusion, if it be a good one, proves too much, because the plaintiff, when he brought the first suit, elected to seek redress against the party prosecuted, and that election, if such it be regarded, was confirmed by his act, in prosecuting the suit to judgment. Subsequent acts, however, such as the taking out execution or the receipt of part satisfaction, add nothing to the force of the argument that the institution of the suit, and the prosecution of the same to judgment, show that the plaintiff had elected to seek redress against that party. A recovery of judgment against one is an election, undoubtedly, to regard the remedy as several, and such an election is final and conclusive. But the judgment is no bar to another suit against another of the co-trespassers, as has already appeared, unless the judgment has been satisfied. Full satisfaction by one tort feasor, whether before or after judgment, is a good defence to a suit against any one of the others; but part satisfaction before suit would clearly be no defence, and it is not perceived that part satisfaction after judgment can have any other or greater effect. Suppose the part payment made by the judgment debtor had been made by him before he was sued; in that case it clearly would not have afforded him a full defence to the action, and if not, it is difficult to see how it can be any more effectual as a defence for a co-trespasser, because paid after judgment. Looking at the question as a question of principle, I am of the opinion that there is no middle ground on which a court of justice can safely stand in regard to it. When viewed in that light, it must either be held that the recovery of the judgment is a bar, or that it is no bar; and if the latter, as I hold, then nothing short of full satisfaction is an answer to a suit against another of the co-trespassers. Question is also made, whether the verdict and judgment against the sheriff are or are not conclusive upon the defendants. The affirmative of the proposition is assumed by the plaintiff, and the defendants maintain the negative. The facts of the case have already been stated, and need not be repeated, except to say that the case shows that the defendants were jointly liable for the same trespass; that they were duly notified of the pendency of the suit against the sheriff, and voluntarily appeared and conducted and controlled the defence.

Justice requires, says Mr. Greenleaf (1 Greenl. Ev. § 522), that every cause be once fairly and impartially tried; but the public tranquillity demands, that having been once so tried, all litigation of that question between the parties should be closed forever. No man ought, however, to be bound by proceedings to which he was a stranger; but the converse of the rule is also true, which is, that by proceedings to which he is not a stranger, he may well be held bound. Under the term parties, says the same commentator, the law includes all who are directly interested in the subject-matter, and have a right to make defence, adduce testimony, cross-examine witnesses, and control the proceedings, and appeal from the judgment. Courts of justice in general agree that a

judgment of a court of competent jurisdiction is conclusive in a second suit between the same parties or privies on the same question, although the subject-matter may be different, and a fortiori it is so when the subject-matter is the same. Doty v. Brown, 4 Comst. [4 N. Y.] 71; Castle v. Noyes, 14 N. Y. 331. All parties are estopped by the judgment who had a right to appear, control the defence, and appeal from the judgment. The attachment in this case, in legal effect, had been made by the directions of these defendants, and they had given a bond of indemnity to the sheriff, and stipulated to save him harmless. They were, therefore, under a moral as well as legal obligation to defend the suit; and when they were duly notified to make the defence, and appeared and assumed the control of it, in pursuance of such notice, they had the right to adduce testimony and cross-examine the witnesses, and might have appealed from the judgment. Appeal, undoubtedly, must have been taken in the name of the sheriff; but as they had appeared in the case in pursuance of notice, and the control of the defence had been conceded to them, under the stipulation in the bond of indemnity, to save the sheriff harmless, it cannot be doubted that they might have appealed from the judgment. Castle v. Noyes, 14 N. Y. 332. Where the first action was against the agent, who had taken lumber by the direction of the principal, and the case showed that the principal appeared and defended the suit, the court of appeals, in the case last mentioned, held that the parties in the second suit, which was a suit against the principal, who gave the directions, were to be regarded as the same, and that the former judgment was conclusive. Parties appearing and defending under such circumstances are regarded as having the same rights substantially as the party in fact, and as having the same power and authority to use the judgment against the adverse party. Smith v. Kernochen, 7 How. [48 U. S.] 217–219; Calkins v. Allerton, 3 Barb. 173; Glass v. Nichols, 35 Me. 328; Warfield v. Davis, 14 B. Mon. 33; Tarleton v. Johnson, 25 Ala. 314; Eaton v. Cooper, 29 Vt. 444; Peterson v. Lothrop, 34 Pa. St. 228; Farnsworth v. Arnold, 3 Sneed, 252; Train v. Gold, 5 Pick. 387. The stipulation of the bond of indemnity was, that the defendants would pay all damages the sheriff might sustain, or which might be recovered against him by reason of his attaching the property, and, of course, they covenanted for the results or consequences of any suit which might be brought against him on that account; and I am of the opinion that such a covenant so connected them in privity with the proceedings, that the record of the judgment is as conclusive against them as the actual party to the suit. Rapelye v. Prince, 4 Hill, 119; 1 Greenl. Ev. § 523; Carver v. Jackson, 4 Pet [29 U. S.] 86; Case v. Reeve, 14 Johns. 81; Chapin v. Curtis, 23 Conn. 388; Emery v. Fowler, 39 Me. 326. Judgment, therefore, must be for the plaintiff; but the question is also presented, as to what the amount shall be, and the authority is conferred upon the court "to enter such judgment as shall be proper." Attention should be called to the fact that the case is presented upon an agreed statement of facts. The federal courts regard such statements as a part of the record; and hence it is that a writ of error will lie upon an agreed statement of facts. Suydam v. Williamson, 20 How. [61 U. S.] 434; U. S. v. Eliason, 16 Pet. [41 U. S.] 291; Stimpson v. Railroad Co., 10 How. [51 U. S.] 329; Graham v. Bayne, 18 How. [59 U. S.] 60.

Regarding the question in that point of view, that it appears of record in this case that the measure of the injury sustained by the plaintiff was legally ascertained in his suit against the sheriff; that it also appears of record that $830 of that amount has been paid, I am of the opinion that the plaintiff is entitled to recover the same damages as in the suit against the sheriff, deducting the amount received in part satisfaction of that judgment, as set forth and admitted in the agreed statement, but adding to the balance so ascertained a sum in the nature of damages equal to six per cent. interest on account of the delay.

Judgment for plaintiff accordingly.

[Upon a writ of error, the case was taken to the supreme court, where the judgment of this court was affirmed, with costs. 3 Wall. (70 U. S.) 1.]

Case No. 9,964.

MURRAY v. McLANE.

[1 Brunner, Col. Cas. 405;[1] 2 Car. Law Repos. 186; 5 Hall, Law J. 514.]

Circuit Court, D. Delaware. 1815.

MALICIOUS PROSECUTION—PROOF NECESSARY TO MAINTAIN ACTION—MALICE—PROBABLE CAUSE.

1. In an action for malicious prosecution, plaintiff must prove malice, express or implied, and want of probable cause, or the action will fail.

2. The question of probable cause is a mixed question of law and fact; whether the circumstances alleged to show probable cause are true, is a question of fact; whether, if true, they amount to probable cause is a question of law to be decided by the court.

The declaration in this case is drawn with great care, and exhibits a full statement of the plaintiff's case. It contains two counts. The first count charges the defendant with having falsely, maliciously, or without cause, instituted a suit against the plaintiff, demanding heavy bail, whereby he was arrested and imprisoned. The second count charges that the suit was instituted maliciously and without cause, and that excessive bail to the amount of $1,200,000 was demanded in a case where he had no right to demand bail, in consequence of which he was arrested and im-

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

prisoned. This action, in its nature is peculiar and delicate. Formerly, it was used as a remedy for malicious prosecutions only. It was afterwards adopted as a remedy where a civil suit had been maliciously and without cause instituted against the party.

THE COURT has been applied to by the counsel for the defendant to instruct the jury upon the law arising in the case. The jury must have observed that the counsel engaged in this cause have not materially differed as to the proof which the plaintiff must necessarily produce in order to sustain his case. That the original suit was instituted maliciously, and without reasonable or probable cause. The court consider the law upon this subject as settled. This species of action is not favored in law. It is incumbent on the plaintiff to prove that the suit by the defendant was instituted with malice, express or implied, and without probable cause. Without probable cause malice may be implied according to the circumstances of the case; but from the most express malice, want of probable cause cannot be implied. Hence, to sustain this suit, the plaintiff must prove malice, express or implied, that there was a writ without probable cause. Whether malice existed or not, is a matter of fact for the jury to decide, taking into consideration all the circumstances of the case.

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law to be decided by the court. Whether the bail required in this case was excessive or not, depended, in a great measure, upon the law of the state of Delaware, and the practice of the courts under those laws. In Maryland, in an action of this kind, no man could be held to bail for the trifling sum of fifty dollars without an affidavit. In Delaware, I understand the practice is proved to be different, and that a man may be required, without affidavit, to give bail to any amount, according to the value of the thing in contest, in the first instance. He may afterwards be exonerated on application to a judge or justice for a rule on the plaintiff to show cause why he may not be discharged on common bail; and it also appears that the practice is, to require bail in double the amount of the value of the ship in dispute. In the case under consideration, it does not appear to the court that $1,200,000 was more than double the value of the Superior and her cargo. The question of probable cause has been considered as involving the legality or illegality of the seizure, and possession of the Superior by the plaintiff, and by the defendant. Here it is necessary to recapitulate the evidence in the case. The principal facts appear to be these: On the 24th of August, 1812, Joseph Grubb wrote a letter to the collector, informing him that the Superior was in the bay of Delaware, having on board a cargo of goods of the growth, produce, and manufacture of Great Britain, and he states that he gave this information in order that he might receive the proportion of any penalty or forfeiture to which he might be entitled by reason of his giving this information. That Thomas Little boarded the Superior near the Capes of Delaware, by instruction from the principal owners and consignees, and obtained a copy of the manifest to be given to the collector. That on the 25th of August one of the gun boats and the revenue cutter were proceeding down the bay, the gun boat being ahead; at seven o'clock in the morning the Superior was boarded near Reedy Island, by —— Smith, an officer of the gun boat, pursuant to the orders of Commodore Murray, commander of the flotilla, then lying in Delaware Bay, by whom she was ordered to Newcastle. About eleven o'clock of the same day she was boarded by Captain Sawyer of the revenue cutter, who demanded the ship's papers, and they were delivered to him by the master of the vessel. She was ordered by Captain Sawyer to the mouth of Christiana creek. A contest arose between the officer of the gun boat and the officer of the revenue cutter, as to the destination of the vessel, and both remaining on board she ascended up the river to Newcastle where the flotilla was stationed. Previous to her arrival off Newcastle, Samuel Spackman, the owner, declared his intention to the collector to order the Superior to Wilmington, and the collector advised the surveyor at Newcastle, and the captain of the cutter, of this circumstance. At Newcastle orders were given that she should be fastened to the pier, but this was prevented by an officer of the flotilla, who, aided by a number of his men, who were armed, forcibly carried her up the river to Philadelphia, the officer of the revenue cutter continuing on board. In this place it may not be improper to remark that the force used was in the absence of Commodore Murray. If he had been present, in all probability it would not have taken place. Under these circumstances, the collector, consulting the district attorney, was advised to take out a writ of replevin to recover the possession of the vessel, but as she had been carried out of the district the writ could not be served. The attorney then, in the absence of the collector, ordered an action on the case, and directed the writ to be indorsed per bail, to the amount of $1,200,000, double the supposed amount of the vessel and cargo. The writ was served on Commodore Murray, and for want of bail, he was committed to gaol by the marshal. This proceeding is the ground of the present action. It is made by law the duty of the collector of the revenue to board, or cause to be boarded, all vessels arriving from foreign parts, within the limits of the United States, or within four leagues of the coast, if bound to the United States, for the purposes specified in the law, and it

is the duty of the person on board to remain there until the vessel shall arrive at the port or place of destination. Before the war a collision of this sort could not have happened. The authority of the collector was complete and exclusive. How far the existence of war authorized the commander of the armed vessels of the United States to capture merchant vessels, belonging to citizens, which had arrived within the waters and jurisdiction of the United States, for a supposed violation of the non-importation act, is a question on which the opinion of the court is required.

The only question of difficulty is whether the boarding by the officer of the gun boat, in the manner pursued, amounts to a capture as prize of war, exclusive of the boarding by the revenue officer, who demanded and obtained the ship's papers. No authorities having been cited on either side, we must decide the case as it is now before us. There is no legal restraint on the officers of the navy to prevent them boarding a merchant vessel belonging to a citizen in the waters of the United States. Boarding for the purpose of examination is a legal act. Under the circumstances which have been stated, the court is of opinion that after the Superior was boarded by the commander of the revenue cutter, who obtained possession of the ship's papers, he was, in construction of the law, in possession of the vessel, and that she ought to have been delivered up by the officer of the flotilla; and that the carrying her out of the district by force was wrongful on the part of that officer, acting under the authority, as he conceived, of Commodore Murray. It has been contended on the part of the plaintiff, and authorities have been produced to prove, that in time of war all trading with the enemy is unlawful, and that the goods of an ally or even of a citizen found trading with an enemy are lawful prizes of war, and confiscable as such. There can be no doubt that the law is so. If the Superior had been captured on the high seas trading with the enemy, or in violation of the laws of the United States, the vessel and cargo without doubt would have been prize of war. Such, I conceive, was the case of the Sally, condemned by the decision of the United States. I do not recollect particularly the facts in that case, but I have no doubt she was captured on the high seas, because she was captured by a private armed vessel whose right to capture is confined to the high seas. The case of the Nelly referred to in the opinion was a capture on the high seas. The reference, in the opinion, to the fourth, sixth, and fourteenth sections of the act of June 26, 1812 [2 Stat. 759, 761, 763], seems to imply a capture at sea. The words of the sixth section are: "And in case of all captured vessels, goods and effects which shall be brought within the jurisdiction of the United States, the district courts of the United States shall have exclusive cognizance thereof, as in civil causes of admiralty and maritime jurisdiction," etc. In the case of the Sally it was contended by the attorney-general, on the part of the United States, that as soon as she had on board her cargo, with intent that the same should be landed in the United States, they became forfeited, and that the forfeiture was complete and immediately attached, but the court was of a different opinion, and that she was lawful prize; there was no intervening claim in that case on the part of the revenue officer. Seizures of vessels within the waters of the United States, for violation of the non-intercourse act, are considered as properly belonging to the revenue officers. This appears by the instructions of the executive department to have been the opinion of the government; and although the instructions were not received in time by Commodore Murray to prevent this contest, yet this clearly shows the construction put upon the law by the navy department. After seizure by the collector, the vessel and cargo are considered to be at the risk, and in case of loss by the neglect or omission of the collector, he is responsible to the owner. Hence the court is of opinion that, admitting the facts to be truly stated, there was probable cause for the suit, which was the ground of this action. It would be rigorous in the extreme, to say that there was not probable cause for the original suit when the attorney for the district, whom the collector was bound to consult, advised and directed the measure. And if it be admitted that the district attorney was mistaken, it cannot alter the case as it respects probable cause, because if the case was of so doubtful a nature as that eminent counsel was mistaken, it affords a strong presumption that there was probable cause.

THE COURT are therefore of opinion, that there was a probable cause of action, and to the jury the case is now submitted.

After such a decided charge, the jury retired for about ten minutes, when they returned with a verdict in favor of the defendant, Col. McLane.

MURRAY (MAIN v.). See Case No. 8,975.

Case No. 9,965.

MURRAY et al. v. MARSH et al.

[1 Brunner, Col. Cas. 22;[1] 2 Hayw. (N. C.) 290.]

Circuit Court, D. North Carolina. Dec., 1803.

WITNESS—DISCHARGED BANKRUPT—INTEREST AS A DISQUALIFICATION—DEPOSITIONS—RECORDS OF UNITED STATES COURTS—PROOF OF.

1. A bankrupt who indorsed a note before his bankruptcy, and who has obtained his certificate, is a good witness for the indorsee.

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

2. A record of the proceedings against a bankrupt, attested by the clerk of the district court is good evidence, the act of congress not requiring the certificate of the presiding judge in the case of records from United States courts.

[Approved in The Watchman, Case No. 17,251.]

3. If the objection to a witness on account of interest arise from proof made by the objector, the witness cannot discharge himself of the objection by any matter sworn by himself; it must be removed by proof drawn from some other source.

4. Depositions which do not show, either in the caption or body of them, between what parties they were taken cannot be received.

5. If a plaintiff supposing himself ready, press a trial, and it is found on the trial that the testimony he relied on cannot be given in evidence as he expected, and he be nonsuited, the allegation of surprise shall not prevail to set aside the nonsuit.

[This was a proceeding by Murray & Murray against Marsh & Marsh.]

Before MARSHALL, Circuit Justice, and POTTER, District Judge.

PER CURIAM. Loomis and Tillinghast assigned to the plaintiffs the note sued on, which was made by the defendants, and afterwards became bankrupts, and obtained a certificate. And now Loomis is offered as a witness for the plaintiffs. He is a competent witness, for he is by the certificate discharged of all debts provable under the commission, and his indorsement to the plaintiffs rendered him liable to them, so as to make their demand provable against him; secondly, the record of the proceedings against them, attested by the clerk of the district court, without any certificate of the presiding judge, is good evidence; for the act of congress relates to certificates in case of officers of the several states, not to those of the United States; thirdly, if the objection to a witness arises from proof made by the objector, the witness cannot discharge himself of the objection by any matter sworn by himself; it must be removed by proof drawn from some other source; fourthly, depositions, not specifying the parties between whom they are taken, in the caption, nor naming them as parties in the body of the deposition, cannot be received; fifthly, if a plaintiff supposing himself ready, press for trial, and it is found on trial that the testimony he relied on cannot be given in evidence as he expected, and he be nonsuited, the allegation of surprise shall not prevail to set aside the nonsuit.

NOTE. Records of United States courts do not require the judges' certificate; such provisions apply only to certificates of state officers. U. S. v. Wood, 2 Wheeler, Cr. Cas. 326.

Witness Incompetent from Interest.—Interest being proved the witness cannot be examined at all, nor the objection be removed by his oath; the objection must be discharged by other proof. The Watchman [Case No. 17,251], citing case in text.

Depositions, Requisites of.—See Waskern v. Diamond [Case No. 17,248].

Case No. 9,966.

MURRAY v. MASON.

[1 Hayw. & H. 120.] [1]

Circuit Court, District of Columbia. Dec. 26, 1842.

TRIAL—RIGHT TO OPEN AND CLOSE—ONUS PROBANDI—ACTION FOR LIBEL.

The case of Kerr v. Force [Case No. 7,730] reaffirmed. He who has the onus probandi should commence the proceedings before the jury, and he who commences should have a right to reply and close the argument to the jury.

At law.

This action was brought [by Charles Murray] on a letter written by the defendant [Richard C. Mason] accusing the plaintiff of perjury. The defendant pleaded "not guilty," and justification. The plea of not guilty was withdrawn and the jury was sworn on the plea of justification. The jury brought in a verdict of guilty. In the course of the trial the following was submitted to the chief judge, the assistant judges differing:

Whether the plaintiff or the defendant shall have the opening and conclusion of the case?

The counsel for the plaintiff contends that he has to prove the loss of office charged in the declaration and the damages sustained, and refers to Moncure v. Dermott [Case No. 9,707]; Evans, Prac. (Md.) 296.

The defendant, by his counsel, contends he holds the affirmative of the issue, and refers to Kerr v. Force [supra]; 1 Starkie, Ev. 381, 384, 385; 6 Har. & J. 469.

J. M. Carlisle, for plaintiff.

Jas. H. Bradley, for defendant.

CRANCH, Chief Judge. The plea of not guilty having been withdrawn, the jury was sworn to try the issue upon the plea of justification only.

The counsel for the defendant contend that as they hold the affirmative of the issue they have a right to open and close the argument before the jury, and they rely upon the decision of this court in the case of Kerr v. Force [supra]; Starkie, Ev.; and Cullum v. Bevans, 6 Har. & J. 469.

On the other side, the counsel for the plaintiff cited Evans, Prac. (Md.) 296, and Moncure v. Dermott [supra].

The case of Kerr v. Force seems to have been well considered, and is decisive of the present question, unless it be overruled by the case of Moncure v. Dermott, or controlled by the case of Kearney v. Gough, 5 Gill & J. 457, cited by Evans on page 296. In the case of Kerr v. Force there seems to have been more reason than in the present to permit the plaintiff to open and close the argument to the jury, because the court had directed the jury to assess the plaintiff's damages upon a demurrer which had been been

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

decided in his favor, yet the court said that that circumstance did not throw the affirmative on the plaintiff, and said also that the uniform practice of this court had been that the party who held the affirmative of the issue should open and close, unless there was some issue in which the plaintiff held the affirmative, in which case the plaintiff had a right to open and close the whole case to the jury; observing also that in all cases the plaintiff must show his damages, and if that were a good cause for giving him the right to open and close, he would have it in all cases whether he held the affirmative of the issue or not. It may also be observed that the question of damages does not arise until the issue is found for the plaintiff.

In the case of Moncure v. Dermott, one of the pleas was "covenants performed," but before an issue could be made up on that plea there must have been a replication setting forth some special breach which would throw the burden of proof upon the plaintiff. That case, therefore, cannot be considered as inconsistent with that of Kerr v. Force.

I have not seen the case of Kearney v. Gough, cited by Mr. Evans from 5 Gill & J. 439. Whether the quotation is a mere dictum of one of the judges, or a decision of the court, does not appear. Judge Dorsey, in delivering the opinion of the court of appeals in Maryland, says: "No principle of law seems more universal or better established than that the onus probandi rests on the party who maintains the affirmative side of the issue." And nothing can be more natural than that he who has the onus probandi should commence the proceedings before the jury, for before he moves nothing can be done. The other party has nothing to say. It is right also that he who commences the contest should have a right to reply to the defensive allegations of the other party.

I am therefore of opinion, in the present case, that the defendant should open and close the argument to the jury.

MURRAY (NICHOLAS v.). See Case No. 10,223.

MURRAY (OTT v.). See Case No. 10,615.

Case No. 9,967.

MURRAY et al. v. PATRIE.

[5 Blatchf. 343.] [1]

Circuit Court, S. D. New York. July 17, 1866.

REMOVAL OF CAUSES—REMOVAL AFTER JUDGMENT—ORIGINAL JURISDICTION—CASES ARISING UNDER CONSTITUTION.

1. Under the constitution of the United States, causes may be removed from state courts to the circuit courts of the United States after, as well as before, judgment.

[Cited in Fisk v. Union P. R. Co., Case No. 4,827.]

2. Original jurisdiction may be conferred by congress upon the circuit courts of the United States, by the removal into them, from the state courts, of cases arising under the constitution, the laws of the United States, and treaties.

[Cited in Fisk v. Union P. R. Co., Case No. 4,827; Woolridge v. M'Kenna, 8 Fed. 658.]

[Cited in Stone v. Sargent, 129 Mass. 506.]

3. Such a case arises when the question assumes such a form that the judicial power is capable of acting on it.

4. When a case is so removed, the question whether the removal is in violation of the constitution, and whether the case is one arising under the constitution, &c., may be raised on the trial.

[Cited in Eaton v. Calhoun, 15 Fed. 159.]

[5. Cited in Fisk v. Union P. R. Co., Case No. 4,827, to the point that where necessary to the exercise of its jurisdiction a federal court will issue a writ of mandamus or other particular process.]

[6. Cited in Tennessee v. Davis, 100 U. S. 294, in dissenting opinion of Mr. Justice Clifford, to the point that removals under section 643, Rev. St., are confined to civil actions.]

This was an application for an order requiring the clerk of the supreme court of the state of New York for the county of Greene, to make a return to a writ of error issued by this court, to remove into this court a suit brought in such state court by Albert W. Patrie against Robert Murray and William Buckley, to recover damages for false imprisonment, and in which a judgment had been rendered by such state court in favor of Patrie, for $9,343.34. After such judgment was rendered, the defendants therein sued out such a writ of error.

Samuel Blatchford and Clarence A. Seward, for plaintiffs in error.

Amasa J. Parker, for defendant in error.

NELSON, Circuit Justice. The principal ground of defence set up on the trial of the suit in the state court was, that the arrest and imprisonment of the plaintiff therein, which occurred between the 27th of August, 1862, and the 3d of September, 1862, took place under the order of the president of the United States. The fourth section of the habeas corpus act of March 3, 1863 (12 Stat. 756), provides, that any order of the president, &c., made during the Rebellion, shall be a defence, in all courts, to any action, &c., pending or to be commenced for any arrest or imprisonment made or committed under such order, or under color of any law of congress. The fifth section provides for the removal of any such suit commenced in a state court, to the circuit court of the United States, either before or after judgment. As respects the latter, the section declares, that "it shall, also, be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered; and the said circuit court shall thereupon proceed to try and determine the facts and the law in

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

such action, in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding."

This provision of the 5th section, and, indeed, the whole of it as to the removal of causes, is a literal copy of the 6th section of the act of March 3, 1815 (3 Stat. 233). The question of the removal of causes from the state courts to the circuit courts of the United States was discussed very much in Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 346-350, and no doubt was entertained that it might take place after, as well as before, judgment. It was again commented upon in the case of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 821-828, and especially by Mr. Justice Johnson, in his dissenting opinion (pages 884-889.) Mr. Justice Johnson was inclined to the conclusion, that congress could not confer original jurisdiction upon the circuit courts of the United States, either directly or by removal from state courts, in cases arising under the constitution, the laws of the United States, and treaties," &c., inasmuch as the federal court must assume the jurisdiction upon the simple hypothesis that such question had arisen, and that, until such question had actually arisen and was presented for decision, the case was exclusively cognizable in the state court. This view led the learned justice to maintain that the question could be brought properly before the federal court only under the 25th section of the judiciary act [1 Stat. 85], as it could not be ascertained whether the case had actually arisen, till it was heard and decided. The chief justice, who delivered the opinion of the court, held that jurisdiction could be entertained when the question assumed such a form that the judicial power was capable of acting on it; that it then became a case; and that the judicial power extended to all cases arising under the constitution, &c.

I admit, that the bringing of the suit in the federal court, and the averments in the declaration in conformity with the act of congress conferring the jurisdiction, do not vest it necessarily or definitely in the court. If it did, the argument of the learned counsel against this motion would be conclusive, namely, that the principle would draw within the federal jurisdiction cases without limit, at the election of the plaintiff. But the defendant may meet the question, whether or not it is a case arising under the constitution, &c., by pleading, or on the trial, as I have endeavored to show in Dennistoun v. Draper [Case No. 3,804], and thus confine the jurisdiction within the constitutional limit. So in the case of original jurisdiction by removal from the state court.

An objection is taken to the removal in this case, on the ground of its violation of the 7th amendment to the constitution, which is, that "no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law." Whether or not this amendment would deprive this court of jurisdiction, I am not inclined to determine on this motion. It is a question that may come up on the trial, and be there ruled by the court, and the ruling can be reviewed on error by the supreme court. The question, also, whether the fourth section of the act of March 3d, 1863, is constitutional, and, if so, whether it applies to this case, are questions that belong to the trial, and need not now be examined.

It was suggested by the counsel for both parties, on the argument, that, if the court had any serious doubts upon the questions involved in this removal, the decision be reserved, and the cause heard before both of the judges, that the parties might have the benefit of a division of opinion, if such should be the result. Having come to the conclusion that the objections to the jurisdiction are properly available on the trial, the suggestion is unimportant.

Let an order be entered requiring the return to be made.

MURRAY (UNITED STATES v.). See Cases Nos. 15,842 and 15,843.

MURRAY (WOOLFOLK v.). See Case No. 18,028.

Case No. 9,968.

In re MURRIN et al.

[2 Dill. 120;[1] 2 Ins. Law J. 524; 4 Bigelow Ins. Cas. 171; 8 N. B. R. 6.]

Circuit Court, E. D. Missouri. April 2, 1873.

BANKRUPTCY — LIFE INSURANCE POLICY PAID FOR BY THE WIFE FOR HER HUSBAND'S BENEFIT — CONTEST BETWEEN ASSIGNEE AND HUSBAND FOR PROCEEDS OF POLICY.

A wife possessed of a separate estate, secured to her by an ante-nuptial settlement, obtained in 1869, a policy of insurance upon her life, payable upon her death to her husband. She paid the premium for a year out of her own estate. Before the year expired her husband was adjudicated a bankrupt. Out of her own estate she paid the premium for the two following years, 1870 and 1871, and before the next premium fell due she died; and the question arose between the husband, and his assignee in bankruptcy, which was entitled to the proceeds of the policy: *Held*, considering the nature of the contract of insurance and the obvious intention of the wife, that the assignee had no right to the proceeds, but that they belonged to the husband.

[Cited in brief in Pullis v. Robinson, 73 Mo. 205.]

Bankruptcy. This cause is brought here to revise an order of the district court for the eastern district of Missouri, overruling the demurrer of the assignee in bankruptcy to the petition of James Murrin, one of the bankrupts, and directing the assignee to pay the bankrupt Murrin the proceeds in his hands of two policies of life insurance, less the sum paid by him for costs and expenses of collec-

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

tion. The petition thus demurred to is as follows: "To the Hon. Samuel Treat, Judge of Said Court: The petition of James Murrin, one of the said bankrupts, respectfully represents, that a petition in bankruptcy against your petitioner and said Bolivar Owen, was filed in this court on the 30th day of November, 1869. That a hearing was had and an adjudication of bankruptcy entered on said petition on December 10, 1869. That on December 28, 1869, your petitioner and said Owen filed their schedules as required by law. That on January 18, 1870, Charles Green was elected and appointed assignee in bankruptcy of said Owen and Murrin as partners and individually. That Sarah E. B. Murrin was the wife of your petitioner, James Murrin; and that by marriage settlement made previous to their intermarriage, all the property and estate of said Sarah was settled and secured to her own separate use and behoof, so that the said James had no right or interest therein, nor title nor claim thereto, nor to any portion thereof. That said separate estate was large in amount and of great value. That on March 17, 1869, the said Sarah made application to the Penn Mutual Life Insurance Company, doing business in this state, for an insurance upon her own life in the sum of five thousand dollars, payable upon her death, upon proper proof, to her husband, the said James Murrin. That upon said application said company issued to said Sarah a policy of insurance upon her life, in consideration of the payment by her of the annual premium of one hundred seventy-seven fifty-hundredths dollars, payable one-half in cash and one-half by note bearing interest at six per cent. payable in advance on or before the 26th April in each year during the continuance of the policy. That said Sarah, out of her own funds, paid the premiums required in cash and also the interest upon the notes for the years 1869, 1870, 1871 in advance. That the said Sarah died on the 19th day of January, 1872. That your petitioner did not pay any of said premium sums, nor were the same paid out of any funds or property in which he had any interest legal or equitable, nor did he suppose that he had any interest or title to said policies either legal or equitable which could pass to his assignee, in bankruptcy, and for this reason he did not enter said policy in his schedule of assets belonging to him at the date of the petition filed in this court. That after the death of the said Sarah and the money due on said policy became payable, the said Green, assignee in bankruptcy of your petitioner, and said Owen, applied to your petitioner, required him to set over said policy and the sum secured thereby to him as assignee; and your petitioner supposing that said demand was legal did give to said Green an order for the payment of the sum due upon said policy as follows:

"'Policy No. 9,199, on life of Sarah E. B. Murrin, I, James Murrin, the person in whose favor the above policy was issued, make no claim for the sum thereby insured, or any part thereof, or any interest therein, and do request and direct the Penn Mutual Life Insurance Company to pay the same to Charles Green, my assignee in bankruptcy, who is entitled to the amount. Witness my hand and seal the 7th day of May, 1872. James Murrin. (Seal).'

"And the said Green, as assignee by suit at law in the St. Louis circuit court, recovered judgment against such company on December 11, 1872, and said judgment for the sum of $4,933.05 was duly satisfied and paid to said Green on the 26th day of December, 1872."

Precisely the same allegations are made in respect to another policy issued to the said Sarah by the Connecticut Life Insurance Company on the 29th day of April, 1869, for the sum of $5,000 payable at her death, to the petitioner, her husband, upon which the said Green as assignee, collected May 11, 1872, the sum of $4,948.57. The petition then continues:

"Your petitioner further represents, that the orders for collection of the amounts due upon said policy were without consideration; that your petitioner had no title or interest legal or equitable in said policies on the 30th November, 1869, the date of the filing of the petition in bankruptcy, which could pass to his assignee by virtue of the act of congress to establish a uniform system of bankruptcy throughout the United States, and he is informed by counsel and believes that the sums of money collected by said Green upon said policies belong to your petitioner and to his creditors, becoming such since the filing of said petition in bankruptcy. In consideration of the premises, he prays that said Charles Green, as assignee, may be made to pay over to your petitioner the said sums of $4,933.05 and $4,948.57, less the costs, charges, and expenses by him incurred in collecting the same, and that your petitioner may have such other and further relief as to the court may seem meet."

Lackland, Martin & Lackland, for assignee.
C. C. Whittelsey, for petitioner.

DILLON, Circuit Judge. The wife of the petitioner being possessed of a separate estate, secured to her by an antenuptial marriage settlement, applied in the spring of 1869 for two policies of insurance of $5,000 each, upon her life, payable upon her death to her husband. They were issued accordingly, and she paid the premiums for one year, one-half in cash, and one-half by note. Before the year expired her husband was adjudicated a bankrupt. Out of her own estate she paid the premiums for the two following years, 1870 and 1871, and before the next premium fell due she died. The question is, whether the assignee as against the bankrupt, is en-

titled, for the benefit of the estate, to the proceeds of the policies. The assignee does not claim that his right is strengthened by reason of having obtained, in the manner stated, the actual possession of the proceeds, and the only contest is as to the respective legal or equitable right of the assignee and bankrupt thereto.

Counsel on both sides, in their well considered briefs, have argued many points which, though pertaining to the general subject of life policies for the benefit of others, are, nevertheless, not necessarily involved in the decision of the case.

The counsel for the assignee claims that at the date of the bankruptcy of the husband, November 30, 1869, the husband had a right of property in the policy (which it is contended is a chose in action) of such a nature that it vested in the assignee by virtue of the adjudication in bankruptcy. Bankrupt Act, § 14 [14 Stat. 522]. Under this section, property and rights which are acquired by the bankrupt after the commencement of the proceedings in bankruptcy do not vest in the assignee; and to make good his claim the assignee must show that the right to the benefit of the policy was one which not only existed in the husband at the time he was proceeded against in bankruptcy, but is one of such a nature as to vest in the assignee as of that time, by virtue of the provisions of the bankrupt act. This act should receive such a construction as accords with its well known purpose, which is, that if an insolvent debtor will surrender all his property (not exempt) for distribution among his creditors, he may, on the terms provided in the act, have his discharge. If the wife's death had happened before the bankruptcy, there being no statute protecting the husband's rights under the policy, the right to collect and hold the money would, it may be admitted, pass to the assignee. But her death did not happen until over two years afterward, during which time the wife continued to pay the premiums. It is admitted that she could not have been compelled to pay them, either by the husband, or by the assignee. Her payment of them proceeded purely from her bounty. It is certain, to a practical intent, that if she had not paid the subsequent premiums, the first payment, made before the bankruptcy, would have been of no benefit, either to the assignee or to the husband, for she did not die during the year. It is also certain, to a practical intent, that, had the last premium not been paid, there would have been no proceeds here about which to litigate. Her intention, her object, in making these payments, in virtue of which the policy was kept in esse, must have been to make provision for her husband; and what equity, let me ask, have creditors, or the assignee representing them, to thwart the purpose which she had in view, and for which she paid her money—money to which they had no claim? The assignee, if it be conceded that he could have done so for the benefit of the estate, which I do not admit nor decide, took no steps to pay the premiums, but asks the benefit of those paid by the wife. It is inconceivable that she made, or intended to make, the payments for the benefit of the assignee, and she doubtless died in the confident belief that she had made provision for her husband.

Without discussing the questions which have been argued at the bar as to the nature and extent, before the death occurs, of the interest of a person designated by the bounty of another as the one to whom a policy is ultimately to be paid, I am quite confident that the husband, at the time of his bankruptcy, had no such interest in these policies as to give the assignee the right to retain their proceeds against the manifest intention and purpose of the wife.

Could the assignee, as against the wish of the wife, have said, "I demand the policy, and intend to keep up the premiums for the benefit of the estate?" If it were necessary to answer this question, it would seem that he had no such right, and that she could properly say, "This is a matter of my own, a provision originating in my bounty, one upon which my husband's creditors have no claim, and with which they have no right to interfere." But the assignee took no such steps; on the contrary, he allowed, or did not prevent the wife from making the payments which kept the policy alive; and I rest my judgment against him on the broad ground, that, under the circumstances of the case, the creditors, for whose benefit the money is sought, have not the shadow of a shade of equity to it, nor to defeat the provident and just provision which the wife intended to secure for her husband, not for them. The policy was kept up by her for the benefit of her husband after her death, not for the benefit of his creditors before his bankruptcy. The district judge, in deciding the case, seized the considerations which control it, when he remarked: "Looking at the nature of the contract for the insurance as being a provision by one married party for the benefit of another, and kept in force by the wife out of her separate estate without any step being taken by the assignee, her equities should be carefully regarded. The policy was for the benefit of the husband, and was kept alive by the wife after the bankruptcy, and it would be inequitable that a sum becoming payable after the bankruptcy under such a contract, should, by relation back to the time of commencement of proceedings in bankruptcy, be held to belong to the assignee. The design of such charitable acts for the benefit of a third party was not intended to be defeated by the bankrupt law, in a case like the present, where such a result would be against all equity."

NOTE. Right of payee or beneficiary in a life policy: See Clark v. Durand, 12 Wis. 223; Kerman v. Howard, 23 Wis. 108; Godsal v. Webb, 2 Keen, 99.

See, and compare, Chapin v. Fellows, 36

Conn. 132; Lemon v. Phoenix Mut. Life Ins. Co., 38 Conn. 294; Ruppert v. Union Mut. Ins. Co., 7 Rob. (N. Y.) 155; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 37; Gould v. Emerson, 99 Mass. 154; West v. Reid, 2 Hare, 251; Burridge v. Row, 1 Young & C. Ch. 183; Triston v. Hardey, 14 Beav. 232; Connecticut Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305; Burroughs v. State Mut. Life Assur. Co., 97 Mass. 359; Swan v. Snow, 11 Allen, 224; Wason v. Colburn, 99 Mass. 342; McAllister v. New England Mut. Life Ins. Co., 101 Mass. 558; Drysdale v. Piggott, 8 De Gex, M. & G. 546; Johnson v. Swire, 3 Giff. 194.

MURRIN v. OWEN. See Case No. 9,968.

Case No. 9,969.

MURTAGH v. PHILADELPHIA et al.

[1 Wkly. Notes Cas. 37.]

Circuit Court, E. D. Pennsylvania. Oct. 19, 1874.

RESTRAINING ERECTION OF PUBLIC WORKS—ACT OF 8TH APRIL, 1846—JURISDICTION OF FEDERAL COURTS.

Application for preliminary injunction by plaintiff, who was a citizen of New York, to restrain the completion of a bridge over the river Schuylkill, at an elevation of only sixteen feet above high-water mark, on the ground that it would, at that level (which was four or five feet lower than that of the former bridge), interfere with the navigation of plaintiff's barges. The Schuylkill is a tidal and navigable river, lying wholly within the state of Pennsylvania.

Affidavits and depositions were read by both parties as to the facts set forth in the bill.

Thomas Hart, Jr., and Mr. Tilghman, for plaintiff.

Thayer & Sellers, for Keystone Bridge Co.

The City Solicitor and R. N. Willson, for the City of Philadelphia.

THE COURT refused the preliminary injunction, saying that where a suit in equity was merely for the enforcement of a legal right, and there was any disputable question upon the merits, it was not in general, proper to grant an injunction before final hearing or a judgment at law; and that the reason for not awarding an interlocutory injunction was here the stronger because the case depended wholly upon questions of right under the laws of Pennsylvania, and the law of that state (Act April 8, 1846; Purd. Dig. 599, pl. 55) provided that no court within the county of Philadelphia should enjoin the erection of public works until question of title and damages should be finally decided by a common-law court.

MURTHA (KNOX v.). See Case No. 7,911.

Case No. 9,970.

MUSCAN HAIR MANUF'G CO. v. AMERICAN HAIR MANUF'G CO.

[1 Fish. Pat. Cas. 320; 4 Blatchf. 174; Merw. Pat. Inv. 237.] [1]

Circuit Court, S. D. New York. May 6, 1858.

PATENTS—PRELIMINARY INJUNCTION — EXCLUSIVE POSSESSION — DOUBTFUL INFRINGEMENT — PRACTICE IN EQUITY—BILL RETAINED.

1. A preliminary injunction will be refused, unless upon proof of exclusive possession under the patent, or of public acquiescence in the exclusive right of the patentee or of a trial at law.

2. Whether a claim, embracing the use of any metallic sulphate, in connection with any alkali; or, any sulphate having an alkaline base, could be sustained, upon proof that substantially the same proportions, of other sulphates than those named in the specification, would not produce the required result. Quaere.

3. Where the patent is recent, the specification obscure, and the proof of infringement meager and unsatisfactory, the court will not grant an injunction, even upon final hearing, but will retain the bill and require the complainant to bring an action at law.

4. The terms, upon which such an order will be made, stated.

In equity. This was a final hearing, on pleadings and proofs, on a bill for an injunction and account, founded on the alleged infringement of letters patent [No. 16,961] granted to Samuel Barker, dated April 7th, 1857, and assigned to the plaintiffs, for an "improvement in processes for treating moss for mattresses." In the specification, the invention was said "to consist in preparing or treating the ordinary moss of commerce, by saturating its fibre with certain metallic sulphates in connection with alkalies, and which will not be separated therefrom by washing, which increases its hardness and elasticity, and renders it indestructible by moisture or exposure to the weather, whereby it is capable of being employed to advantage in various upholstery manufactures, wherein hitherto only the best quality of curled animal hair, could be used satisfactorily." This specification stated the processes by which the desired results were to be obtained, as follows: "My treatment is as follows: I prefer to use sulphates of both characters, viz: a sulphate having a metallic base, as the sulphate of iron, and a sulphate having an alkaline base, as the sulphate of soda; and, to the action of these, the crude moss, having been cleared by the usual machine from the dirt and bark with which it is admixed, is submitted, in a liquor prepared by dissolving in one hundred gallons of water fifty-six pounds of sulphate of iron, to which is then added sixty-five pounds of sulphate of soda, the whole being well mixed. In this the moss is to be kept im-

[1] [Reported by Samuel S. Fisher, Esq., and Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 1 Fish. Pat. Cas. 320, and the statement is from 4 Blatchf. 174. Merw. Pat. Inv. contains only a partial report.]

mersed, say from thirty-six to forty-eight hours, and, when taken out, is to be well washed in clear water, dried, and passed again through the clearing machine, when it will be ready for use." The specification then stated, that it might be desirable to have the article dyed black, to render it more uniform in appearance, and proceeded to describe a process for giving it that color; and it then gave a mode for testing the proper preparation of the moss, when treated according to the specification. It also contained a statement that "other metallic sulphates, as well as other alkaline matters, will effect, in combination, the same desired result, as, for instance, the sulphate of copper, in connection with sulphate of soda. or with pure soda;" but that the patentee had found that neither alone would accomplish the purpose attained by his invention. The claim of the patentee was in these words: "I claim the method of treating or preparing the moss of commerce, to serve as a substitute for curled animal hair, substantially as set forth herein." The bill alleged, that the defendant had used, and was still using, the processes so patented, in the treatment of moss, and had sold, and continued to offer for sale, moss so prepared and treated, in violation of the rights of the plaintiff, as assignee of the patentee, and prayed an account and an injunction. The defendants' answer admitted the issuing of the patent, but denied that Barker discovered or invented the improvement patented, and averred that such processes were known and in use before his alleged discovery and application for a patent therefor. It also denied the infringement alleged. The bill was filed June 26th, 1857, less than three months after the issuing of the patent.

Edward Hoffman, for plaintiffs.
Francis G. Young, for defendants.

HALL, District Judge. And if there has, in fact, been any infringement by the defendants, it is more than probable that the defendants' use of the process patented began sometime prior to the issuing of the patent, and was continued until or near the time of the commencement of the suit.

In short, there is no proof to show any exclusive possession under the patent: there is no proof of such a public acquiescence in the exclusive right of the patentee as would justify the assumption that the claim to such exclusive right is well founded, and there has been no trial at law. And, therefore, if this was a motion for a preliminary injunction, instead of the final hearing of the cause, it is quite clear that an injunction would not be granted without a previous trial at law, to establish the complainants' right.

Objections were also taken to the sufficiency of the specification, and if the claim should be so construed as embracing the use of any metallic sulphate in connection with any alkali, or any sulphate having an alkaline base, these objections might deserve serious consideration upon the trial of an action for an infringement, especially if it should appear that substantially the same proportions of other sulphates would not produce the result which is said to be produced by the use of the sulphate of iron and sulphate of soda in the proportions and manner set forth in the specification. On this ground, also, I can not but feel some doubt in regard to the right of the complainants to the injunction and account prayed for by their bill.

On the question of infringement, too, the proof is very meager and unsatisfactory. The proof shows that on the 17th of June, 1857, nine days before the filing of the bill, a person purchased of the agent of the defendants, at their place of business, four pounds of prepared moss, and some fifteen or twenty bales of the same, or a similar article, at the same place. The moss so purchased was delivered to Dr. James R. Chilton, chemist, who made a set of experiments upon it for the purpose of ascertaining whether it contained the ingredients described in the specification annexed to Barker's patent. He found that it contained sulphate of iron, and sulphate of soda, and coloring matter. And he gave it, as his opinion, that this moss had been treated with the same substances described in Barker's specification; but the manner of treatment, or whether the sulphate of iron and sulphate of soda had been used in the proportions given in that specification, he confessed himself unable to state. These proportions, he says, are not, in his opinion, essential to the effect produced; but he does not say how far they may be departed from, without failing to produce the effect said to be produced by the use of the process described in Barker's specification.

There was also evidence given, showing the purchase, by the defendants, of sulphate of iron and sulphate of soda in considerable quantities, but in very different proportions from those stated in Barker's specification, as well as evidence to show that the defendants were first made acquainted with the process of treating moss for the purpose of improving its quality and adding to its value, by a person who had learned from Barker a mode or modes of treatment adopted by him prior to his application for a patent.

On the other hand, there is some proof to show that the processes adopted by the defendants (it appearing that different processes were used at different times) are not like the processes described in the specification annexed to Barker's patent, but were essentially different from that process, and different, to some extent, at least, from each other. But this evidence, like all the other evidence bearing upon the question of infringement, was indefinite and unsatisfactory.

This evidence does not sufficiently show that the patented process has been used by the defendants, if the proportions are substantially the proportions stated in the specification, and the modus operandi there described is essential to that process.

It certainly would be sufficient to raise a strong presumption that the patented process has been used, if there was no proof that substantially the same results could be produced by other and distinct processes; but as this has been stated, rather than satisfactorily proved, by witnesses on the part of the defense, I think there is so much doubt even upon the question of infringement, that there should be a trial at law before an injunction and account are ordered.

The right of the plaintiffs is not, therefore, clear; and this cause will therefore stand over a reasonable time, for the bringing of a suit at law against the defendants for an infringement; and if such a suit is brought, until a sufficient time for the final determination thereof has elapsed. And if, in such suit, there shall be final judgment for the plaintiffs, they will be entitled to a decree for injunction and account, as prayed for in the bill; and if, in such suit, there shall be final judgment for the defendants, the bill will be dismissed with costs; and so, also, it will be dismissed with costs on an application of the defendants, if such suit is not brought within a reasonable time, and prosecuted with reasonable diligence.

Case No. 9,971.

MUSCATINE v. MISSISSIPPI & M. R. CO. et al. MUSCATINE COUNTY v. SAME. LETZ et al. v. CLARK et al.

[1 Dill. 536.] [1]

Circuit Court, D. Iowa. 1870.

RAILROAD AID BONDS—DEFENCES—JUDGMENTS—INJUNCTION—TAXATION AND EXEMPTION.

1. Matters, such as fraud, which should have been pleaded as a defence, are not sufficient grounds after judgment, upon which to apply to equity to enjoin process to collect the judgment.

2. Fraud of the payee is no defence to negotiable bonds in the hands of innocent holders for value, before due.

3. Where, by reason of complainant's own carelessness (no fraud or malfeasance in this behalf being charged against the creditor), judgment in an action on coupons is, by clerical mistake, rendered for too large a sum, a proper remedy of the creditor is to apply to the court which rendered it to have it corrected, and where the alleged mistake was not plainly shown, and if it existed, could not have happened except for the debtors' laches, and no application had been made to correct the judgment, an injunction, to restrain process to enforce such judgment, was denied.

4. A creditor having an obligation of a principal debtor and of a surety, may pursue his remedy against both for the satisfaction of the debt; and if the creditor has reduced his claim against the primary debtor to judgment, equity will not enjoin process to enforce the judgment at the instance of such debtor on the ground that the creditor is also pursuing the surety and has seized a fund, which is in litigation, belonging to the surety; but the creditor can have only one satisfaction.

5. Conceding a statute of a state exempting railroad companies from their due proportion of taxation to be unconstitutional, the omission, pursuant to such statute, to tax the property of railroad companies the same as that of individuals, does not render void a tax levied upon the property of others which is liable to taxation; and hence the owner of property properly assessed cannot, on the ground that other property subject to taxation is omitted to be assessed, enjoin the collection of taxes against his own property.

6. Where a state constitution requires all general laws to be uniform in their operation; and all laws for the assessment and collection of taxes to be general and of uniform operation throughout the state, and that the property of all corporations shall be subject to taxation the same as that of individuals, quere whether it is competent for the legislature to tax railway corporations on their earnings, while the bulk of the other property in the state is taxed upon its value?

7. Gilman v. Sheboygan, 2 Black [67 U. S.] 510, commented on by Mr. Justice Miller, and the statute in question in that case distinguished.

[8. Cited in Furbush v. Collingwood, 13 R. I. 723, to the point that fraud, as a ground for enjoining or setting aside a judgment, is not mere falsity of claim or proof, but fraud outside of them, perpetrated by some artifice or contrivance of the party or person benefited, or by collusion, whereby in the course of the trial, or in entering judgment, the injured party or the court has been imposed upon or betrayed into inattention, and deceived.]

In the three causes above entitled [the city of Muscatine against the Mississippi & Missouri Railroad Company and others, County of Muscatine against same, and Letz and others against G. W. Clark, United States marshal, and others], application at chambers was made by the complainants to Mr. Justice MILLER, one of the judges of the circuit court of the United States for the district of Iowa, for writs of injunction to restrain further proceedings to collect taxes to pay certain judgments severally rendered against the city of Muscatine, against the county of Muscatine, and against the county of Louisa.

These judgments were rendered against the afore-mentioned public corporations by the United States circuit court for the district of Iowa, upon coupons attached to what are known as railroad bonds, that is, bonds issued by these corporations in payment for their subscription to the capital stock of certain railway companies.

At the May term, 1870, of the said circuit court, on a showing made to it, the court (Dillon, Circuit Judge, and Love, District Judge, being present), entered an order appointing the marshal to collect the taxes to pay certain judgments against various counties, and, among others, against the said county of Louisa, and that officer entered upon the execution of this duty in the county last named, and it was for this reason that the marshal was made a defendant in the bill

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

filed by Letz and other tax payers of that county.

The facts respecting the Mark Howard Case, mentioned in the opinion, are briefly these: The city and county of Muscatine severally issued their bonds in payment for their subscription to the stock of the M. & M. R. R. Co. (made a defendant in the bills of complaint), and by virtue thereof became stockholders in said railroad corporation. These bonds, the said railroad corporation guaranteed before they negotiated them, so that a holder thereof had the liability of the city and county as principal debtors, and the railroad company as guarantors. All of the property and franchises of this railroad corporation were subsequently sold on a decree foreclosing a mortgage thereon, and there was a surplus which would belong to the stockholders, and among other stockholders to the city and county of Muscatine; but before it came into their hands it was seized by proper process to answer these judgments against the city and county. That fund is still in the hands of the receiver, and the litigation in respect thereto is yet undetermined.

Concerning the constitutional question referred to in the opinion, it may be here mentioned that the constitution of Iowa contains the following provisions. Article 1, § 6: "All laws of a general nature shall have a uniform operation." Article 3, § 29: "The general assembly shall not pass local or special laws in the following cases: For the assessment and collection of taxes for state, county, or road purposes; * * * and all such laws shall be general, and of uniform operation throughout the state." Article 7, § 7: "Every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object." Article 8, § 2: "The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals."

A statute of the state of Iowa, general in the sense that it applies to all railroad corporations, and not specially to any one of them, provides that they shall pay into the state treasury as taxes one per cent. each year of their gross receipts in lieu of all taxes. Acts 1862, p. 227; and see Acts 1870, p. 109.

The provision of the constitution of the state of Wisconsin referred to in the opinion, is in these words, article 8, § 1: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe."

The opinion of Mr. Justice MILLER was pronounced orally, and, in substance, as below given.

D. C. Cloud, for the motion.

Grant & Smith, contra.

MILLER, Circuit Justice. These are applications to me as a judge of the supreme court and of the circuit court of the United States, for the district of Iowa, for injunctions to restrain further proceedings in the collection of certain taxes which have been assessed against citizens of the counties mentioned and of the city of Muscatine. These taxes have been levied and are in process of collection in pursuance of writs of mandamus from the circuit court for the payment of numerous judgments against the city and the two counties aforesaid.

A bill of complaint in each case has been filed, and the answers, though not filed, are before me and sworn to, and are supported by affidavits. These will be sent to the clerk by me, to be filed with the bills of complaint.

The bills in the cases of the city and county of Muscatine seek relief upon substantially the same grounds, and will be considered together. These grounds are:

(1) That the bonds on which the judgments are founded, and for the payment of which the taxes are levied, were without consideration, and obtained by fraud. (2) That the judgments are for more than they ought to be. (3) That the judgment creditors have a decree for funds now in the hands of the receiver of the circuit court, on account of the same debt for which the taxes are levied.

In regard to the first ground of relief, it may very well be doubted whether the bill shows any fraud or failure of consideration which should be a defence to the bonds either in law or equity. When the allegations are examined closely they seem to amount to more than a failure of the railroad company to which the bonds were first issued, to comply with certain promises made at the time of the transaction.

If, however, they could be held sufficient as allegations of fraud or failure of consideration, there are two very sufficient answers to them in this application.

1. They are no defence to the bonds in the hands of innocent holders.

2. They were proper defences, if good at all, to the action in which the judgments were rendered, and cannot be set up against the enforcement of these judgments now.

3. The judgments as to which these injunctions are sought are numerous, and the plaintiffs in them are different persons in most of the cases. The bill alleges that in some of these judgments, without specifying which, the amounts are too large. That is shown by the absence of coupons from the clerk's office in which the judgments are found, and that a rate of interest too large was calculated in some cases. The judgments in which these supposed mistakes were made are not specified. Indeed the complainants say they have no means of determining in which of the judgments the mistakes were made, but they arrive at the conclusion that judgments on the whole have been rendered for more than the corporations were liable in these suits, by a conjectural calculation based on the coupons not sued on and the amount originally issued.

A court of chancery can hardly be expected to restrain the collection of the judgment of A B, because there is error in the judgment of C D, nor can the force of this proposition be avoided, by alleging that there is error in the judgment of A B or C D, and therefore both of them shall be enjoined. Besides, as the only error worth notice is one of clerical mistake, and one which never could have been made without gross carelessness on the part of the complainants in this suit, the only remedy is to apply to the court to correct the calculations. The absence of the coupons for which the judgment was rendered from the clerk's office cannot be assumed to imply that they were not present when the judgment was rendered, though it is certainly true that they should then have been cancelled and filed.

4. In regard to the funds in the hands of the receiver in the Mark Howard Case, it is certainly true that when paid to the judgment creditors it will operate as a discharge of so much of the judgments on which the tax proceedings are based as those creditors shall receive on account of these judgments. The fund is one which was designed to go to the county and city, as well as other stockholders in the railroad company. Before it came to their hands it was seized and held to answer these judgments against the city and county, and if appropriated to that purpose pays so much of that debt. But the judgment creditors have not received that fund as yet. It is still in litigation. They are pursuing their remedy against it, as also against the city and county at the same time. This they have an undoubted right to do, and especially against the latter, as they are the primary obligors. It is also provided in the decree that when the debt is paid the city and county shall be subrogated to all the rights of these judgment creditors in regard thereto.

The right of the creditor to pursue his remedy in each case until satisfaction of his debt, is clear upon all the authorities, and no harm can come to the present complainants from this course, as upon payment from either fund, whether complete or partial, on application to the circuit court the judgment creditors will be restrained from any further use of their judgments or decrees to the prejudice of these complainants. It is proper to add that the portion of this fund which any of these creditors may receive can in no case exceed one-sixth of the amount of the judgments which they are seeking to collect of the city and county.

In the case of the citizens of Louisa county the usual allegations of fraud in obtaining the bonds by the parties to whom they were originally issued, are made. This is concluded by the judgment on those bonds. It is further alleged that Fellows, the principal judgment creditor, bought his bonds after the courts of Iowa had judicially held them void. This defense cannot now be set up against the judgment. This allegation is expressly denied in the answer, and this is supported by the affidavit of a witness, who says he knows Fellows purchased before such a decision was made. It is further alleged that two railroad corporations have in Louisa county a large amount of valuable property amounting to one-fourth of the taxable property within the county, which is not assessed by the officers who are collecting this tax; although by law it is liable to its share of the tax.

As the tax complained of is being collected under the order of the federal court, and as the evident tendency of all that has been said by the supreme court in regard to these corporation debts, implies that no interference by state courts will be permitted in enforcing the tax, the statement here made presents a very grave question for the consideration of the court which is collecting the tax by its agents. I have had more difficulty on this point than on any which has been presented in these applications.

A statute of Iowa exempts railroad property from all other taxes except one per cent per annum paid into the state treasury. The constitution of the state declares that all taxation shall be uniform. Whether this constitutional provision (the exact terms of which I have not attempted to state) renders the statute void, is a question upon which the supreme court of this state has twice, as I am informed, been equally divided. If the question was presented to the circuit court by way of supervisory control over the officers, who, under its command, are collecting this tax, whether this railroad property should be assessed the same as other property, I confess I do not see how it could avoid deciding it. But, instead of an order to assess the property, I am asked to declare all other assessments void, because it is not assessed. This, it will be seen, is a very different question; and it is clear that I can only enjoin its collection on the ground that it is void. The case of Gilman v. Sheboygan, 2 Black [67 U. S.] 510, is relied on as authority for the latter proposition. In that case, after the city of Sheboygan had issued bonds in aid of a railroad, the legislature of that state passed an act, declaring that the tax to pay these bonds should be assessed exclusively on the real estate of the city. The constitution of Wisconsin has a provision similar to the one referred to in the constitution of Iowa, and the supreme court of the United States held that this attempt to make a part only of the taxable property of the city responsible for this particular debt, was a violation of the constitution which rendered the tax levied under that statute void.

In the case before us there is no attempt to render any species of property liable to taxation for any specific debt, or class of debts, but an exemption of the railroad from all other burdens, in consideration of a definite sum, which may be more or less than its share of such burden. Whether this exemption be forbidden by the constitution or not,

I am quite clear that it does not render void the tax which is levied upon other property.

The case of Gilman v. Sheboygan does not go so far as this, either in the facts on which it is grounded or the reasons by which the judgment was sustained. There is a manifest difference between an attempt to impose the entire burden of a debt already incurred by a municipality, upon a particular species of property, and the attempt to exempt a species of property from all other taxation, in consideration of a sum supposed to be its just share of the general public burden.

It is not inappropriate to look to the consequences of holding that this failure to assess the railroads renders all other tax void. It applies to the tax assessed for all other purposes as well as this tax. Every non-resident holder of property in the state could apply to me and insist on an injunction against the tax on his property. And if the state judges believe it to be void, they would be bound on the same principle to suspend the collection of all taxes throughout the entire state. A proposition which leads inevitably to such a result cannot be sound. I cannot therefore grant an injunction on this ground, whether the railroad property is liable to taxation or not. It is alleged that the officers are collecting the penalties for failure to pay the tax, according to this law as it stood before the act of last winter, which provides that only seven per cent should be collected in this class of cases.

Whether this is right or not, I do not pretend to decide. It is matter for application to the court for direction, and I am informed that the course pursued is one prescribed by the court at its last term. It is clearly no foundation for an injunction.

Injunction denied.

NOTE. After this decision, denying the injunction, upon assurances given to the circuit judge, by the county authorities, that if the marshal were withdrawn, they would proceed to collect taxes to pay the judgments, the execution of the order appointing the marshal was suspended, and the required taxes were collected by the county officers.

That the state courts cannot interfere with the federal courts in enforcing the collection of taxes to pay judgments against municipalities: Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166; Lansing v. County Treasurer [Case No. 16,538].

That they will not attempt to do so: Ex parte Holman, 28 Iowa, 88.

As to uniformity of taxation and mode of taxing property of corporations under the Iowa constitution: City of Davenport v. Mississippi & M. R. Co., 16 Iowa, 348. Of express and telegraph companies: U. S. Exp. Co. v. Ellyson, 28 Iowa, 370; Id. 380.

Construction of the provision in the constitution of Wisconsin referred to in the foregoing opinion, see Milwaukee & M. R. Co. v. Supervisors of Waukesha Co., 3 Am. Law Reg. 679; Gilman v. Sheboygan, 2 Black [67 U. S.] 510: By the supreme court of Wisconsin, in Weeks v. Milwaukee, 10 Wis. 242; Lumsden v. Cross, Id. 282; State v. City of Portage, 12 Wis. 562; Bond v. Kenosha, 17 Wis. 284; Dean v. Gleason, 16 Wis. 16; Carter v. Dow, Id. 298; Fire Department of Milwaukee v. Helfenstein, Id. 136; Brightman v. Kirner, 22 Wis. 54.

Constitutionality of bonds issued by municipalities in aid of railways, and defences thereto: Gilchrist v. Little Rock [Case No. 5,421], and note; King v. Wilson [Id. 7,810].

MUSCATINE COUNTY (UNITED STATES v.). See Case No. 16,538.

MUSE (COATES v.). See Cases Nos. 2,916–2,918.

MUSGROVE (INGERSOLL v.). See Case No. 7,040.

Case No. 9,972.

MUSSELWHITE et al. v. RECEIVERS.

[4 Hughes, 166.]

Circuit Court, E. D. Virginia. 1882.

RAILROAD COMPANIES—NEGLIGENCE—EMISSION OF SPARKS FROM LOCOMOTIVE.

[1. The mere fact that a spark from a locomotive enters the window of a building and sets it on fire does not render the railroad company liable for the damage; but plaintiffs must prove that the company was negligent in the use of its engine.]

[2. The company is liable only in case it fails, in using its engines, to use the diligence which good specialists in this department are accustomed to exercise.]

This is a petition in the suit of Skiddy, Barlow & Duncan, Trustees, v. The Atlantic, Mississippi & Ohio Railroad Company, claiming the payment of about $1524, for alleged damages to the petitioners from fire, alleged to have been caused by live sparks emitted from one of the locomotive engines of the receivers, drawing a freight train, in passing near a shop building in the town of Abingdon, owned by [J. M.] Musselwhite, which, with its contents, some of which belonged to the other petitioners, were burnt and destroyed on the afternoon of the 7th November, 1879. The shop was distant some forty yards from the railroad track on the north, and fronted south to the railroad. The fire began in the upper story of the shop, inside, in the end of that story next the railroad near two windows, both of which were closed at the time; but a pane of glass in one of the windows was broken, and a third to a half of it had fallen out of place. The fire occurred about five minutes after the train passed, and about half an hour after two workmen who had been upstairs in the shop had left the building. There was no fire burning in the stove in the building at the time, and had not been that day. No one was in the building when the fire began, and it was locked. When the building was broken into and the fire seen by the first person who reached the upper story, the fire was burning on the floor in the southeast end of the building near the window with the broken pane, and was running up the legs of the benches and up standing pieces of lumber, and blazing in lumber overhead on the ceiling joists. There was an engine house one story high adjoining the building on the east side, which was consumed by the fire. The wind was from

the direction of the railroad towards the buildings; but was light, it being a matter of doubt with many, what its direction was. The afternoon was very dark and cloudy; the atmosphere damp and heavy; the clouds low and thick. Witnesses testify to seeing dense smoke issuing from the engine; some of them testify to seeing sparks in the clouds of smoke; others say nothing of sparks, though they testify to the smoke. One witness testifies to seeing these sparks from a distance of three hundred yards off: but claims that he is exceptionally far-sighted. Another witness, who was the driver of a team of horses which was standing not far from the shop and about thirty yards from the railroad, testifies, that the sparks were so large or fervid that they burnt the hair of ("swinged") his horses.

One witness says the alarm of fire was within four or five minutes after the passage of the freight trains; another says it was five minutes. Witnesses who were at a distance say the alarm of fire reached them within ten minutes after the trains went by. Testimony is given estimating the damages by loss of the buildings at $505; by destruction of lumber in the building, engine and implements at $734; and by destruction of tools, $102, in all $1511.

On the part of the defense, a paper is filed by which counsel for petitioners "admits that the receivers can prove that they used the most improved appliances to prevent the escape of sparks from their locomotives at the time of the fire, which is the subject of the investigation in this cause." Such is the substance of the evidence.

HUGHES, District Judge I have little to remark on the evidence. I must express a doubt whether the statement of McCannahan is not an afterthought, not only as to the sparks themselves, but as to the "swingeing" they are alleged to have inflicted on his horses; and it is also rather difficult to think that Midkiff does not exaggerate a little when he testifies to seeing sparks three hundred yards off which Henry Johnson could not see as near as ten yards; although he claims to be exceptionally far-sighted. A doubt occurs, also, whether the shower of sparks not seen at all by some witnesses, but seen so vividly by others to fall upon the buildings, should have ignited nothing in or near it on the outside; but should have confined their operations to what could be effected inside, by entering a very small aperture through a part of the space of a pane of glass, the only open space in that part of the building.

A doubt also arises whether a fire communicated by a single spark could in five minutes have produced the cloud of smoke that was seen pouring out of the eaves of the building, of which there was an alarm over the town in ten minutes. I think the evidence is inconclusive. It is only circumstantial; and the soundest test of the validity of that sort of evidence is, that no other theory but the hypothesis on which the conclusion is based, can be formed. Are there not many ways of accounting for a fire in a carpenter's shop attached to an engine house, full of combustible material, with a stove in it, frequented by workmen who smoke pipes or cigars and carry matches, than by supposing it was burnt by a spark from an engine forty yards off that could not have entered the building at all except through a single aperture in the window of the upper story? I do not think the evidence taken and submitted by petitioners (the defendants not appearing and waiving cross-examination) is conclusive of the fact that the shop and contents were burned by fire from a spark getting in at that broken pane of that shop window.

But I do not base my ruling in this case on the inconclusive character of the evidence. The law applicable to all such cases must govern in the decision of this. The petitioners would not be entitled to damages from the mere fact, if it were a fact, that a spark from the defendant's engine, by entering the building, caused the fire which consumed it. It is necessary to their case that the defendants should have been guilty of negligence in the use of their engine, and for the petitioners to prove that they were. The law as to railroads is, that when a railroad company is chartered with a right to propel its trains by steam engines, then the company is liable only in case, in using its engines, it fails in the diligence which "good specialists" in this department are accustomed to exercise. As to "good specialists," see Whart. Neg. §§ 635 and 872, and cases there cited. The emission of sparks from the engine is not negligence; unless the sparks were negligently emitted. See Vaughan v. Railroad, 3 Hurl. & N. 685; Whart. Neg. § 869.

The authorities on this point are so numerous that it would be a useless burden to cite them. The trains in this case were running lawfully over the company's property; they were running under powers granted by the legislature to the company. Running thus, they are not responsible for fires arising from sparks proceeding from their own engines, unless it is proved that the emission of the sparks was due to negligence on the part of the defendants, either in using engines improperly equipped and furnished; or in using properly furnished engines in some negligent manner. Such negligence is not even charged in the petition. Though the burden is on the petitioners to prove it, no evidence is offered on that point. Being neither charged nor proved, there is no case made or shown for damages. The petition must be dismissed with costs.

Case No. 9,973.

MUSSER v. CURRY.

[3 Wash. C. C. 481.] [1]

Circuit Court, D. Pennsylvania. April Term, 1819.

WILLS — IN PENNSYLVANIA — PROBATE — BEFORE WHOM HAD—RE-PUBLICATION—WHAT PROOF NECESSARY.

1. By the laws of Pennsylvania, the register of wills is authorized to take the probate of wills, copies of which, with the wills, under his seal, are declared to be matters of record and good evidence.

2. This authority extends to re-published wills and codicils, which, in reference to after acquired lands, are as new wills.

[Cited in Harvey v. Chouteau, 14 Mo. (594) 416; Newton v. Seaman's Friend Soc., 130 Mass. 97; Shield's Appeal, 20 Pa. St. 295.]

3. The same evidence is necessary to prove a re-publication, as a publication; and proof of such re-publication by one witness, will not be sufficient.

The plaintiff [the lessee of Musser] claimed as heir at law of John E. Allen, and fully established his title as such. The defendant was the husband of Susanna Allen, the natural daughter of John E. Allen, and claimed the property in dispute, under the will of Allen, as tenant by the courtesy; his wife, and the child he had by her, being dead. It was conceded, by the plaintiff's counsel, that the clause in the will, under which the defendant claimed, passed to his late wife an estate of inheritance; but it was denied that the will operated on the property in question, as it was acquired after the will was made. The date of the will is in the year 1805; and the property in dispute was conveyed to the testator on the 13th of June, 1812. The defendant insisted, that the will was re-published after the above period, and this was the turning point of the cause. The will was proved by two of the subscribing witnesses, on the 28th of August, 1813, before the register of wills, and certified accordingly. On the 10th of November of the same year, one of the witnesses made oath, before the same officer, that the testator had, on the 23d of August, 1813, re-published his will in his presence, at which time he was of sound and disposing mind and memory. Evidence having been given of the death of this witness, the defendant offered to prove his signature to the oath endorsed on the will, and certified by the register, which was opposed by the plaintiff's counsel, on the ground that the register has no power to receive the probate of a re-publication, but that, having once received the proof of publication, he was functus officio, and his certificate of subsequent proof of re-publication, was no more than the certificate of any other person, and consequently inadmissible as evidence.

Peters & Newcomb, for plaintiff.

J. R. Ingersoll, for defendant.

WASHINGTON, Circuit Justice. The register is authorized, by the law of Pennsylvania, to receive the probate of wills; and copies of such wills and probates, under the public seals of the courts, or offices, where the same shall have been taken, or granted, if in force, are declared to be matters of record, and good evidence to prove the devise thereby made. The authority of the register being general to take the probate of wills, extends as well to the re-publication as to the publication of a will. The will, in relation to after acquired property, is a new will, by virtue of the re-publication; and the probate belongs to the register, under the literal expressions of the law, as well as under its plain and obvious meaning. For, if on account of the want of a court of chancery, to perpetuate the testimony of the witnesses to a will, or for any other cause, the probate of the will before the register was to be received as evidence of the devise of land, the same reason would seem to have required, that the re-publication should be proved in the same way. A codicil amounts to a re-publication; and there can be no doubt, but that the register, having received probate of the will, may afterwards receive probate of the codicil, which does not differ materially from the present case. But the same evidence is necessary to prove a re-publication, as the publication. The proof before the register was only that of one witness, which is not sufficient, without further evidence, to establish the re-publication.

The defendant then examined two others of the witnesses to the will, to show that the will was re-published subsequent to the 13th of June, 1812. The credit of one of these witnesses was powerfully attacked; and some degree of uncertainty, as to the time of re-publication, accompanied the evidence of the other.

THE COURT stated to the jury, that the cause turned altogether on the fact, whether the will was re-published after the 13th of June, 1812, or not; and left it to them to weigh the credit of the witnesses, and to find their verdict according to the conclusion they might come to as to that fact.

Verdict for plaintiff.

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

MUSSY (DUPONTI v.). See Case No. 4,185.

MUSTIN (THRUSTON v.). See Case No. 14,013.

Case No. 9,974.

MUTTER v. HAMILTON.

[1 Brunner, Col. Cas. 27;[1] 2 Hayw. (N. C.) 346.]

Circuit Court, D. North Carolina. June Term, 1805.

PRACTICE IN EQUITY—INJUNCTION TO STAY ACTION AT LAW—CAUSE READY FOR TRIAL.

Where a cause is ready for trial, an injunction will not be granted so as to stay the trial.

In equity.

PER CURIAM. We will not grant an injunction so as to stay trial, or entering up judgment; therefore this cause now ready for trial shall not be postponed, although the bill in equity which has been read for obtaining an injunction may contain matter enough to warrant the granting it.

Case No. 9,975.

MUTUAL BENEFIT LIFE INS. CO. v. CHARLES.

[4 Ins. Law J. 265.]

Circuit Court, N. D. Illinois. Feb. 27, 1875.

PRINCIPAL AND AGENT—INSURANCE AGENCY CONTRACT—CONTINUING INTEREST.

The defendant, an agent of the company, purchased the business of two local agents, with the acquiescence of the company, and continued to collect the premiums and reserve his commissions. He was subsequently appointed general agent for the state. The warrant appointing him to this position provided that "no commission can be claimed by any person whose agency has been discontinued;" also, "the right to discontinue any agent or agency at any and all times is reserved." In a memorandum bearing even date and evidently intended to be part of the contract, it is provided that "business obtained previously to date hereof shall stand on same basis as heretofore." The testimony tended to show that the basis of such previous contracts were the same as the present, except as to the rate of commission. Afterward the company abolished its state agency and proposed to allow the defendant to appoint local agents, and make his own bargains with them for the transfer of his interest. The defendant claimed that by an understanding with the company, he was entitled to a life interest in the business which he had purchased, and that which he had worked up, which the company denied. *Held*, that the agent had no continuing interest in the business after the discontinuance of the agency. In the absence of proof of such continuing interest in the business previously purchased, the memorandum must be construed as referring simply to the rate of commissions during the existence of the agency. The offer to treat with him on the basis of a continuing interest, was of the nature of an amicable settlement, not the concession of a right. No such continuing right can be raised by implication or usage. The defendant is ordered to account for and pay over to defendant all money in his hands as agent, and surrender all books and papers.

At law.

Hitchcock & Dupee, for complainant.

Thomas J. Turner and F. W. S. Brawley, for defendant.

OPINION OF THE COURT. The bill in this case charges in substance that on the 1st of April, 1870, complainant appointed the defendant, William Charles, its agent for the state of Illinois, and that said Charles continued to act as such agent in the management and prosecution of the business of the complainant in this state until the 13th day of Sept., 1873, when he was removed from such agency. Demand was made on Charles to account for and pay over to the company all money in his hands as such agent. At the time of being so removed Charles had in his hands the sum of $16,000 belonging to the company, which he refused to pay over to them. To this bill defendant filed an answer, and also a cross-bill in both of which he alleged in substance that he went into the employment of the complainant as an agent in 1863, acting in a general way all over the state; that in 1868 he bought the interest of one Oviatt, a local agent, in the business of the company, for which he paid $7,000, with the consent and knowledge of the company, which sum, he avers, he was induced to pay from an understanding between himself and the company that he was thereby securing to himself a life interest in the business of said company in the hands of Oviatt, which was the collection of renewed premiums on policies which had been placed by Oviatt. In like manner he afterward paid to G. R. Clarke, the agent of said company at Chicago, the sum of $4,000 for Clarke's interest in the business of the company, and on the 1st day of April, 1870, he was appointed the general agent of the company for the entire state of Illinois. He continued to act as such agent until some time in the spring of 1873, when the company changed its plan of doing business, and adopted a system of appointing local agents, each reporting to the home office instead of to the general agent for the state. He was dissatisfied with this change, and refused to act as special agent, and a difficulty then arose between himself and the company in regard to the amount he was entitled to claim from them; he insisting that he was entitled to the commuted value of all the business he had himself worked up, as well as that he had purchased from Oviatt and Clarke—that is to say the right to collect during his life the renewal premiums on the business which he had organized and purchased, and retain his commissions therefrom. The complainant, by its answer to the cross-bill, denies that it ever made any contract with Charles entitling him to any commissions except so long as he should continue to be the agent of the company, and insisting that by the terms of the contract appointing Charles its agent the right of removal was reserved. His agency had ceased, and his right to commissions had therefore ceased, so that there was no interest to commute or settle.

The warrant or letter appointing Mr.

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

Charles the agent of the company for this state, provides (section 11): "You will be allowed 15 per cent. commission on the cash paid on the first year's premiums on all policies procured by you; 5 per cent. commission on cash collected and remitted for renewal premiums on such policies. No commission is allowed on premium loans or interest collected, or on dividends or losses paid. No premium can be collected and no commission can be claimed by any person whose agency has been discontinued." Section 16 provides, "The right to discontinue any agent or agency at any and all times is reserved." And by a memorandum signed by the president of the company, bearing date the same day as his appointment, and evidently intended to be part of the contract it is stipulated among other things, that "business obtained previously to date hereof shall stand on same basis as heretofore." What were the specific terms of the former contracts by which Charles acted as agent of the company prior to April 1, 1870, is not shown by the proof,—Charles insisting that his copies were destroyed in the fire of Oct. 9, 1871,—but what testimony there is tends to show that the contract was substantially the same as that of 1870, with the exception that the commissions were somewhat higher.

It is conceded that after Mr. Charles purchased the interest of Oviatt and Clarke, he continued to collect the renewal premiums on the policies placed by them respectively, and to retain his commissions therefor. It is also conceded that, when the company decided to discontinue the state agency, the officers proposed to allow Charles to name the local agents, and to make such bargains as he could with them for the transfer of his interest in the business for their respective localities.

Upon this testimony the question is, does it appear that Mr. Charles had any continuing interest in the business of the company originated or purchased by him after he ceased to be the company's agent? In other words, was he entitled either to continue to collect the renewal premiums on his old business, and retain his commissions for so doing, or if the company withdrew those collections from him, was he entitled to the commuted value of the business? The contract in unambiguous terms says: "No premiums can be collected and no commission can be claimed by any person whose agency has been discontinued," and the right to discontinue any agent or agency is at all times reserved by the company. Clearly, then, there is no right in Charles to continue to collect the renewal premiums. Much stress is laid on the memorandum made at the same time with the appointment which provides, that "all business obtained previously shall stand on the same basis as heretofore," and, if the proofs showed that there was a continuing life right to commissions or renewals on the business "previously obtained," this memorandum would show that this right continued. But I think that the fair construction of this memorandum is that it applies to the rate of commissions on such business during the time Charles remained agent. Manifestly the legal effect of the contract of April 1, 1870, is to give the company the right of removal of any agent at pleasure, and to prohibit his collection of premiums after such removal, and, to my mind, the memorandum or supplementary contract does not change any original contract in that regard. It does appear that after the decision to vacate the state agency had been arrived at, negotiations were had between Mr. Charles and the company with a view of adjusting and settling his interest in the business, and that at least one of the officers—Chancellor Dodd—seemed to treat with him on the basis that he had a continuing interest, but I think that was done more for the purpose of obtaining an amicable settlement than as a concession that his contract gave him such right. The company naturally wished to avoid an open rupture with an agent, so influential and active as Mr. Charles was and had been, and probably considered the propriety of allowing something of his claim to avoid difficulty, and also was willing to concede something to him from the fact that his salary had in a certain sense terminated without fault of his, but solely from a change of policy on the part of the company. The case of Partridge v. Insurance Co., 15 Wall. [82 U. S.] 513, is in point on the question that there can be no continuing right in the business raised by implication or usage. The cross-bill is therefore dismissed, and the defendant ordered to account for and pay over to complainant the money in his hands and surrender all books and papers.

MUTUAL BENEFIT LIFE INS. CO. (DESMAZES v.). See Case No. 3,821.

MUTUAL BENEFIT LIFE INS. CO. (MARKEY v.). See Case No. 9,091.

MUTUAL BENEFIT LIFE INS. CO. (NEWTON v.). See Case No. 10,191.

MUTUAL BENEFIT LIFE INS CO. (NIMICK v.). See Case No. 10,266.

MUTUAL BENEFIT LIFE INS. CO. (ROBINSON v.). See Case No. 11,961.

MUTUAL BENEFIT LIFE INS. CO. (SPARROW v.). See Case No. 13,214.

MUTUAL BENEFIT LIFE INS. CO. (TISDALE v.). See Case No. 14,059.

Case No. 9,976.

In re MUTUAL BUILDING FUND SOC. & DOLLAR SAV. BANK.

Ex parte BEATTY.

[2 Hughes, 374; [1] 15 N. B. R. 44; 5 Am. Law Rec. 571.]

District Court, E. D. Virginia. Dec. 19, 1876.

BANKRUPTCY—BANK DEPOSITS — NEW ACCOUNT—SPECIAL FUND—PREFERENCE—LIEN.

Where a bank, which had suspended payments, advertised that it would on a certain day "resume business by receiving special separate deposits in trust to new account, pledging the bank to use these deposits only in payment of checks against that new account, and as fast as the bank can collect and realize from the loans and securities to pay pro rata instalments of its present indebtedness," etc., etc., and received new deposits, and soon after finally failed, and was adjudicated in involuntary bankruptcy: *Held* (on petition of a new depositor to be paid in full as a preferred creditor), that the new deposits were not special deposits; that no lien was secured when they were paid in over the counter of the bank; that no preference was secured by the advertisement, and that the new depositors were general creditors to be paid pro rata.

This savings bank suspended payments over its counter on the 23d of September, 1873, a day memorable among bankers. Its managers, in the belief that the failure would be temporary, invited, a few days after, new deposits by means of and as described in the following advertisement, which they published in the Richmond newspapers:

"Dollar Savings Bank.—This bank will resume business on Monday, October 6th, as per resolution herewith adopted by the board of directors: 'Resolved, that this bank resume business on Monday, October 6th, by receiving special separate deposits in trust to new account, pledging the bank to use the deposits only in payment of checks against that new account, and, as fast as the bank can collect and realize from the loans and securities, to pay pro rata instalments on its present indebtedness until the whole shall be liquidated, the same drawing the usual interest as heretofore until paid.' (Signed) John E. Bossieux. Thomas S. Armistead, Cashier. Oct. 3—3 times."

Deposits were made under this call, by a few men, one of whom was this petitioner; but the bank very soon found itself unable to go on, and closed its doors. In February, 1874, proceedings were taken against it by creditors, and it was duly adjudicated an involuntary bankrupt in this court. There is no evidence that the new deposits were marked and kept separate, as special deposits, and the fact seems to be that they were received over the counter in the same manner as general deposits are received. Indeed, the advertisement itself virtually announced that the new deposits would be treated as a common fund as to the new depositors, and not treated as special separate deposits, except as against the old depositors. A dividend has been declared and paid, without prejudice to the claim of the petitioner, John Beatty, and of the other depositors under the advertisement of October 3d, 1873, to be paid in full, according to the tenor of the advertisement, as preferred creditors.

John B. Young and Holliday & Holliday, for petitioner.

James Neeson, for the trustees in bankruptcy of the assets of the bank.

HUGHES, District Judge. It is claimed on the part of the petitioner that his deposit, under the advertisement of the 3d October, was a special deposit, and that the advertisement was a contract which this court is bound ex aequo et bono to specifically execute, as a court of equity. I do not concur in either of these propositions.

First. The deposit of the petitioner was not a special deposit; for it is only where the special money or thing deposited is received by the bank to be kept to itself and returned in corpore on demand, that the deposit can be claimed to be special. True, the advertisement held out that the bank would receive "special separate deposits;" but calling a thing what it is not does not make it what it is not.

Second. It is claimed for the petitioner that he has a higher equity than the former depositors of the bank, created and given by the advertisement of the 3d October. I do not think so. The former depositors made their deposits on precisely the same terms, in all essential respects (save one), as those on which the petitioner made his deposit; those terms being implied in their case, while in his they were expressed.

In the exceptional respect to which I allude, the case of the petitioner is weaker in point of equity than that of the former depositors. The contract under the advertisement was, virtually, that all the existing resources of the bank as well as the new deposits would be first used for paying the checks of the new depositors. The bank proposed to go on with its banking business; and the new deposits were of course intended to be used for the purpose of making new discounts in the regular course of that banking business. As the new deposits were to be loaned out for this purpose, the checks of the new depositors would have to be paid in whole or in part from the moneys taken in on notes already discounted and which would be falling due. The advertisement of October 3d was virtually a promise to use the funds collected on maturing paper in paying the checks of the new depositors; that is to say, the contract required money belonging ex aequo et bono to the old depositors to be paid to the new depositors. I think such a contract, so far as it was to operate in that way, was ultra vires. The bank had no power to make it; and the contract when made was contrary to equity, and, so far as it had the unjust operation described, ought not to be enforced in equity.

But even if it were a contract free from the

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two objections of being illegal and contrary to equity, and were such a contract as a court of equity dealing with solvent parties should specifically execute, still this court, as a court of bankruptcy, would be unable to decree a specific performance. In its nature this court has little to do with the specific execution of contracts. It has to deal with bankrupts who have broken all contracts, and are unable to perform any of them. It is a court whose primary duty is the distribution of assets gathered from the wreck of the estates of bankrupts, who themselves have already exhausted them of every resource available for the execution of contracts. The policy of the law under which the court acts is to avoid preferences, and to divide the assets pro rata, share and share alike, among creditors. The business of the court in this case is to distribute assets under the terms of a law which, except in favor of liens, requires a pro rata distribution.

If the new deposits which have been spoken of had in fact been special deposits, duly earmarked and set aside and held as such, the bank would have been a simple bailee of them and would have been obliged to return them in kind. But it is precisely because they were not special deposits, were not duly earmarked and set aside and held in kind, that a return of them cannot be decreed to the new depositors. No principle has been more thoroughly settled than the one that deposits of money paid into a bank over the counter are not received by the bank as a bailee, the property in them remaining in the depositors; but that they become the property of the bank, which itself thereby becomes the debtor of the depositors.

This bank, therefore, having become the debtor of Mr. Beatty and of the new depositors, and having gone into bankruptcy, and the new deposits having been paid into it over the counter, no pains having been taken to separate them from other moneys or to preserve their identity, it follows that no lien was preserved at the time of the deposits, that no legal preference could therefore arise under the advertisement of 3d October, 1873, and that the petitioner stands in this court only on the footing of a general creditor. I will sign an order dismissing the petition with costs.

Case No. 9,977.

MUTUAL BUILDING FUND SOC. & DOLLAR SAV. BANK v. BOSSIEUX et al.

[1 Hughes, 386.] [1]

District Court, E. D. Virginia. May, 1877.

RULES OF COURT—UPON WHOM BINDING—FOLLOWING STATE PRACTICE—DISCRETIONARY POWER OF FEDERAL COURTS.

1. A rule of practice prescribed by a court of justice, is for the government of suitors, counsel, and officers of the court in the conduct of causes and proceedings; and though it controls these persons, it does not control the discretion of the court itself so as to deprive it of power to secure the trial of causes on their merits, on proper showing.

2. An act of the legislature which takes away this discretion from a court, and deprives it of this power, is more than a rule of practice, and affects the common law right of suitors to sue in the courts.

3. Section 914 of the Revised Statutes of the United States, requiring the United States courts to conform their practice as near as may be to the practice obtaining in the courts of the several states in which they are held, contemplates only those rules of practice which are merely such, and does not contemplate those enactments of state legislation relating to practice in the courts which deprive them of power to control the application of rules of practice according to their discretion.

4. The discretionary power of United States courts held in Virginia over proceedings at rules, is not limited by sections 2 and 52 of the 167th chapter of the Code of Virginia of 1873, pp. 1089 and 1097.

In these suits [against E. Bossieux & Bro. and other defendants] an order was made on the first day (2d April) of the present term of the court, directing that these causes be reinstated on the rule docket. They appeared from the record to have been dismissed from that docket at the July rules, 1876, for want of declarations. Motion is now made (17th May, 1877, of the same term of the court) to set aside the order of the 2d April, on the ground that the motion to reinstate ought to have been made at the regular October term of 1876, and is now too late. Although the declarations were filed at the adjourned term of the court, held next after the July rules, 1876, at which the suits had been dismissed for want of declarations, it seems that the clerk did not make up the causes for the docket of the October term, and that the counsel of plaintiffs were not aware of that fact until shortly before the April term, 1877, when they promptly moved that the causes should be reinstated at rules. Counsel for defence, in moving to set aside and annul the order of April 2d, rely upon sections 2 and 52 of chapter 167 of the Virginia Code of 1873. Counsel for plaintiffs rely upon Nudd v. Burrows, 91 U. S. 426; Indiana & St. L. R. Co. v. Horst, 93 U. S. 291; The Palmyra, 12 Wheat. [25 U. S.] 1; Sibbald v. U. S., 12 Pet. [37 U. S.] 488; Harris v. Hordman, 14 How. [55 U. S.] 334; and Bank v. Wistar, 3 Pet. [28 U. S.] 431.

James Neeson and Thomas G. Jackson, for plaintiffs.

John A. Meredith, for defendants.

HUGHES, District Judge. These were suits at common law, and were brought to March rules, 1876, when they were each "continued for declaration." At the April, May, and June rules, they were "continued for declaration." At July rules they were dismissed for want of declaration, on the 31st of July, 1876, and on August 2d, 1876, the dec-

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larations were filed, the court being then in session. Although the declarations were marked as filed, they do not purport to have been filed by leave of court. It is sufficient to conceive how they could have been filed after dismissal of the suits, except by leave of court, given on application of the counsel for plaintiffs (himself one of the plaintiffs), who, as we all know, had been in a protracted illness. I conclude that such leave was given, and will deny the motion now made on that ground, but I would deny it on other grounds.

Section 918 of the United States Revised Statutes gives the United States courts authority to adopt rules and orders, directing (among other things) the taking rules, and making and entering up of judgments by default in vacation, and otherwise regulating their own practice. And section 914 requires that the practice, pleadings, and forms and modes of proceeding in common law suits, shall be conformed by the United States courts, as near as may be, to the practice, pleadings, and forms and rules of proceeding existing in like causes in state courts of record. Since 1872 this court has not, under section 918, adopted rules of practice conforming its own practice, pleadings, and forms and modes of proceeding to those of the state court. But section 914 is itself a general direction and authority on this subject, rendering any express adoption of rules of practice prevailing in the state courts unnecessary by this court. The Code of Virginia (page 1089, c. 167, § 6), requires the clerk to enter at rules a dismissal of any suit in which, after the lapse of three months after the defendant has been summoned, though he has not appeared, the declaration or bill has not been filed. And the same chapter of the Code (page 1097, § 52) gives control to the court at its next term, over all proceedings in its clerk's office, during the preceding vacation, with power to reinstate any cause discontinued during such vacation, to set aside any proceedings at rules, correct any mistake therein, and make any order concerning the same that may be just. The question is, whether these two sections of the laws of Virginia, operating together, are not more than rules of practice, and such as would take away from the United States courts that discretionary power over the proceedings of its officers which they have been decided to possess by the supreme court in the cases cited by plaintiff's counsel. Section 2 of this chapter of the Code, it will be observed, is more than a rule of practice, intended to govern the officers of court. It is a rule depriving a citizen of a right enjoyed before this law was enacted. It is, therefore, when enforced, in conjunction with section 52, a rule of right, and seemed to have been relied upon as such by the defendant's counsel in argument. It may be said of every rule merely of practice, that it is for the government of the officers of court, and does not deprive a court of its discretion to modify the application of it for sufficient cause. Any law which takes away that discretion from the court ceases thereby to be a mere rule of practice. Though the plaintiff and his attorney (as in the cases at bar) may be prevented by unavoidable accident from filing their declaration within three months, this section of the Virginia Code requires that suit shall be dismissed at rule, and if not reinstated at the next term of court, makes dismissal final. Having been dismissed by the clerk, section 52, of the same law, authorizes the court at its next term to reinstate the cause; but does not in terms prohibit the court from doing so at any subsequent term upon a proper showing. Now if this last section of the law be held by the state courts, as I believe they do, to be a statute of limitation, stringent in its meaning and purpose, and prohibitory upon the court after the expiration of the first term following the dismissal at rules, then section 2d is thereby made more than a mere rule of practice; it more than directs the methods, forms, and times of proceeding in a suit to be pursued by the officers of court; it takes away in many cases (like the one at bar) a right of action; it deprives the suitor of a right, and the court of its discretion in respect to the suit. It would deprive a United States court of a discretionary power over orders of dismissal, affirmed by the supreme court in the cases cited by plaintiff's counsel. As such it does not fall within the meaning of the 914th section of the United States Revised Statutes. That section was not intended as more than a regulation of the practice in the courts of the United States. By rules of practice are meant the rules prescribed for the government of the officers of court respecting the times, forms, and methods of orderly proceeding in a court; and I repeat that rules of practice are not superior to the discretion of a court, so as to deprive it of the power to secure the trial of causes on their merits. A statute of limitation is more than a rule of practice. Section 2d of the chapter 167 of the Code of Virginia is a statute of limitations, and when enforced in connection with section 52 is more than a rule of practice. It affects very important and very valuable rights of citizens in many cases. I feel authorized therefore to hold that it does not fall within the contemplation of the act of congress of June, 1872, now incorporated into the Revised Statutes of the United States, as section 914. Section 52 of chapter 167 of the Code of Virginia does not in terms prohibit a court at a later term than the one next following a proceeding at rules from correcting those proceedings for good and sufficient cause; but is construed to do so by the state courts. If it does, it is more than a rule of practice, and becomes a statute of limitation. As a statute of limitation it does not fall within the contemplation of section 914 of the United States Revised Statutes. I arrive therefore at the conclusion that this court is not bound by section 914 to enforce the two provisions of the Code of Virginia which have been men-

tioned, because they have the character of statutes of limitation. I feel authorized to treat the motion now made as addressed to its discretion.

If the suits which were reinstated on the rule docket by the order which this court made on the 2d of April, 1877, were allowed to stand as dismissed at the July rules, 1876, the right of action is lost to the trustees in bankruptcy of the Dollar Savings Bank under the limitation of two years put by law upon their authority to sue. The court ought to prevent such a result if possible, and allow the causes which would be dismissed by default to be tried upon their merits. The well-known illness of the counsel for the plaintiffs, who was himself one of the trustees, his filing his declaration by leave of court long before the commencement of the next succeeding regular term of the court, his belief that the cause had matured for regular hearing at the October term, 1876, and ignorance of its previous dismissal at rules, and all the circumstances of the case, are sufficient grounds, in my judgment, to warrant the court in its discretion in refusing the motion now made to the court by the defendant's counsel, to set aside and annul the order of 2d of April, 1877.

MUTUAL COMMERCIAL MARINE INS. CO. (OLIVER v.). See Case No. 10,498.

Case No. 9,978.

MUTUAL FIRE INS. CO. v. The S. G. ANDREWS.

[10 Chi. Leg. News, 149.]

District Court, N. D. Illinois. 1878.

INSURANCE PREMIUM NOT A MARITIME LIEN ON VESSEL.

In admiralty.

Charles E. Kremer, for libelant.
Rae & Mitchell, for respondent.

BLODGETT, District Judge. These cases are before the court upon exceptions to the commissioner's report as to the claim which was filed by the Millville Mutual Fire Insurance Company, for premiums on policies of insurance, issued upon the vessel in question. The commissioner, upon reference to him, allowed the libellant's claim for these premiums, as a lien upon the vessel. He did this upon the authority of a case lately decided by his honor, Judge Brown, of the Eastern district of Michigan, assuming that this court would follow that case, as it was directly in point. With all due respect to the learning which is displayed in that decision, I have never been entirely satisfied to follow it, and the best authority we have in this circuit is the other way. The learned circuit judge of this circuit, when district judge in 1869, had before him the case of The Security Fire Ins. Co. v. The Proceeds of the Lady Franklin [unreported], and after due consideration, dismissed the case upon the ground that a debt incurred for premium for insurance on the vessel did not create a maritime lien.

In this case it is not necessary to decide that question in as broad a sense, because it may be a debt against the owners of the vessel which would have a right to participate in the remnants, if there were any remnants. But here there are no remnants or will be none after the satisfaction of the maritime liens proper. I don't intend in making this decision to do any more than intimate my own views. I have not gone to the labor of writing out an opinion, nor have I attempted to cite any authorities, I would prefer that the question should be taken to the circuit court, and have an authoritative decision of this circuit on that question. I rule as I do because it is in accordance with my own conviction of what the law should be, and because I think until the law is definitely settled the other way in this circuit, that this class of claims should be rejected, and complications avoided growing out of the allowance of claims which may hereafter be held not to be properly enforcible in this form of procedure.

Exception to the commissioner's report is sustained.

It is due to Judge Drummond, that I should here say that his opinion in the Lady Franklin Case was never reported, and I have only been able to gather the purport of it from the recollection of counsel, and some brief notes in one of the daily newspapers of the city.

MUTUAL INS. CO. (SHERWOOD v.). See Case No. 12,776.

MUTUAL LIFE INS. CO. (ANDERSON v.). See Case No. 362.

MUTUAL LIFE INS. CO. (BATTLE v.). See Case No. 1,109.

MUTUAL LIFE INS. CO. (HAMILTON v.). See Case No. 5,986.

MUTUAL LIFE INS. CO. (JACKSON v.). See Case No. 7,141.

MUTUAL LIFE INS. CO. (NEWCOMB v.). See Case No. 10,147.

MUTUAL LIFE INS. CO. (QUIGLEY v.). See Case No. 11,511.

MUTUAL LIFE INS. CO. (SHATTUCK v.). See Case No. 12,715.

MUTUAL LIFE INS. CO. (SNYDER v.). See Case No. 13,154.

MUTUAL LIFE INS. CO. (WATERS v.). See Case No. 17,267.

Case No. 9,979.

MUTUAL LIFE INS. CO. v. WILCOX et al.

[8 Biss. 197; 6 Reporter, 8; 10 Chi. Leg. News, 268.] [1]

Circuit Court, N. D. Illinois. April 27, 1878.

BONDS—EXECUTED IN BLANK—PRINCIPAL AND SURETY—PRIOR LIABILITY SETTLED—INSURANCE AGENT—DEFALCATIONS.

1. The fact that a bond was executed in blank by the surety and afterwards filled up by his principal, does not alter the liability of the surety, where this irregularity is not brought home to the knowledge of the obligee.

2. An agent's bond is not invalidated by being left blank in regard to the place of the agency.

3. If an agent gives a trust deed to secure payment of a defalcation, the cancellation of the deed upon subsequent payment in full of that defalcation, would not affect the agent's surety on a subsequent bond.

4. If the agent at the time of the signing of the bond had moneys in his hands which he ought to have reported as collected but had not—they would come within the condition of the bond.

5. In order for the surety to escape liability on the ground of existing irregularities and defalcations of the agent, it must be shown that these were known to the latter's principal.

At law.

M. W. Fuller and F. H. Winston, Jr., for plaintiff.

George W. Smith and E. A. Storrs, for defendants.

BLODGETT, District Judge. This is a suit upon a bond given by Cronkhite as principal, and signed by the other defendant, Sextus N. Wilcox, as surety, conditioned for the faithful performance by Cronkhite of his duties as agent of the plaintiff and for the payment to the plaintiff of all moneys which might come into his hands as agent in the due course of his business, pursuant to the rules and regulations of the company. The proof shows, and in fact it is admitted, that Cronkhite was a defaulter to the amount of something over fourteen thousand dollars on the 12th day of January, 1876, and suit is brought upon the bond to recover the amount of this defalcation.

The defenses set up are: First—That the bond was executed in blank by the surety, Mr. Wilcox. Second—That the bond as it now stands is in blank in regard to the location or place in which Cronkhite was agent. Third—That Cronkhite had been for many years prior to the execution of this bond an agent for the plaintiff in this city, and was a defaulter to the company at the time the bond was executed, and that the company obtained the bond in question by fraudulently concealing from Wilcox the fact that Cronkhite was a defaulter at the time. Fourth—That some seventy-eight hundred dollars of the alleged defalcation was incurred before the bond was given.

In reference to the defense that the bond was executed in blank and is not the deed of Wilcox, the evidence shows this state of facts: The company sent to Cronkhite a blank form of the bond used by them, the only written portion of the bond being the amount of penalty, $20,000, with directions to Mr. Cronkhite to have it filled up, signed by his surety, and returned. Mr. Cronkhite took the bond to Mr. Wilcox, who signed it in the condition in which it came from the hands of the company; that is, without being filled up. Cronkhite then filled up the bond, and it was forwarded to the company. It was filled and returned to the company in precisely the condition in which it is now offered in evidence. There is no claim or pretense that it has been altered or changed since it came into the possession of the company. Cronkhite filled up the bond, putting in his own name, the name of the surety, and the date, perhaps, but left blank the name of the place where Cronkhite was agent.

I am satisfied that this does not vitiate the bond in any particular. The authorities upon that point [Dair v. U. S.] 16 Wall. [83 U. S.] 1, and [Butler v. U. S.] 21 Wall. [88 U. S.] 273, go to show that unless this irregularity is brought home to the knowledge of the principal to whom the bond is payable, the company will not suffer from it. There is certainly no evidence that it was brought home to this company, that this bond was not precisely as it now is, when Mr. Wilcox wrote his name for the purpose of giving this bond and having it properly placed in the hands of the company. Cronkhite was not the agent of the company in this transaction, but was acting in his own behalf, and if Mr. Wilcox saw fit to deliver a bond signed in blank to Mr. Cronkhite, he must suffer if there has been any irregularity.

It is further claimed that this bond was obtained by fraudulent concealment of the condition of Cronkhite's account, and that the company surrendered certain securities which they had, and of which the sureties should have had the benefit; whereby the contract is vitiated.

The facts bearing upon this branch of the defense, are simply these: Cronkhite, as has been stated, had been for several years, the agent of the plaintiff in this city. In 1873, he was found to be behind in his accounts, and making explanations that his deficiency had grown out of his giving indulgences to parties here in Chicago, who had suffered by the fire and various other reasons, he was continued in his office and an arrangement made that he should pay up from month to month this defalcation; and between the time that this defalcation was discovered, which I think was in September, 1873, and the time this bond was given in 1874, the deficiency was all paid up. About the time that Cronkhite had made or was making the last payment, at the time he remitted the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 Reporter, 8, contains only a partial report.]

drafts which as he supposed liquidated his former defalcation, he stated to the company that Mr. Warner, who had been his surety upon his bond as agent for the company here, had made an arrangement with his co-partners by which they had mutually agreed not to make indorsements, or become surety for any person, and asked that Mr. Warner's bond be cancelled. He said that a wealthy man—without naming him, of this city who would be entirely satisfactory to the company, was willing to become surety for him, and by the return mail, or shortly afterwards in acknowledging the receipt of the remittances, the company sent this blank bond and stated that when a new bond satisfactory to the company was returned, the Warner bond would be surrendered.

In accordance with this arrangement the bond in question was executed and forwarded to the company and the Warner bond surrendered. At the time the defalcation of 1873 was discovered, Cronkhite, in order to secure it, in addition to his bond signed by Mr. Warner, gave a trust deed upon certain property here in Chicago, for the nominal sum of $20,000, but for the real purpose of securing this defalcation, and at the time, or shortly after the Warner bond was surrendered, a small balance of some six hundred dollars for interest upon this defalcation, having been paid, Mr. Cronkhite wrote to the company that he wished this old trust deed surrendered to him, and it was accordingly cancelled and returned.

It is alleged that this was in bad faith to Mr. Wilcox. But the evidence is conclusive to my mind that this old trust deed had reference only to the old defalcation; that whenever that defalcation was paid up, Cronkhite could enforce the cancellation of that deed; that there was no understanding or agreement that it was to stand as security for the future transactions or dealings between Cronkhite and the company, but only for this single defalcation; and in accordance with that understanding on the final adjustment of that defalcation, this security was cancelled.

Now with reference to the concealment of the condition of Cronkhite's affairs, there is no evidence that any inquiry in the first place was made by Mr. Wilcox or anybody else, as to the condition of Cronkhite's accounts. There is no evidence that any statement was made to Wilcox by any person connected with the company, except Mr. Cronkhite, and he, of course, was an interested party and making his own explanations, and the company was not bound by them, as it was simply a business relation between Cronkhite and Wilcox.

There is some evidence in the case that at the time this bond was executed, Cronkhite was in default to the company, but the defalcation was concealed, and concealed in this way: The chief business of Cronkhite consisted in the placing of policies of insurance or the obtaining of new risks and in the collections of the annual or semi-annual payments upon past policies. The renewal receipts were forwarded to Cronkhite from New York and it was his duty to collect the premiums and return them during the month or return in time so that he could get them in the succeeding month's business. It was his duty to forward them or return the money in his report of that month's business, but instead of doing so, he got into the habit of returning a certain portion of his receipts as not paid, and carrying them over into the next month, and collecting the money the next month, and applying it upon them, and reporting them as paid and so lapping over the business of one month into the next.

There is no evidence whatever, that the company at this time had any knowledge of this course of dealing on the part of Cronkhite. They supposed him to be conducting his business entirely in accordance with the rules of the company and in a correct manner, but it is now attempted to defeat the claim of the plaintiff on the ground that this irregularity had been going on with the knowledge of the officers of the company for some time before this bond was given. I am satisfied that this irregularity on the part of Cronkhite was not known to the officers or general agents of the company, and that it supposed that Cronkhite's accounts were square. At the time this bond was given it was given in substitution of another bond which had been standing for several years, and I have no doubt that the understanding of all the parties was that the new surety stepped into the place of the old one, but if it were not so, I should consider that by the terms of this bond if there were any moneys in the hands of Cronkhite at this time, which he had not paid over and not reported as collected, they come within the spirit, intention and letter of the bond. That is to say, suppose that this bond was given on the first day of April, and that Cronkhite had money remaining in his hands which he ought to have remitted as part of his March collections, but had not remitted, I have no doubt that such money would come within the obligation of this bond. This consideration disposes substantially of all the objections to the claim of the plaintiff upon this bond.

The finding will be, the issues for the plaintiff—debt, $20,000; damages, the amount of $14,982, and six per cent. interest, being in all, to date, $17,041.82.

NOTE. A surety cannot escape liability on a bond as having been signed only on condition that a specified co-surety should be procured before it was used if he delivered it to the principal to be completed, with nothing on its face to suggest that such a condition was imposed. Brown v. Probate Judge, 42 Mich. 501, 4 N. W. 195.

[Cronkhite was also indebted to the insurance company $10,000 for money loaned him. For this he gave his note, indorsed by the defendant Sextus N. Wilcox. For action on the note, see Case No. 9,980.]

Case No. 9,980.

MUTUAL LIFE INS. CO. v. WILCOX.

[8 Biss. 203; 17 Alb. Law J. 426; 8 Ins. Law J. 815; 7 N. Y. Wkly. Dig. 13; 5 Reporter, 681; 10 Chi. Leg. News, 269.] [1]

Circuit Court, N. D. Illinois. April 27, 1878.

CORPORATIONS—ULTRA VIRES—DEFENSE TO NOTE—LOANS.

1. Where the charter of a company provides that its surplus funds shall be invested in mortgages on real estate in New York, or in certain classes of bonds, it is not competent for one who in another state has obtained a loan on personal security, nor his surety, to set up in defense the want of power in the company to make the loan.

[Cited in Farmers' Loan & Trust Co. v. Green Bay & Minn. R. Co., 12 Fed. 776.]

[Cited in American Button-Hole, etc., & S. M. Co. v. Moore, 2 Dak. 280, 8 N. W. 135.]

2. Credit for commissions, claimed by an insurance agent from the company cannot be allowed a guarantor of the agent's note in a suit at law; such claim could only be made available in a suit in equity on an accounting.

At law.

M. W. Fuller and F. H. Winston, Jr., for plaintiff.

Geo. W. Smith and E. A. Storrs, for defendant.

BLODGETT, District Judge. This is a suit upon a promissory note executed by Orville Cronkhite, payable to Merrill & Ferguson, and guaranteed by [Sextus N.] Wilcox. The note bears date June 29, 1875, for the sum of $10,000. The facts surrounding the transaction are these: The Mutual Life Insurance Company is a corporation created in the state of New York, and deriving its powers from the charter granted by the state of New York, and certain of the general laws of that state. The provisions of its charter applicable to this case are sections 9, 10, and 11.

"Sec. 9. It shall be lawful for the said corporation to invest the said premiums in the securities designated in the two following sections: * * *

"Sec. 10. The whole of the premiums received for insurance by said corporation * * * shall be invested in bonds and mortgages on unincumbered real estate within the state of New York; the real property to secure such investment of capital shall, in every case, be worth twice the amount loaned thereon.

"Sec. 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this state, or of any incorporated city in this state."

Mr. Cronkhite was the agent of the plaintiff in this city. In the month of June, 1875, he applied to the plaintiff for a loan of money, stating to them that his interests required that he should raise the sum of $10,000; that it was very difficult for him to attend to other business here as their agent, and at the same time make necessary changes in his own affairs. Considerable discussion and correspondence took place between the parties in regard to this matter, and finally the company concluded to let him have the money, and directed Merrill & Ferguson, who were the general agents of the company in the northwest, to advance the money, and the note was taken by Merrill & Ferguson and assigned by them to the company. This note was guaranteed by Mr. Wilcox in due form; and at the same time, and simultaneously with giving the notes, Cronkhite gave to the company an assignment of all his interests in the renewals, as they are called. It was claimed, on the part of the defendant, that Cronkhite, as the agent of the company, had a vested right in the commissions upon the premiums which should be paid upon certain policies which he had placed as the agent of the company.

Shortly after this note was given, or perhaps simultaneously with giving it, the money was remitted to Mr. Cronkhite by Merrill & Ferguson; but Cronkhite continued to collect these premiums and receive them; did not remit to the company, but retained in his own hands all the premiums to which he was entitled as agent of the company from that time on until January, when it was discovered that he was a defaulter for a large amount of premiums collected and not paid over.

It is claimed: First, that this note is ultra vires; that this company had no right to loan this money to Cronkhite on the security of this note; and second, that the company has been reimbursed by the collection of the premiums upon policies which Cronkhite had placed, and upon which he was entitled to commissions.

With reference to the first question—that of the power of the company—there is a class of old cases in the state of New York, which, perhaps, go to the extreme extent of holding that this company, being by its charter directed to invest its funds in a certain manner, all other methods of investing its funds are excluded, and even securities given for such investments are void. But there is no case parallel with this cited by counsel, and I have found none. The later New York cases, and the later cases all through the United States, do not go to the extent of the New York cases cited by the defendant, and I think the settled rule now is, that the question of how this company shall invest its funds, is a question between itself and the sovereignty that created it, and not a question between the borrowers and the company; in other words, that it does not lie in the mouth of this defendant to charge that this security is void. The money was advanced upon the faith of this

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security. But whether the company had the power to take this security or not, is a question the defendant has no right to raise.

There is a large number of cases that have arisen lately under the United States national bank act [13 Stat. 99], that are very analogous to this; where the bank is positively prohibited by the act from loaning more than ten per cent. of its capital to any one person, and yet the courts have held that securities given on such loans, in excess of ten per cent. were valid, and that it does not lie in the mouth of the party who borrowed the money of the company to object to a violation of this rule. Any other rule than this would make the policy holders and parties interested in the funds of this company entirely remediless. Suppose that the directors of this corporation, induced by the larger rate of interest which is usually proffered in the western states, or outside of New York, had, instead of loaning their money upon New York state security, seen fit to invest largely in securities in the state of Illinois, would the stockholders have to lose it all, simply because their directors had violated the charter? It would seem to me a very harsh rule to say that the parties interested in this fund should be the losers simply from this violation of the company's charter; a question simply between the sovereignty and the corporation itself.

Some force may also be given to the suggestion that this was an isolated transaction made between the company and its agent, and not a general change in the policy or business of the company. But the same section which I have just read, for instance, requires that the funds of the company shall be invested on unincumbered real estate. Suppose that the directors had made loans to a man in the state of New York upon incumbered real estate, would it lie in his mouth to say that that loan was void because there was a mortgage on the property prior to the mortgage of the company for the debt? The same section also provides that the real estate shall be at least double the value of the amount loaned. Now, the same rule that is invoked here on the part of the defense would entitle a man in the state of New York, who has borrowed this fund, to say that the security for the loan was void because the property was not of double the value; that the directors had exceeded their power, and the note or obligation was ultra vires. I therefore conclude that the defense of want of power to make this loan here, and consequent invalidity of the note, is not well taken.

The next objection is, that the company has been paid by the collections of commissions which ought to have gone to Cronkhite, and which should be applied in liquidation of this note. As I have already said, in stating the facts, Cronkhite, during the time he remained the company's agent, after the giving of this note, retained all the commissions in his hands, and the company received no commissions from him while he remained the company's agent. It may be a very important question whether Mr. Cronkhite is entitled to draw any commissions after his agency ceased.

On general principles, I would be inclined to hold that the insurance company would certainly have made a very improvident and unbusiness like contract to agree to pay an agent commissions on collections after he had ceased to be worthy of their confidence as an agent to make collections. But whether that is so or not, I am satisfied that this defense, if available at all, can only be made in a court of equity where an account can be stated, and it can be ascertained how much this company has collected that ought to be applied upon this claim.

I do not intend to commit myself by saying that the defense could be made applicable even in equity; but if at all available, it must be maintained in equity. I shall, therefore, find the issues in this case for the plaintiff, and assess the damages at the amount of the note.

[NOTE. The defendant, Sextus N. Wilcox, was also the surety on Cronkhite's bond to the company given, conditioned for the faithful performance of his duties as agent. For action on this bond, see Case No. 9,979.]

MUTUAL LIFE INS. CO. (YOUNG v.). See Case No. 18,168.

Case No. 9,981.

MUTUAL SAFETY INS. CO. et al. v. CARGO OF THE GEORGE et al.

[Olc. 89; 8 Law Rep. 361; 3 N. Y. Leg. Obs. 260.] [1]

District Court, S. D. New York. April, 1845.

MARINE INSURANCE — PROPERTY ACQUIRED BY ABANDONMENT—SPES RECUPERANDI—RIGHTS OF ASSURED — GENERAL AVERAGE — VOLUNTARY STRANDING TO SAVE CARGO — JURISDICTION — LOCAL LAW.

1. Assurers acquire by abandonment to them of property insured and satisfaction of their policies, all the present rights and remedies of the assured thereto, together with the spes recuperandi.

[Cited in The Manitoba, 30 Fed. 131.]

2. Those rights and remedies may be presented or proceeded upon in admiralty courts, by the assurers, in their own names.

[Cited in The Sarah J. Weed, Case No. 12,350.]

[See Amazon Ins. Co. v. The Iron Mountain, Case No. 270.]

[1] [Reported by Edward R. Olcott, Esq. 8 Law Rep. 361, and 3 N. Y. Leg. Obs. 260, contain only partial reports.]

3. Parties may have, in this court, the same remedies against the proceeds of property, subject to its jurisdiction, that they are entitled to against the property itself, in whose hands soever the proceeds may be found.

[Cited in U. S. v. Mackoy, Case No. 15,696.]

4. Admiralty has jurisdiction of cases of general average upon losses at sea.

[Cited in The Congress, Case No. 3,099; The Hyperion's Cargo, Id. 6,987.]

5. The voluntary stranding of a vessel, in peril of loss, with a view to save the cargo, although the vessel be thereby totally lost, is ground for general average, and the ship and freight, in such case, are subjects of average contribution.

[Cited in Heye v. North German Lloyd, 33 Fed. 63.]

6. The federal courts are governed, in commercial and maritime cases, by the general, and not by the local law.

[Cited in Faulkner v. Hart, 82 N. Y. 418.]

7. The adjustment of average in case of sale of the goods at the place of disaster, before reaching the port of destination, may be in relation to the sale price.

8. When no sale is made at such place, the value, at the place of shipment, will govern.

9. The policies do not, of themselves, supply proof of the value of ship, cargo or freight, on general average. But the adjusters can receive the policies as auxiliary evidence of those values.

10. Invoices and bills of lading are competent evidence of the value of the cargo at the place of its purchase and shipment.

The cargo and its proceeds are libelled in this action by three insurance companies [the Mutual Safety Insurance Company, the American Insurance Company, and the Jackson Marine Insurance Company], underwriters on ship and freight, to recover a contribution share on general average, claimed to be payable by the cargo on board the ship George, because of a voluntary stranding of the vessel by her master to save the cargo and freight. The underwriters had accepted the abandonment of the ship and freight after the loss of the ship, and paid a total loss on the vessel and freight. The facts are as follows: The George, being insured by the libellants, (all the three companies having underwritten the vessel to the valued amount of twelve thousand dollars, four thousand dollars each, and the Mutual Safety Insurance Company having underwritten the freight to the amount of $4,400, on a valuation of $6,800,) sailed in May, 1841, from New Orleans to Trieste, with a cargo of cotton, consigned to the claimants, Reyea & Schlick. When about six days out, the vessel met with heavy weather, and sprung a leak. The leak increased, and the master, after making a fruitless attempt to reach the harbor of Nassau, finally, with the view to save the cargo from destruction, ran the ship on a reef, about three-quarters of a mile from the main land on the west end of the Grand Bahamas. The vessel and freight were wholly lost, and after abandonment to the underwriters, a total loss was paid by them. A large portion of the cotton was saved, and the proceeds came to the hands of the defendants, [Josiah] Macy & Son, as agents of Reyea & Schlick, and Livingston & Barclay. The libel was now filed in rem against the cargo and its proceeds, on the ground that they were bound to contribute in general average to the loss of the vessel and freight, and in personam against the respondents, as holders of those proceeds or parts of the cargo. A foreign attachment was prayed against the defendants, Reyea & Schlick, and Livingston & Barclay, to make them personally liable for the funds in their hands, and also to compel the appearance of the owners of the cargo. There was very little dispute as to the facts of the case. The answer of Barclay & Livingston, the agents of Reyea & Schlick, insisted that the vessel was run on shore to save the lives of the master and the crew, and that the most expedient course had not been pursued in running the vessel on shore. The answer of J. Macy & Son admitted the proceeds of cargo to be in their hands, and disclaimed all personal interest in the subject matter. The only witness examined on the hearing was Thos. S. Minott, master of the George. He testified that the vessel sprung a leak soon after leaving New Orleans, and between the 17th and 22d of May the leak had averaged from two hundred to twelve hundred strokes of the pump per hour; that the water was four feet in the hold, and increasing, when he determined, on the 28th, to run the vessel ashore. The wind was light, with little sea. He testified positively that he ran the vessel ashore to save vessel and cargo, and that he did not consider any life on board in danger, as they had good boats, and the weather was moderate. That if the cargo had been thrown overboard, the leak might have been stopped, if it was in the upper works, but he did not know where it was. That he thought there was a chance, although a small one, of keeping the vessel free, even without running her ashore or throwing over cargo. That he selected the place of running her ashore with the view and in the hope of saving both ship and cargo. An average statement had been made up by an adjuster, and was submitted to the court by the libellants as the basis of the decree demanded.

Theodore Sedgwick, for libellants.

[2] [I. This libel is filed by insurers on a vessel voluntarily stranded for the benefit of all concerned, and her freight on which a total loss has been paid, to subject the cargo to a contribution in general average. Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331. The ship George, in May, 1841, being at sea was found leaking, and could not be kept free

[2] [From 3 N. Y. Leg. Obs. 260.]

by the pumps. The condition of the vessel was not desperate, but no attempt could be made to stop the leak without throwing the cargo overboard, and as it was more valuable than the vessel, the captain thought it most for the benefit of all concerned to run the vessel ashore. The cargo was thus saved—the vessel lost. II. By reason of the voluntary stranding, and sacrifice of the vessel and freight for the general benefit, the cargo became liable to the owners of the ship for a contribution in the nature of general average. III. The owners of the vessel and freight, being insured by the libellants, made abandonment and received payment of a total loss. The general average contribution is, therefore, due to the libellants. IV. The claim is founded on the implied maritime contract by which the vessel and cargo are reciprocally bound to each other to contribute to all sacrifices made for the common benefit of that contract—this court has of course jurisdiction. V. The court can either order a reference to the clerk to adjust the account or act definitely on the average statement already made, if no errors are shown to exist in it. VI. The admiralty has jurisdiction of a question of general average. 2 Phil. Ins. 580; Browne, Civ. & Adm. Law; De Lovio v. Boit [supra]. VII. The master has a lien on the cargo for its share of contribution towards a general average. Curt. Merch. Seam. 217; Abb. Shipp. pt. 3, c. 8, § 17; Simonds v. White, 2 Barn. & C. 805; Scaife v. Tobin, 3 Barn. & Adol. 523; The Hoffnung, 6 C. Rob. Adm. 383; Stev. Av. p. 50; U. S. v. Wilder [Case No. 16,694]. VIII. The doctrine that the admiralty has no jurisdiction over accounts, means accounts in the original sense of the term, i. e. disputed merchants accounts. Dunl. Adm. Prac. p. 16; Ordinance of 1648. "The court of admiralty shall not hold pleas or admit actions upon any bills of exchange, or accounts betwixt merchants and merchants or their factors." The John, 3 C. Rob. Adm. 288; (Am. Ed.) 234. "The account is of too general and unsettled a nature to entitle the party to this remedy." Dunl. Adm. Prac. p. 29. "A copartner or part owner of a ship cannot institute a suit for accounts in the admiralty in England." IX. The result is, that this court has jurisdiction of the case, both as one of maritime contract, and one of maritime lien, and that it does not come within the exception of disputed merchant's accounts.

[Danl. Lord, Jr., for respondents.

[I. The libellants are mere assignees of a chose in action, and as such, cannot sue in admiralty. II. The vessel being a maritime vessel, the underwriters residing in New York, the ship bound for Louisiana, to Austria, and the respondents being citizens of the latter country, there is no sufficient evidence that, either by the laws of Maine, New York, Louisiana, Austria or England, general average is due in a case like this. We insist, that in New York, where the contract was made, it is settled in a similar case, that no contribution in the nature of a general average is due. Bradhurst v. Columbian Ins. Co., 9 Johns. 9; 1 Parke, Ins. 280, c. 7; 2 Phil. Ins. "Gen. Average," 102. III. Even if a general average contribution were due, the court of admiralty has no jurisdiction to state the account between the parties. 2 Hagg. Adm.; 3 C. Rob. Adm. 288. IV. If any average were due, and this court is competent to make it, Bermuda is the proper place of adjustment, and there is no evidence of the law there. The learned counsel commented at length on the statement which had been made; citing 2 Phil. Ins. 141–167.

[BETTS, District Judge. The undersigners, by the abandonment, became clothed with all the rights of the insured, in respect to contribution in general average. 2 Phil. Ins. 322. The cargo is bound to the vessel to satisfy such contribution, and courts of admiralty will enforce the lien, it being of a maritime character. The proceeds of cargo may be pursued by libel or petition to recover general average. Stev. Av. 25; Dunl. Adm. Prac. p. 57; 4 Wash. 99, 100. As a general rule, when admiralty has jurisdiction in rem, or over the subject matter, it can be exercised against whatever represents the thing, or to which it may be changed or converted; and is exercised by monition, &c., against those who hold the proceeds. [Sheppard v. Taylor] 5 Pet. [30 U. S.] 675. The voluntary stranding of a vessel by the master, to save the cargo, is ground for a general average, although the vessel be totally lost. Abb. Shipp. 349, note 1; 3 Wash. C. C. 398; [Columbian Ins. Co. v. Ashby] 13 Pet. [38 U. S.] 331. The rule adopted by the state court (9 Johns. 9) does not control here. In commercial and maritime cases, the United States courts are not governed by the local law, but administer the general law. [Swift v. Tyson] 16 Pet. [41 U. S.] 1. The owners of the ship so lost are entitled to contribution on the freight as well as the cargo. [Columbian Ins. Co. v. Ashby] 13 Pet. [38 U. S.] 344. The adjustment of average, in case of sale of the goods at the place of disaster, and before reaching the port of destination, may be in relation to the sale price. Ben. Ins. 289. General rule of adjustment is explained. Stev. Av. 122, 167; 3 Kent, Comm. 343; Abb. Shipp. 3677.] [2]

BETTS, District Judge. The main subjects of controversy in this case are: The competency of this court to entertain the action; the right of the ship-owners to compensation on general average; and the principles upon which the average contribution shall be adjusted and distributed. The ship was totally

[2] [From 3 N. Y. Leg. Obs. 260.]

lost and was abandoned to the underwriters, who are the libellants in the action by virtue of that title. The abandonment conferred on them every interest and right in the ship possessed by her owners. They take all title and authority of the assured, even the spes recuperandi; his agents become theirs, and they stand subrogated to every privilege and power he possessed and might legally exercise. 2 Cond. Marsh. 601ab; 2 Phil. Ins. 420; [Chesapeake Ins. Co. v. Stark] 6 Cranch [10 U. S.] 268; Jumel v. Marine Ins. Co., 7 Johns. 412. If this complete substitution of the assurers in the place of the assured should fail to confer also the capacity to sue at law in their own names, they would meet no such technical impediment in this court; an assignee of an interest may maintain an action upon his title as if originally vested in him. It accordingly presents no objection to the sufficiency of parties that the libellants sue in their own names or solely. The objection to the jurisdiction of this court over the subject of general average was earnestly pressed on the argument. No case, however, was produced in the American or English maritime courts, in which the jurisdiction has been disavowed; and upon the criterion by which the capacity of the court is determined, general average would seem to be a subject eminently adapted to its functions, and to be made up of those ingredients which constitute a maritime jurisdiction and require its exercise. If not strictly international, it is cosmopolite in character, useful to the navigation of all nations, and everywhere recognized as an essential accompaniment of maritime commerce. Its necessity is created by transactions at sea, and relates to the exigencies and liabilities of ships, cargoes and freights reciprocally to each other at sea, in respect to maritime disasters, in which the exposure is common to each, and especially when it happens that some interest is, wholly or in part, voluntarily sacrificed for the preservation of the others. The rights springing out of that condition are recognized instinctively or by natural reason, and the primitive sea laws acted upon those rights, as subjects appropriate to their cognizance and authority. The civil law gave body and system to the usages and customs which had before prevailed in place of primitive law, and with the simplicity and practical equity which pervaded that polity, dealt directly with the property benefited or prejudiced by the sacrifice, and distributed between the two that which remained after the disaster in such ratio as to render the loss a mutual one to the owners of ship, cargo and freight, undergoing the common peril. The master of the ship became, in his official capacity, the minister of the law, who arrested and detained the property remaining, determined the amount of loss and the scale of contribution to be made and received by the respective portions of it, and carried the decision into effect by his own authority. The practical procedure in accomplishing this end is subject to regulation by the governments to which the vessels belong, but all the elements and gist of a general average, as recognized in its inception, and now administered by commercial nations, are maritime in their origin and nature, and appertain to the functions of maritime tribunals. This was the understanding of the law by the old English civilians. Zouch says, "Admiralty courts have jurisdiction touching contributions to be made for loss upon occasions of common danger." Zouch, Adm. assertion 3, art. 4, p. 32. Godolphin enumerates carefully the subjects over which the admiralty courts had a clear jurisdiction, and says, "Within the cognizance of this jurisdiction are all affairs at sea immediately relating to vessels of trade and the owners thereof"; also, "all cases of jactus, or casting goods overboard." Chapter 4, pp. 44, 169. Alexander, justice, in a treatise upon the sea laws, published in London, 1705, reiterates this declaration, and commends Godolphin as an eminent and reliable authority upon the subject of admiralty jurisdiction. Sea Laws, 259. The more modern elementary writers evidently hold the same sentiments, although expressed with a perceptible dread of the despotism of writs of prohibition. Browne says, "If a party institute a suit in admiralty in a cause of average and contribution, and be not prohibited, I do not see how the court could refuse to entertain it." 2 Browne, Civ. & Adm. Law, 122. When objection was made to the authority of the court to award average contribution, Sir William Scott yielded to the objections, but on two special grounds, first, that the claim was one of prize against a ship by captors of the cargo as prize of war. The cargo would have been entitled to average contribution as between its owner, and the owner of the ship. A part of it had been applied to repair the vessel before her capture. She was restored by the court. The court held, that as a prize court, it could not take notice of a contributory liability of property, expended for the benefit of the ship, and that, though cases of average on the part of the ship against the cargo are not unfrequent, a demand of the cargo against the ship is perfectly novel. The Hoffnung, 6 C. Rob. Adm. 383. No intimation is given by the court that it had no jurisdiction in cases of average. Its remarks strongly imply the contrary. In The Gratitudine, 3 C. Rob. Adm. 255, the implication is direct and forcible that cases of contribution are properly within the jurisdiction of the admiralty. Mr. Abbott refers to the civil law as the source of the authority for enforcing average contribution (Abb. Shipp. 361, § 17), and its procedures were in rem, and belong now only to courts of admiralty. The doctrine of the American courts is clear and distinct on this subject. Judge Story, in his thorough and profound discussion of the jurisdiction of the courts, says, "It embraces contracts and quasi contracts respecting average contributions." De Lovio v. Boit [supra]. In U. S. v. Wilder he

says, "The general maritime law enforces a contribution in default of any notion of a contract upon the ground of justice and equity, and is the only mode of remedy in many cases." Case No. 16,694. See, also, The Packet [Id. 10,654]. The practice is familiar to the courts. Dunlap, Prac. 57. It seems peculiarly fitting the functions of the court, no other tribunal having the faculty to compel property made liable to contribution by the maritime law, to fulfil that obligation.

A suit at law or in equity may be employed to obtain the value of the contribution (1 Smith, Merc. Law, 192; 1 Law Lib. (N. S.) 115; 1 Story, Eq. § 490); but the proceedings can only be in personam at law, helped out by the fiction of a contract (3 Chit. Pl. 87, 88), where none subsists in fact. And the interposition of equity affords no specific relief against the property, and is invoked rather to bring suitable parties into the controversy than to effectuate, by its direct action, the remedy the case requires. It will not even restrain the master from parting with the goods, if he thinks proper to do so. The civil law supplies the only forum adequate to the full necessities of the remedy. Abb. Shipp. (Ed. 1829) 361, 362, § 17. So, also, in my opinion, the parties entitled to a contribution can enforce their right by appropriate proceedings against the proceeds of the property, subject to make contribution in average, in whosesoever hands those proceeds may be found; or against whatsoever represents that property; without regard to a continuing possession of the goods to which the right of lien or contribution attached. [Sheppard v. Taylor] 5 Pet. [30 U. S.] 675; Harris v. Lindsay [Case No. 6,123]; [Ramsay v. Allegre] 12 Wheat. [25 U. S.] 615; 11 Johns. 323; Dunl. Adm. Prac. 57; Stev. Av. 25. The owner, if a foreigner or non-resident, may be brought under the jurisdiction of this court by suits of foreign attachment, so that the proceedings will be as efficacious against him, as if the were under personal monition or arrest. Munro v. Almeida, 10 Wheat. [23 U. S.] 473.

The point most contested on the hearing is involved in the objection that the ship-owner is not entitled to bring the value of the ship into contribution on general average, when the peril to which she was voluntarily exposed resulted in her total loss and destruction. The facts of the case are free from all conflict, and upon the testimony of the master, it appears the vessel was voluntarily run ashore by him to save the cargo, the lives on board not being in danger, and was totally lost in consequence. The policy and justness of the rule which, in my opinion, warrants this demand, is clearly manifested by these facts, because, if the probable or even possible destruction of the ship might follow the act, the master would have no inducement to risk that sacrifice, if, when the total loss followed, no claim for indemnity could be maintained against the cargo and freight for whose benefit it was made. In this act are all the requisites to a case of general average. The exposure of the ship to loss was voluntarily made by the master and crew for the common benefit of the shippers, and solely for the purpose of saving the cargo. It conduced to their preservation. The controlling test in questions of average is the voluntary placing of part of the property in peril by the master and crew, for the safety of the residue. 2 Browne, Civ. & Adm. Law, 199; Whitteridge v. Norris, 6 Mass. 125. And in vindication of the soundness of the new rule, admitted in the American courts, giving the value of the ship when she is totally lost a right to contribution, Ch. J. Tilghman, in Gray v. Waln, says, if the case is not one of general average, because the ship was totally lost, the result would be that for a small loss there shall be compensation, but a great loss is to go without compensation. 2 Serg. & R. 229.

To constitute a case of general average it is admitted to be essential that the ship and cargo should be in common danger, and that a part should be sacrificed for the preservation of the remainder, or, as is laid down by Emerigon (volume 1, 603), "le dommage n'est avaire grosse, que dans les cas ou il été opéré voluntairement pover le salut commerce." All these ingredients to a case of general average are proved to exist in the present instance, and it varies only from those described and approved in the earliest edicts and adjudications on the subject, in the feature, that the ship was subjected to a total instead of a partial loss, in the effort to save the cargo. This consideration augments the equity of the claim that such loss should be apportioned, and the property saved should contribute towards its remuneration. The argument against the claim attempts to replace the old doctrine declared by Emerigon and sanctioned by the supreme court of New York, excluding the owners of a ship totally lost from participation in the general average shared by the owners of cargo and freight. Bradhurst v. Columbian Ins. Co., 9 Johns. 9; Emerig. vol. 1, c. 12, § 13, p. 614. "It will be general average if the stranding has been voluntarily made for the common safety, provided, always, that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is, save who can." To do this effectually, the effort is made to distinguish the facts and principles acted upon by the supreme court of the United States and other American tribunals, from the broad and direct proposition presented by this case. But in my judgment no sound distinction can be shown between them, and the scope and force of the reasoning and conclusions of the supreme court embrace and dispose of every material question made upon that point in the case. Judge Story, in speaking for the court (Columbian Ins. Co. v. Ashby, 13 Pet. [U. S.] 539): Surely, says he, the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice, for that would be to say, that if

a man lost all his property for the common benefit, he should receive nothing; but if he lost a part only he should receive full compensation, and emphatically declares the law to be that a voluntary stranding of the ship, followed by a total loss of the ship, but with a saving of the cargo, constitute, when designed for the common safety, a clear case of general average. In this cardinal doctrine other influential decisions concur. The principle to be gathered from the new application of the rule is, that if the voluntary act of the master and crew is the direct occasion, the efficient motive and cause of the stranding, the loss becomes one of general average. Caze v. Reilly [Case No. 2,538]; 2 Browne, Civ. & Adm. Law, 199; Whitteridge v. Norris, 6 Mass. 125; Gray v. Waln. 2 Serg. & R. 229; Sims v. Gurney, 4 Bin. 513. The Rhodian law, whence the doctrine of contribution is derived, is founded upon this principle, jactus factus levandae navis gratiâ. The particular loss incurred is elected, with a view to the safety of what remains. 2 Cond. Marsh. 536. There is nothing in the adage of the Rhodian edict which imports that a partial injury of the property put in peril is all that is contemplated by the devotion of it to relieve the common peril; on the contrary, the larger doctrine has always been deduced from it, that as the jettison is unreserved, and may naturally result in the entire loss of the property abandoned to the risk, so the average remuneration shall correspond to and be measured by the degree of loss. Jac. Sea Laws, 345; Wesk. Ins. (Fol. Ed.) tit. "General Average, Jettison"; Abb. Shipp. (Ed. 1829) 348; 3 Kent, Comm. (3d Ed.) 232. This reference to the foundation of the law of general average is sufficient to indicate that the application of its rules and principles by the supreme court of this state (9 Johns. 9) is in restraint of the exalted and comprehensive equity it is designed to accomplish in cases of common perils wherein the property of one is sacrificed to promote the safety of others standing in equal exposure. Had the counsel then succeeded on this argument in raising a doubt whether the conclusions of the supreme court (13 Pet. [38 U. S.] 359) were in conformity with antecedent adjudications or usages on this subject, the doctrine of that decision supplies the more satisfactory exposition of this important branch of maritime law, and gives a rule eminently adapted to the exigencies of commercial navigation. Independent of this acquiescence in the soundness of the views of the court in that case, I should feel bound to conform to its expositions of the general principles and rules applicable to average claims, although the particular facts of this case may be shown not to be exactly coincident with those on which that judgment was founded. The leading feature of that case embodies the principle which controls this. But even if it could be demonstrated that the conclusions of the supreme court were speculative and hypothetical, the solemn enunciation and sanction of a rule of maritime law, by that high tribunal, would be a guide and light I should not fail to follow in the administration of that law in this court.

In commercial and maritime questions, the federal courts are not governed by the jurisprudence of particular states, but by the general principles and doctrines of commercial law, or the law-merchant. Swift v. Tyson, 16 Pet. [41 U. S.] 1. I shall, therefore, hold the libellants, representing the rights of the owners of the ship, as entitled to contributions on general average upon her value, at the place of loss, notwithstanding she was totally lost by the stranding. The act was voluntarily done by the master with a view to the safety of the cargo alone. They are entitled to contribution toward the loss, from all that was saved, including cargo and freight. The ship, cargo and freight are to be estimated at their full value, at the place of stranding. That value will be ascertained on the adjustment of the average by appropriate proof. The invoices and bills of lading will be received as evidence of the value of the cargo at the place of purchase and shipment, and the policies may be consulted as evidence conducing to prove the worth of the ship at the port of departure, and the value of the freight lost. 3 Kent, Comm. 167; Abb. Shipp. 607; 2 Cond. Marsh. 618. But additional evidence of the value must be produced. The principles governing the valuation between assured and assurers, are not conclusive in cases of average, because, in the first instance, the policy is the common act of the parties in interest, and may estop all question as to valuation, whilst on general average interests are brought in which are not controlled by the policy. Still I think the policies may be admissible before the adjusters as auxiliary proof of the value of the ship, cargo or freight. The decree will be drawn up in correspondence with this decision, and all questions of law which may properly be raised on the proceedings of the adjusters under it, may be brought forward for consideration on the coming in of the adjustment or auditor's report.

The following decree was adopted by the court and entered in the cause: This case having been heard upon the pleadings and proofs, and having been argued by Mr. Sedgwick for the libellants, and by Mr. Lord for the claimants, and due deliberation being had in the premises, it is considered by the court that the libellants are entitled to recover against the claimants and against the proceeds of the cargo owned by them, and saved from the wreck of the ship George, a contributory part in general average, in the proportion the value of the cargo saved bore to the cargo on board paying freight. And it is further considered by the court, that the libellants, for the purpose of such contribution, are entitled to have the ship and freight

valued at the sums respectively named in the policies in the pleadings mentioned, deducting, in respect to the ship, a reasonable allowance for wear and tear on the voyage up to the time of the disaster, and all sums received on sale thereof, or any part of her tackle or apparel at the place of wreck or elsewhere. And it is further considered by the court, that the goods of the claimants saved pay contribution according to the prices at which the same were sold at Nassau, (the place of the stranding,) deducting therefrom salvage and other necessary charges; and if it be found that such prices are below the average invoice prices of such goods, or the valuation thereof in the policies of insurance, that then the residue of the cargo paying freight be valued, for the purpose of adjusting the average contribution, at the same rate or proportion. And it is ordered by the court, that it be referred to the clerk, (or to an auditor to be named or designated by consent of the proctors of the respective parties,) to adjust and state the average contribution against the claimants, conformably to the principles of this decree, and that on such reference, the testimony used in this cause, and such other evidence as may be pertinent and competent, may be offered by either party, subject to all legal objections.

[For hearing on exceptions to the auditor's report, see Case No. 9,982.]

Case No. 9,982.

MUTUAL SAFETY INS. CO. et al. v. CARGO OF THE GEORGE.

[Olc. 157; 8 Law Rep. 363.] [1]

District Court, S. D. New York. June, 1845.

SHIPPING—GENERAL AVERAGE—LOSS BY JETTISON—VALUE OF VESSEL—STRANDED TO SAVE CARGO—ESTIMATING FREIGHT.

1. In the adjustment and settling of general average the contributory interest of the ship is to be estimated at her value at her port of departure, making reasonable allowance for wear and tear on the voyage, up to the time of the disaster.

[Cited in The Star of Hope, 9 Wall. (76 U. S.) 235.]

2. General average on loss by jettison is allotted on the principle that the property pays and receives in contribution upon the basis of loss and value at the time of the sacrifice.

[Cited in Dupont v. Vance, 19 How. (60 U. S.) 171.]

3. As between assurers and assured, the valuation agreed in the policy may be taken on general average, as the value of the property at risk.

4. But the valuation in the policy on the ship is no more than prima facie evidence of her value as against owners of the cargo; her value must be established in the ordinary modes of proofs in respect to their interests.

5. Invoices and bills of lading are admissible evidence of the value of the cargo at the place of shipment.

6. The valuation of freight in the policy may be received as prima facie evidence of its value in favor of and against the ship-owner, on general average.

7. In case of total loss of the ship voluntarily stranded for the safety of the cargo, all the property exposed to the risk must contribute, and be contributed for at its value, when the sacrifice was made.

8. The more ancient method of estimating freight at its gross value, both when contributed to and when contributory, held to be preferable to the modern practice of estimating its full value in the first instance, and in the second, diminishing it at discretion, by abating one-fifth, one-third or one-half from its value.

[This was a libel by the Mutual Safety Insurance Company, the American Insurance Company, and the Jackson Marine Insurance Company against the cargo and proceeds of the ship George, to recover a contribution share on general average, claimed to be payable by the cargo because of a voluntary stranding of the vessel by the master in order to save cargo and freight. The underwriters accepted an abandonment and paid a total loss. There was a decree in favor of libellants, and a reference to an auditor to adjust and state the average contribution against the claimants. Case No. 9,981.]

On the coming in of the report of the auditor under the reference of April term last [Case No. 9,981], various exceptions were interposed to the report by the respective parties, and applications were made to the court to change the terms of the interlocutory decree, and to insert other provisions in the final decree.

The hull of the vessel had been sold after the disaster on the beach for a small sum; about two-thirds of the cargo was lost, one-third only saved. The interests to be contributed for were (1) the value of the vessel represented by her underwriters, and valued at $12,000; (2) the freight represented by the underwriters on freight to the extent of the insurance, $4,400, and by the owners of the vessel for the balance; (3) the cargo lost. The interests to contribute to make up this loss were, of course, as to vessel and freight, the same, and the entire cargo. The rate at which the vessel and freight should contribute was the subject of difference of opinion. The insurers on the vessel contended on the authority of the case of Leavenworth v. Delafield, 1 Caines, 573, and on what they asserted to be uniform custom, that to determine the wear and tear of the vessel, one-fifth should be deducted, and the vessel be contributed for upon the balance, or four-fifths. The insurers on freight contended, on the authority of the same case and custom of alleged similar generality, that the freight should only contribute on one-half its gross amount, or, in this case, $3,400, and be contributed for on the whole, the reason of this rule being stated to be the propriety of making a deduction for the expense of earning the freight; and lastly, the underwriters, whether on vessel or freight, contended that the valuations in the policies were to govern.

In the case above cited, the following language was held by Livingston, J., in the supreme court of New-York: After citing Pothier and Marshall, he proceeds (page 579):

[1] [Reported by Edward R. Olcott, Esq. 8 Law Rep. 363, contains only a partial report.]

"As the rule is not accurately defined by the law of England, and the one adduced applies to cases of jettison only, we are at liberty to make one for ourselves. The injustice of making the ship and freight contribute for their full value has already been stated. The first will be injured by the voyage, and oftentimes the whole freight received will not be equal to the disbursements and expenses to which the owner has been exposed. * * * What value to put on the vessel and freight, and do complete justice, is more difficult, perhaps impracticable. To take their full worth will not do. After the best reflection I have been able to bestow on the subject, I am for valuing the vessel at four-fifths of her original cost, reckoning nothing for provisions or wages paid in advance, and the freight at one-half of the gross sum agreed to be paid. This rule may be deemed arbitrary; so will any that can be devised, and yet, perhaps, it will come as near as any other in producing a contribution in proportion to the real interest of each which may be in jeopardy." For the respondents it was insisted, that this case of Delafield v. Leavenworth did not apply to the present; that the valuations in the policies could not affect third parties, that is, the owners of cargo; that the actual wear and tear of the vessel should be ascertained by evidence, not by any arbitrary deduction, and that the freight should contribute on its whole gross amount.

John Duer and Theo. Sedgwick, for libellants.

Daniel Lord, Jr., for respondents.

BETTS, District Judge. The specific points in contestation, and determined between the parties by the decree of April last, were, that the court has cognizance of the case as one of admiralty and maritime jurisdiction, that the ship was voluntarily stranded for the benefit of the cargo, and although a total loss, her owner was entitled to compensation by way of general average; that the adjustment of average could be made in this port, where the proceeds of the cargo were attached, and that the freight was both subject to contribution, and entitled to a contributory allowance. The frame of the order was not discussed between the parties when adopted, and the claimants, by exception to the report of the auditor, and the libellants, through a direct petition or motion to the court, seek to have portions of the decretal order explained, modified or annulled. To avoid the complexity of cross motions and arguments upon objections in relation to the details of the order, the court permitted the counsel to consider the whole matter open as to the particulars to be embraced in the final decree, beyond the general principles settling the rights of the libellants to recover, and that the argument be directed to the terms asked by the libellants to be inserted in the decree adjusting the contributory interests, or fixing the rules by which they shall be determined, with the right to the claimants to propose any substantive provisions in the final order not moved by the libellants, and pertinent to the case.

The positions which the libellants maintain are, that the ship is to contribute and receive contributions upon her value agreed in the policy of insurance, deducting one-fifth for wear and tear, conformably to the rule declared by the supreme court of this state, in Leavenworth v. Delafield, 1 Caines, 573. That the cargo saved is to contribute according to its invoice value, and that lost by stranding to be contributed for at a like valuation. That the freight is to be contributed for at its gross value, according to the amount named in the policy, being the sum payable to the ship-owner: and the freight is to contribute on such gross amount less one-half, being its cost or value at the time of loss, according to the rule in Leavenworth v. Delafield, 1 Caines, 573. That the libellants are entitled to a decree in personam against Macy & Co. and Barclay & Livingston, who hold portions of the proceeds of the cargo, or part of the cargo itself, for the amount of such cargo or proceeds and costs, and to a decree against the foreign owners of the cargo, upon a proceeding by foreign attachment for the value of the cargo saved, and not recovered of Macy and the other respondents.

The claimants combat each of these propositions, except the second, and also ask the direction of the court as to the compensation chargeable in behalf of the auditor and adjuster of average. It is understood the latter particular may be arranged between the parties, and it will not, therefore, be further noticed in this opinion. In directing, by the former order, the ship and freight to be valued at the sums named in the policies set forth upon the pleadings, being their true values at the port and time of departure, the court did not overlook the fact that the owners of the cargo were not parties to those policies, and would not be considered, in judgment of law, to have assented to the valuations made in them; nor was the court unaware of the diversity of opinions and usages stated in the books in relation to the basis of valuations which were to be subjects of general average. 1 Cond. Marsh. Ins. 290, 291; 2 Cond. Marsh. 621–623.

The preponderance of authority is believed to be, that the contributory interest of the ship should be estimated at her value at her port of departure (3 Kent, 242; 2 Serg. & R. 258; Benecke, 210; 1 Caines, 573), with proper allowances for wear and tear; that is, upon her value at the time to which the apportionment relates (1 Phil. 358). Other cases indicate that if the ship is sold, her contributory value is to be the sale price. 2 Johns. R. 98. Abbott considers the rule to be that the ship is to be estimated according to her value at the end of the voyage (Abb. Shipp. 356), that is, at her port of destination (2 Marsh. London Ed. 1802, c.

13, § 7). But Benecke combats that doctrine (Benecke, 310), and his conclusions are more in consonance with the principle upon which average is exacted and given, which clearly is, that the property should pay and receive in contribution upon the basis of loss and value at the time of the disaster. The means of measuring these particulars with certainty are not, however, well defined, and different commercial states, and sometimes different tribunals in the same country, are at variance as to the proper method of attaining that end. Weskett, 255; 1 Marsh. (Ed. 1802) c. 13, § 7; 2 Phil. 358; Benecke, 322–325; Stev. Av. pt. 1, art. 3. It is, moreover, not a definitely settled principle whether these methods or means are matters of evidence only, or are raised to rules of decision, and thus become fixed doctrines of law. In the latter case it would belong to the court to determine the amount of the contributory interests, very much as it settles the relative liability of the parties; and in the former, the inquiries would be essentially matters of fact, to be ascertained by ordinary modes of proof.

The case of Leavenworth v. Delafield, 1 Caines, 573, is an instance in which embarrassing questions under a general average are disposed of by the judgment of the court as purely legal, and Gray v. Waln, one where the same particulars were referred to the jury to be passed upon as matters of fact. 2 Serg. & R. 229. The court considered the jury rightfully exercised their discretion in following the reason of the New York case as conducing to certainty, but the decision itself is not sanctioned beyond the special case of capture; 2 Johns. 98; and is regarded an anomaly in its principle by high authority. 2 Phil. Ins. 218. No reason is assigned in the decision for giving an effect to a loss by vis major, different in one case from that of another; so that losses by jettison or capture can stand on different rights to compensation by average. It is to be borne in mind, that the speculations in the English books upon the valuation of the ship as a subject of general average, and essentially so, also, in the American authorities, until the case of Columbia Ins. Co. v. Ashby [Case No. 3,038], had relation to partial injuries by voluntary sacrifice, and not to her total loss. In the latter case no reason is discovered for distinguishing her valuation on general average from that on a claim against her underwriters. In respect to the valuation of the ship, as she is to contribute and be contributed for at her value at the port of departure, with a proper allowance to cover the deterioration at the time of her loss, how are these particulars to be ascertained? As between owners and assurers, the valuation agreed in the policy is ordinarily taken for the purposes of general average, as the value of the ship (Stev. Av. c. 1, art. 2); and Benecke says that valuation is frequently the best guide in determining the contributory interest between all parties concerned (Benecke, 311, 312). Upon the assumption that it belongs to the court to prescribe the means by which the value is to be determined, the policy might, perhaps, be safely adopted as a more reliable approximation to the value than the report of surveyors, or the estimate of casual observers or appraisers. Usually the vessel is examined on the part of the underwriters by an experienced surveyor, having knowledge of her age, build and character, who will be watchful to prevent an over-valuation; and the strong interest of the owner and his agent, on the other hand, to have the policy a sufficient indemnity in case of loss, might, in the conflict of these interests and views, secure an estimate sufficiently near the fair value to answer the purpose of a general rule, which would prevent serious injustice to either party. It is no more arbitrary to declare such valuation to be that on which the average shall be estimated, than to direct one-fifth or one half (1 Caines, 373; Abb. Shipp. 356; 2 Valin, 294, 295), to be deducted from the proved value at the commencement of the voyage, to determine the worth of the vessel at the time of her destruction. In view of the vagueness and want of uniformity in fixing the contributory value of property subject to general average, with which the courts and text writers have always been embarrassed, the first order in this case adopted the valuation in the policy as the value of ship and freight, and this seems a common method of fixing such value in case of total loss (Stev. Av. 163–167). Yet I am not satisfied the policy can be received as more than prima facie evidence of the value of the ship and freight, admitting it covers no more than her naked valuation, if admissible to that extent, because the parties proceeded against in this action are not parties or privies to the policy on the ship or freight, and I do not find that the practice of taking the valuation in the policy as full evidence to that point is so far recognized in the mercantile law as to require the force of a general usage, and where a legal proposition is rather experimental than established, it may be considered preferable to adhere to known rules, however fit and reasonable a proposed change may appear.

Proceeding in subordination to legal rules of evidence, no less so in case of jettison than in privation of property by other casualties, the party claiming recompense for his loss should establish its value by the ordinary modes of proofs. Benecke, 294. The court cannnot look to the probable inconvenience or delays he may be subjected to in pursuing his remedy in that method; those are incidents to every demand put in suit, and I accordingly hold that the libellants must establish before the adjuster, by legal evidence, the value of the ship at the time the disaster occurred. He must determine that fact by due proofs. I can see no reason to vary

the rule on this inquiry, or to assume that the value at the place of departure of the vessel may easily be proved, whilst it must be impracticable to prove it at the place of her loss. Testimony, for aught that appears in this case, may as well be furnished tending to show the degree of depreciation of value, as to determine its state when the voyage commenced. The rule is, that a reasonable allowance shall be made for wear and tear (3 Kent, Comm. 242), and there would manifestly be great conveniency in possessing a criterion which should infallibly fix that amount; but without the support of notorious usage and custom to an uniform scale of depreciation of a vessel by performing the whole or any portion of her voyage, it must be sheer conjecture with the court to pronounce that the abatement of one-fifth or one-half, or any other aliquot of the value of the ship when sound, a reasonable measure of its worth at the time of loss. The method of ascertaining the value of the ship at her place of departure, and that which governs the same inquiry, at the period of her loss, should be alike.

On the argument, the counsel on both sides agree to accept the invoice prices and bills of lading as proof of the true value of the cargo, and the policy as evidence of the value of the freight; and that agreement renders it unnecessary to inquire what effect in law those documents would be entitled to upon the question of actual value of the cargo at the time and place of its shipment, or of the freight at the time of loss. The next consideration is, how freight is to be contributed for, and on what sum it is to contribute. In the authorities upon which the decision on the merits in this case is rendered for the libellants (2 Serg. & R. 229; Caze v. Reilly [Case No. 2,538]; [Columbian Ins. Co. v. Ashby] 13 Pet. [38 U. S.] 331), it is held that freight is to be brought into the account on general average, both as receiving and rendering compensation, because of the loss of the vessel, but those cases do not settle the ratio of allowance or contribution. In the United States circuit court the point was not debated by the bar or court, nor does it clearly appear that any average adjustment had been made in that cause. In the Pennsylvania case the jury found the freight payable per cask, but the case does not state what rate on the value was allowed in adjustment. The case in the supreme court is alike barren of facts on this point, and the attention of the court was not directed to the consideration of the special question made in this case. It appears, by the opinion of the court, that an auditor's report was made, but not being excepted to, no information is given of the basis upon which it was formed. In no one of those cases, or the thoroughly studied arguments made by the counsel in them, is it intimated that the freight is to receive contribution upon one valuation, and be contributory on a different one.

The libellants, by means of the abandonment to them, stand in place of the owners in this case, and it is admitted, that on portions of the cargo, freight has been received by them, and earned pro rata on others, and that they are bound to contribute on what is so saved towards the general loss. It is contended for them that they are first entitled to be allowed in contribution for the gross freight taken on board, and that they are only to contribute on the freight saved after deduction of the expense of earning it, whether the expenses are measured by a fixed ratio of deduction, as is the practice frequently adopted, or are ascertained by subtracting the wages and other expenditures in earning it as chargeable in favor of the ship against freight.

Legal writers, and the adjudged cases, constantly speak of the contribution in respect to freight as divisible in its character, the ship-owner to have contribution upon his gross freight on average adjustment, and to pay only upon the net amount saved him by the sacrifice to the common benefit. Abb. Shipp. 356, 357, and notes 1, 2; 1 Phil. Ins. c. 15, § 11; Benecke, Ins. 291; Id. 313; 1 Marsh. c. 13, § 7; Stevens, pt. 1, arts. 2, 4; Id. pt. 2, art. 3; Ann. Ins. 98; Hughes, 225, 226; Id. 283; Hall, 489, 492; 1 Smith, Merc. Law. 192. And such undoubtedly is the prevalent usage in respect to the contributory value of freight in cases of total loss. The principle recognised as the foundation of this doctrine is that every thing sacrificed for the common safety shall be contributed for by those benefited at its actual worth or value when lost, and that the contribution shall be drawn from every thing saved at its value at the same time. Maggrath v. Church, 1 Caines, 216. The court says the freight actually gained or earned in the voyage, and not what the vessel would have earned if she had gone the full voyage, ought to be the rule of contribution. When a jettison occurs, the freight for the voyage upon the goods thrown overboard is lost with them, and is provided for by general average at the rate of its full value. The freight on the residue of the cargo must accordingly be called on to contribute towards that loss at its value to the ship-owner, as one of the particulars benefited and saved by means of the jettison. What, then, in this relation to the subject, is that value as saved? There is great diversity and looseness of opinion and practice on this point, and it must be regarded yet an undetermined question of commercial law. The justness of the distinction set up between the amount to be paid and received on account of freight is not obvious, particularly as the freight lost, though paid for in full, need not be, and rarely if ever can be, fully earned at the time. The principle of the rule seemed to be aimed at is, to require the freight to be placed on the same footing with the ship and cargo, and have its interest in contribution at a common valuation, whether lost or saved.

The ship contributes upon her actual value, for loss or injury to herself or to the cargo, and in the present case is so contributed for; and it is not undeserving notice in this connection that wages and provisions, which are estimated in average adjustments as expenditures in earning freight saved and to be deducted from the valuation of freight, would perhaps be more appropriately referred to the ship, as necessities of her equipment and navigation, or of the expense of carrying her to the place of disaster. 2 Serg. & R. 229; Id. 237, notes. In that sense their value would be involved in the valuation of the vessel, and ought not to be reiterated and again provided for as a distinct interest in connection with freight. But adopting the usual mode of valuation, and regarding provisions and wages as expenditures in gaining freight and chargeable against that, the question yet recurs, whether the ship-owner is entitled to full freight on the cargo lost, and chargeable with less on that saved?

The case under consideration would mark the unequal operation of such rule as a general one. The owner here claims to be credited gross freight on part of the cargo, and to realize that amount in the adjustment, yet that he should be made chargeable in contribution upon the same, less the cost of earning it, say one-fifth. Thus he would be paid the expense of gaining the freight in a full allowance therefor, and receives compensation again, or what is equivalent, is relieved from contribution, in the way of deduction from the amount, before it is made contributory to the common loss. Such method of valuation, in effect, imparts to the ship-owner a double contribution on the same loss; first, in ranking him as creditor for gross freight, then abating from the sum (which is tantamount to adding it to the ship) the cost of earning it, when it becomes contributory. It is not easy to discern the equity which permits the subtraction of the cost of wages and provisions from freight, and does not allow them on the valuation of the ship. They are the indispensable conditions to her navigation; freight is not. Whatever her value may be at the place of loss, greater or less than at the place of her departure, the services of the crew (represented in wages and provisions) become ingredients of that value, in being the means of placing her there, and would be estimated by the owner as part of her cost price at that place, as the voyage is not necessarily one earning or seeking freight. The ship is the only losing party contributed to in this case, and, it seems to me, the suggestion is not without force, that in adjusting the average by allowing her full freight as parcel of her loss, and abstracting from the amount, when made contributory, her advantage on the average is augmented. She is relieved from contribution proportionably to the privilege thus given to freight when it is contributory.

If the rule were to be regarded as definitely settled, that between owners of the cargo, or in respect to the ship-owner, in compensation of the usual average losses on the vessel, the proportion of contribution laid upon freight shall be adjusted by deducting from the gross freight the cost of earning it; can that privilege be justly claimed, when the vessel seeks not recompense for a partial injury, merely retarding the voyage, which is performed after her reparation, and towards which she must make like contribution, but in compensation for her entire value as a total loss? The modern practice undeniably favors that distinction, and freight is relieved from contributing on general average upon its gross value; and a lesser one, supposed to have first satisfied the expenses of earning it, is assumed as the contributory valuation. 2 Phil. Ins. c. 15, § 11; Abb. Shipp. (Ed. 1829) 356; 1 Caines, 573; Humphreys v. Union Ins. Co. [Case No. 6,871]. Although this is accepted and acted upon by most commercial tribunals as a general doctrine, yet, as has already been shown, there is no uniformity in the rules governing the estimates of value. Sometimes it is an arbitrary abatement of one-fifth, one-third or one-half, and at others the proportion is worked out by valuing the charges incurred in gaining the freight. Without intending presumptuously to originate a plan of contribution in this respect, or to overlook or underate the prevailing practice, or the considerations upon which it is supported, I am more disposed to fall back upon the primitive usage, the great stock from which these diversities are offshoots. The decision now adopted will at least afford the opportunity to parties concerned in the question, to carry the subject before the national court of last resort, where a rule may be established and declared which will govern the American merchant navigation on this important topic.

In the Consulato de Mare, Bourdier's translation, c. 96 (2 Pardessus, Us et Coutumes de la Mer, quarto, p. 101, note 6), it is said, "In case of jettison, if the master receives freight for his whole cargo, the same shall be included in the general contribution;" although the ship, in the same ordinance, on such an average, is rated at one-half her value. And in chapter 98 it is expressly declared, that the freight saved shall contribute for its full value, the same as do the goods saved (2 Pardessus, 103, note 3); and the compiler points out the error of Bourdier in his translation of chapter 98, in this respect. The Laws of Oleron (8) declare, that losses by jettison are paid in full out of the vessel or freight, at the discretion of the master. Zouch, Append. 169, 170. So in various sea laws and ordinances collected by Molloy (B. 2, c. 6, § 12, pp. 12, 13), it appears that the contribution was laid upon the whole value of the freight. The ordinance of Philip II., of 1563, at Antwerp, so allots it, and the same usage had prevailed in the northern parts of Holland before 1300. La Recopila-

cion de Leyes de las Indias, in Spain, and the statutes of Genoa, lay on the ship a contribution both for the whole of her value and freight; and the ordinances of Koningsburgh and Hamburgh agree that the ship is to contribute to the same extent for the whole of her value and freight. Molloy refers to some instances amongst the old edicts in which the contribution appointed is less than on the whole value of the freight; but their general bearing and usage puts the gross value of the freight in contribution. Stevens quotes Van Weytsen (Traité des Avarie, 1563), who concludes his examination of the subject, by saying, "that in reason and justice they ought to carry in common contribution the whole value of the vessel, as well as the entire freight which the master receives for the voyage." (Stev. Av. 52; 1 Pardessus, Us et Coutumes de la Mer; Laws of Oleron, art. 8, p. 329, note 2; Id. art. 31, p. 344, note 5).

The considerations adverted to will lead me to place this decision on that basis, and to direct the freight to be charged on the adjustment at its full value at the place of disaster. The proceeds and part of the cargo being arrested in this port, the adjustment will then be made up conformably to the rules governing the subject here; preserving, however, a common basis of contribution in respect to freight, either to it, in satisfaction of its loss, or from it, contributing to the common loss. The decree adopted in this case will meet the other points also brought forward on these motions, and determine the terms of the adjustment to be carried into execution under the judgment of the court.

The court accepted, and ordered to be entered the following form of decree in the case:

This cause having been further heard in respect to the form of the order or decree to be rendered therein, and due consideration being had of the premises, it is considered and adjudged by the court, that the libellants recover against the proceeds of the cargo in the pleadings mentioned, a contributory part on general average in proportion to the value of the cargo saved (represented in whole or in part by the said proceeds) bore to the cargo on board paying freight. And it is further ordered and adjudged, that for the purpose of such contribution, the said ship be estimated at her value at her port of departure, when the voyage in the pleadings mentioned commenced: such value to be proved on the part of the libellants, subject to such deduction for wear and tear up to the time of her loss, as on the part of the claimants shall be proved to be reasonable; and also deducting all sums received by the libellants on sale of said ship, or any part of her tackle or apparel, after the stranding in the pleadings mentioned. And it is further ordered and adjudged, that the cargo laden on board be valued for the purpose of contribution, at the prices stated in the invoice and bills of lading thereof, or either, if both cannot be produced, deducting therefrom salvage and other necessary charges incurred in consequence of the wreck of said ship. And it is further ordered and adjudged, that the freight of the said ship be contributed for at its gross value, and that the freight saved after the wreck also contribute at its gross value, being the amount contributed for in the general average, deducting therefrom all necessary expenses incurred (if any) subsequent to the wreck aforesaid. And it is further ordered and adjudged, that it be referred to the clerk of this court (or, at the option of the parties, to an auditor, to be selected by their respective proctors) to adjust and state the average in this district, conformably to the directions of this decree, and that on such reference the proof produced on the hearing of the cause, and such other evidence as may be pertinent and competent, may be offered by either party, subject to all legal exceptions. And it is further ordered and decreed, that on the coming in and confirmation of the report of the clerk, (or auditor,) the libellants may take and enter a final order, that the claimants, Josiah Macy and others, in the pleadings named, and holding in their hands part of the proceeds aforesaid, pay over to the libellants respectively the sum so reported to be due them, or the rateable proportion thereof, according to their respective insurances, with interest thereon, from January 10, 1842, to the amount of the said funds in their hands, if necessary for that purpose. And it is further ordered and decreed, that the libellants recover their costs to be taxed, to be paid out of said proceeds, but no decree or process by virtue of the proceedings of foreign attachment is to be taken in personam against any party in the pleadings mentioned.

MUTUAL SAFETY INSURANCE CO. (HENSHAW v.). See Case No. 6,387.

MUXLOW (WIGHT v.). See Case No. 17,629.

MUZZY IRON WORKS (HUTCHINGS v.). See Case No. 6,952.

Case No. 9,983.

The M. W. WRIGHT.

[Brown, Adm. 290;[1] 3 Chi. Leg. News, 313.]

District Court, E. D. Michigan. March, 1871.

SEAMEN'S WAGES—ACT OF 1790 CONSTRUED—PROCEEDING BY SUMMONS—ATTACHMENT.

1. The provisions of section 6 of the merchant seamen's act of 1790 [1 Stat. 131], with respect to the recovery of wages, apply only to the classes of vessels enumerated in the first section of the act.

2. The proceedings by summons to the master, provided for in section 6, are cumulative and op-

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

tional, and the party may resort to an attachment in the first instance.

[Approved in The Waverly, Case No. 17,301. Cited in Murray v. The F. B. Nimick, 2 Fed. 88; The Edwin Post, 6 Fed. 208; The Frank C. Barker, 19 Fed. 334.]

On exception to answer, and motion to expunge.

The libel was for seaman's wages. The answer, by its first, second, and third allegations, ignored the hiring of libellants, the rate of wages, and the rendering of the services as alleged in the libel, but on information and belief, disputed the validity of libellant's claim, and in general terms denied the jurisdiction of the court. The fourth allegation of the answer was in the following words: "Fourth: These respondents allege, upon information and belief, that the said steamer, during the season of 1870, was employed in running from the port of Bay City, Michigan, to the port of Pine River, Michigan, making the round trip from said Bay City to said Pine River and return once in each twenty-four hours, and that during said season she made no trip or voyage except between said ports as aforesaid; that since on or about the 4th day of August last, said steamer has been tied up and remained idle at the port of Bay City aforesaid, until about November 1st, 1870, and during that time made no trip or voyage whatever, and that none of the preliminary steps or proceedings provided for and required by the sixth section of the act of congress, passed the 20th day of July, A. D. 1790, entitled 'An act for the government and regulation of seamen in the merchant service,' has ever been taken, or complied with by the said libellants, or any person on their behalf; and these respondents therefore submit that the said libellants ought not to have or maintain their said libel, and they pray that they may be allowed to have the same benefit of this objection and defense as if the same had been especially pleaded to the jurisdiction of this court in this proceeding." The exception and motion to expunge related solely to this fourth allegation, and were based upon the alleged reason that the allegations of said article "set forth no defense to said libel or any part thereof."

H. B. Brown, for libellant.
Hoyt Post, for claimant.

LONGYEAR, District Judge. The questions discussed upon the argument of the exception and motion, and which are for decision, are: 1. Does this case fall within the purview of section 6 of the act of 1790 (1 Stat. 131)? 2. If the case is within the purview of said section, then do the provisions of the section relating to commencement of suits by seamen for recovery of wages, supersede the law in force at the time the act was passed, or are those provisions merely cumulative and optional?

Section 6 is in the following words: "That every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong," (he belongs) "one-third part of the wages which shall be due him at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract, and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district" (or a commissioner appointed by the circuit court, as amended by the act of August 23, 1842,—5 Stat. 516), "where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him to show cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of admiralty courts, to answer for the said wages; and if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge" (commissioner), "or justice, shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause or complaint of the like kind against the same ship or vessel), shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise, the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander: but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after

the delivery of her cargo or ballast." I have quoted this section in full for the reason that there are expressions interspersed all through it plainly indicating to my mind the true interpretation to be given of it. The act is entitled "An act for the government and regulation of seamen in the merchant service." Section 1 provides that "every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing, or in print, with every seaman or mariner on board such ship or vessel," etc. Then, after providing what shall be the prices or wages to be paid by any master or commander to every seaman or mariner he shall carry out "without such contract or agreement being first made and signed," and for a forfeiture by such master or commander of twenty dollars for each seaman or mariner so carried out, section 1 closes as follows: "And such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures, contained in this act." Now, it is apparent, that if section 6 is intended to provide for the same class of cases as is specified in section 1, then the case under consideration does not fall within the purview of section 6, because the vessel was not a vessel "bound from a port in the United States to any foreign port," nor "from a port in one state to a port in any other than an adjoining state."

Mr. Sedgwick, in his treatise on Statutory and Constitutional Law (page 237) says, "It is an ancient and well settled rule, that where any cause of doubt arises, although apparently the doubt attaches only to a particular clause, the whole statute is to be taken together, and to be examined, to arrive at the legislative intent." Applying this rule to the act in question, we find that by section 1 a certain contract or agreement is required to be entered into between the master or commander and the seamen, and the class of vessels and kind of voyages defined to which that requirement shall apply. By a subsequent part of the same act (section 6 above quoted), we find certain rights conferred upon seamen and mariners as to demanding and receiving wages during the voyage, and certain regulations prescribed for the collection of what may be due them on the termination of the voyage, by the express reference to "the voyage," and "the contract." If section 6 stood by itself—if it was all there was of the act—the language used, "the voyage," and "the contract," would at once suggest the idea of something lacking, and an incompleteness of expression and meaning. What "voyage?" what "contract?" We might infer, and should be under the necessity of inferring, however great a grammatical inaccuracy, it would involve, that it meant any voyage in which such ship or vessel was or had been engaged, and any contract relating to such voyage. But when we find section 6 embodied in an act in other parts of which a certain class of voyages are defined, and a certain contract is prescribed and required to be entered into, the meaning of the language used in section 6 at once becomes plain, full, and consistent, and we are not only under no necessity of resorting to inference, but are not allowed to do so under the well settled rule of construction above laid down. Sections 1 and 6 are but parts and parcels of one general system adopted by congress for the government and regulation of seamen in the merchant service (as expressed in the entitling of the act) in the class of cases therein specified. It is foreign to the plain object and intent of the act, and it is unnecessary, unnatural, and far fetched to attempt to put upon section 6 any other construction. Section 6, standing alone, is also incomplete and inconsistent in another respect, but which incompleteness and inconsistency not only entirely disappear, but the provisions of that section become harmonious and perfect when interpreted in the light of the last clause of section 1. Thus, the idea of the existence of a written or printed contract is so impressed upon section 6 by the language used throughout, that the rights of seamen prescribed by, and the procedure provided for the enforcement of such rights, can hardly be conceived of under said section, in a case in which there is no such written or printed contract. It is impossible to read the section without that impression being produced upon the mind. It is spoken of as "the contract," and "his contract," as containing express stipulations, as determining the amount due, as something to be produced, and of which the contents may be stated; and it is so spoken of in the same manner and evidently in the same sense as it is in every other part of the act, and in such parts, too, as without doubt relate to the written or printed contract prescribed in section 1. Therefore, standing alone as a law to apply to all cases of collection of seamen's wages, the section is incomplete and inconsistent.

Now let us interpret section 6 as a part of a system of which section 1 also constitutes a part. The last clause of section 1 provides as follows: "And such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in this act." We can now see clearly why section 6 should, and is consequently made to cover only such cases as arise upon written or printed contracts, and why it makes no provision for any other class of cases. It is because, and only because, by the provisions of the clause of section 1 above quoted, seamen not signing such contract are not subject to any of the provisions of the act of which section 6 is a part. Interpreting section 6 then as a

part of one system, of which section 1 is also a part, it again becomes complete, harmonious and consistent. See, also, Cooley, Const. Lim. 55, 57.

I have been referred by counsel to no adjudicated cases involving the point under consideration, and it is believed there are none reported. Judges Betts, Conkling, and Benedict have alluded to it, however, in their several treatises on admiralty practice. Judge Betts (Betts, Adm. 67) adopts the construction that the provisions of section 6 refer exclusively to the class of cases specified in section 1. Judge Conkling (2 Conk. Adm. 68) expresses a doubt, and on account of such doubt, and for reasons based upon certain provisions of the act of February 26, 1845 [5 Stat. 726], extending the jurisdiction of the district courts to certain cases arising on the Lakes, says he had applied the provisions of the sixth section indiscriminately to all vessels embraced by the act of 1845; that is to vessels of twenty tons burden and upwards. He does not discuss the question at all independently of the provisions of the act of 1845, and it is quite apparent that his doubt as to the true interpretation of section 6, and his disagreement from Judge Betts in his practice under it, arose more on account of the difficulties he thought he perceived in the application of Judge Betts' interpretation of section 6 to certain cases arising under the act of 1845, than to anything found in section 6 independently of the act of 1845. Saying nothing of the propriety or soundness of resorting to an act of congress passed fifty-five years after a former act in order to arrive at the legislative intent of such former act, I have simply to observe that, it now being conceded that the act of 1845 is obsolete, and that there is no distinction between the jurisdiction of the admiralty on the Lakes and on tide water, it is to be presumed that that learned judge would now adopt the same reasonable interpretation of section 6 as that adopted by Judge Betts, and would conform his practice to such interpretation. Mr. Benedict (Ben. Adm. 507) goes a little further than Judge Conkling. He says, speaking of the practice in cases for collection of seamen's wages, as founded on the act of 1790: "This is believed to embrace all vessels not in the national naval service. The first three sections of the act relate to vessels and voyages of a particular character, but other sections of the act embrace 'any ship or vessel,' 'any seaman or mariner,' and the careful use of different phraseology for different purposes in the different sections, shows that the language, in every case, was intended to have its appropriate force." But then in this immediate connection the learned judge adds: "The law as administered under this act in the Southern district of New York, will be found very fully laid down in Betts' Practice, pages 59 to 68." Although the learned judge comments somewhat further upon the practice as adopted by Judge Betts, he nowhere alludes to the difference of views between them, as to the class of cases to which section 6 applies. This circumstance, as well as others which become apparent to any one examining the matter closely, such as the fact that the reference made is not to section 6 specially, but generally to "other sections of the act" (other than the first three sections), while the question arises upon section 6 alone; also, that the language quoted by him as the words of the act upon which he bases his opinion, are inaccurate as applied to section 6, and the more important fact that he fails entirely to consider the language quoted, or any like language used in section 6, in connection with and in the light of the context, all tend strongly to show that this learned judge and author did not bring to bear upon the question that close scrutiny and intelligent discrimination which usually characterize his writings and opinions. The subject-matter of section 6 is introduced as follows: "That every seaman or mariner" (general terms, it is true) "shall be entitled to demand and receive from the master or commander of the ship or vessel to which they" (he) "belongs, one-third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo before the voyage" (qualification No. 1—what voyage? See section 1) "be ended, unless the contrary be expressly stipulated in the contract" (qualification No. 2—what contract? See section 1). And so throughout the whole section qualifications occur which can be satisfactorily explained and understood only by reference to section 1, and by the application of those old and well-settled canons of interpretation and construction of statutes to which I have already alluded.

Upon the whole, therefore, I am of the opinion, as to the first question stated, that the provisions of the sixth section of the act of 1790, for the government and regulation of seamen in the merchant service (1 Stat. 131), are to be considered as referring exclusively to those voyages preparatory to which the master or commander is required, by the first section of the act, to make an agreement in writing with the seamen. From this it follows that the voyage or voyages in which the wages claimed by the libellants in this case are alleged to have been earned, not being voyages from a port in the United States to some foreign port, or from a port in one state to a port in any other than an adjoining state, as specified in section one of the act, but, on the contrary, to and from ports in the same state, the case does not fall within the purview of section 6; and hence that the exception to article 4 of the answer is well taken.

I am also of opinion, under the second question stated, that the proceedings prescribed by section 6 are merely cumulative and optional; and consequently, even if the case were within the purview of section 6, the exception would be well taken. But as the exception is disposed of upon the first question, I shall

not enter into any extended discussion of the second. It is an old and well-settled rule of construction, that "where a right or remedy exists at common law, and a statute is passed giving a new remedy, without any negative, express or implied, upon the old common law, the party has his election either to sue at common law, or to proceed upon the statute." Sedg. St. & Const. Law, 93, 125, 401, 402, and the numerous cases cited. This rule is applicable to the remedies under the maritime law as well as the common law. When the act of 1790 was passed, it was lawful for seamen to commence suit in rem in the admiralty by libel, and arrest the vessel in the first instance. The act of 1790 simply makes it lawful, in certain specified cases, to proceed by summons in the first instance, as preliminary to the libel and arrest. There is no provision expressly negativing the old law, and the language used in conferring the right to such new proceeding is certainly very far from implying such negative. The rule of construction above quoted, therefore, applies with its full force. This same rule of construction has been applied in numerous cases to another branch of the act of 1790, viz., that relating to desertion of seamen; and it may be now regarded as well settled that the maritime law of desertion is not superseded by the statute, notwithstanding the latter defines and prescribes punishment for desertion in some respects different from the offense and its punishment as defined by the former; and hence it is optional with the party injured to proceed under the maritime law, or under the statute. I can see no good reason why the same rule should not apply to the provisions of section 6, so far as it prescribes a mode of procedure for collection of seamen's wages.

I hold, therefore, that the preliminary proceedings by summons, &c., prescribed by section 6 of the act of 1790, are cumulative, and in addition to the ordinary proceedings by libel, according to the admiralty practice, and may be resorted to or not at the option of the libellant. See Judge Sprague's opinion in the case of The William Jarvis [Case No. 17,697], in which this question is fully and ably discussed, and the above views and conclusions are fully maintained. The exceptions are allowed. Motion granted.

MYER (STETTINIUS v.). See Case No. 13,385.

Case No. 9,984.

In re MYERS.

[2 Hughes (1877) 230.] [1]

Circuit Court, D. Maryland.

BANKRUPTCY—ASSIGNMENT OF PROPERTY—UNDER DECREE OF STATE COURT—VOID PREFERENCE.

1. A trustee, who had misappropriated a fund intrusted to his management, and so turned it over as finally to invest it in property in his own name, finally is adjudicated a bankrupt; but, within six months before adjudication, he had executed a deed of this property for certain proper purposes in obedience to a decree in equity of a state court, before which he was sued as trustee. *Held*, that this assignment was not such as is meant to be declared void by section 5129 of the Revised Statutes of the United States (section 35 of the bankruptcy act of congress [14 Stat. 534]).

2. An assignment within six months of bankruptcy, of real estate acquired before he became trustee, but paid for out of funds acquired under the trust, was not such an act as section 35 makes void.

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

Petition for review in circuit court. This was a petition on the part of certain creditors of Andrew J. Myers to the district court to have him adjudicated a bankrupt.

The acts of bankruptcy set forth in the petition are, that within six calendar months preceding the date of the petition the alleged bankrupt, being seized and possessed of certain real estate in the district, made an assignment thereof to a certain Edward P. Suter, trustee, with intent to hinder, delay, and defraud his creditors. The deed is dated the 10th day of April, 1876, and it is not disputed that Myers executed and delivered it. It is then alleged that Myers, about the 28th day of March, 1876, suffered and procured his property to be taken upon legal process in favor of Suter, trustee. After the hearing of the petition, and an examination of the facts, the district court refused to declare Myers a bankrupt, and this is an appeal to the supervisory jurisdiction of the circuit court.

The facts pertinent to the questions to be here considered appear to be that Myers, about the 21st of December, 1860, by the circuit court of Baltimore county, in a cause there depending, in which he and his wife were complainants, and a certain Thomas J. Griffith, together with certain infant children of the complainants et al., were defendants, was appointed trustee to execute the trusts contained in the will of a certain Edward Griffith, and as such trustee took possession of a large amount of real and personal property. It further appears that in total disregard of his obligations as trustee, he squandered a large part of the trust property, and by many changes, sales, and transfers, had managed to get the most of that left, and that which was purchased with the proceeds of sale of such as in violation of his trust he had sold, invested in his own name. These facts coming to the knowledge of the cestuis que trust, about the 13th of March, 1876, they filed a petition in the cause depending in the circuit court of Baltimore county, setting them forth, and asking to have a new trustee appointed, and that Myers should be made to account. Myers, about the 28th of March, 1876, answered this petition, admitting the facts alleged, the truth of which could not be denied. The state court, on the same day, passed a

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

decree removing Myers from his trust, and appointed one Edward P. Suter trustee in his stead. The decree directed Myers to surrender and deliver all the trust property to the new trustee, together with all the property standing in his individual name, or held by him individually, but really belonging to the trust estate, or for the purchase of which the trust funds were used and applied. In compliance with this decree Myers executed the deed of assignment which is here alleged as an act of bankruptcy.

BOND, Circuit Judge. So far as the charge of the petition that Myers procured his property to be taken upon legal process is concerned, it seems to me it is easily settled The proof is pretty clear that until Myers came into possession of the trust property he had none of his own, or at least but little, and even if he had caused the petition on the part of his cestuis que trust to be filed, of which there is no proof, he could hardly be said to have procured his own property to be taken in execution, for it was not his in any full sense. The assignment in obedience to a decree of a court of equity, which, if he had not made it immediately, ought to have sent him to prison at once for contempt, is not such an assignment as is contemplated by the 35th section of the bankrupt act. But proof is offered to show that one piece of property assigned by Myers to the trustee, Suter, was held by Myers in his own name antecedent to his appointment as trustee of Edward Griffith's will, and the assignment of this piece of property which it is said is not within the terms of the decree of Baltimore county court is an act of bankruptcy. Myers says, however, in his examination, and there is nothing to contradict it, that he borrowed the money to purchase the property in question, and afterwards paid the lender with the money of Griffith's estate. This, it is argued, does not make the property in question part of the trust estate, because the money of the trust is not traced directly to investment in it. But surely it would be hard to adjudge that an act of bankruptcy which stands upon so doubtful a point of equity law. Myers was required by the decree of a court whose confidence he had grossly violated to convey to Suter all property in the purchase of which he had used funds of the trust estate committed to his care. He had not, perhaps, in this instance taken the actual money paid to him as trustee to pay for this particular piece of property, but he repaid the loan which he had made in order to its purchase with trust funds. It is not unlikely, had he not done as he did, and made the transfer, Baltimore county court would have imprisoned him till he complied with the decree, and would have ruled, as it should have done, all doubtful questions of equity against the faithless trustee, leaving their final determination to await the suit of some injured creditor. We do not think this, under the circumstances and facts shown, was an act of bankruptcy on the part of Myers. There is nothing else alleged in the petition of these creditors as an act of bankruptcy which is set out with any particularity. Proof has been offered here, however, of an assignment of an interest in an insurance company; but as that assignment was not specifically set forth in the petition, or mentioned in any way, so as to give the bankrupt notice that he was to be held to answer it, no proof of it was allowed to be given in the district court, but was properly refused. I think the judgment of the district court was correct, and that this petition should be dismissed.

MYERS (COOKE v.). See Cases Nos. 3,174 and 3,175.

Case No. 9,985.

MYERS v. COTTRILL.

[5 Biss. 465.] [1]

Circuit Court, E. D. Wisconsin. Oct., 1873.

INNKEEPERS—LIABILITY FOR LOSS—COMMERCIAL TRAVELER—NEGLIGENCE—ACTION BY HUSBAND FOR PROPERTY OF WIFE.

1. Where a guest at a hotel takes to his room valuable articles of merchandise and keeps them there for show and for sale, inviting purchasers to examine them, the hotel-keeper is relieved as to such merchandise from the special liability of the common law.

2. The fact that such guest sleeps in the room does not alter this rule.

3. The statute of Wisconsin does not alter this rule, for that did not contemplate the case of guests bringing quantities of merchandise to be placed in the safe, nor did it intend to compel an innkeeper to receive whatever merchandise his guests might choose to bring, nor to provide a safe to contain it.

4. These rules will not, however, under either the common law, or the statute, excuse the innkeeper for the negligence of either himself or his servants.

5. The innkeeper, knowing that such goods were in the room, should use reasonable diligence with reference to the condition and value of the property.

6. Negligence is a relative term, depending very much upon the circumstances of each case, and is frequently a mixed question of law and of fact.

7. Property belonging to the wife may be recovered for in an action brought by the husband, provided it was given to the wife by the husband.

8. The fact that the property of the wife was in the same room with the merchandise does not alone prevent him from recovering.

9. The innkeeper in order to avail himself of the state statute as a defense must show that he has literally complied with it.

This was an action by Samuel Myers against William H. Cottrill, the proprietor of the Plankinton House in Milwaukee, to recover the value of certain property alleged to have been stolen from his room in the

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

Plankinton House, on the 29th of May, 1872. The plaintiff and his brother were partners in business in Boston, and were in the habit of taking to different parts of the country for sale various articles of jewelry, which when thus taken were charged to the person taking it, and he was considered accountable to the firm for it. The plaintiff and his wife arrived at the Plankinton House on the 27th of May, 1872, and were assigned to room No. 80, on the third floor of the hotel, to which room were sent his trunks and certain packages, forwarded to him by express, containing a large quantity of watches, chains and various kinds of jewelry, of the value of from $15,000 to $16,000. The admitted object of the plaintiff's visit was to dispose of this property in the ordinary course of business, and immediately after his arrival he took part of it out of his trunks and arranged it in his room and from that time forward displayed it from time to time to different persons, and sold a considerable quantity of it. Either the plaintiff or his wife were in the room regularly except when absent at their meals. On the morning of the 29th of May, between eight and nine o'clock, the plaintiff and his wife left their room to go to breakfast, leaving it in its usual condition, locking the door, and taking the key with them. On their return, in about twenty minutes, they found the door open, papers strewn on the floor and several empty watch-cases scattered about, the trunks open, having the appearance of having been rifled of their contents, and watches and jewelry of the value of about $4,000 missing. The alarm was immediately given, the police called and an examination of the apartment made by them, but no clew was found to the perpetrators of the robbery. There was no appearance that the door had been broken open, and a key which on trial was found to open the door was discovered upon the bureau. In addition to this jewelry, there was also taken a gold watch and jewelry belonging to the plaintiff's wife, of the value of $400.

The statute of Wisconsin concerning innkeepers, which was relied upon by the defense, is as follows:

"Sec. 71. No innkeeper in this state, who shall constantly have in his inn, an iron safe, in good order, and suitable for the safe custody of money, jewelry, and articles of gold or silver manufacture, and of the like, and who shall keep a copy of this act printed by itself, in large, plain English type, and framed, constantly and conspicuously, suspended in the office, bar-room, saloon, reading, sitting and parlor room of his inn, and also a copy printed by itself in ordinary size plain English type, posted upon the inside of the entrance door of every public sleeping room of his inn, shall be liable for the loss of any such articles aforesaid, suffered by any guest; unless such guest shall have first offered to deliver such property lost by him to such innkeeper for custody in such iron safe, and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody, and give such guest a receipt therefor.

"Sec. 72. * * * Any innkeeper shall be liable for any loss of any guest in his inn, caused by theft or gross negligence of the innkeeper, or any of his servants, anything to the contrary thereof in this act notwithstanding." 2 Tayl. St. Wis. 1871, pp. 1662, 1663.

It was conceded that the notice required by law to be posted in every room was not posted in the room occupied by the plaintiff.

Winfield Smith, for plaintiff.

1. The innkeeper is the insurer of the property of the guest within the inn. Hulett v. Swift, 42 Barb. 230, on appeal, 33 N. Y. 571; Calye's Case, 8 Coke 32; Mason v. Thompson, 9 Pick. 280; Sibley v. Aldrich, 33 N. H. 553; Richmond v. Smith, 8 Barn. & C., 9; Piper v. Manny, 21 Wend. 282; Morgan v. Ravey, 6 Hurl. & N. 265; Ramaley v. Leland, 43 N. Y. 539; Stanton v. Leland, 4 E. D. Smith, 88; Cashill v. Wright, 6 El. & Bl. 891; Shaw v. Berry, 31 Me. 478; Clute v. Wiggins, 14 Johns. 175; Bennet v. Mellor, 5 Term R. 273; Wilkins v. Earle, 44 N. Y. 172; Hawley v. Smith, 25 Wend. 642; Burrows v. Trieber, 21 Md. 320; Thickstun v. Howard, 8 Blackf. 535; Taylor v. Monnot, 4 Duer, 116.

2. At all events he is liable for any negligence, and a loss is prima facie evidence of negligence. McDaniels v. Robinson, 26 Vt. 316; Gile v. Libby, 36 Barb. 70; Johnson v. Richardson, 17 Ill. 302; Laird v. Eichold, 10 Ind. 212; Kiston v. Hildebrand, 9 B. Mon. 72.

3. The liability extends to goods and merchandise, as well as to the guest's personal baggage. Calye's Case, 8 Coke, 32; Johnson v. Richardson, 17 Ill. 302; Richmond v. Smith, 8 Barn. & C. 9; Piper v. Manny, 21 Wend. 282; Hawley v. Smith, 25 Wend. 642; Clute v. Wiggins, 14 Johns. 175; Farnworth v. Packwood, 1 Starkie, 249; McDaniels v. Robinson, 26 Vt. 333; Newson v. Axon, 1 McCord, 509; Armistead v. White, 6 Eng. Law & Eq. 349; Mason v. Thompson, 9 Pick. 280; Morgan v. Ravey, 6 Hurl. & N. 265; Taylor v. Monnot, 4 Duer, 116; Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Needles v. Howard, 1 E. D. Smith, 54; Burgess v. Clements, 4 Maule & S. 306; Bennet v. Mellor, 5 Term R. 273; Towson v. Havre de Grace Bank, 6 Har. & J. 47; Kiston v. Hildebrand, 9 B. Mon. 72; Wilkins v. Earle, 44 N. Y. 172; Hulett v. Swift, 33 N. Y. 571; Bendetson v. French, 46 N. Y. 266; Houser v. Tully, 62 Pa. St. 92; Kellogg v. Sweeney, 1 Lans. 397, 46 N. Y. 291, 293. See Manning v. Hollenbeck, 27 Wis. 202.

4. Slight, or even considerable negligence of guest does not exonerate innkeeper. Classen v. Leopold, 2 Sweeney, 705; Shoecraft v. Bailey, 25 Iowa, 553; Wilkins v. Earle, 44 New York, 172; Cashill v. Wright, 6 El. & Bl. 891; Buddenberg v. Benner, 1 Hilt. 84; Rich-

mond v. Smith, 8 Barn. & C. 9; Profilet v. Hall, 14 La. Ann. 524; Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Woodward v. Birch, 4 Bush, 510; Quinton v. Courtney, 1 Hayw. (N. C.) 40; Burrows v. Trieber, 21 Md. 320.

5. Even if personal and actual notice to the guest of the safe, etc., would bring the case within the statute, so as to relieve the innkeeper (Purvis v. Coleman, 21 N. Y. 111), nothing short of such notice would have that effect (Lima v. Dwinelle, 7 Alb. Law J. 44; Bodwell v. Bragg, 29 Iowa, 232; Richmond v. Smith, 8 Barn. & C. 9).

6. Though a guest may become his own insurer by taking exclusive charge of his room, yet the innkeeper is not relieved merely because he gives the guest a key. More especially, when as in this case, the keys of other rooms in the hotel unlock the plaintiff's door. Farnworth v. Packwood, 1 Starkie, 249; Newson v. Axon, 1 McCord, 509; Epps v. Hinds, 27 Miss. 657; Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Pope v. Hall, 14 La. Ann. 324; Johnson v. Richardson, 17 Ill. 302; Burgess v. Clements, 4 Maule & S. 306.

7. The innkeeper's liability extends to property brought into the hotel by the guest, though it belong to others. Johnson v. Richardson, 17 Ill. 302; Epps v. Hinds, 27 Miss. 657; Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Needles v. Howard, 1 E. D. Smith, 54; See Manning v. Hollenbeck, 27 Wis. 202.

8. The merchandise in question was committed to the plaintiff by the firm of which he was a partner, charged to his account, and is to be accounted for by him, and although the partner has an equitable interest, the plaintiff may properly sue alone, as entitled to the sole custody, and as "trustee of an express trust" under the Wisconsin statute, which is taken from the New York Code. Rev. St. Wis. p. 858, c. 122, § 14; Kimball v. Spicer, 12 Wis. 668, 671; Gardinier v. Kellogg, 14 Wis. 605; People v. Norton, 9 N. Y. 176; Minturn v. Main, 7 N. Y. 220.

9. The letter of the plaintiff offered in evidence does not prove a contract. If it is evidence of a contract, such contract is not champertous. "Such an agreement is neither unlawful, immoral, nor disreputable." Allard v. Lamirande, 29 Wis. 502, 508.

Cary & Cottrill, for defendant.

DRUMMOND, Circuit Judge, after stating the facts, charged the jury as follows: The counsel for the defendant insist that he is not liable for the merchandise stolen, because at the time of the alleged loss it belonged jointly to the plaintiff and his partner. But as I understand the facts, although there was no absolute sale of the property by the firm to the person who thus took it for sale, it was nevertheless considered as in his custody and to be accounted for by him to the firm in any event. This being so, the court instructs you that inasmuch as the property was within the custody and control of the plaintiff, he was a trustee of the property, accountable to the firm, and therefore can maintain an action for it in his own name.

The defendant was an innkeeper at the time. He was subject to the law applicable to innkeepers as to the property of guests in his house, either under the common law or the statute law of this state. And the first question is, whether he was liable for the property, confessedly mere merchandise and not ordinary baggage of the plaintiff and his wife, which was in their room at the time they were the guests of the house.

The general rule of the common law undoubtedly was and is that an innkeeper is responsible for the property of a guest brought within the house, or within that which may fairly be considered as appurtenant to the house, and so within his custody. And perhaps it is not going too far to say that it is very nearly an absolute liability, that is he is bound to see that the property is kept safe, as it is in his custody in contemplation of law. But conceding that to be the rule of the common law do the facts in this case change the rule?

I think this is the true rule of law on the subject. If a person, going into a hotel as a guest, takes to his room not ordinary baggage, not those articles which generally accompany the traveler, but valuable merchandise, such as watches and jewelry, and keeps them there for show and sale, and from time to time invites parties into his room to inspect and to purchase, unless there is some special circumstance in the case showing that the innkeeper assumes the responsibility as of ordinary baggage, as to such merchandise, the special obligations imposed by the common law do not exist, and the guest, as to those goods, becomes their vendor and uses his room for the sale of merchandise, and really changes the ordinary relations between innkeeper and guest.

It is, we know, as a matter of experience impracticable for the landlord to notice and vouch for every person who goes into the room. The guest permits them to stay as long as he pleases, and shows his goods and sells them to whomsoever he pleases. We must presume that it is not for that purpose that the innkeeper allows persons to come to his house and enter his rooms, and the fact that the vendor may sleep in the room I do not think changes the rule. Therefore the court will leave it to you as a question of fact to say whether or not the evidence brings the case within the conditions stated; that is, whether or not the plaintiff did use room No. 80 as a place for showing and selling his merchandise as such. If he did, in the absence of evidence proving the contrary, then I think, as to that, the extraordinary obligations of the innkeeper did not exist.

One point to be considered is as to the ef-

fect of the special act of the legislature of this state as to the liability of innkeepers. It is a question not free from difficulty perhaps, but I am inclined to think that the law of Wisconsin did not contemplate the case of guests bringing to the inn quantities of merchandise to be placed in the safe. The law may be said to assume that there is a safe in the house, but it is not to be assumed that is was within the intention of the legislature that an innkeeper should have a safe so large as to retain any quantity of merchandise that guests might bring into the house, and thus turn the hotel into a warehouse. It is very difficult, undoubtedly, to decide precisely what meaning is to be attached to the language of the statute, when it speaks of "money, jewelry, and articles of gold and silver manufacture, and of the like," whether, in other words, it intends to include the ornaments which a lady, for example, may have, and from time to time wear about her person, and which may be and often are of very great value. I think, however, that it is clear that it was not within the contemplation of the lawmakers to compel the innkeeper to take in any quantity of merchandise, however bulky or valuable it might be, which the guests might choose to bring into the house.

Here the plaintiff brought into this house a large quantity of watches, chains, and other jewelry. They were confessedly not used either by himself or his wife as travelers, but he was there with them as a merchant selling goods, and I do not think the statute contemplates a case of that kind. So that it depends upon the general principles of law whether the defendant is liable for the merchandise if it were taken.

Although in one aspect of the case the defendant might not be liable, still the fact that these articles were there as merchandise, and were exposed and sold in the manner stated, would not prevent the plaintiff from recovering the value of the property if there was any negligence on the part of the defendant or of his servants, for I am not prepared to go so far as to say that the principle which I have stated will excuse the innkeeper for the negligence either of himself or of his servants. But that is a question to be determined by the jury under the instructions of the court; for example, whether or not the defendant knew that the goods were there and shown and sold in the manner stated; whether or not he had provided the proper means of security for the goods. I will not say that it was incumbent on the defendant if he knew they were there to keep a watchman in the hall and at the corners to watch the ingress and egress of every person that might come or go. But he should have used reasonable diligence with reference to the condition of the property, as one whose duties and responsibilities may have been qualified by the special circumstances of the case, he being to some extent relieved from the extraordinary responsibility of an innkeeper.

And it is also proper for you to consider whether or not there was a key to the room, or whether there were keys of other rooms that would open the door of No. 80, and which would enable any person or any guest in the house to enter the room, because, of course, a guest may be a thief as well as an outside intruder or the servants of a hotel. Then if the defendant or his servants were guilty of negligence, and of course if his servants abstracted the property, the defendant would be liable.

Another question proper for the jury to consider is whether or not the plaintiff was himself guilty of any negligence. Negligence is a relative term depending very much upon the circumstances of each case. We feel it our duty sometimes as a court to say, under conceded facts of a case, whether or not they constitute negligence, and to instruct a jury absolutely that such facts do or do not constitute negligence. At other times, it is a mixed question of law and of fact, partly for the court and partly for the jury to determine, whether or not there is negligence in a given case.

A person might be in a hotel as an ordinary guest, and protected in every way in which a guest could be in his property, and yet might be guilty of such negligence as to prevent him from recovering for its loss. For example, if a man occupies a room in a hotel and goes out and leaves his door open, and on his table, exposed to view, a large sum of money, where persons are passing backward and forward in the hall, there perhaps would not be a difference of opinion. Every man would say the guest had no right to go out of his room and leave his door open, and a large sum of money thus exposed, tempting the cupidity or the criminality of any person who might happen to see it. That may serve as an illustration. I think that we may say that there is more care required of a guest in a hotel, where he has articles of great value in his room, and especially when he is aware that it is known by many persons that they are there, than if he had but ordinary baggage. Now it is for you to say, taking the testimony of the plaintiff, whether there was any want of due care on his part which contributed in any way to the loss of this property. He says—and if that is true, and you believe that statement, of course it goes very far to show that there was a very considerable amount of care exercised as to the custody of this property—that either he or his wife was always there except when they went to their meals.

It is insisted on the part of the defendant that the value of the property which belonged to the wife, and which it is alleged was taken, cannot be recovered in this action. I shall instruct you that it can be recovered, provided you believe from the evidence that the property lost was given to the

wife by the husband. For it depends upon different rules from those stated in relation to the merchandise. It is said that there was about $400 worth of property of the wife taken, one article of which was a very valuable watch.

I am not prepared to say that if the plaintiff had those goods in the room, and was showing and selling them, and they together with other property belonging to his wife were taken, that circumstance alone would prevent him from recovering for the property of his wife. That may depend upon the construction to be given this special act of the legislature upon the subject. It is very difficult, as I have stated, to limit or qualify this act of the legislature so as to exclude the ordinary articles of ornament which a lady may be in the daily habit of wearing about her person. For example, I hardly think that it could have been the intention of the legislature to require every guest that entered a house to deposit his watch in the safe of the hotel.

Mr. Cottrill: Will your honor allow me to state that in a case at Madison the supreme court of this state expressly held that the legislative act covered the watch of the guest which he had put under his pillow. Stewart v. Parsons, 24 Wis. 241.

THE COURT: Very well. If the supreme court of this state has so held, and it is the settled law of this state, of course we may feel obliged to acquiesce in that decision, and to rule accordingly. I was about to say that I doubted very much whether it was the intention of the law to compel every man when he went to bed, instead of putting his watch under his pillow or somewhere where he could see the hour, to put it in the safe, but if the supreme court of this state has so declared, we will acquiesce in that decision. Our rule is to follow the decisions of the supreme court of the state. I would like to see that decision. (Counsel produces it.) Well, if that is the law of this state, then I think it my duty to say to you that before the innkeeper would be exempt from liability for the loss of the wife's property he must show that he has literally complied with the law. He must do all these things specified in the act, and prove them, in order to exempt himself from liability. And if this decision is to be received, and these facts are all proven, then I suppose that the innkeeper would not be responsible for the property of the wife. Otherwise he would be. Now, in regard to the wife's property, if the plaintiff has been guilty of negligence, of course the same rule would apply as I have stated it, and so if the defendant or his servants had been guilty of negligence, even if he had complied with the act of the legislature, because the law excepts the negligence of the innkeeper or his servants.

The jury returned a verdict of $456.15, the value of the watch and jewelry belonging to Mrs. Myers, with interest.

MYERS (CUTTING v.). See Case No. 3,520.

Case No. 9,986.

MYERS v. DAVIS.

[6 Blatchf. 77.] [1]

Circuit Court, N. D. New York. March 19, 1868.

PLEADING AT LAW—ASSUMPSIT—FORM OF DECLARATION—BAD COUNTS—GENERAL DEMURRER.

1. The proper form of a declaration, in an action of assumpsit, in this court, commented on.

2. A count in such a declaration, alleging a sale and delivery of property by a third party to the defendant, an agreement by the defendant to pay such third party so much money therefor, and an assignment of the claim of such third party to the plaintiff, but not alleging that the defendant ever undertook or promised the plaintiff to pay to him the whole or any part of the claim, is bad, on general demurrer.

3. A count in such a declaration, alleging a sale of property by the plaintiff and a third party to the defendant, for so much money, and an agreement by the defendant to pay that sum therefor, but not alleging that the promise was to pay at any specified time, or on demand or request, and alleging that the defendant had not paid any part thereof to the plaintiff or to such third party, that such third party assigned his interest in the demand to the plaintiff, and that the defendant, in consideration of the premises, promised to pay such money to the plaintiff, but not alleging that the defendant promised the plaintiff, or that the promise was to pay at any particular time, or on demand or request, and not alleging any other consideration for the promise, or any request or refusal to pay, is bad, on general demurrer.

4. Another count in such a declaration, *held* bad, on general demurrer, and its defects pointed out.

This case came before the court on a general demurrer to the third, fourth and sixth so-called counts of a pleading, on the part of the plaintiff [Austin Myers], in a suit at law, which the defendant [Frank S. Davis], in his demurrer, treated as a declaration.

HALL, District Judge. The plaintiff's pleading, so far as it can be said to have form or comeliness, is probably in the form of a complaint under the New York Code of Procedure; and, if it has, in some respects, the substance of a proper pleading in this court, it may properly be considered as belonging to the same class of misbegotten and ill-shaped hybrids with the pleading I had occasion to remark upon in the case of Birdsall v. Perego [Case No. 1,435], decided at the October term, 1865.

If the demurrer, in this case, had been special, and had properly alleged the want of form of the pleading demurred to, as a pleading in this court, a single glance at the pleading itself would have been sufficient to justify the court in declaring that the whole declaration was clearly bad. But the de-

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

murrer is not special, and a somewhat careful examination has been given to so much of the plaintiff's pleading as is covered by the demurrer.

The pleading demurred to has not the proper form of a declaration in either of the several forms of action which are sustainable on the law side of this court. The plaintiff's case required a declaration in assumpsit, and the pleading demurred to approaches more nearly to a declaration in assumpsit than to any other legitimate form of pleading, and its sufficiency must, therefore, be maintained, if at all, on the ground that the three several parts of the plaintiff's pleading to which the demurrer applies, are sufficient, in substance, as counts in assumpsit, under the rules of pleading which obtain in this court. It is in that light that I shall consider the questions raised by the demurrer.

The statement of the cause of action thirdly alleged, is bad, in substance, for the reason, among others, that it alleges a sale and delivery of stock by one Hagar to the defendant, an agreement by the defendant to pay Hagar $3,300 therefor, and a subsequent sale and assignment of this claim of Hagar's to the plaintiff, without alleging that the defendant ever undertook or promised the plaintiff to pay to him the whole or any part of the claim.

The statement of the cause of action fourthly alleged, is bad, in substance, for a different cause. It alleges a sale of stock, by the plaintiff and Hagar, to the defendant, for the price of $7,000, and an agreement, by the defendant, to pay that sum therefor, but without alleging that the promise was to pay at any specified time, or on demand or request; that the defendant had not paid any part thereof to the plaintiff, or to Hagar; that Hagar, for a valuable consideration, transferred and assigned his interest in said demand to the plaintiff; and that the defendant afterward, and before the commencement of the suit, "in consideration of the premises respectively, promised to pay the said sum of $7,000 to the plaintiff," without alleging that "the defendant undertook and promised the plaintiff," &c., or that the promise was to pay at any particular time, or on demand or request, and without alleging any other consideration for the promise, or any request or refusal to pay. The undertaking and promise of the defendant should have been alleged to have made to the plaintiff, and the pleading should have alleged a promise or undertaking to pay on request, or at a specified time, and then have alleged, in proper terms, the non-performance of such promise or undertaking.

The statement of the cause of action sixthly made in the declaration, is bad, in substance, for the reason that there is a failure to set forth an undertaking or promise, and its non-performance, in such manner as to show a right of action, these defects being similar to those already referred to in respect to the cause of action fifthly stated. It is bad, also, because it does not state why, or how, the plaintiff and Hagar sustained damages, or sufficiently show that the damages claimed are the legal consequence of the suspension of work, or that the defendant undertook, or promised, to pay such damages, the alleged promise "to pay the said several sums of money respectively to the plaintiff," not being an allegation of a promise to pay damages the amount of which had only been stated in one single aggregate sum of $10,000.

The defendant must have judgment on the demurrer, with leave to the plaintiff to amend his declaration, and the several counts therein, within twenty days, on payment of costs.

Case No. 9,987.

MYERS et al. v. D'MEZA.

[2 Woods, 160.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

ESTOPPEL—RES JUDICATA—LIEN—SPECIFIC PERFORMANCE.

A creditor of a succession claimed title to a part of the proceeds of a life insurance policy, on the ground that the policy had been pledged to him to secure a debt due him from the testator, but his claim was rejected by the court, on the ground that there had been no delivery of the pledge: *Held*, that this decision was no bar to a bill in equity to enforce a specific performance of the contract to deliver the pledge and for a decree for so much of the proceeds of the policy as might be necessary to pay the complainant's claim.

In equity. Heard upon bill and plea in bar. The case made by the bill was as follows: The complainants, [Myers & Levy,] during the lifetime of [A. D.] D'Meza, advanced to him the sum of $3,524, on the condition that he would assign to them a certain policy of insurance on his life for $5,000. D'Meza did indorse an assignment on the policy, but died before delivering the policy to complainants. His executor, instead of complying with the contract of his testator by delivering the policy to complainants, collected the money due thereon from the insurance company, and refused to pay the same to complainants. So much of the amount collected as was necessary to pay the sum advanced by complainants to the testator was, by the order of the probate court, kept separate from the other assets of the succession. The prayer of the bill was for a specific performance of the contract to assign the policy, and for an order enjoining the executor from paying out said money, or mingling it with other funds of the succession, until the final decree in this case, and that said executor might be ordered to pay over said $3,524 to the complainants. To this bill the defendant filed a plea to the effect, that on an opposition to

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the provisional account and tableau of distribution filed by him in the probate court, in his said capacity of executor of the succession of D'Meza, the said complainants did claim the same thing, founded on the same cause of action as that demanded of defendant in this case, and judgment was rendered dismissing said opposition, which on appeal to the supreme court of Louisiana was affirmed. In other words, the defendant claimed that the question raised by this litigation had been decided by a court of competent jurisdiction, in a proceeding between the same parties, and that such decision was a bar to suit.

Harry T. Hays and J. H. New, for complainant.

A Voorhies and W. Voorhies, for defendant.

WOODS, Circuit Judge. The proof to support the plea is a certified transcript from the record of the probate court of the parish of Orleans, of the opposition of the complainants, Myers & Levy, to the provisional tableau of the defendant, as executor of A. D. D'Meza, and the decree of the supreme court rendered on appeal. The provisional tableau to which their opposition was made shows that Myers & Levy were placed in the same as ordinary or general creditors. The opposition to this tableau represented that opponents had a special lien on said policy of $5,000, to secure the payment of their debt, and prayed that they be declared to have a privilege upon said life policy, or the funds received thereon, and that the executor be ordered to pay the opponents said sum of three thousand, five hundred and twenty-four dollars.

It seems to me quite clear that a judgment that the complainants in this case had no lien or privilege on this fund does not bar them from setting up an absolute title to the policy, or to a part of its proceeds. It is plain from the opinion of the supreme court, that the claim of the complainants to a specific performance of the contract of D'Meza, to transfer to them the policy, has never been adjudicated upon.

The supreme court, in affirming the judgment of the probate court, dismissing the opposition to the tableau, say: "Whether opponent's remedy were an action to enforce the verbal contract, with regard to the policy, or a suit for breach thereof, it is unnecessary to decide in disposing of this case. But it is proper to remark, that a contract or promise to transfer or deliver a collateral to secure a debt resulting from the payment by the indorsers of notes indorsed for accommodation, gives no privilege or pledge upon the collateral, not transferred or delivered in pursuance of said contract or promise." Succession of D'Meza, 26 La. Ann. 35. It appears from this as well as from the opposition to the tableau, that the opponents were setting up a claim to the fund as to a thing pledged. The case went against them, because it appeared that the thing which was claimed as a pledge had never been delivered. On this ground alone the court decided against them. Can there be any doubt that a decision of that controversy does not bar the complainants from praying a specific performance of the contract to deliver the pledge? It is clear, that this would be an entirely different issue, and would not be decided by a judgment, finding that the pledge had never been delivered. To ascertain what is demanded in a particular suit, in order to determine whether it is a bar to another suit brought, resort must be had to the prayer of the petition. Slocomb v. Lizardi, 21 La. Ann. 355.

The prayer of the opposition to the tableau, and the prayer of the bill in this case, differ in the relief sought, and the title to the relief sought is different in the two cases. But the defendant says, that when a party has brought suit upon a particular title, and has been defeated, he cannot afterwards bring another suit for the same thing upon another title, unless he acquired such title since the former demand. In support of this proposition he cites the cases of Williams v. Close, 12 La. Ann. 873, and Shaffer v. Scuddy, 14 La. Ann. 576. But these authorities do not settle the question raised by the plea in bar. It may well be held, that if a plaintiff has two titles to a thing, one derived from A. and the other from B., and he brings suit for the recovery of the thing to which his titles relate, and offers in evidence only the title derived from A., and loses his case, he cannot afterwards bring another action and set up the title derived from B. The reason is, that he might have used both titles in his first suit. But in this case, the complainants having claimed in the probate court, to have a pledge of the policy, could not at the same time set up an absolute title. Evidence to sustain title would not have been pertinent to the issue and would have been excluded. In fact, the probate court would not have had jurisdiction of a suit for the specific performance of the contract. Code Prac. art. 126.

I am of opinion, that the controversy presented by the bill in this case, has never been passed upon, and it would be depriving the complainants of their day in court upon it, to hold them concluded by the proceedings in the probate court. The finding of this court must, therefore, be against the plea of defendant.

Case No. 9,988.

MYERS v. DORR et al.

[13 Blatchf. 22.] [1]

Circuit Court, D. Vermont. Oct Term, 1870.

COURTS—FEDERAL JURISDICTION—NEITHER PARTY RESIDENT OF STATE—CORPORATIONS—PURCHASE OF INTEREST PENDENTE LITE—PLEADING IN EQUITY.

1. M., a copartner with D., filed a bill against D. for a dissolution of the copartnership, and an account. The firm had a contract with the S. Co., a corporation, in regard to the furnishing by it to the firm of marble. A receiver of the copartnership property was appointed. Afterwards, M. filed an amendment and supplement to the bill, alleging a secret agreement by D. with the S. Co., in fraud of the rights of M. under said contract, and the refusal of the S. Co. to furnish marble to the receiver, and making the S. Co. a defendant, and praying a specific performance of said contract by it. M. was a citizen of Ohio. The bill alleged that the S. Co. was a citizen of Vermont. The S. Co. interposed a plea to the jurisdiction of the court over it, alleging that it was a corporation created by Massachusetts. Issue was joined on the plea, and proofs were taken, and the cause was heard thereon, as to the S. Co.: *Held*, that the court had no jurisdiction of the suit as to the S. Co.

2. Where a plaintiff in equity, instead of setting down the defendant's plea for argument, replies to it, he admits its sufficiency as a defence, if the facts it alleges shall be established.

[Cited in Matthews v. Lalance & Grosjean Manuf'g Co., 2 Fed. 233; Theberath v. Rubber & Celluloid Harness-Furnishing Co., 3 Fed. 151; Bean v. Clark, 30 Fed. 225; Korn v. Wiebusch, 33 Fed. 51; Burrell v. Hackley, 35 Fed. 834.]

3. A corporation can have no citizenship or inhabitancy out of the state by which it was created, and, under section 11 of the judiciary act of September 24, 1789, (1 Stat. 78,) cannot be made a party to a civil suit, in a circuit or district court, by original process, in any other district than a district of the state by which it was created.

[Cited in Runkle v. Lamar Ins. Co., 2 Fed. 11; Zambrino v. Galveston H. & S. A. Ry. Co., 38 Fed. 452.]

4. One who purchases pendente lite the interest of a defendant in the subject-matter of a suit, does not thereby become a necessary party to the suit; and, if the court has no jurisdiction of him, he cannot be compelled to come in as a party.

5. As to the S. Co. the amended and supplemental bill is an original bill.

In equity.

The bill of complaint herein, filed in October, 1869, alleged a copartnership between the plaintiff [John J. Myers], a citizen of Ohio, and the defendant [Seneca M.] Dorr, a citizen of Vermont, stated various facts as grounds for a dissolution of such copartnership, and prayed a decree declaring such dissolution and directing an account, a disposition of the copartnership property, and a distribution, &c. The copartnership was formed for the purpose of sawing and selling marble, and the firm were owners of mills, machinery, &c., used in their business. The firm also held a contract with the Sutherland Falls Marble Company, by which the latter, upon certain terms therein specified, agreed to furnish to the firm marble in blocks, to be sold, and gave them the right to hold and use certain mills and property of the said company. Such contract contained a provision that no assignment thereof should be made by the firm without the consent of the marble company. After the filing of the bill a receiver of the copartnership property was appointed. In the October term, 1869, the plaintiff filed what was termed an amendment and supplement to his bill of complaint, alleging that the defendant Dorr had, in September, 1869, entered into a secret agreement or understanding with the Sutherland Falls Marble Company, in fraud of the plaintiff, under said contract, or in modification thereof, the object of which was to depreciate the value of the interest of the latter in the contract for the supply of marble to the firm, and embarrass the business of the firm; that the said company had, since the appointment of the receiver herein, and in pursuance of such fraudulent agreement with Dorr, by notice in writing, refused to supply marble under such contract, and called on the plaintiff to vacate and deliver up the quarries and other property of said company, on the ground that the appointment of such receiver operated as an assignment of the contract, in violation of the provisions thereof; and that said company had, since the said notice, discontinued the supply of marble, and refused to continue the same, although the receiver desired, and was ready to proceed with, the execution of the said contract. It then averred that great injury to the plaintiff and to the business, and great embarrassment to the receiver, would ensue, if marble were not supplied to the firm or its receiver, for the purpose of maintaining and preserving the business. Thereupon the plaintiff insisted that he was entitled to a decree for a specific performance of the said contract by the said marble company, and to an injunction restraining any further acts, &c., tending to discharge, modify or suspend the said contract; that the giving of such notice was a contempt of this court; and that the said Sutherland Falls Marble Company ought to be made a party to this suit. This bill further alleged, that the said marble company was organized for the sole purpose of quarrying marble in the state of Vermont; that its quarries, property, business and principal office were in that state; that a part of its directors and stockholders, and its general agent, resided in that state; that the company had likewise a charter obtained from the legislature of the state of Vermont; and that it was a citizen of said state of Vermont. Wherefore the complaint prayed relief as aforesaid, and that the company might be decreed specifically to perform their contract, and be enjoined from suspending business or the supply of marble under the contract, &c., with a prayer for process against the said company, &c.

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The Sutherland Falls Marble Company, appearing specially and only for the purpose of objecting to the assumption of any jurisdiction of that company by this court, interposed a plea to the jurisdiction, wherein it was alleged, that the said company was not organized for the sole purpose of quarrying marble in the state of Vermont; that its property was not solely in that state; that it had not, and never had had, any charter obtained from the legislature of that state, and, if any person or persons had obtained from that legislature any act of incorporation under the same name or a similar name, it was without the knowledge or consent of such defendant, and such defendant had never adopted or acted under it; and that such defendant was not, in any sense, a citizen of the state of Vermont, but was a corporation organized and established within and by the laws of the state of Massachusetts only, and had its locality, residence and citizenship solely in Massachusetts, and had no residence, citizenship or locality within the state of Vermont.

Upon this plea the plaintiff took issue, averring that the said plea and the several matters and things therein pleaded and therein set forth were not true. Proofs were taken, and, upon the bill and supplement, plea and proofs, the cause was heard as to the said Sutherland Falls Marble Company.

Edward J. Phelps, for plaintiff.
Isaac F. Redfield, for defendant.

WOODRUFF, Circuit Judge. The single question presented by the pleadings in this suit, as now brought before us, is, whether the facts alleged by the Sutherland Falls Marble Company in their plea, are proved. The complainant has thought proper, by replying to the plea, to put its averments in issue. The rule is elementary, and is well settled, that, when a complainant in equity, instead of setting down the defendant's plea for argument, to test its sufficiency, elects to reply thereto, denying the facts alleged, he admits its sufficiency, both in form and substance, as a defence to all the matter of the bill to which it is pleaded, and that, if the facts shall, upon the proofs taken, be found established, the bill must be dismissed (Story, Eq. Pl. § 697; Gallagher v. Roberts [Case No. 5,194]; Hughes v. Blake, 6 Wheat. [19 U. S.] 453; Rhode Island v. Massachusetts, 14 Pet. [39 U. S.] 210, 257); and this must be done without reference to any equity arising from other facts stated in the bill.

There is no occasion to discuss the evidence. The proofs taken to sustain the allegations of the plea are uncontradicted by any evidence produced on the part of the complainant. Indeed, we do not understand the counsel for the complainant to claim that those facts are not established. The plea is to the jurisdiction of the court over the defendant corporation. By replying, the complainant admits the sufficiency of the facts alleged, to support the plea. The allegations of the plea are proved, that is to say, it is proved that the corporation was not organized for the sole purpose of quarrying marble in Vermont, and has property without that state; and that it has never had or adopted or acted under any charter granted by the legislature of that state, and is not a citizen of that state, but, on the contrary, is a corporation organized and established within and by the laws of the state of Massachusetts only.

It is quite too late to insist that the residence or citizenship of a director or stockholder of a corporation in another state than that by which it was created, changes or affects its citizenship. Whatever was formerly held on that subject to the contrary, it is now well settled, that a corporation can have no citizenship or inhabitancy out of the state wherein it was created; and this has become too familiar to require that we should refer to the numerous modern cases to that effect. We might therefore, with great propriety, stop here, and say the defendant has established the plea, and is, therefore, entitled to a decree dismissing the bill. The discussion, upon the hearing, had a much broader range. The counsel for the complainant treated the hearing as if it were upon a demurrer to the plea, insisting that the facts alleged therein and proved did not show a want of jurisdiction, and that, in considering that question, the court should regard every fact alleged in the bill, which the plea does not deny, as true. What we have above said, is in direct denial that the complainant is at liberty to raise any question touching the sufficiency of the plea. But, if we should pursue the subject, and consider the views urged upon us, the result to the complainant must be the same.

The defendant is a corporation created by or under the laws of the state of Massachusetts, and has no other residence or inhabitancy. The judiciary act of 1789, § 11 (1 Stat. 78), is express, that no civil suit shall be brought before a circuit or district court, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. In respect to the question of jurisdiction, a corporation is to be treated, pro hac vice, as a natural person. Clarke v. New Jersey Steam Nav. Co. [Case No. 2,859]; Day v. Newark Ind. R. Co. [Id. 3,685]. Such corporation cannot be found out of the state wherein it is created, within the meaning of the statute, and be served by or through its officers. Pomeroy v. New York & N. H. R. Co. [Id. 11,261]. To the general rule declared by the statute, see Toland v. Sprague, 12 Pet. [37 U. S.] 300; Picquet v. Swan [Case No. 11,134]; Richmond v. Dreyfous [Id. 11,799]; and the other cases cited above: and the case of Minnesota Co. v. St. Paul Co., 2 Wall. [69 U. S.] 609, relied upon by the complainant as creating an exception, affirms the general rule. And yet here the Sutherland Falls

Marble Company is sued and required to answer in the district of Vermont. The circuit court of that district has no jurisdiction to compel that corporation to appear and answer, and the repeated decisions of the supreme court, that no decree can be pronounced which shall affect the rights of a party who is out of the jurisdiction, show that no decree can be pronounced against this defendant. Story v. Livingston, 13 Pet. [38 U. S.] 359; Coiron v. Millaudon, 19 How. [60 U. S.] 113; Shields v. Barrow, 17 How. [58 U. S.] 130; Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. [56 U. S.] 233; Barney v. Baltimore City, 6 Wall. [73 U. S.] 280.

In order to sustain the jurisdiction, the counsel for the complainant insists that the Sutherland Falls Marble Company have, since this suit commenced, purchased the interest of the defendant Dorr in the contract with them; and this is claimed to be a submission to the jurisdiction, and to make them substantially parties to the suit. In the first place, the fact alleged is not proved, and we are constrained so to find, upon the evidence. In the next place, if proved, it could not affect the question. A purchaser pendente lite may be said to submit to the jurisdiction, but in this sense only—he purchases subject to the litigation; but the litigation may proceed without noticing his purchase, and he does not, by such purchase, become a necessary party. If the court have not jurisdiction of him, he cannot be compelled to come in as a party. And, once more, it is claimed to be essential to the rights of the complainant, and to the protection of the business now in the hands of the receiver, and its successful prosecution, that the complainant should have the relief against the marble company sought by the supplemental bill. A short answer might be given to this. The complainant or the receiver must seek that relief in a court having jurisdiction of the party against whom it is sought. The circumstance that such relief would be beneficial to the parties, and prevent incidental loss to them, pending the prosecution of the original bill, will not warrant or create any extension of the power of the court.

We forbear to remark upon the extraordinary character of the whole case now before us, in which a complainant who has commenced a suit to dissolve a copartnership and adjust its affairs with his partner, seeks, by what he calls a supplemental bill, to compel a third party, who has no interest in the copartnership, specifically to perform an agreement made with the firm; and that is just what is sought against this defendant. As to him the bill is, in every just sense, an original bill. If the complainant can maintain such a suit upon the contract in question, he must prosecute it where the court has jurisdiction, and the attempt to unite it with a controversy with his partner touching their copartnership affairs, cannot avail anything. And so, also, the receiver of the copartnership property, if, in virtue of his receivership, he can sue on the contract, or if he can maintain a suit for its specific performance, must prosecute it elsewhere. Arguing that it is important that this court should have jurisdiction of this defendant, in order to do full justice and protect all parties, will not avail to confer jurisdiction, where the limitation imposed by statute and settled by adjudication forbids its exercise.

We have referred to the nature of the suit for the purpose of adding, that the case of Minnesota Co. v. St. Paul Co., 2 Wall. [69 U. S.] 609, touches no question here discussed. There, a suit was rightly brought and was decided, the court having jurisdiction of the parties, a decree was made, it was found that certain orders made in execution of the decree were invalid by reason of a change in the jurisdiction of the court, and that further adjudication was necessary in order to the execution of the decree and the disposal of the property in the hands of the receiver, and it was held that a bill supplemental in its nature, filed in order to carry the prior decree into execution and administer the property, was to be regarded, not as an original suit, but as a continuation of the former suit, and that, as no other court could execute that decree and make due administration of the property, the power of the court to act was not impaired by the fact that persons who had acquired interests in the property or questions were citizens of the same state as the complainant in such last-named bill; and the court refer to cases in which a person acquiring rights as purchaser under a decree, is regarded as a party having a right to proceed in continuation of the suit, so far as to protect his rights, irrespective of any question touching his citizenship. In a recent case (Jones v. Andrews, 10 Wall. [77 U. S.] 327), the supreme court have gone so far as to hold, that, where a judgment has been recovered in a suit in the circuit court, and the judgment creditor is proceeding in that court, by the process of garnishment, against an alleged debtor of the defendant in the judgment, such debtor may file a bill supplemental or ancillary to his defence, to protect himself against a compulsory proceeding duly instituted to compel him to pay, showing by such bill a just and equitable defence, and the necessity of making the creditor not residing in the district a party will not defeat such ancillary suit. And, in Freeman v. Howe, 24 How. [65 U. S.] 450, where a suit had been duly commenced in the federal court by attachment of property, and, while the same was in the possession of the marshal, it was taken from him by process of replevin issued by the state court at the suit of a third party, the court not only held that such interference with the custody of the marshal was illegal, but declared that a bill of equity might, in such case, be filed by the plaintiff in the federal court against the plaintiff in the replevin suit, notwithstanding both were citi-

zens of the same state. These cases proceed upon the ground, that, where the federal court is proceeding in the due exercise of its jurisdiction, it has power to regulate and control its own judgments, and carry them into execution, and power to maintain its own jurisdiction, and protect either plaintiff or defendant therein, in respect of the subject-matter thus lawfully within its jurisdiction, and, by an ancillary suit, to call in parties for those purposes, whether their citizenship would have authorized an original suit against them by the plaintiff in such ancillary proceeding, or not. The present is no such case. Here, the original suit was for the dissolution of a copartnership, and the adjustment of the rights of the complainant and Dorr. In that the marble company had no interest, and they have done nothing to prevent that suit from proceeding to its termination according to its intent and purpose. The cause of action against the marble company is its refusal to perform a contract made with the firm, and the decree sought is the specific performance of that contract. To grant the relief might be useful to the parties to the original bill, but it has no legal connection with the cause of action therein, and is in no sense necessary to the full exercise of the jurisdiction of the court. It is not, in any sense, a continuation of the original suit, but an attempt to add a new cause of action against a new party.

This bill must be dismissed, as to the defendant the Sutherland Falls Marble Company, with costs.

Case No. 9,989.

MYERS et al. v. DUKER et al.

[1 Ban. & A. 535.] [1]

Circuit Court, D. Maryland. Oct., 1874.

PATENTS—EQUIVALENTS—CLAMPS FOR CIRCULAR SAWS—ROLLERS.

1. The complainant's patent was for clamps, having a lateral elastic movement, independent of the roller beds of a circular saw, to which the clamps are attached, for the purpose of compensating for the varying thickness of different pieces of lumber, and keeping them in a proper relative position to the saw. The defendants used pressure rollers, having the same mode of operation, and performing the same functions as the clamps. The evidence showed no device prior to the clamps for accomplishing the result: *Held*, that the defendants infringed complainants' patent.

2. A patented mechanical device, by which a new result is produced, is infringed by the use of another device, which, although different in form, produces the same result by substantially the same means.

[This was a bill by Margaret Meyers and others against Otto Duker and others to restrain the infringement of certain letters patent, No. 10,965.]

Benjamin Price, for complainants.

L. M. Reynolds, for defendants.

GILES, District Judge. In this case, it is admitted, that defendants have infringed the first claim in complainants' patent, which bears date the 23d of May, 1854. This first claim is for the deflecting plates. The answer of defendants denied that they used any of the devices claimed by complainants and described in their patent, but their solicitor, in his argument, narrowed this defence, and limited it to an infringement of complainants' second claim, to wit: the clamps I, I. This claim is as follows: "We claim the employment or use of the clamps I I, arranged, as herein shown, or in an equivalent way, so as to have a lateral elastic movement, independent of the roller-beds to which said clamps are attached, for the purpose of compensating for the varying thickness of different pieces of stuff, and keeping them in a proper relative position to the saw." Such is the claim, and the models of complainants' saw, and defendants' saw, have been exhibited in court.

Now, it is apparent, from an inspection of them, that the pressure-rollers of defendants' machine, while different in their construction and form, have the same mode of operation, and perform the same function, as the clamps in complainants' machine. Were the clamps, then, the first device ever used for the purpose of keeping the plank in a proper relative position to the saw, and for compensating for the varying thickness of different pieces of stuff? If they were, then complainants are entitled to be protected against a device which effects the same substantial purpose by substantially the same mode of operation. The result could not be patented, but only the mechanical device by which it is attained; and no device is an infringement of the patent but such as produces the same result by the same mode of operation, although the form may be varied.

Judge Grier, in McCormick v. Talcott, 20 How. [61 U. S.] 405, says: "If the complainant be the original inventor of the divider, he will have a right, to treat as infringers, all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations."

Now, there is no evidence in this case, that prior to the invention of Myers & Eunson, any device had been made or used, to keep the plank in a proper relative position to a circular saw, or which possessed a lateral elastic movement independent of the roller-beds, and, by that means, compensated for the varying thickness of different pieces of stuff. This was accomplished by the clamps described in the patent of Myers & Eunson. In the defendants' machine, the pressure rollers act on the same principle, and reach the same result, and, therefore, the defendants have infringed the second claim in complainants' patent.

I will, therefore, sign a decree, in favor of the complainants, and will refer the cause to

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

the master, that he may take an account of the profits.

[For other cases involving this patent, see note to Myers v. Frame, Case No. 9,991.]

Case No. 9,990.

MYERS et al. v. DUNBAR et al.

[12 Blatchf. 380; 1 Ban. & A. 565; 8 O. G. 321.] [1]

Circuit Court, S. D. New York. Nov. 5, 1874.[2]

APPEAL—SUPERSEDEAS—BOND—FEES TO MASTER—ATTACHMENT.

A final decree, in an equity suit, awarded a decree against the defendant in favor of the plaintiff, for a sum named, and then decreed that the defendant pay the master $500, allowed to him as his compensation, less such sum as the defendant had paid to the master, and that the plaintiff have execution for the sum awarded to him. The defendant paid to the master $35 on account of the $500, and refused to pay more. He appealed to the supreme court from the whole of the decree, and gave a bond to the plaintiff, sufficient to cover the amount awarded to the plaintiff and to stay the execution, and a citation was issued and served. The master applied for an attachment against the defendant for the $465: *Held*, that the bond did not cover the amount directed to be paid to the master, and was not a bond to the master; that the provision for the payment of the master was not subject to be stayed by the proceedings for appeal; and that the attachment must be granted.

[Cited in Werner v. Reinhardt, 20 Fed. 163; American Diamond Drill Co. v. Sullivan Machine Co., 32 Fed. 552.]

[This was a bill in equity by Margaret Myers, executrix, etc., of Eugene S. Eunson, against John Dunbar and Jeremiah Hopper to restrain the infringement of letters patent No. 10,965, granted to John Myers and Robert G. Eunson, May 23, 1854.]

Frederic H. Betts, for the motion.

Samuel J. Glassey, opposed.

BLATCHFORD, District Judge. In this case a final decree was entered in May last, on the report of the master, overruling exceptions taken by both parties to his report, and ordering, "that the compensation of the master herein be fixed, determined and settled, (including what may have already been advanced or paid to him,) at the sum of five hundred dollars." The decree then proceeded to award a recovery to the plaintiffs against the defendants for the sum of $9,120 94, and $686 32, interest thereon from the date of the report to the date of the decree, being, in all, $9,807 26, and to decree, "that said defendants pay to the master the said sum of five hundred dollars allowed to the master as compensation, less such sum as may have been paid or advanced to said master by the defendants, and that the complainants have execution or other proper process of the court for the said sum awarded to them." The 82d rule in equity provides, that "the compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct;" and that "the master shall not retain his report as security for his compensation, but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court." The 10th rule in equity provides, that "every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause." The defendants have paid to the master the sum of $35 on account of such compensation, and no more. Demand has been made upon the defendants by the master for the payment of the residue of the $500, but it has not been paid. Prior to the date of the master's report, the plaintiffs advanced to the master $100 on account of his compensation, and, after the date of the report and before the entry of the final decree, the plaintiffs advanced to the master $200 more on account of his compensation. The master now applies to the court for an attachment against the defendants for the $465.

The defendants have taken an appeal to the supreme court from the whole of the decree. They have given a bond, with sureties, in the penalty of $21,000, to the plaintiffs, conditioned that the appellants "shall prosecute their said appeal to effect and answer all damages and costs, if they fail to make their plea good." The bond has been approved as to form, and amount, and the sufficiency of the sureties, and a citation has been issued and served. The citation was made returnable to the first day of the present term of the supreme court, now past.

In opposition to the granting of the application, the defendants contend, that the 82d rule is subject, in its application, to the provisions of law regulating appeals; that the defendants have appealed from the whole of the decree and have given security, by bond, for the full performance of its requirements, if it shall be affirmed, and, therefore, all proceedings upon the decree are superseded and stayed; that the cause is pending in the supreme court; that injustice to the defendants will result, if the application is granted, in case the defendants should succeed on the appeal, because the defendants will not be able to recover back from the master any money paid to him; and that, if the plaintiffs pay the amount due to the master, they

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission.]

[2] [Reversed in 94 U. S. 187.]

will be able, if the decree is affirmed, to recover that amount on the bond.

Although the defendants have taken an appeal from the whole of the decree, their bond does not cover the amount directed to be paid to the master. It is a bond to the plaintiffs, payable to the plaintiffs, and is a bond only to respond for the amount which the decree awards to the plaintiffs as a recovery, and for which execution is awarded to the plaintiffs by the decree. The bond is not one under which either the master or the plaintiffs could recover the $465 from the defendants. Notwithstanding the appeal, it remains for this court to enforce the provision of the decree for the payment of the master.

Nor would the case be varied if the defendants had given a bond to the master to stay proceedings to enforce payment of his compensation. The order as to the compensation of the master might as well have been in a separate order, and not have formed a part of the final decree. The master is not a party to the suit, in any sense, and it was not intended that a provision for his payment should be subject to be stayed in its operation by proceedings such as are employed to stay the execution of a decree inter partes. The 82d rule prescribes the mode in which an officer of the court is to be compensated, and where the court directs which of the parties is to be charged with and bear the compensation of the master, whether in the first instance, or ultimately, the direction must be carried out, as between the master and such party, however, ultimately, such party may be entitled, as against the other party to the suit, to relief or reimbursement in respect of the amount paid to the master. If the defendants succeed, as against the plaintiffs, in reversing the decree, they will, indeed, not be able to recover back any money from the master, but it will be competent for the court, if, on such reversal, costs of the suit shall be awarded to the defendants, to regard the amount paid by the defendants to the master as a part of such costs, and to enable the defendants to recover such amount from the plaintiffs. The amount disbursed by the defendants to the master will merely take its place with other items of disbursements, as to which the defendants, with a decree against them, now have no recovery, but which may form part of a recovery, in case they shall have a decree in their favor.

The application is granted.

[On appeal to the supreme court, the decree of this court was reversed, and the cause remanded, with directions to enter a decree dismissing the bill. 94 U. S. 187.]

[For other cases involving this patent, see note to Myers v. Frame, Case No. 9,991.]

MYERS v. DUNBAR. See Case No. 9,991.

MYERS v. EUNSON. See Case No. 9,991.

Case No. 9,991.

MYERS v. FRAME et al. MYERS v. DUNBAR et al. SAME v. SWIFT. EUNSON et al. v. PEDDIE.

[8 Blatchf. 446; [1] 4 Fish Pat. Cas. 493.]

Circuit Court, S. D. New York. May 18, 1871. [2]

PATENTS—INFRINGEMENT—IMPROVED MACHINE FOR SAWING THIN BOARDS—DISCLAIMER—COSTS.

1. The letters patent granted May 23d, 1854, to John Myers and Robert G. Eunson, for an "improved machine for sawing thin boards, &c.," are valid, when construed in connection with the disclaimer filed to a part of the first claim of the patent.

2. The inventions described and claimed in the patent, explained.

3. Various devices in the defendants' machines described and explained, and held to be infringements of the patent.

4. The disclaimer in this case held to have been proper, and in proper form.

[Cited in Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 135.]

5. A claim to the use of two deflecting plates, one at each side of the saw, sustained, as not being a mere duplication, although a single deflecting plate, on one side of the saw, had before been used.

6. Costs not allowed to the plaintiffs on a recovery, as the disclaimer was not filed before the suit was brought.

7. Where the owner of the entire right under the patent for the territory where the infringements had taken place, had not joined in the disclaimer, and there was no evidence that he had unreasonably neglected to disclaim, and no such defence was set up, he was allowed to make such disclaimer, after final hearing.

[These were four bills in equity, filed to restrain the several defendants from infringing letters patent [No. 10,965,] for an "improved machine for sawing thin boads," etc., granted to John Myers and Robert G. Eunson, May 23, 1854, and extended for seven years from May 23, 1868.] [3]

Frederic H. Betts, for plaintiffs.

Charles M. Keller and Charles F. Blake, for Frame, Nichols and Robbins, and Dunbar and Hopper.

Jonathan Marshall, for Swift.

Miller & Peckham, for Peddie.

BLATCHFORD, District Judge. These suits are founded on letters patent of the United States, granted May 23d, 1854, to John Myers and Robert G. Eunson, for an "improved machine for sawing thin boards, &c." The patent was extended, on the 13th of May, 1868, by the commissioner of patents, for seven years from the 23d of May, 1868. On the 20th of May, 1868, Robert G. Eunson assigned to Eugene S. Eunson all his

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[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 446, and the statement is from 4 Fish. Pat. Cas. 493.]

[2] [Reversed in 94 U. S. 187.]

[3] [From 4 Fish. Pat. Cas. 493.]

interest in the patent and in the extension thereof and in all damages for infringing the same. On the 19th of October, 1864, John Myers and Robert G. Eunson assigned to Eben Peek and Gilbert J. Bogert all their interest in the patent for that part of the city of New York lying west of a line running through Broadway to the Eighth avenue, and through the Eighth avenue to the northerly limits of the city. On the 23d of May, 1868, John Myers, Robert G. Eunson and Eugene S. Eunson assigned to Peek and Gilbert Bogert all their interest in the patent for such territory for the extended term. The suit first above entitled is brought for an infringement of the patent within such territory. After it and the suits secondly and thirdly above entitled were brought, John Myers, who was one of the plaintiffs, in each of them, died, and Margaret Myers, his widow, was appointed his executrix, on the 17th of November, 1870, and was substituted as a plaintiff, in his stead, in each of them. The suits secondly and thirdly above entitled are brought for infringements of the patent within that part of the city of New York not embraced in the territory conveyed to Peek and Gilbert Bogert. On the 12th of September, 1866, John Myers assigned to Jacob Lagowitz all his interest in the patent for the state of New Jersey, and all damages for infringing the same; and on the 19th of June, 1868, John Myers assigned to Lagowitz all his interest in the patent for the state of New Jersey, for the extended term. The suit fourthly above entitled is brought for an infringement committed at Newark, New Jersey.

The specification of the patent states that the invention is of "improvements in machines for sawing lumber into thin stuff, for mirror and picture frame backs, and other purposes for which thin stuff is used." It says: "The nature of the invention consists, 1st. In the employment or use of deflecting plates, one or two, placed at the sides of a circular saw, for the purpose of preventing the sawed stuff from coming in contact with the sides of the saw, and enlarging or expanding the saw kerf, and thereby preventing the stuff from binding against the edge of the saw near its teeth. The deflecting plates also allow the saw to be stiffened by a proper plate secured to it, and a thin veneer saw may consequently be employed, which will cause but a small waste of stuff in sawing, as a narrow kerf is made thereby. 2d. Our invention consists in the employment or use of elastic clamps, attached to the ordinary adjustable and elastic beds, between which the stuff is fed to the saw. The clamps above mentioned have an elasticity independent of the beds, and compensate for the varying thickness of the different pieces of stuff to be sawed, by holding firmly the extreme end of the stuff, and keeping it in proper position to the saw, however much the elastic beds may be expanded by a succeeding piece of stuff of greater thickness. 3d. Our invention consists in the employment or use of knives or cutters, secured to the adjustable beds, and so arranged as to cut or smooth off the rough and projecting sides of the stuff at the ends, making it of uniform thickness. 4th. Our invention consists in the combination of an adjustable bed and circular saw, arranged as will be hereafter shown." Then follows a description of the machine. A shaft runs transversely across the front part of a frame. On the shaft is placed a circular saw, formed of thin steel plate and such as is used for sawing veneers. On one side of the saw, a circular plate, somewhat less in diameter than the saw, is secured by rivets or screws. This plate stiffens the saw, and, without its use, a comparatively much thicker saw would be required. There are two deflecting plates, placed one at each side of the saw. The deflecting plate which is on the same side of the saw with the stiffening plate, covers the upper part of the stiffening plate, and the inner end of it does not project outward from the saw quite as far as the outward end of it. The deflecting plate on the opposite side of the saw is rather smaller in diameter than the other deflecting plate, and projects from the saw at about an equal distance at both ends. There are two feed roller beds placed vertically in the back part of the frame and parallel with each other. Both of these beds are made adjustable by screw rods, which bear against the sides of the beds, the screw rods of each bed being operated simultaneously by means of chains passing around small toothed wheels at the ends of the screw rods. There are two cranks, one of which is attached to one of the toothed wheels of each bed. The beds also have a lateral elasticity given them by means of india rubber or other springs attached to them in any proper manner. There are four feed rollers placed in the beds, two rollers in each bed. The feed rollers project some distance beyond the inner edges of the beds. There are two clamps, attached to the inner ends of the beds. At the back part of each clamp there are two journals, one at the top and one at the bottom. These journals fit in boxes which work or slide in recesses in the top and bottom pieces of the beds. There are set screws which pass transversely through the top and bottom pieces of each bed, and the inner ends of which bear against india rubber springs which are placed directly back of the boxes. There are two india rubber springs at the top of the clamps, one spring to each clamp. These springs are placed between the clamps and set screws which pass transversely through the top pieces of the beds. There are two stops which pass through the top pieces of the beds, one through each top piece, and regulate the distance of the lateral vibration of the clamps. Then follows a description of the knives or cutters before referred to, but they are not

involved in any of these suits. Motion is given to the feed rollers by proper gearing at the lower part of the rollers. The beds are adjusted relatively to the saw, so that the stuff may be sawed into the desired thickness. Either side of the saw may be made the "line side", by fixing permanently or destroying the elasticity of the proper roller bed. The stuff is placed between the feed rollers in the beds, and, motion being communicated to the saw and feed rollers, the stuff is fed towards the saw and cut by it, the two pieces being prevented from bearing against the sides of the saw by means of the two deflecting plates. When the outer end of the stuff has passed the innermost feed roller, the clamps bear against the stuff and hold it in a proper relative position to the saw. A fresh piece of stuff is then placed between the feed rollers and forces forward the preceding piece. If the new piece of stuff is rather thicker than the preceding piece, it merely acts upon the beds and forces the elastic one farther from the permanent one, without affecting the clamps, which have an independent elasticity, owing to the springs. If it is desired to saw stuff two inches in thickness into two strips, one of which is to be a quarter of an inch in thickness, that strip, being the thinner one, may be deflected by the plate which is on the same side of the saw as the stiffening plate, as that deflecting plate is inclined or projects outward from the saw farther than the other deflecting plate. The roller bed in line with the deflecting plate which is on the same side of the saw as the stiffening plate, is permanently fixed at one-quarter of an inch from the side of the saw. The opposite bed being elastic, the side of the saw on which the thin strip passes is the "line side." The opposite side of the saw may be made the "line side," by permanently fixing the opposite roller bed, and allowing the other one to remain elastic. The patentees state that, by those improvements, they can employ a thin veneer saw, and, consequently, a small amount of stuff is lost, as the saw kerf is narrow; and that the stuff to be sawed is always kept in a proper relative position to the saw, when varying in thickness. The specification says: "We do not claim the adjustable and elastic roller beds, F. F., for they have been previously used." The first, second and fourth claims of the patent, which are the only ones involved in these suits are as follows: "1st. The employment or use of the deflecting plates E. E'., one or both, placed at the sides of the saw, as herein shown, for the purpose of preventing the sawed stuff from bearing against the sides of the saw, and expanding the saw kerf, and also for the purpose of allowing a thin veneer saw to be stiffened by plates, D., one or two, as desired." "2d. The employment or use of the clamps, I. I., arranged as herein shown, or in an equivalent way, so as to have a lateral elastic movement, independent of the roller beds to which said clamps are attached, for the purpose of compensating for the varying thickness of different pieces of stuff, and keeping them in a proper relative position to the saw." "4th. The employment of an adjustable bed, F., with clamps, as described, in combination with the saw, C., when the saw has a stiffening plate, D., in line with said bed, by which the stiffened or rounded side of the saw is made the 'line side.'"

After these suits had all of them been brought, Eugene S. Eunson, and Margaret Myers, executrix of John Myers, filed in the patent office (but when, does not appear) a petition dated November 30th, 1870, signed by them, which states that they are the joint and exclusive owners of the patents for the whole of the United States, except the state of New Jersey, owned by Eugene S. Eunson and Jacob Lagowitz jointly, the city and county of Philadelphia, owned by persons unknown to them, and all that portion of the city of New York lying west of Broadway and the Eighth avenue, owned by Eben Peek and Gilbert J. Bogert; and that they thereby enter their disclaimer to that part of the first claim of the patent "which covers the employment or use of the deflecting plate E.," (which is the deflecting plate on the same side of the saw with the stiffening plate,) "at the side of the saw, thereby causing the said claim to include only the combination of the saw described with both of the deflecting plates, E., and E'., when both of said deflecting plates are used at one and the same time, in the manner and for the purposes described in said patent." The disclaimer then states that the said first claim of the patent will accordingly be as follows: "1st. The employment or use of the deflecting plates E. E'., both placed at the sides of the saw, as herein shown, for the purpose of preventing the sawed stuff from bearing against the sides of the saw, and expanding the saw kerf, and also for the purpose of allowing a thin veneer saw to be stiffened by plates, D., one or two, as desired;" that the petitioners also desire to disclaim that part of the patentees' description of their invention, wherein they say that the nature of the invention consists, first, in the employment or use of deflecting plates, "one or two," placed at the sides of a circular saw, &c., and to limit the nature of the invention to which claim is made, to the combination with the saw of the two deflecting plates, one at each side of the saw, as described; and that the disclaimer is to operate to the extent of the interest in the patent vested in the petitioners.

In the suit against Frame, Nichols and Robbins, the answer admits the use, by the defendants, of a machine for sawing thin boards, but denies that it infringes the patent. It also sets up a prior knowledge and use of the patented inventions by Charles Turner, Isaac Smith, John N. Lyman, Daniel Doncaster, James Hay, Henry McGoffin,

James Moses, C. M. Whiting, George W. Cook, Alvah Metcalf, William Rockwood, and the defendants. It also sets up, as containing prior descriptions of such inventions, Holtzapffel's Mechanical Manipulation, London, 1847, volume 2. pages 809 to 813; letters patent of the United States to Manassah Andrews and James Sproat, granted December 31st, 1839, to Pearson Crosby, granted April 8th, 1851, and to Pearson Crosby, granted November 3d, 1841, reissued March 10th, 1849, extended October 30th, 1855, and reissued April 28th, 1857; and letters patent granted in England to Auguste Edouard Loradoux Bellford, dated May 2d, 1853, and specification dated October 26th, 1853, and filed November 2d, 1853.

The plaintiffs' machine is one of great utility. It is not designed for the sawing of logs or of boards from logs, but is designed to saw lumber, that is, boards and planks, in the state in which they are found in the market, into thinner lengths. It is generally called a re-sawing machine, which indicates the subjecting again to the process of sawing, lumber which has been created by sawing. It is an object, in a re-sawing machine, that the kerf, or portion of the wood converted into saw-dust by the operation of sawing, should be as narrow as possible, in order that the largest possible number of thin boards may be obtained from a thick one. To accomplish this end, the only suitable saw is what is called a veneer saw, or a saw such as is generally used for sawing veneers. A veneer saw is a circular saw composed of thin plates or segments screwed fast to a central circular flange or stiffening plate, in such a manner that the stiffening plate protrudes on only one side of the saw, the other side of the saw being a plane. The veneer, after it is cut, passes off on the side which has the stiffening plate, while the unsawed part of the wood passes on, on the other side.

In the plaintiffs' machine, the organization is such that the stiffened veneer saw can be used, while the stuff can be sawed thin, and of an uniform thickness, from end to end, and the operation be rapidly performed. The saw revolves on a horizontal axis, and the board to be re-sawed is fed in with its two flat faces standing perpendicular. It is fed by feeding rollers, which have a yielding pressure to accommodate inequalities in the thickness of the board. When the machine is running, the feeding rollers on one face of the board are left free to yield, while those on the other face have their yielding feature destroyed. The distance, on the unyielding side, between the line of the periphery of the rollers and the line of the nearest face of the saw, is equal to and determines the thickness of the piece to be sawed off, such two lines being parallel to each other. The feeding rollers on either face of the board can be made to yield or be fixed so as not to yield, at pleasure, the fixed side being the gauge side or line side, determining the thickness of the piece to be sawed off, and the rollers on the other side being set so as to yield to inequalities in the thickness of the board. Thus, either side of the saw can be made the line side, as well the stiffened side as the plane side.

There is, in the machine, a provision for holding the board that is being sawed, after its rear end has passed beyond the gripe of the feeding rollers, and while a portion of it still remains to be sawed. This arrangement consists of two pressing instruments, one pressing on each side of the board near the saw, and between the feeding rollers and the saw, and forming a clamp. Each one of these two instruments can be set so as to yield to inequalities in the thickness of the board, and each one can be fixed so as not to yield. In the use of the machine, the fixed side of the clamp is the same side as the fixed side of the rollers and the line side of the saw, and when one side is fixed, the other side is left free to yield. The elasticity of each clamping instrument is independent of the elasticty of the feeding rollers which are on the same side with it. Therefore, when one of the clamping instruments is set to yield, it can yield in and of itself, without reference to the yielding of the feeding rollers on the same side. Hence, a board of one thickness may be pressed between the yielding and the unyielding jaws of the clamp, while a board of a different thickness is being fed and pressed between the yielding and the unyielding rollers.

Another feature of the plaintiffs' machine is the use of two deflecting plates, one on each face of the saw. They are thin, stiff plates, set in close to the saw face, and operating to relieve the saw from the pressure and friction of the surfaces each side of the cut in the board, and to open the cut and relieve the cutting edge of the saw.

The machine used by the defendants Frame, Nichols and Robbins, and which I call the Frame machine, has a circular veneer saw, composed of segments of thin metal, secured to a central supporting plate, and a deflecting plate on each face of the saw. The saw and the plates are substantially the same, in construction and mode of operation, as the saw and the plates in the plaintiffs' machine, and the combination of the saw and the plates is the same in the two machines.

The Frame machine has two pairs of feed rollers, one pair on each side of the board, each pair being in a frame. The rollers on one side can be set to yield, and, when so set, yield independently of the frame. In the plaintiffs' machine, when yielding is required, the entire frame which contains the pair of rollers yields. But this is only a formal difference. The Frame machine has two pressing instruments, which together form a clamp. On the same side with the yielding feed rollers, there is a yielding clamping instru-

ment, which, like the clamping instruments in the plaintiffs' machine, is a non-rotating piece of metal. Opposite to this, and on the line side or gauge side of the machine, is a fixed, unyielding roller, which forms the other member of the clamp. It is contended, for the defendants, that this clamping arrangement of theirs does not infringe the second claim of the plaintiffs' patent, for the reason that the roller, which forms part of the clamp, is not capable of having any lateral elastic movement, and that the clamp does not hold the stuff at its extreme end, as does the clamp in the plaintiffs' machine. But, the Frame machine does hold the stuff by means of an elastic action in the clamp, which elasticity is independent of the feed rollers, and thereby the machine can and does saw successive boards of varying thickness, one being held by the clamp while the succeeding one is being held by the feed rollers. To accomplish this, it is not requisite that more than one of the two instruments which form the clamp should be elastic at a given time, or that both of them should be elastic at one and the same time; and as shown by the description and drawings of the plaintiffs' patent, the roller bed on the line side is never set so as to be elastic when the machine is running, and, when such roller bed is made inelastic, the elasticity of the clamping instruments on the same side is destroyed, so that, in use, but one clamping instrument at a time is suffered to be elastic. The difference between the Frame machine and the plaintiffs' machine, in this respect, only measures the inferiority of the former. It has the entire invention and apparatus of the plaintiffs', in respect to the clamp, applied, however, to only one side of the machine.

The Frame machine also contains substantially the same arrangement of adjustable bed, clamp, saw and stiffening plate which is found in the plaintiffs' patent, and so combined that the stiffened side of the saw can be made the line side.

The foregoing views apply to the Frame machine of which Exhibit No. 5 is a model. It follows that it infringes the first, second and fourth claims of the plaintiffs' patent. The Frame machine of which Exhibit No. 6 is a model, contains the combination of two deflecting plates with the saw, which is covered by the first claim of the plaintiff's patent, and infringes that claim.

The answer in the suit against Dunbar and Hopper sets up the same matters of defence that are set up in the answer in the suit against Frame, Nichols and Robbins, adding, in respect to prior knowledge and use, the name of E. W. Robbins, and omitting that of John M. Nichols.

The machine used by the defendants Dunbar and Hopper has the combination of two deflecting plates with a circular veneer saw, which is covered by the first claim of the plaintiffs' patent.

That machine, which I call the Dunbar machine, has four feed rollers, two on each side of the machine. Two of the four are opposite to each other, and nearer to the saw than the other two are, which latter two are, also, opposite to each other. It also has two clamping instruments, which are located, with reference to the saw, substantially in the same place as the two clamping instruments described and shown in the plaintiffs' patent. One of those clamping instruments is rigidly attached to the standard which holds one of the two rollers nearest the saw, and the other of such instruments is rigidly attached to the standard which holds the other one of the two rollers nearest the saw. Therefore, neither one of such clamping instruments can have any lateral elastic movement independent of the roller held by the standard to which it is attached. One, however, of such clamping instruments has a lateral elastic movement independent of the feed roller on the same side which is farthest from the saw, and the result of the arrangement is, that inequalities in a board that is being sawed affect independently the lateral elastic action between the clamping instruments, and the lateral elastic action between the two feed rollers that are farthest from the saw, and two boards of different thicknesses may follow each other through the machine, and one of them be firmly held by the clamp, while the other is firmly held by the two feed rollers that are farthest from the saw. This is the substance and essence of the invention covered by the second claim of the plaintiffs' patent.

It is objected, that the plaintiffs' clamping instruments have an elasticity independent of the roller beds to which they are attached; that the clamping instruments in the Dunbar machine have no elasticity independent of the roller beds to which they are attached, one of them having an elasticity which is independent only of the roller bed to which it is not attached; that the second claim of the plaintiffs' patent claims expressly only clamping instruments which have a lateral elastic movement independent of the roller beds to which such clamping instruments are attached; and that, therefore, the Dunbar machine is, in respect to its clamping instruments, not an infringement of the second claim of the plaintiffs' patent. But this is too technical a view, and sacrifices substance to shadow. Taking the whole specification, and the statement of the invention, and the description, and the second claim, and reading them together, it is manifest, that the arrangement in the Dunbar machine embodies the real invention covered by such second claim, and that there is no violence to the language of that claim in so construing it as to hold it to cover an arrangement in which one of the clamping instruments has a lateral elastic movement independent of feed rollers with which it is combined or in connection with which it is used. The change made in the

Dunbar machine is not a substantial change, but is one that would be made by a mechanic seeking to vary form without varying substance, and hoping, while using the invention, to avoid the charge of infringement.

It is also objected, that each of the plaintiffs' clamping instruments has a swinging motion, on a vertical axis, so that they can hold at the same time between themselves, two boards of different thicknesses, without reference to any independent elastic action of the roller beds; and that neither of the clamping instruments in the Dunbar machine has any such swinging motion on a vertical axis. This feature exists in the plaintiffs' clamping instruments, and is a useful one, and is absent from the Dunbar machine, but it is not a feature that enters into the second claim of the patent, nor is it a feature that has anything to do with the question of a lateral elastic action in the clamping instruments independent of a lateral elastic action in some or all of the feeding instruments.

Nor does the absence from the Dunbar machine of provision for making the clamping instruments on both sides elastic independently of the elastic action of the feed rollers farthest from the saw, make it any the less an infringement of the second claim of the patent. This question has been already considered in reference to the Frame machine.

The Dunbar machine also infringes the fourth claim of the plaintiffs' patent.

In the case against Swift, no proofs have been taken on the part of the defendants. The answer sets up prior knowledge and use of the inventions by Asa M. Beard, George Hyde, J. B. Graham, R. Dorsett, and H. J. A. Neilson.

The machine used by Swift is made by the Huntington Machine Company, of Newark, New Jersey. It has the combination of the saw and the two deflecting plates of the plaintiffs' patent. The clamping instrument on the same side with the stiffened or rounded side of the saw, is permanently fixed to the roller bed that is nearest to the saw on that side. That side of the saw is permanently the line side. The clamping instrument on the other side is permanently fixed to the roller bed that is nearest to the saw on that side, but has a lateral elastic movement independent of the feed roller on the same side that is farthest from the saw. In this respect, the arrangement is, in substance, the same as in the Dunbar machine. The machine of Swift also infringes the fourth claim of the plaintiffs' patent.

The answer in the case against Peddie sets up the same matters of defence that are set up in the answer in the case against Dunbar and Hopper, omitting, in respect to prior knowledge and use, the names of Whiting, Cook, Metcalf, and Rockwood, and the patent to Andrews and Sproat. The machine used by Peddie is the same in construction as that used by Dunbar and Hopper.

There is no force in the suggestion that the specification of the plaintiffs' patent contemplates the use of any other description of feed than a roller feed, in connection with an independent elastic action in the clamping instruments.

The disclaimer of the use of only one deflecting plate with the saw, and the limitation thereby of the first claim to the use of the two deflecting plates with the saw, was proper, and the disclaimer was in proper form.

There is nothing in the fact that one deflecting plate is described in the extract from Holtzapffel, and in the Andrews and Sproat patent, which affects the novelty of the invention of the use of two deflecting plates in the plaintiffs' machine. The case is not one of mere duplication. In view of the fact that, in cutting from a block, as in the Andrews and Sproat patent, and from a log, as in the machine described in the extract from Holtzapffel, but one deflector is required, or could be used, and that the plaintiffs substituted, for the carriage feed before used with one deflector, a roller feed, in the use of which, in a machine for resawing boards, the saw is exposed to friction on both sides of it, so as to require a deflection of the board on both sides of the saw at the same time, the introduction of deflecting plates on both sides of the saw, so as to render practical the resawing of boards by a circular saw with a roller feed, must be regarded as a substantial invention, notwithstanding one deflecting plate had before been used in a machine for sawing from the log or block without a roller feed. The Andrews and Sproat patent, containing the one deflecting plate, was granted in 1839. Yet Crosby, in his patent of 1851, introducing devices to relieve the saw on both sides at once, did not hit on the idea of putting in two deflecting plates. The use of them was not obvious in such a machine as the plaintiffs'.

The prior use, by Doncaster, of the two deflecting plates with the saw, is not established; and the evidence shows that Myers and Eunson made the invention before it was made by Doncaster, or any one connected with him.

The English patent to Bellford, and the Crosby patent of 1851, are the same. Neither of them contains any clamping instrument which has a lateral elastic movement independent of any feed-roller bed in the machine. The machine which they describe would not allow one board to be held by a clamp, while a board of greater or less thickness was being held and fed by feed rollers.

There is nothing in the Crosby patent of 1841 to affect the novelty of the plaintiffs' patent. No evidence was given as to any other prior use or knowledge, that is set up in any of the answers; nor was the novelty of the fourth claim of the plaintiffs' patent attacked.

In the case against Dunbar and Hopper, and in the case against Swift, the plaintiffs are entitled to a decree for a perpetual injunction, and for an account of profits, based on

an infringement of the first, second, and fourth claims of their patent, but without costs, as the disclaimer in respect to the first claim was not filed prior to the bringing of the suits.

In the suit against Frame, Nichols and Robbins, Margaret Myers and Eugene S. Eunson are merely nominal plaintiffs. The plaintiffs Peek and Bogert are the owners of the entire right for the territory within which the infringement in that case took place. They have not disclaimed the claim to the use of one deflecting plate with the saw. That claim is anticipated by the Andrews and Sproat patent. There is no evidence that Peek and Bogart have unreasonably neglected to disclaim; nor is any such defence set up in the answer. Unless such disclaimer be made, there can be no decree for the plaintiffs. An opportunity will be allowed to Peek and Bogert to make such disclaimer, and present to the court evidence of its having been made. When such evidence shall have been presented, a decree will be entered for a perpetual injunction and an account of profits against Frame, Nichols and Robbins, in respect of the first, second, and fourth claims of the patent, but without costs.

The same course must be taken in respect to the suit against Peddie. Lagowitz is a joint owner with Eugene S. Eunson of the right to the patent for the state of New Jersey, where the infringement complained of in that suit took place. Eunson's disclaimer operates only to the extent of his interest, and does not cover the interest of Lagowitz.

[For other cases involving this patent see Myers v. Duker, Case No. 9,989; Eunson v. Dodge, 18 Wall. (85 U. S.) 414; Peek v. Frame, Case No. 10,903; Peek v. Frame, Id. 10,904; Emerson v. Simm, Id. 4,443.]

[For another case involving this patent, see Belding v. Turner, Case No. 1,243.]

[NOTE. In the case against Dunbar and Hopper, upon the coming in of the master's report, a final decree was entered against them. The decree, in addition, awarded $500 fees to the master. From this decree the defendants appealed to the supreme court and gave an appeal bond. Pending the appeal the master made application in this court for an attachment for the fees due him. Case No. 9,990. The supreme court subsequently, upon the hearing, reversed the decree of the circuit court, holding that there was no infringement. 94 U. S. 187.]

Case No. 9,992.

MYERS v. The HARRIET.

[19 Hunt. Mer. Mag. 535.]

District Court, E. D. Pennsylvania. July 28, 1848.

SHIPPING—GENERAL AVERAGE — FREIGHT — SALE OF CARGO TO REPAIR SHIP—SHIPPER'S DAMAGES.

[1. General average for repairs to the vessel are not allowed as against the cargo except where the vessel goes to a port of necessity from which the voyage is afterwards resumed; hence, where the cargo was sold in a port of refuge to obtain funds for repairing the vessel, there is no right to contribution.]

[2. Where a vessel after sustaining injury in a storm, puts into a port of refuge, and the master, without attempting to obtain funds by hypothecation of the vessel or other maritime contract, sells the cargo and uses part of the proceeds for making repairs, such sale must be considered to be without justification or excuse, it appearing that half the amount brought by the cargo would be sufficient to make the repairs.]

[3. In such case the shipper's damages are to be measured by the value of the cargo at the place of shipment, together with all expenses and interest from the time of shipment. If libelant claims more than this or respondent asks to be discharged for less, they must clearly show what would have been the value of the goods at their destination.]

This case involves principles of great importance to the mercantile community. The Harriet sailed from Norfolk on the 27th of November, 1847, bound to Point a Petre, Guadaloupe. She was loaded with staves, shipped by Myers & Co. to Carron & Bonaffe, of Guadaloupe. She met with very heavy, tempestuous weather, which damaged the vessel and rendered it impossible to continue the voyage without repairs. She therefore put into Kingston, Jamaica, where she arrived December 25th. On survey it was found that the upper works of the vessel were considerably strained, and that they needed repairs. These were made under the orders of the captain, and in order to pay for them, he took the responsibility of selling the cargo, and returned with the vessel in ballast to the United States. The vessel has now been libelled by the shipper and consignee for a breach of contract and of affreightment and they ask for a decree for the value of the goods at the point of shipment with interest from the time of sailing. The defendant does not deny a liability for the value of the cargo, but claims that the goods shall be charged with general average for the expenses from the time of the enforced deviation, and also the freight. He also contends, in the second place, that he is only liable for the net proceeds of the cargo at Kingston.

OPINION OF THE COURT. General average is not allowed except when the vessel went to a port of necessity, from which its voyage was afterwards resumed.

2. That freight is not earned if the voyage is abandoned by the delict of the ship or master.

3. The captain was not justified in making sale of the cargo at Kingston. It does not appear that he made any exertion to obtain funds by the hypothecation of the vessel or by any maritime contract. In order to justify a sale of the cargo, the necessity must be absolute and unequivocal or the sale is a tort. The captain sold the cargo, not only to pay the repairs, but because he had determined the voyage should be broken up. It appears that one-half of the amount brought by the cargo would have been sufficient to pay all the repairs—even if such a course were allowable. The sale was without excuse. The

cargo was not perishable, and the master has no right to dispose of the property of the shipper for the sole benefit of the shipowner. The goods appear to have been disposed of solely for the benefit of the transporter. The rule is, where the sale of the cargo is allowable, that no more shall be sold than is necessary, so that the remainder may be carried to its place of destination by another vessel.

4. The rule determining the amount of damages is the value of the cargo at the place of shipment, all expenses and interest from the time of shipment. If the libelant claims more than this, or the defendant asks to be charged less, they must clearly and unequivocally show that the goods would, at the place of destination, bring the amount claimed to be the proper value.

Decree for libelants.

It is referred to the commissioner to ascertain the amount.

The defendant afterwards obtained leave to appeal to the circuit court.

MYERS (HILL v.). See Case No. 6,496.

Case No. 9,993.

MYERS v. The LIZZIE HOPKINS.

[1 Woods, 170.] [1]

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

SEAMEN—INJURY IN DISCHARGE OF DUTY—WAGES—MEDICAL ATTENDANCE—SUBSISTENCE.

When a seaman, while in the discharge of his duty, is injured by reason of the neglect or carelessness of an officer of the boat, the boat is liable for his wages until restored, and for his subsistence and medical attendance in the meantime.

[Cited in The Guiding Star, 1 Fed. 349.]

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

In admiralty.

R. H. Shannon, for libellant.

B. Egan, for claimant.

WOODS, Circuit Judge. The libellant claims of the libellee the sum of $350. He alleges that while employed upon the steamer Lizzie Hopkins, as a deck hand at the wages of $50 per month, and while engaged in the discharge of his duty under the orders of the officers of the boat, he was seriously injured by reason of the carelessness of said officers and other employees of the steamer. That by reason of his injuries he was disabled from labor and confined in the hospital for three months and fifteen days. He asks a decree for his wages for that time at $50 per month, amounting to $175, and for $175 for his subsistence, lodging and medical attendance for the same period, also amounting to $175.

The defense is, substantially, that the injury received by libellant was caused, not by the wrongful conduct, carelessness or negligence of the officers of the boat, but wholly through the neglect and carelessness of libellant, and that the libellant was shipped for the round trip from New Orleans to Natchez and return, and no longer, and that the defendant is not liable for his wages or the expenses of his cure after the expiration of the time for which he was engaged.

The record shows that, while the Lizzie Hopkins was lying at Natchez Island taking on board a lot of cotton, and while the libellant and a comrade were engaged in rolling a bale of cotton on board, having just reached the shore end of the staging, another bale of cotton was allowed to escape from the grasp of two other hands who were upon the bluff, and it came down and struck libellant, knocking him down and breaking his arm, and that at the time the mate of the steamer was on the bluff giving orders and hurrying up the lading of the cotton. The pretense that libellant was injured by reason of his own carelessness and negligence is utterly unsupported by any testimony in the case. No prudence or vigilance on his part could have averted the injury. He was in no way to blame. On the other hand, it appears that at the time of the occurrence it was raining, the bluff was muddy and slippery, and several bales of cotton had escaped from the grip of the hands and rolled down the bluff. Notwithstanding the lives and limbs of employees of the steamer were thus endangered, no additional care seems to have been taken by the mate to prevent a recurrence of this dangerous accident. The result was the serious injury of the libellant as above stated. I think it clear, from the record, that a decent regard for the lives and limbs of the hands in the employ of the boat, exercised by the officers of the boat, would have prevented the injury to the libellant.

The only question in the case then is, how far is the defendant liable for the wages and expenses of the libellant? Without passing upon the question whether the steamer would be liable for the wages and expenses of the injured party after the end of the trip or voyage for which he shipped, when there was no fault on the part of the officers of the boat, I think that, in a case where an injury is received by a seaman while in the discharge of his duty, through the fault or neglect of the officers of the boat, the boat is liable for wages until the seaman is restored, and for the expenses of his keeping and medical attendance until restored. Brown v. Overton [Case No. 2,024]; Croucher v. Oakman, 3 Allen, 185. I am satisfied that libellant has demanded no more than the defendant ought to pay. Let a decree be entered in his favor for $350 with interest from the date of the decree of the district court.

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

MYERS (LYMAN v.). See Case No. 8,629.

MYERS (PENNSYLVANIA SALT MANUF'G. CO. v.). See Case No. 10,955.

MYERS (ROBERTS v.). See Case No. 11,906.

Case No. 9,994.

MYERS v. SEELEY et al.

[10 N. B. R. (1874) 411; [1] 1 Cent. Law J. 451.]

District Court, E. D. Missouri.

CORPORATIONS — UNPAID SUBSCRIPTIONS—ACTION BY ASSIGNEE IN BANKRUPTCY—CREDITORS' BILL—ASSIGNEE OF STOCK—CALLS.

1. Unpaid subscriptions to the capital stock of a corporation are assets applicable to the payment of corporate debts, which the corporate authorities may call in for corporate purposes.

[Cited in Glenn v. Abell, 39 Fed. 12.]

2. Primarily the amount due on subscriptions is a debt due to the corporation which it alone can enforce, and, unless the corporation is without other assets to meet its obligations, and fails to meet the needed calls, creditors cannot interpose.

3. An account should be taken to know what, if any, calls should be made, for the bill by creditors cannot reach beyond the satisfaction of their demands.

4. An assignee of stock may have paid for it to the assignor and relied on his representations, and those of the officers of the company, that the shares so bought were fully paid for; yet creditors are not bound thereby, and if the stock was not fully paid, the holder is liable to creditors of the company for the amount remaining unpaid.

5. The assignee in bankruptcy has all the authority of a receiver to collect demands and pay debts, and, under the order of the court appointing him, an assessment may be made on the unpaid shares just as if the same had been ordered by the corporation before bankruptcy.

[Bill in equity by [Nathaniel Myers] the assignee of a bankrupt corporation [the St. Louis Soap Company] against the stockholders [F. A. Seeley and others] to collect the amount alleged to be due on their respective shares of stock.][2]

Meyers & Litton, for plaintiff.

S. M. Breckenridge, Ira C. Terry, and Lee & Adams, for defendants.

TREAT, District Judge. The bill is by the assignee of a bankrupt corporation, against certain stockholders, to compel payment by them of the amount alleged to be due on their respective shares of stock. Many of the parties defendant have not been served, and many responsible stockholders are not made defendants. Bills by creditors who have judgments against a corporation have been sustained against the corporation and its stockholders. Said bills being framed in the name of the judgment-creditors and of all others who may choose to come in and be made parties thereto. In such cases the decree has been for an account to be taken of the debts and assets of the corporation, for the appointment of a receiver, to whom the stockholders and officers are ordered to pay and account respectively for so much of the assets and capital stock as are necessary to pay the debts due to the creditors; the assets thus collected and received to be applied by the receiver in discharge of the debts. The reason of that rule is, that the unpaid subscriptions are assets applicable to the payment of corporate debts which the corporate authorities may call in for corporate purposes. If there are adequate assets other than said calls, then the creditor has no legal or equitable right to insist upon such calls. Primarily, the amount due on subscriptions is a debt to the corporation which it alone can enforce, and unless the corporation is without other assets to meet its obligations, and fails to make the needed calls, creditors cannot interpose. When the facts justify their interposition, an account of assets and debts should be taken in order that it may be known what, if any, calls should be made. No further call should be made than what is sufficient, together with the other assets, to meet all debts; for the bill by creditors cannot reach beyond the satisfaction of their demands. They have no other equity. Adler v. Milwaukee Patent Brick Manuf'g Co., 13 Wis. 57.

If a company is insolvent, the original mode of making calls upon the stock is not to be pursued in the enforcement of such a decree; for the debt is then due on the stock without demand, and no stockholder can shelter himself behind an agreement that he might pay otherwise than in money, or money value, as other stockholders have to do. Every share of stock subscribed represents an asset available to the corporation and its creditors. The payment of it in full, that is, actual cash payment, or payment of cash value, is enforceable. As between the corporation and its stockholders, its agreement as to paid up stock may be valid, but neither directors nor stockholders, nor both, can so act towards creditors as to debar the latter from insisting upon the actual payment by stockholders of what is really due on their stock. The assignee of shares can be in no better condition than the assignor. The transfer is not, so far as the right to make calls is concerned, dependent upon the good faith of assignor and assignee in their dealings between themselves. The question is simply whether the stock has been really paid in full to the corporation. The assignee may have paid for it to the assignor, and may have relied on the representations of the latter, and of officers of the company, that the shares bought were fully paid; yet creditors are not bound thereby, and if the stock was not fully paid, the holder is liable to creditors for the amount remaining unpaid.

The foregoing rules are clear enough for all ordinary cases brought by creditors; yet here, as stated in the case cited from 13

[1] [Reprinted from 10 N. B. R. 411, by permission.]

[2] [From 1 Cent. Law J. 451.]

Wis., and in the case of Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380, where the corporation is in bankruptcy, what is the proper course to be pursued? The assignee in bankruptcy has all the authority of a receiver to collect demands and pay debts; the proceedings in bankruptcy are adjusting the accounts, and the court sitting in the bankrupt case is proceeding to ascertain what calls, if any, will be necessary. If this suit in equity (and it might have been brought in the United States circuit court) is to result in a decree for an account, etc., shall the decree take from the court sitting in bankruptcy all further cognizance of those matters, or in other words, shall the court of equity draw into its jurisdiction and supersede all the powers and functions of the court in bankruptcy, specially charged by law with the collection and distribution of the assets of this insolvent corporation? This suit is by the assignee in bankruptcy, and under the orders of the court appointing him, an assessment may be made on the unpaid shares, just as if the same had been ordered by the corporation before bankruptcy, for he represents the corporation for the collection of all its assets. He represents also the creditors who are not bound by any agreement between the corporation and its stockholders, whereby the latter were to be considered as holding full paid stock. Hence, to now order an account to be taken by a master and to appoint a receiver, etc., would be virtually to supersede the pending proceedings in bankruptcy.

The proper course seems to be to dismiss the bill without prejudice, and order an assessment on all unpaid stock to be collected by the assignee; otherwise the proceedings will be embarrassed at every stage.

As the assignee is plaintiff, the court cannot appoint him receiver; and if he is to be superseded in the administration, what is to become of his powers and duties, and also of the ordinary and regular proceedings in bankruptcy? The powers and duties devolved by the bankrupt act [of 1867 (14 Stat. 517)] seem necessarily to make a distinct proceeding in equity improper—to supersede that mode of satisfying creditors' demands against an insolvent corporation which has been adjudged bankrupt.

[NOTE. To avoid any difficulty arising from the two years' limitation clause in the bankrupt law which might prevent the bringing by the assignee of new suits against the individual stockholders, to recover payment of the unpaid stock on their respective shares, the court instead of formally dismissing the bill, as indicated in the opinion, subsequently directed "that the bill be retained for further proceedings thereunder on the following order: That the assignee proceed to collect from all stockholders of said company the amount due and unpaid on their respective shares." As to the general right of creditors and of the assignee in bankruptcy against the delinquent stockholders of a bankrupt corporation, see Sawyer v Hoag, ante, p. 43.] [2]

[2] [From 1 Cent. Law J. 451.]

MYERS v. SWIFT. See Case No. 9,991.

Case No. 9,995.

MYERS v. TYSON et al.

[13 Blatchf. 242.] [1]

Circuit Court, S. D. New York. Jan. 15, 1876.

JUDGMENT—LIEN ON REALTY — NEW YORK STATUTE—DISCRETIONARY POWER OF STATE COURT.

Under section 967 of the Revised Statutes of the United States, which provides, that "judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon," the courts of the United States, in the state of New York, are not vested with the discretionary power which the state courts of New York have, under section 282 of the Code of Procedure of New York, to order real property bound by the lien of a judgment to be exempted from such lien, in certain cases, during the pendency of an appeal from such judgment.

[Cited in U. S. v. Sturgis, 14 Fed. 811.]

[This was a suit by Margaret Myers against William P. Tyson and Martin Murphy. It is now heard upon application of defendant Tyson for suspension of lien of decree entered upon real estate.]

Frederic H. Betts, for plaintiff.

Samuel J. Glassey, for defendant.

JOHNSON, Circuit Judge. This is an application for an order to suspend the lien of a decree of this court in equity upon all the real estate of the defendant Tyson. It is founded upon the claim, that the provision of the New York Code (section 282) applies, by force of the statute presently to be mentioned, to the lien of the judgment in question. If that claim is well founded, then it would rest in the discretion of the court, in view of all the facts, to grant or deny the order asked for. Section 967 of the Revised Statutes of the United States is as follows: "Judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such states cease, by law, to be liens thereon." This section is a re-enactment of part of section 4 of the act of July 4th, 1840 (5 Stat. 393), and which differs from it only by the word "now," and reads "now cease, by law, to be liens thereon." The state law, as it existed in 1840, was that, therefore, which was adopted by the statute of the United States of that year. At that time, no statute of New York gave to a party a right, on giving security on appeal, to apply for a suspension of the lien of a judgment against him. That right was given by an act of 1851, for the first time, which made it discretionary with the court to suspend the lien. The phrase of the act of 1840, re-enacted in section 967 of the Revised Statutes, was not

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

intended to cover such a case, so far as this state is concerned, when it was adopted. Nor does it appear to me that the alteration of the statute, by re-enacting it, omitting the word "now," has the effect of introducing into the law of the United States, in this state, this particular provision. The lien, according to the section of the Code before referred to, is suspended during the appeal, but does not cease. It is suspended not by law, but by the discretion of the court. The words "by law," in section 967, are emphatic, and refer, in my judgment, to a fixed rule in respect to time and manner, and not to a discretionary power vested by statute in a state court. The section of the Code (section 282) is: "Whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, the court in which such judgment was recovered may, on special motion, after notice to the person owning such judgment, or to his attorney, and to the sureties to such undertaking, on such terms as such court shall see fit, by order, exempt from the lien of such judgment the whole of the real property upon which said judgment is a lien, or a specific portion thereof, to be described in such order, and direct an entry to be made by the clerk on the docket of such judgment, that the same is 'secured on appeal,' except that in case only a specific portion of such property is exempted from such lien, such order shall direct an entry to be made on such docket, that the same is 'secured on appeal, as per order of the court, dated ——,' specifying the date of such order, and thereupon such judgment shall cease, during the pendency of such appeal, to be a lien upon the property so exempted, as against purchasers and mortgagees in good faith." This vests a discretionary power in the state court to order the whole or a part of the real property bound by a judgment, to be exempted from its lien during the pendency of the appeal, in favor of purchasers and mortgagees in good faith. It does not, in my opinion, come within the meaning of section 967 of the Revised Statutes, and the courts of the United States do not, under that section, take, in this state, the discretionary power conferred upon the state courts in respect to their own judgments.

The motion must be denied.

Case No. 9,996.

MYERS v. UNITED STATES.

[1 McLean, 493.] [1]

Circuit Court, D. Ohio. July Term, 1839.

PRINCIPAL AND SURETY—BOND OF GOVERNMENT OFFICERS—CREDITS—PRIOR DEFALCATIONS—NEW SURETIES.

1. Moneys collected by the government, on execution, may be proved as a credit in a subsequent action on the same bond, against a different party to the bond, without exhibiting the voucher for such payment to the treasury department.

2. New securities are not responsible for prior defalcations, unless the conditions of the new bond shall embrace them.

[Cited in Allen v. State, 61 Ind. 275; Anaheim Union Water Co. v. Parker, 101 Cal. 488, 35 Pac. 1049. Cited in brief in Barnet v. Abbott, 53 Vt. 127. Cited in Bissell v. Saxton, 66 N. Y. 60. Doubted in Clark v. Wilkinson, 59 Wis. 550, 18 N. W. 483. Cited in Hyatt v. Grover & Baker S. M. Co., 41 Mich. 227, 1 N. W. 1038; Luce v. Dorchester Ins. Co., 105 Mass. 297; Ohning v. City of Evansville, 66 Ind. 63; Scofield v. Churchill, 72 N. Y. 567; Vivian v. Otis, 24 Wis. 521. Distinguished in State v. Sooy, 39 N. J. Law, 547.]

3. When a question arises between liabilities of securities on different bonds of different dates, the general doctrine of the application of payment does not apply.

4. The government cannot apply money received by a receiver of public moneys, and paid over, after the date of the bond, in discharge of a previous defalcation, to the prejudice of the new sureties.

[Cited in Boody v. U. S., Case No. 1,636.]

[Distinguished in Chapman v. Com., 25 Grat. 743. Cited in Ohning v. City of Evansville, 66 Ind. 63. Cited in brief in Ornville v. Pearson, 61 Me. 555.]

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

At law.

Mr. Wright, for plaintiff.

The District Attorney, for the United States.

OPINION OF THE COURT. The action in the district court was brought on a penal bond for fifteen hundred dollars, given by Peter Wilson, Abraham Myers, and others, securities, conditioned that the said Wilson should faithfully perform his duties as receiver of public moneys, at Steubenville, in the state of Ohio. The bond was dated 22d September, 1820. The breach assigned is, that Wilson received a large sum of money, to wit, the sum of fifteen thousand dollars, which he failed to pay over or account for to the government, as he was bound to do. The defendant, in the district court, pleaded non est factum, and gave the following notice, under the statute. 1. That Wilson was first appointed in the recess of the senate, and gave bond in ten thousand dollars, dated 3d of November, 1808, with Johnson, Wells, and Pritchard, securities. That his permanent appointment was made 6th December, 1808; and that bond was given 6th January, 1809, with Pritchard and George Wilson securities, in $10,000. That afterwards, and upon the requisition of the secretary of the treasury, on the 15th of February, 1819, he gave another bond, with Campbell and Myers, securities; and upon like requisition gave the bond in suit, and if operative, is only collateral, &c. 2. That the duties of receiver were materially changed by several acts of congress. 3. That judgment was obtained on the first bond at July term, 1827, for $10,000, to be released on pay-

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

ing $9,919, on which $2,320 have been paid. 4. Judgment on second bond against Wilson, at the same term, for $10,000. 5. Judgment on the third bond, at the same term. 6. That the United States brought suit on the bond declared on in July, 1826, and obtained judgment in July, 1827, for the sum due, and on which a large sum has been collected which is claimed as a credit in this case. 7. That Wilson performed his duties as receiver from 22d September, 1820, to 20th December, 1820, from 30th September, 1820, to 6th December, 1820; when his term of office expired. 8. That defendant was surety, and the agent of the treasury, the 18th September, 1828, gave Wilson time till January, 1828.

On the trial, a bill of exceptions was taken by the attorney for the United States, substantially as follows: The defendant offered in evidence under the issue, payment of $2,320 received on execution which issued on a judgment against Wilson and his surety on the above bond, without showing that the vouchers had been exhibited and rejected at the treasury department, or any excuse for not thus exhibiting them, and which vouchers were admitted as evidence. And the court instructed the jury that the question of the application of payments in this case was a substantive fact to be proved by the plaintiff, and whether Wilson's payments since 22d September, 1820, had been applied to the balance then due, was to be determined by the jury from an inspection of the transcripts, and if not applied, the jury could apply them. And the court refused to charge as requested by the attorney of the United States, that from the manner of keeping the accounts, as shown in the transcripts, the jury should apply Wilson's payments since 30th September, 1820, to the balance then due, until such balance was discharged, and that the jury should apply the overplus above the debt of 30th September, 1820, pro tanto, to the sum due 6th December, 1820, or that the jury should apply said surplus, according to priority of time.

The bond on which this action was brought is dated 22d September, 1820, and the first question that arises is, whether the sureties in this bond can be held liable for any prior defalcations of Wilson, the receiver. The answer is, that the sureties are bound for a faithful discharge of the duties of receiver, from the date of the bond; and not that he had performed those duties. If the government intended the bond to cover the official responsibility of Wilson in time past, as well as for time to come, its language would have been adapted to such an object; and the sureties would have had due notice of the extent of their liability. The obligation of a surety is a matter of strict law, and can never arise from implication. The bond must speak for itself, and its language can never be extended or altered, to the injury of the surety. But it is insisted that the transcript shows a large balance due at the date of the bond, which the receiver was bound to pay over to the government; and a failure to do this, is a failure of official duty, for the due performance of which the sureties in this bond are bound. The transcript, it is true, shows that Wilson was a defaulter in a large sum at the time this bond was executed, and which he should have paid over before its execution to the government. Now can the sureties to this bond be held responsible on this evidence. The receipt of the money by the receiver may be admitted, but suppose, as the fact probably was, that he had applied it to objects of a private nature before the execution of the bond, would any one contend that the sureties are responsible for such misapplication of the public money. The default in this view was complete before the date of the bond, and the fund was misapplied. There could, therefore, be no liability of the sureties under such circumstances, unless the bond provided expressly for the case. And unless there was more evidence before the jury than that which is found on the transcript, the defendant below could not be charged with any part of this defalcation. It may be admitted, if the government had shown that the whole or any part of the balance due, at the date of the bond, came into the hands of the receiver subsequent to the date of the bond, the sureties might be held responsible for the payment of the amount received. Or if it had been shown that the balance was in the hands of the receiver, not presumptively but in fact, when the bond was given, there would be ground on which to insist that the sureties are liable. But there appears to have been no evidence to the jury that the balance was in the hands of the receiver at the date of the bond; or that it came into his hands subsequently. I am aware that this might have been set up as a matter of defence. But I am inclined to think, that it is not incumbent on the defendant to show the misapplication of monies received, and for which the receiver was in default prior to the execution of the bond. It appears to me that when the government seeks to make a surety responsible for a balance due, at the time the bond is executed, it must show the money was in the hands of the principal when the security became bound.

The court in the case of Farrar v. U. S., 5 Pet. [30 U. S.] 389, say: "We feel no difficulty in affirming that for any sums paid to Rector prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is on the assumption that he still held the money in bank or otherwise. If still in his hands, he was, up to that time bailee to the government; but upon the contrary hypothesis, he had become a debtor or defaulter to the government and his offence was already consummated. If intended to cover past dereliction, the bond should have been made retrospective in its language. The sureties have not undertaken against his past misconduct."

And the court held that the court below erred in not suffering the defendant to prove the misapplication of the money before the date of the bond. But the question was not raised whether it was not incumbent on the government to show the amount of money in the hands of the surveyor at the date of the bond. This evidence is essential to the liability of the surety; and I am inclined to think that proof of the defalcation only, does not fix this liability. The default being prior to the bond, the government must show that the money was in the hands of the principal at the date of the bond. And this upon the simple ground, that the surety does not undertake to account for prior defaults, but for those which may subsequently occur. In the case cited the fund was placed in the hands of the surveyor for disbursements; but in the case under consideration, the receiver was bound to pay over the money, which he had failed to do; and for such failure, I hold a subsequent surety is not bound, unless the bond be retrospective in its conditions, or the money is shown to be in the hands of the receiver when the bond was given. In [U. S. v. Giles] 9 Cranch [13 U. S.] 227, 229, it was decided that the sureties were not bound for moneys received by a marshal, before the date of the bond. But the charge of the district court, in regard to the application of payments was not prejudicial to the government. It adopts the language of the court, substantially, in the case of U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720. The court there remark, that the general doctrine is, that the debtor has a right if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen, and a fortiori, at the time of the trial. But this is not a case where the general doctrine on this subject applies. It is a case between different sets of sureties, under several bonds which have been stated. And I do not conceive that the government had any right to apply monies received and paid over, in the regular course of his duties, subsequent to the date of the bond under consideration, in discharge of a balance due from the receiver, before the date of the bond. This would be doing gross injustice to the defendant, in holding him responsible for a default consummated before he became bound. [U. S. v. January] 7 Cranch [11 U. S.] 575. Subsequent to the date of the bonds, the respective sureties are held responsible. But in ascertaining this liability it is necessary to show when the bonds took effect, and what defalcations they cover.

I am clearly of the opinion that the court very properly refused to instruct the jury, as asked, that the moneys paid by the receiver subsequent to the date of the bond should be first applied in discharge of the balance due before the bond was executed; and consequently there was no error in refusing to instruct them how the residue of the payments, after the discharge of said balance, should be applied. Nor did the court err in permitting evidence of the money collected on the judgment as a credit on this identical bond, against another surety. It was not necessary that the voucher for this payment should be presented, for allowance, at the treasury department. The return of the marshal is evidence of the payment to the government; he being the legal agent of the government to receive it, the execution being placed in his hands. I suppose it would hardly be contended that where an individual had paid to the treasurer of the United States in full, a sum of money which he had collected for them, he must exhibit to the treasury the voucher he had received, before such voucher would be admissible in evidence in an action by the government, for the money thus paid. And the principle is the same whether a payment is made in whole or in part. But the case under consideration is still stronger, as the government has placed the claim in the hands of the officers of the law, and the payment is shown by the official action of those officers. In fact the charge was favorable to the United States, and in some parts against the defendant, as it regards the application of the payments, so that had the verdict been in favor of the government, there would have been error.

Upon the whole the judgment of the district court is affirmed.

MYERS (UNITED STATES v.). See Cases Nos. 15,844–15,848.

MYERS (VALLEY NAT. BANK v.). See Case No. 5,549.

MYERS (WYTHE v.). See Case No. 18,119.

Case No. 9,997.

MYERS v. YORK & C. R. CO.

[2 Curt. 28.] [1]

Circuit Court, D. Maine. Sept. Term, 1854. [2]

REFERENCE—FORMAL DEFECTS—AWARD—RULE OF DAMAGES — RAILROAD CONSTRUCTION — PAY IN STOCK — STOCK RESERVED — MEASURE OF DAMAGES.

1. A reference of a pending action, under a rule of court, authorizes the referee to take into consideration only the subject-matter substantially shown by the declaration; but he may disregard all such formal defects as might be amended if the case were tried in court.

2. The award cannot be accepted if it does not enable the court, by inspecting it, to separate what was, from what was not awarded within the submission. But a general award of a specific sum, without specifying the items

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

[2] [Affirmed in 18 How. (59 U. S.) 246.]

of which it is composed is good, in point of form.

3. Reference of an action of covenant by a rule of court, makes the referee the final judge of the lawful rule of damages, and the court, on an application to accept the award, will not review his decision.

4. Under a stipulation to pay for building a railroad by monthly payments, twenty-five per cent. to be paid in stock of the corporation, "reserving one half the stock as indemnity for the fulfilment of this contract until said division of said road shall be completed," the corporation having wrongfully interrupted the work before the completion of the said division, *held*, that the stipulation as to the stock was executory, and the covenantee had not obtained a title thereto, and consequently should be allowed in damages the value thereof.

[Cited in McCreery v. Green, 38 Mich. 180.]

5. In an action of covenant, the plaintiff having been wrongfully prevented by the defendants from completing the work, the measure of damages is the difference between the price agreed to be paid for the work, and what it would have cost the plaintiff to complete it.

[Cited in McCreery v. Green, 38 Mich. 183; Hammond v. Beeson (Mo. Sup.) 15 S. W. 1002; Id., 112 Mo. 198, 20 S. W. 476.]

[This was an action of covenant by John G. Meyers against the New York & Cumberland Railroad Company, to recover damages alleged to have been sustained by reason of plaintiff's dismissal by the railroad company before the completion of his contract.]

F. O. J. Smith (with whom was Deblois), for plaintiff.

Clifford & Shepley, contra.

CURTIS, Circuit Justice. This action was referred under a rule of the court, entered at the April term, 1853, to John Davis, Marcus Morton, and Nathan Hale, Esquires, and after these referees had fully heard the parties, one of their number, Mr. Davis, died, and then Mr. Morton became so ill as to be unable to act. The parties thereupon agreed, that the remaining referee, Mr. Hale, should make an award, and he having done so, it was presented to the court at the last term, and its acceptance moved by the plaintiff, and opposed by the defendant,—only one judge being then present, by consent of parties, the case was continued to the present term, when the defendants filed their objections to the acceptance of the award, as follows:

"United States of America, Circuit Court of the United States for Maine District. In the action John G. Myers, Plaintiff, v. The York and Cumberland Railroad Company, Defendants. And now at the September term of said court, the defendants in the above entitled cause come into court and object to the acceptance of the award of Hon. Nathan Hale, as referee in the above action, and allege the following objections to the acceptance of the paper offered as an award of the said referee: First. That the said Hale has acted and awarded upon, and included in said award, damages for a subject-matter not referred to him. Second. That the said Hale has included in his said award damages for a claim not embraced in the plaintiff's writ or declaration, and not sued for in the above action, and not referred to his arbitration or decision. Third. That in and by his said award he has awarded to the plaintiff in said action damages for the non-delivery of the reserved stock specified in said writ and declaration, and in the contracts therein set out and copied, although the said reserved stock is not sued for, nor is any allegation made in the said writ and declaration that the same had been demanded, nor was any proof of demand of the same offered at the hearing before said referee, nor was any claim for the same referred for his arbitration or decision. Fourth. That the said Hale has awarded damages to the said plaintiff, in lieu of profits for work not performed by the plaintiff, under his said contracts, contrary to law. Fifth. That there having been no proof or claim that the defendants, in fraud of the plaintiff's rights under his said contract, had taken the contract from the plaintiff and given it to any other person at a lower rate, or taken it for the purpose of giving it to any other party, at a lower rate, the referee has awarded a sum as damages to the plaintiff, for prospective profits not earned by him, contrary to law. Sixth. That it does not appear in and by said award whether the said referee has credited or charged the plaintiff with an amount of bonds deposited in the hands of Levi Morrell, under the terms of the supplementary contract dated February 6, 1851, and set out in said writ and declaration. Seventh. That it does not appear in and by said award what disposition was made by the referee, of an amount of bonds in the hands of D. C. Emery, the treasurer of said corporation. Eighth. That it does not appear in and by said award whether the said referee charged the said plaintiff with an amount of bonds in his hands purporting to have been issued by one Nathaniel J. Herrick, describing himself as treasurer pro tempore of said corporation."

Upon these objections, by permission of the court, the testimony of Mr. Hale, the referee, was taken, and the counsel of the respective parties having been heard, and the objections to the award considered, we will now state our opinion thereon. The first three objections are statements in different forms, of the same thing. Their substance is this, that the referee exceeded his authority, by awarding to the plaintiff damages on account of certain stock of the defendant corporation, called reserved stock. This involves two inquiries: 1. Whether the referee did, in point of fact, allow such damages; and 2. Whether that subject-matter was referred to him. The first has been answered by the referee himself. He has testified "the value of the reserved stock, as estimated by me, was included in the damages I awarded." And it is insisted by the defendants, that the referee had not authority to include in his award a compensation to the plaintiff, for not

receiving this stock. The argument is, that this was not a reference of all demands, but only of this action; that nothing was referred which was not sued for; that under the declaration in the case neither the reserved stock, nor its value, nor a compensation for not receiving it is demanded; that the referee therefore exceeded his power in awarding damages on this account, and as the amount of those damages does not appear upon the award, so that they can be separated from the residue of the damages, by the court, the whole award is void.

To the correctness of many of these positions the court at once assents. This being a reference of the action, it was not competent for the referee to take into consideration any subject-matter, not substantially shown by the declaration. We say substantially, because formal defects in a declaration may be, and should be overlooked by a referee of an action under a rule of court. He has not the power possessed by the court, to allow them to be amended, but he may disregard them. Coffin v. Cottle, 4 Pick. 454; Forseth v. Shaw, 10 Mass. 253. Still the declaration must in substance, embrace a subject-matter, to enable a referee of that action, under a rule of court, to include that subject-matter in his award. We are of opinion also, that under our practice, the award itself must be such, as to enable the court to distinguish what is, from what is not, legally awarded. The practice here, derived from ancient usage in the state of Massachusetts, is to render a judgment on the award. The record must contain the basis of such a judgment. The award goes upon the record. But if the court were to hear parol testimony as to the amount of damages actually awarded, and act thereon, and render judgment therefor, the judgment would accord with that parol evidence, which would not be on the record, and would not pursue the award, which would be on the record. We think the correct practice, in such a case, would require us not to accept the award. Whether it should be recommitted or not, must depend on circumstances, not necessary in this connection to be described.

The important question here is, whether this subject-matter of the reserved stock was substantially embraced in the declaration; and to decide this question we must consider the contracts set out in the declaration, and the averments there made. and the breaches there assigned. The declaration, which is in covenant broken, sets out in haec verba, two principal contracts under seal. The first bears date the 12th day of August, 1848, the second on the 5th day of August, 1850. The subject-matter now under consideration, namely, "the reserved stock" depends upon the second of these contracts, by force of which the original contract to build the railroad was modified and changed in many important particulars. By this second contract the road was to be divided into four parts: from the depot in Portland to the station house in Gorham, being the "First Division;" from Gorham to the Saco River, "No. 2;" from Saco River to Alfred, "No. 3;" from Alfred to the terminus, "No. 4." And the second contract provides that for the work on the first division, "as the same shall progress from the first day of August current, payment shall be made at the rate of fifty per cent., in cash, and twenty-five per cent. in the six per cent. bonds of the company hereafter described, and twenty-five per cent. in stock, reserving one half of the stock, as indemnity for the fulfilment of this contract until said division of said road shall be completed." The declaration avers, that after the making of the last-mentioned contract, the plaintiff proceeded in the performance thereof, and continued, down to the 19th day of August, 1851, to do all that was incumbent on him towards the fulfilment thereof on his part; that on that day, while proceeding with the work, and when he had nearly completed the "first division," and while he was willing to continue to execute his contract, the defendants removed him from his situation as contractor; and prevented him from completing the work and performing the residue of his contract.

Upon this declaration, the question is, whether the referee could take into consideration that claim in the contract, which entitled the plaintiff to receive from the company, twelve and a half per cent. of the contract price of the work upon the "first division" in the stock of the corporation, upon the completion of that work. It is entirely clear that the time for this payment had not arrived when this action was brought. The language of the contract is, that payment shall be made to the extent of twenty-five per cent. in stock, "reserving one half of the stock as indemnity for the fulfilment of this contract, until said division of said road shall be completed." The substance of this stipulation, and its legal as well as its practical effect, were, that until the "first division" should be completed, this part of the payment was not to be made. And the declaration avers, that when the plaintiff was prevented by the defendants from going on with the work, the first division had not been completed. The precise ground of action, therefore, so far as concerns this stock, was not that the defendants would not deliver it to him, for he had not become entitled to receive it; but it was, that by preventing him from completing the first division of the road, they have prevented him from acquiring a right to this stock. This was one of the benefits which would have accrued to him by the completion of his contract. Of this benefit they deprived him by stopping his work. And, consequently, the value of this right is, among other things, to be made good to him, he having lost it by the wrongful act of the defendants. Having set out in the declaration the contract which gave

him the right, and made its enjoyment dependent on the completion of the work, and having averred that he was prevented from completing it by the defendants, the declaration contains sufficient to lay the foundation for this claim of damages. Suppose the contract had stipulated that the price of the work should be paid on its completion, in some species of merchandise, and the defendants had prevented the contractor from completing the work. It would then have been necessary to ascertain at what time the contractor could and would, if not prevented, have finished the work; then to find the market value of such merchandise on that day, and then to allow the contractor, by way of damages, that market value, deducting the cost of completing the work; and all this would be done by the jury, under a declaration describing the contract, and averring that the defendants had prevented its completion. In our opinion, the assignment of the breach, that the defendants discharged the plaintiff from the work, and refused to permit him to complete it, was sufficient to enable the plaintiff to claim before the referee, all damages which naturally arose from that breach; and that the value of the stock, which the plaintiff was prevented by this breach from obtaining, constituted a part of those damages.

It was strongly argued by the defendants' counsel, that so far as the plaintiff had earned these stocks by work actually done, they were, in truth, his property; that he was their legal owner; that though they continued in the hands of the company, it was only that the latter might retain a lien thereon for their security; and that the company had been at all times ready to acknowledge his title. But whatever force this argument is entitled to, we think it was an argument to be addressed to the referee, and considered by him, in the exercise of the jurisdiction conferred on him by the parties. He was to determine what damages Myers was entitled to recover, by reason of any breaches of covenant by the defendants, alleged in the declaration. Among those breaches, was the refusal to permit him to finish the work. But the amount of damages which he should recover for this breach, necessarily depended on the general state of the account between the parties. He was entitled to recover the contract price of the work, deducting the cost of finishing the work, and deducting also so much of that contract price as had been paid to him by the company. Suppose the ground had been taken before the referee, which is taken here, that for twelve per centum of the work done on the first division the plaintiff had already received payment in stock pursuant to the contract, and, therefore, to that extent, could have no claim for damages by reason of the interruption of the work by the defendants; and suppose the plaintiff had then answered, as he now does, that the provisions of the contract, taken in connection with what was done respecting this stock, did not amount to a payment pro tanto, and so did not reduce his claim; must not the referee have decided that question? and if he decided it in favor of the plaintiff, must he not have gone on and put a money value on this stock, which the plaintiff was entitled to receive as part of the contract price of the work? Whether such questions were in fact raised before the referee, we do not know, nor is it material. It is enough that they might have been raised; for if they could, and he had power to decide them, he did not exceed his authority, when he allowed the value of this stock, as estimated by him, as part of the damages he awarded. He has testified that he did not perceive how he could assess the damages in money without passing on this question, and we think he was justified in taking this view of his powers and duties. For reasons which will be presently more fully stated, we consider the decision of the referee final upon this question, which he had authority to decide. But if we were now to revise that decision, we do not perceive how we could declare it to be erroneous. The plaintiff, as already stated, was not to receive the reserved stock on account of the first division, until the contract for that division should be completed. The time for receiving this payment had not arrived; his title to it was yet incomplete when the action was brought. This stock was to be evidenced by certificates thereof issued by the company in pursuance of their charter and by-laws, describing and identifying the particular shares. So far as appears to us, no tender of any certificates of this stock was ever made by the company to Myers, and no admission made that there was any balance due him on general account. And the only act done by the company concerning this stock which has been shown to us is, that in the account exhibited by the company to the referee is the following entry:

The Amount of Stock Estimated to Mr. Myers by the Engineer.	
Amount of certificates issued.....	$65,000 00
Amount of reserved stock.....	31,435 33
Amount of stock due Myers, Nov. 1, 1851	1,294 69
Bal. stock due Myers and not issued	1,294 69

Upon this state of facts, we are unable to see how the company could successfully maintain that this reserved stock had actually passed to the plaintiff and become his property. In this account they do not even treat it as due to him. The object which the parties had in view in the stipulation for its being reserved, the security of the company, could only be obtained by having the title continued in the company. No certificates having ever been issued, and no particular shares identified, the property was not the subject of a pledge, or mortgage, or

lien by contract, and the only mode in which it could stand as security, was to consider the whole contract as executory; that is, that the company agreed to issue certificates to him, and thus constitute him a stockholder to the extent of this twelve and a half per cent., when the first division should be completed; and, that until that time should arrive, no such shares were in existence, and the company was under no obligation to create them for his benefit. We are aware, that under some circumstances, a party may be the owner of stock in a corporation, though no certificate has been issued to him. But we consider such cases distinguishable from this case, by strongly marked features. Where the title of a party to receive a certificate is perfect, he may insist, as against the company, that he shall be treated as a stockholder. Where the obligation of a party to take a certificate is perfect, the company may insist that he shall bear the burdens of a stockholder. But where an executory contract is made by a corporation to issue shares of its stock to a party when he shall have done certain work, and the company prevent him from completing the work, make no tender of certificates, and do nothing to set apart any particular shares for his use, we do not think they can defeat the action of the contractor for damages, upon the ground, that the contract on their part, executed itself and made him the owner of the stock which they agreed he should have, and so he has no cause of complaint. Our opinion is, that this stipulation for a payment in stock, was executory merely; and the plaintiff no more became the owner of such an amount of stock, by doing a part of the work, than he would have become the owner of the defendants' money, while in the hands of their treasurer, if the whole payment had been to be made in money instead of partly in stock. The first, second, and third objections are, in our opinion, insufficient to prevent the acceptance of the award. The fourth and fifth objections to the award are, in substance, that the referee has awarded damages for prospective profits on work not actually done by the plaintiff.

At the hearing, the court intimated that it considered the law to be, that profits which the contractor would have made, if allowed to complete the work, were recoverable, as damages in this action; and that however this might be, the judgment of the referee upon the rule of damages was final. Upon this intimation, though the court expressed its willingness to hear the counsel, and to allow the referee to be examined, to ascertain what rule, he in fact adopted, the counsel declined to press their objections, and the referee was not examined on this subject-matter. Still, if on further reflection and examination, the court had found that its intimations were not well-founded, it would have given opportunity further to examine the referee. But we have not so found. Under a contract for building part of a railroad, in its nature precisely like the one now before us, the supreme court, in the case of Philadelphia, W. & B. R. R. v. Howard, 13 How. [54 U. S.] 344, decided this question. It is there said, "It is insisted that only actual damages, and not profits, were in that event to be allowed by the jury. It must be admitted that actual damages were all that could lawfully be given, in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits were not to be allowed, understanding as we must, the term profits, in this instruction, as meaning the gain which the plaintiff would have made, if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains propter rem ipsam non habitam, and in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise; and to deprive him of it, when the other party has broken the contract, and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice." Upon the other ground, the conclusiveness of the judgment of that tribunal to whose decision the parties have voluntarily submitted their case, we are equally clear. Unless we overrule the decision of Mr. Justice Story in Kleine v. Catara [Case No. 7,869], we must hold, that the judgment of the referee upon all questions of law and fact, necessary to a determination of the matter submitted to him, is final, and binding on the parties, in the absence of fraud and under regular proceedings in which no improper conduct is alleged. We are satisfied of the correctness of this rule, which has received the sanction of courts of great respectability, and among others, of the supreme court of Maine, in Brown v. Clay, 31 Me. 518, and of the supreme court of Massachusetts, in Boston Water Power Co. v. Gray, 6 Metc. [Mass.] 131. Our opinion is that the fourth and fifth objections are not tenable.

The remaining objections were, properly, not pressed at the hearing, and it is not necessary to notice them in detail. A referee may certainly make a general award, provided it appears on its face to embrace, and finally dispose of, what was submitted to him. He is not bound in a case like this, to show what disposition he made of each item in a long and complex account. If this case had been tried by the court and jury, the verdict and judgment would have shown no more particulars than are upon the face of this award, and the court does not exact of a referee of an action under a rule, any more fulness and

particularity of finding than the law has deemed sufficiently certain in its own regular proceedings.

The result is, that the objections to the award are found insufficient, and it must be accepted.

[This case was carried by writ of error to the supreme court, where the judgment of this court was affirmed. 18 How. (59 U. S.) 246.]

Case No. 9,998.

MYGATT v. GREEN BAY.

[1 Biss. 292; [1] 8 Am. Law Reg. 271.]

District Court, D. Wisconsin. Sept., 1859.

MUNICIPAL CORPORATIONS — BONDS — RIGHTS OF HOLDER—PAYABLE IN DISTANT PLACE—ACT AUTHORIZING ISSUE—NOTICE.

1. The holder of a city bond issued to a plank road company or bearer in aid of the construction of the road, pursuant to a legislative act, is not bound to examine the records of the city to ascertain whether the resolution of the council for issuing the bonds corresponds with the resolution recited in the bonds. The recital in the bond binds the city in an action by a bona fide holder.

[Cited in Milner v. Pensacola, Case No. 9,619.]

2. Where city bonds are issued to a corporation or road company payable in the city of New York, without express authority of law to make them so payable, the bonds are not void for this reason, but the city is not bound to transport funds to New York for their payment.

3. The act under which the bonds are issued is the basis of the contract, and dealers in such bonds should take notice of the act, it being a public statute.

An act of the state legislature to amend the charter of the town of Green Bay, and to enable the corporation to aid in the construction of roads, approved March 7th, 1853 [Laws 1853, p. 138], provided, that the corporation of said town shall be hereafter known and styled the "President and Trustees of the Borough of Green Bay." Section 2 of said acts is: "That the president and trustees of said borough shall have authority to subscribe in behalf of said borough, to the capital stock of any rail or plank road, which is now, or may thereafter be incorporated for the purpose of constructing roads passing through, or terminating in said town, or on the Fox river opposite said borough, to the amount of one hundred thousand dollars." And by section 3: "In order to provide for the payment of the installments on the stock subscribed as aforesaid, the said president and trustees may borrow, on the faith of said borough, any sum or sums of money not exceeding in the aggregate the whole amount of the installments to become due on such stock, at a rate of interest not exceeding eight per cent. per annum, and for a term not exceeding twenty years. And in order to provide for the payment of the installments becoming due on such stock, in case the same shall not have been provided for by law, or otherwise, and also in order to provide for the payment of the interest and principal of any loan made in pursuance of this act, the said president and trustees shall levy annually a tax on the real estate within the corporate limits of said borough not exceeding one per cent. on the assessed value of said property: provided, that if in any year the exigency of the case may require it, such tax may be increased to any rate not exceeding two per cent. on such assessed value." By an act to incorporate the Taychudah and Green Bay Plank Road Company, approved April 16th, 1852 (Laws 1852, p. 551), that company was incorporated; and the city of Green Bay was incorporated by an act approved February 27th, 1854 (Laws 1854, p. 100). By this act the city was made liable for the debts of the borough. This suit is on bonds of the borough of Green Bay, for the recovery of the interest accrued, according to their condition, and coupons annexed. The bonds recite the authority given the president and trustees, by the act of March 7th, 1853, to subscribe to stock. And also: "Whereas, the president and trustees of said borough at a meeting of their board, did agree by resolutions of said board to subscribe the sum of twenty thousand dollars to the stock of the Taychudah and Green Bay Plank Road Company, and that the said borough issued bonds to the amount of said subscription, to the said plank road company, and that said bonds be signed by the president and countersigned by the clerk, under the seal of the corporation. Now, therefore, for the purpose of carrying out the provisions of the said act of the legislature, and in accordance with the resolutions of the said board, as aforesaid, the borough of Green Bay is held and firmly bound unto the Taychudah and Green Bay Plank Road Company, or bearer, in two thousand dollars, upon the condition that the said borough of Green Bay shall pay or cause to be paid to the said Taychudah and Green Bay Plank Road Company, or their successors or assigns, or to the bearer hereof, the just and full sum of one thousand dollars in ten years from the first day of January, 1854, with interest annually at the rate of eight per cent. per annum until paid, said principal and interest to be paid at the Bank of New York, in the city of New York." The coupons annexed are for eighty dollars each. The annual interest is payable at the Bank of New York. The bonds are signed by the president of the borough and countersigned by the clerk under the corporate seal. The coupons are signed by the president. The following resolution of the board on the 19th of November, 1853, was read on the part of the defendant: "That the board of trustees of the borough of Green Bay, hereby authorize their committee on subscriptions to subscribe the sum of twenty thousand dollars to the capital stock of the Green Bay and Taychudah Plank Road Company, payable in bonds

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

of the borough at seven per cent. per annum, under the act authorizing the said borough of Green Bay to subscribe to plank roads and railroads." One terminus of the road was at Green Bay. The defendant's counsel offered to prove, that the contractor received seventeen of these bonds, and that he had only made three miles of road, at a distance of sixteen miles from Green Bay, which offer was overruled as immaterial. A verdict was taken pro forma for the amount of coupons due before suit brought, not adding exchange on New York. The defendant's counsel moved for a new trial.

Peckham & Bloodgood, for plaintiff.
Howe & Beckwith, for defendant.

MILLER, District Judge. The two questions worthy of consideration, raised on this motion are: 1st. That the resolution of the board did not authorize the issuing of the bonds at a rate of interest higher than seven per cent. 2d. That the act did not authorize bonds to be issued payable in the city of New York.

The resolution of the board of trustees, as recited in the bonds, does not correspond with the resolution of record, excepting in this, that twenty thousand dollars of stock in the company is authorized to be subscribed for, and that bonds be issued for the amount. The rate of interest recited in the bonds is not as prescribed by the resolution. The recital refers to a resolution directing how the bonds shall be executed. The clerk testified that there was no other resolution of the board on record but the one. It may be, there was another resolution which was not recorded. At all events it is immaterial in this suit of the holders of the bonds, whether there was such a resolution or not. The city cannot take advantage, in this suit, of the omission or neglect of the clerk. The recital in the bonds binds the borough the same as if a previous resolution had been passed by the president and trustees, and duly recorded. The city is now estopped from denying the existence of a resolution authorizing the president and clerk to execute bonds in the form of these bonds at an interest of eight per cent. The purchaser was not bound to look for the resolution. Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Royal British Bank v. Turquand, 6 Ell. & Bl. 327. The bonds are the acts of the trustees directly and not through agents.

The weight of authority sustains the principle, that when an obligation is payable at a particular place, and is necessarily sued at a place where the exchange is in favor of the place of payment, the party is entitled to recover the real difference of exchange. Story, Confl. Law, §§ 308–313, and cases cited; Story, Bills, §§ 150–152, and cases cited; Sedg. Dam. 240, and cases cited; Smith v. Shaw [Case No. 13,107]; Lanusse v. Barker, 3 Wheat. [16 U. S.] 101; Woodhull v. Wagner [Case No. 17,975]; Lee v. Wilcocks, 5 Serg. & R. 48; Grant v. Healey [Case No. 5,696]. In Wood v. Kelso, 27 P. St. 241, a suit on a note dated in Erie, Pennsylvania, payable in New York, the exchange was allowed.

The decisions against the allowance of exchange are Martin v. Franklin, 4 Johns. 125, which was an action of assumpsit for goods sold and delivered, and insimul computassent, Schofield v. Day, 20 Johns. 102. It will be observed, that the courts in each of those cases contented themselves with a per curiam opinion without any examination of authorities or precedents, and also Adams v. Cordis, 8 Pick. 260. These bonds would on their faces entitle the holders to the exchange between Green Bay and New York, in addition to the debt and interest.

The legislative act authorized the president and trustees of the borough of Green Bay, to borrow on the faith of said borough, at a rate of interest not exceeding eight per cent. per annum. The condition of the bonds is for the payment of the principal and interest at the rate of eight per cent. at the Bank of New York, in the city of New York. The act did not expressly authorize the issuing of bonds, but it is reasonable to suppose it was contemplated that some security or evidence of debt should be given by the president and trustees for the money borrowed. The bonds were given to the company for stock subscribed, and according to the modern system of financiering, they were put into negotiable shape, so that money could be raised on them for the prosecution of the work. By the law the principal and interest on these bonds are to be paid out of taxes assessed upon the real estate of the inhabitants of Green Bay.

In the case of the Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539, the act authorized bonds to be issued, redeemable at such time and place as the directors of the company may determine. The bonds were made payable in the city of New York, to the Ohio and Mississippi Railroad Company, or bearer, for stock in said company. There was express lawful authority for issuing these bonds.

These bonds, on their face, import a compliance with the law under which they were issued. "The act under which the bonds were issued is a public statute of the state, and the person dealing in them is chargeable with a knowledge of it, and as the board was acting under delegated authority, he must show that the authority has been properly conferred." In reading the act, under which the bonds in suit purport to be issued, he will not find express authority to issue bonds, nor any authority, express or implied, to issue them payable in the city of New York, where the exchange is uniformly against Green Bay. The purchaser of these bonds might properly consider them nothing more than a certificate

under the corporate seal of the borough, signed by the president, and countersigned by the clerk. They are in substance nothing more.

The borough of Green Bay, instead of borrowing money to pay installments on the stock, issued bonds direct to the plank road company. The company thus became the creditor of the borough, instead of some person from whom the money might have been borrowed, and it received the bonds as cash in payment of the subscription. It was attempted to be proved, at the trial, that the borough never received the certificates of stock, but proof was not to be received to affect the bonds in the hands of these plaintiffs, for the neglect of the corporation in not obtaining the certificates, could not be a reason for not paying the bonds. The city is entitled to the certificates of stock for which the bonds were given, and can recover them, or damages for their amount on demand.

Giving the bonds to the plank road company cannot be now made an objection on the part of the city, even if it were not according to the literal terms of the act. The borough preferred this mode of carrying out the provisions of the act, and either received an equivalent, or a supposed equivalent for the bonds, or is entitled so to receive it on demand. Under the act it could have borrowed the money, and paid the subscription in installments, or paid the whole amount in advance, or given its bonds for the whole amount. Either proceeding would be a substantial compliance with the act. And having preferred the latter mode, a defense to the payment of the bonds and interest, based upon technical grounds, is not to be favored. In the case of City of Bridgeport v. Housatonuc R. Co., 15 Conn. 475, the bonds were made payable in the city of New York, without express authority of law. That was not made a point of defense. The defense was, that the interest on the bonds was payable semi-annually when it was directed to be paid annually. The court held it was not such a material violation of the authority for issuing the bonds, as to invalidate them, particularly as the freemen of the city afterwards approved them. The rate of exchange between New York and Bridgeport was probably so nearly balanced, and the expenses of transporting the money to New York, so trifling—that this objection was probably not thought worthy of consideration.

A note payable generally is a different instrument from one given by the same parties for the same amount, payable at New York. The rate of interest, the exchange, and the place of demand are controlled by the place where it is payable. Nor will a note payable at a particular place be received on a declaration, in which the place of payment is omitted. Sebree v. Dorr, 9 Wheat. [22 U. S.] 558; Covington v. Comstock, 14 Pet. [39 U. S.] 43. In this case the rate of interest is prescribed in the bond. And no demand is necessary. But the rate of exchange between Green Bay and New York, or the expense of transporting funds from Green Bay to New York, is so considerable in amount as greatly to enhance the amount of debt. It is evident that the act did not authorize the loans or debts to be contracted on this condition. But shall the bonds be adjudged void for this reason? It was the duty of the plaintiffs to examine the act, and there they would not see any authority for contracting the loan or debt on this condition.

After much reflection upon the subject, I have come to the conclusion, that the interest on the bonds is recoverable, but not with exchange on New York, as the act did not authorize the loan or debt to be contracted on that condition. The act controls the extent of the obligation. That part of the condition of the bonds is not binding on the city, as a part of the contract under the act, and the property in the city should not be taxed for its payment. The holder of such bonds and coupons cannot require the city of Green Bay to pay in the city of New York. I think the bonds are a lawful debt of the city, with annual interest at the rate of eight per cent. The motion for a new trial will be overruled.

NOTE. The holder of coupon bonds payable to bearer but referring to act under which they were issued, is chargeable with knowledge of its provisions, and the construction to be placed upon them by the courts. Com. v. State, 32 Md. 501. County bonds payable absolutely to bearer are good in hands of bona fide holder, although restrictions in statute have been disregarded. Wood v. Alleghany Co. [Case No. 17,939]; City of San Antonio v. Lane, 32 Tex. 405. Bona fide purchaser without notice of a suit pending to cancel the bonds, not prejudiced. Durant v. Iowa Co. [Case No. 4,189].

Want of power to issue bonds is a good defense, even against a bona fide holder. Treadwell v. County Com'rs, 11 Ohio St. 183; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Starin v. Town of Genoa, 23 N. Y. 439; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; Aspinwall v. Commissioners of Daviess Co., 22 How. [63 U. S.] 364; Gould v. Town of Sterling, 23 N. Y. 456; Hill v. Manchester & S. Water Works Co., 5 Barn. & Adol. 866; City of Aurora v. West, 22 Ind. 88; Marshal Co. v. Cook, 38 Ill. 44; Clay v. County Court, 4 Bush, 154.

Mere irregularities, however, do not vitiate them. Thompson v. Lee Co., 3 Wall. [70 U. S.] 327; Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 175; Moran v. Commissioners, 2 Black [67 U. S.] 722; Maddox v. Graham, 2 Metc. [Ky.] 56; Butz v. Muscatine, 8 Wall. [75 U. S.] 575; Van Hostrup v. Madison City, 1 Wall. [68 U. S.] 291; Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 537; Woods v. Lawrence Co., 1 Black [66 U. S.] 386; Bissel v. Jeffersonville, 24 How. [65 U. S.] 287; Butler v. Dunham, 27 Ill. 474; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Commissioners of Knox Co. v. Nichols, 14 Ohio St. 260; Mayer v. City of Muscatine, 1 Wall. [68 U. S.] 384; Rogers v. Burlington, 3 Wall. [70 U. S.] 654.

The supreme court has lately held recitals in bonds, issued by supervisors under an act of the legislature, binding upon the county as against bona fide holders and that want of compliance with the forms of law, or fraud by the agents of the county, could not be shown in defense. Town of Grand Chute v. Winegar [15 Wall. (82 U. S.) 373].

Compare, also, Luling v. Racine [Case No. 8,603]; Goedgen v. Manitowoc Co. (June term, 1870) [Id. 5,501]; and Schenck v. Supervisors of Marshall Co. (Oct. term, 1866) [Id. 12,449].

MYNDERSE (UNITED STATES v.). See Cases Nos. 15,850 and 15,851.

Case No. 9,999.

In re MYRICK.

[3 N. B. R. 153 (Quarto, 38).] [1]

District Court, S. D. Georgia. April 6, 1869.

REAL PROPERTY—LIMITATIONS—NOT TO BE BOUND FOR DEBTS—BANKRUPTCY.

1. A father, resident of Georgia, bequeathed lands therein to the husband of his daughter, in trust "for her sole and separate use, during her natural life, and the use of her children," with limitation over on her death to her then husband and children living, share and share alike, with a clause that no part of the property should be liable for the debts of any present or future husband. The wife having died and the husband become bankrupt, *held*, he took, under the laws of Georgia, on her death, a fourth interest in fee in the said lands.

2. The clause against the use of any part of the lands in payment of debts of husband, applied during the life of the wife only, and does not apply after the fee vested in the husband.

Benjamin H. Myrick filed his petition in bankruptcy February 10, 1868. At that time and for some years before, he was in possession of, besides other lands, four hundred and sixty-five and a half acres—being two tracts or parcels put together—the one, the "Greene Place," two hundred and sixty-three acres, the other, the "Britt Place," two hundred and two and a half acres, making in all four hundred and sixty-five and a half acres. He acquired the Greene Place directly by the will of John Edmondson, deceased; and the Britt Place was bought by him under the instructions of the will, and paid for with money which came to him by the will; and the question now under consideration is, did that land or any part of it, at the time of his bankruptcy, belong to Benjamin H. Myrick, so as to be liable as assets in the hands of the assignee? In other words: did Benjamin H. Myrick, at the time of his bankruptcy, possess such an interest in the land as should, under the law, pass to his assignee for the benefit of his creditors, and if so, what interest? In order to determine this question, it is necessary to recur to the will of John Edmondson, who was the father-in-law of Myrick, and give it a legal construction in so far as it relates to this property. The clause of the will relating to this property, and the terms and conditions of its bequest, reads as follows, to wit: "All of which property, together with all that which my said daughter may receive according to my will, I give to Benjamin Myrick to hold in trust for the sole and separate use of my said daughter, Mary Ann, during her natural life, and for the use of her children; and at her death, the said property to be equally divided between the children she may have living, and the descendants of such as may be dead, and her then husband, share and share alike. And said property to be in no wise liable to the payment of the debts of any present or future husband." Mrs. Mary Ann Myrick died some time previous to Mr. Myrick's bankruptcy, leaving three children and Mr. Myrick, as her then husband.

By ALEXANDER G. MURRAY, Register:

The general rule for construing a will is, to give it such construction as will carry into effect, if possible, the intention of the testator. But, at the same time we take intention as the guide, we must not suffer a departure from the legal restrictions thrown over the making of wills by legislation, to lead to a conclusion that will violate the law—always presuming that the intention of a testator is to conform to the law. It is clear, from the provisions of the will, that Benjamin H. Myrick held the property in trust during the lifetime of Mrs. Mary Ann Myrick, his wife. All must admit this. But, what was the condition of the property after her death? The will provides, that on the happening of that event, the property should be equally divided between the children she then had, and her then husband, viz.: three children and Benjamin H. Myrick, share and share alike. If it were at all doubtful whether the testator intended that the trust estate should then end, the law settles the question. The legislature of Georgia has enacted (Code Ga. § 2230) "that limitations which, by the English rules of construction, would create an estate tail by implication in this state, shall give a life estate to the first taker, with remainder over in fee to the * * * beneficiaries intended by the maker of the instrument." Thus Mrs. Mary Ann Myrick was the first taker, and took a life estate in trust in the property bequeathed. But at her death, the law vested an absolute title in fee in the three children and Benjamin H. Myrick, share and share alike. Consequently, Benjamin H. Myrick, at the time of his bankruptcy, was the owner in fee of one-fourth interest in the four hundred and sixty-five and a half acres of land, and that interest is assets which passed to the assignee. The clause of the will which says: "Said property to be in no wise liable to the payment of the debts of any present or future husband," must be construed to be limited by and to apply only during the life of Mrs. Mary Ann Myrick. It cannot apply after the property has vested in fee.

ERSKINE, District Judge. After careful consideration of the question certified for the approval or disapproval of the judge, he

[1] [Reprinted by permission.]

is of opinion that the decision of the register is correct, and it is approved.

[This case was subsequently heard upon the question of the validity of certain proofs of debt, taken under power of attorney not stamped with an internal revenue stamp. Case No. 10,000.]

Case No. 10,000.

In re MYRICK.

[3 N. B. R. 156; (Quarto, 38).] [1]

District Court, S. D. Georgia. 1869.

INTERNAL REVENUE—STAMP DUTY—POWER TO REPRESENT CREDITOR IN BANKRUPTCY—PROOF OF CLAIM—CORRECTION OF ERRORS.

1. A power to represent a creditor in bankruptcy is not subject to stamp duty by existing laws.

2. A creditor may correct clerical errors in his proof of claim at any time before final dividend.

[This case was previously heard upon the question of the interest of the bankrupt in certain real estate under the will of John Edmondson, the bankrupt's father in law, Case No. 9,999.] At the second general meeting of the creditors of Benjamin H. Myrick, bankrupt, on the 16th day of February, 1869, the assignee, in the absence of a majority of the creditors, determined on a dividend; and preparatory to computing the same, William McKinley, attorney for John Wood, a junior creditor, objected to the proofs of debt filed in favor of David Bateman and George L. Denning, respectively, and moved that they be rejected as not duly proved, because the proofs had been made by Lucilius H. Briscoe, under powers of attorney which were void for the want of the proper revenue stamps. To remedy the defect, if defect it was, Col. Briscoe moved to affix the proper stamps instanter; but contended that the law did not require a stamp at the date of the powers. Col. Briscoe also moved to fill two blanks that were not filled at the execution of one of the proofs. This proof had been made out on a printed blank, and the blank place left for the name of the county of his residence, and also the name of the agent proving the claim, had been omitted in one place only, but appeared in every other proper place throughout the proof. The motion to fill these two blanks was resisted by Col. McKinley.

By ALEXANDER G. MURRAY, Register:

The revenue laws of the United States, prior to March, 1867, did require such papers to be stamped; but since the removal of stamp duty from judicial proceedings by congress, in March, 1867 [14 Stat. 517], a power to represent a creditor in bankruptcy (being a paper which is part and parcel of bankrupt proceedings, and is required to be filed in the case as part of the record), dated in October, 1868, does not require a stamp. As to the right to remedy technical errors or omissions, or correct clerical errors, the law gives a creditor the right to prove his claim at any time after the commencement of proceedings, and before final dividend; and so long as the right to prove continues, the right to correct a clerical omission in a proof filed should not be denied. If a proof on file were totally defective, the party would have the right to file anew. The just and fair distribution of the assets of a bankrupt according to law, should not be defeated on mere technicalities.

ERSKINE, District Judge. I have carefully examined the matter certified for review in the case of Benjamin H. Myrick, and I am of the opinion that the decision of the register is correct, and I approve it. The clerk will certify the same to Register Murray.

[1] [Reprinted by permission.]

Case No. 10,001.

MYRICK v. MICHIGAN CENT. R. CO.

[9 Biss. 44; 7 Reporter, 229; 11 Chi. Leg. News, 151.] [1]

Circuit Court, N. D. Illinois. Jan., 1879.[2]

CARRIERS—LIVE STOCK—NECESSARY ACCOMMODATIONS — RAILROAD COMPANIES — CONNECTING LINES—THROUGH BILL—CONTRACTS—CONSTRUCTION.

1. In the construction of a contract the court will ascertain what the surrounding circumstances and facts were, in order to determine the intention of the parties and the full legal purport of the contract.

2. In this case it was held, where the defendant received at Chicago certain cattle consigned to Philadelphia, giving shipping receipts therefor, that these receipts constituted through contracts, by which the defendant was liable for the proper transportation of the cattle beyond the line of its own road.

3. In such case it was the duty of the defendant to notify each of the carriers beyond its terminus of the requirements of the contract, and each of them became the agent of the defendant for the purpose of executing the contract and seeing that its terms were complied with, and the delivery of the cattle to a stock yards company by the last carrier, made the managers of the yards the agents of the defendant, which is liable for any wrongful or negligent delivery of the cattle by them.

4. Railroad companies which become carriers of live stock must provide accommodations, whereby the stock can be safely and properly kept and cared for until a delivery can be made to the consignee according to the terms of the shipment.

5. No mere usage between the consignor and carrier concerning the delivery of the cattle at the end of the line of transportation, contrary to the terms of the contract, could affect the rights of an assignee of the bill of lading, when such usage was not known to him.

[This was an action by Paris Myrick against the Michigan Central Railroad Company to recover damages for a breach of contract.]

Larned, Ryerson & Larned, for plaintiff.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Reporter, 229, contains only a condensed report.]

[2] [Reversed in 107 U. S. 102, 1 Sup. Ct. 425.]

A. L. Osborn and Wirt Dexter, for defendant.

BLODGETT, District Judge (charging jury). This suit is brought to recover damages for a breach of two contracts which the plaintiff claims he made with the defendant, as common carrier, one on the 7th, and the other on the 14th of November, 1877, for the transportation of beef cattle from Chicago to Philadelphia. The allegation on the part of the plaintiff is that on the 7th of November, 1877, he delivered to the defendant at the stock yards in this city, and the defendant there accepted, two hundred and two head of beef cattle to be transported by the defendant as a common carrier from this city to Philadelphia, Pennsylvania, and there delivered to the plaintiff or his order; that plaintiff received from the defendant a bill of lading or receipt for said cattle, and that he duly indorsed the same, to the Commercial National Bank, as security for a loan of money advanced by said bank to the plaintiff to pay for said cattle, and thereby the defendant became bound to safely transport said cattle to Philadelphia, and there deliver them to said bank or its proper agents; that the defendant failed to perform its contract and neglected and failed to deliver the cattle to the bank or its agent, whereby the cattle were wholly lost to the plaintiff and said bank.

It is also alleged that a similar contract in all respects was made by the plaintiff with the defendant on the 14th of November, for the transportation of another lot of two hundred and two head of beef cattle, and that the defendant has failed to perform said contract in the same manner it failed to perform the first. The defendant contends:

First. That it owns and operates a railroad from Chicago to Detroit and no further, and while it received the cattle and carried them on its own line as far as Detroit, it did not undertake to transport them beyond that point, and that the obligation to the plaintiff was fully performed when it delivered the cattle to the connecting carrier at Detroit, for their place of destination.

Second. That even if the contract with the plaintiff was for the transportation of the cattle in question from Chicago to Philadelphia, it fully performed its undertaking in that behalf by the delivery of the cattle to the North Philadelphia Drove Yard Company, and that the loss to the plaintiff occurred through the neglect of said drove yard company, for which defendant is not responsible.

It is conceded that the plaintiff did ship by the defendant's road, the two lots of cattle in question; that the cattle passed over the defendant's railroad to Detroit and from there over connecting railroad lines to Philadelphia, reaching the latter place by what is known as the North Penn. Railroad, and that the North Penn. Railroad Company delivered the cattle to the North Philadelphia Drove Yard Company, a corporation or firm owning and managing certain cattle yards in the vicinity of Philadelphia, fitted up with conveniences for receiving and yarding live stock; that the first lot of said stock arrived at the drove yards on the 11th of November, and the last on the 18th of November, and that the officers or managers of the drove yards delivered the cattle to J. and W. Blaker, without the surrender of the receipt or bill of lading which the defendant had issued to Myrick, and which Myrick had indorsed to the bank, and without the order of Myrick. The following is a copy of one of the shipping receipts given by defendant to plaintiff, the other being like it except as to date:

"(*Michigan Central Railroad Company, Chicago Station, Nov.* 7, 1877.)

"Received from Paris Myrick, in apparent good order, consigned to order Paris Myrick. Notify J. and W. Blaker. Philadelphia, Pa.

Articles.	Marked.	Weight and Measure.
Two hundred and two (202).	Cattle.	240,000.

"Advanced charges, $1,200, marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company, to the warehouse at ——.

"This receipt can be exchanged for a through bill of lading.

"Notice.—See rules of transportation on the back hereof. Signed,

"Wm. Geagan, B. Agent.

"Indorsed, Paris Myrick."

The only rule on the back of the receipt which affects this question, is rule 11, which is as follows:

"Goods or property, consigned to any place off the company's line of road, or to any point or place beyond its termini, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting, for the purpose of delivery to such carrier, as the agent of the consignor or consignee, and not as carriers. The company will not be liable or responsible for any loss, damage or injury to the property, after the same shall have been sent from any warehouse or station of the company."

It is claimed by the plaintiff, that by the terms of the shipment it became the duty of the defendant as a common carrier, to notify J. and W. Blaker, of the arrival of said cattle at the place of destination, and that no rightful delivery could be made, except upon the order of Myrick and the surrender of the bill of lading, but that without the order of Myrick the cattle were wrongfully delivered to the Blakers, who sold them and converted the proceeds to their own use, whereby the cattle were wholly lost to the plaintiff and the bank which had advanced money on them

The first question is, did the defendants make a contract to transport these cattle from here to Philadelphia? It was competent for

the defendant as a common carrier, to contract for the transportation of these cattle beyond its own terminus, and to Philadelphia. If such a contract was in fact made, the carriers beyond the defendant's terminus, that is, beyond Detroit to the place of destination, became the agents of the defendant to complete the contract, and the defendant is liable for any breach of it whereby the plaintiff sustained damage. Considerable discussion has been had before the court upon the questions of law raised, whether these receipts are, or are not, a through contract or bill of lading. At first I was inclined to submit this as a question of fact to the jury; that is, to submit all the testimony, including the shipping receipts, and allow the jury to say, as a question of fact, whether the defendants did contract to transport these cattle through to Philadelphia, or not, but upon further reflection, I have concluded that this is solely a question of law for the court.

In construing a written contract, courts have the right to hear, to a certain extent, parol evidence as to the circumstances under which a contract was made, for the purpose of putting themselves in the place of the contracting parties, and determining the purport and effect of the language used; that is, the court has the right to ascertain what the surrounding circumstances and facts were, in order to determine the intention of the parties, and the full legal purport of the contract made. Perhaps the rule asserting the right of the court to look into the surrounding facts connected with the making of a contract, for the purpose of determining its meaning has never been more lucidly stated than by Mr. Justice Caton, of the supreme court of the state of Illinois, in the case of Doyle v. Teas, 4 Scam. 256: "But the true rule, clearly deducible from the cases, I think, is where the language is of such a character as to show that the parties had a fixed and definite meaning which they intended to express, and used language adequate to convey that idea to persons possessed of all the facts which they had in view at the time they used the language, it then becomes the duty of the court to learn those facts, if need be, by parol proof, and thus, as far as possible, by occupying the place of the parties employing the expressions, ascertain the sense in which they were intended to be used."

Now, taking into consideration the circumstances, as shown in the proofs, surrounding the making of these shipping receipts or bills of lading, I come to the conclusion, and say to you, gentlemen of the jury, that they are through contracts, whereby the defendant agreed to transport the cattle in question from Chicago to Philadelphia, and there deliver them to the order of Paris Myrick, and to notify J. and W. Blaker of their arrival. This was the undertaking on the part of the defendant with the plaintiff, and with whoever might be made the assignee or holder of this contract.

It thus became the duty of the defendant, if the defendant's road did not reach the place of destination of the property, to properly notify or inform each of the carriers beyond the defendant's terminus, of the terms upon which that shipment was made, and each of the carriers beyond the defendant's terminus is, for the purpose of executing this contract, the agent of the defendant, and as completely bound to carry out the terms of the contract as if defendant's road extended from here to the place of destination, and the agents of the last carrier that transported these cattle are the agents of the defendant for the purpose of executing this contract and seeing that its terms were complied with.

This, then, being a through contract, the only question is, whether there has been a breach of it. The defendants insist that owing to the peculiar nature of live stock as freight, it is not to be considered as ordinary merchandise; that it must be yarded, watered and fed, not only along the route, but at the terminus, or place of destination, and that peculiar accommodations are required for that purpose, such as railroad companies do not usually have; and that the plaintiff knew when he shipped this stock that the railroad at the place of destination had no facilities of its own for caring for cattle, but that its course of business was to deliver to this drove yard company, and that, therefore, the contract of carriage was completed when the delivery was made to the drove yard company. Undoubtedly this kind of freight must have accommodations adapted to it, and railroad companies that become carriers of live stock may provide such accommodations themselves, or may adopt those provided by other independent companies or persons. But if they adopt the yards of another, they thereby make them their own for the purpose of performing their contract, the same as if they were their own depot, and the managers of the yards their servants and agents. As with merchandise, they are bound to provide a depot or freight house in which the goods may be safely kept for a reasonable time until the consignee can take them away; so, in regard to cattle, they must make some preparation whereby they can be safely and properly kept and cared for, until a delivery can be made to the consignee, according to the terms of the shipment. For this purpose, as I have already intimated, the railroad company, as a common carrier, had a right to make this drove yard its warehouse or place for the storage of these cattle, and the drove yards were required to hold the cattle, as the railroad company itself would have been compelled to hold them until the consignee called for them, or until a reasonable time elapsed. The cattle being, of course, expensive to keep, they would be kept at the cost of the consignee, and the charges upon them would be additional charges to be paid whenever they were taken away; and if they were detained an unreasonable time, then, under

the law pertaining to the rights and duties of common carriers, the drove yard company would be entitled to sell the cattle as perishable property for their advances and charges thereon. They would not be obliged to keep them indefinitely, but they would be obliged to keep them a reasonable time, the same as a railroad company is obliged to keep your goods a reasonable time after they arrive at the terminus in order that you may pay the charges and take them away. So, that, as I have already instructed you, the defendant, by its contract, agreed to transport these two lots of cattle to Philadelphia, and deliver them to the order of Paris Myrick there, and to notify J. and W. Blaker; and it being admitted, or at least not disputed, that Myrick had duly assigned and delivered the shipping receipts or bills of lading given him by the defendant to the Commercial National Bank, to secure the advance of money, if you are satisfied from the proof that the railroad companies along the route, which transported the cattle to Philadelphia, delivered them to the drove yard company mentioned in the proofs, and that the persons in charge of the said drove yard did, on the day after the arrival of each of the said lots of cattle, deliver them to J. and W. Blaker, without the order of Myrick, and that the plaintiff and the Commercial National Bank of this city thereby lost the said cattle, or the benefit of them, or the proceeds thereof, then the defendant is liable to the plaintiff in this action; it being the duty of the defendant, if it or its agents, the railroad company at the terminus, delivered the cattle to the drove yard company, to accompany the cattle with the proper directions for their being delivered only to the order of Myrick, and if the railroad company failed to properly direct the drove yard company, or if they had been properly directed, and the drove yard company had delivered them improperly, then the defendant in either event, would be liable. That is, it makes no difference whether the North Penn. Railroad Company, which made the delivery to the drove yard company made the mistake, or whether the drove yard company made the mistake and delivered the property wrongfully; in either event the defendant is liable, as both these parties were agencies by which the defendant undertook to complete its contract.

It is contended by the defendant, that by the course of business growing out of a series of shipments by the plaintiff over the defendant's line to the same destination, a usage had grown up to deliver the cattle to the Blakers upon substantially such contracts as this, and therefore defendant is not liable, and upon this point I say to you, while the parties to a contract like this, may, by a long continued usage, change the mode of delivery, yet in order to warrant a delivery contrary to the terms of the contract, it must appear satisfactorily from the evidence, that the plaintiff knew that the terms had been changed at the terminus; and that in this case, if you believe from the evidence that the plaintiff assigned his bill of lading or receipt to the Commercial National Bank as security for a loan or advance of money, then no mere usage between the plaintiff and the defendant in that regard, contrary to the terms of the contract, would affect the rights of the bank as the holder of this bill of lading; that is to say, the bank had the right to have the contract executed according to its terms, unless the proof shows to your satisfaction that the bank had become cognizant of a usage by which the terms were changed, and acquiesced therein.

Then, gentlemen of the jury, the next question for you to consider will be the measure of damages. The evidence in the case, which is undisputed, I may say, shows that Myrick immediately upon receiving this bill of lading, that is, as soon as the two things could follow each other in the due course of business, repaired to the Commercial National Bank, where he received a discount or advance of money to the amount of $12,287.54 on the shipment of the 7th of November, and $12,448.12 on the shipment of the 14th of November; and that he drew drafts on J. and W. Blaker for these respective amounts, and secured their payment by assigning and delivering these bills of lading to the bank, and that these bills of lading went forward with the drafts to the First National Bank of Newtown, Pennsylvania, for collection. The evidence in the case tends to show, and perhaps does show without dispute, that Myrick, the plaintiff in this suit, bought the cattle in question for the Blakers; that is, he was the agent of the Blakers here for the purchase of cattle; he had no interest in the cattle further than to be reimbursed for the money which he borrowed, and became responsible for, to pay for the cattle. The undisputed proof shows that he was to buy the cattle in Chicago, make drafts upon the Blakers for the purchase money which he was to have discounted here, and pay for the cattle with the proceeds of the discount, and the drafts so made were to be secured by the transfer of the shipping receipts or bills of lading obtained from the railroad.

[And he was compensated for his services in the matter by a draw-back which he received from the railroads for furnishing them with this large amount of freight; the proof is so uncertain as to the amount of the draw-back, to which Myrick was entitled under his arrangement with the railroad, and as to whether he collected the draw-back from each railroad separately, or whether some one railroad paid him the whole and settled with the other members of the combination or line, that I do not think the jury can predicate any claim in favor of the plaintiff upon this draw-back item. It is left wholly uncertain, as I conceive it, by the proof, in the first place, as to how much

draw-back Myrick was to have, and secondly as to who was to pay it. I therefore direct you to exclude this item from the plaintiff's claim.] [3]

If you are satisfied from the instructions that I have given, that the plaintiff is entitled to recover, his damages will be the amount of these two drafts, with interest thereon at six per cent. from the time the cattle were wrongfully disposed of; which was, in one case, by the undisputed testimony, the 12th of November, 1877, and in the other the 19th of November, the cattle having arrived in Philadelphia on Sunday in each case, and having been disposed of on the following Monday.

Verdict for plaintiff for $26,451.22.

NOTE. Where goods are delivered to a common carrier to be carried to a designated place, and the charges for transportation to that place paid in full, and the goods are received by the carrier without any contract limiting its liability, such carrier is responsible for the delivery of the goods at the place designated, notwithstanding its line ends before reaching such place, and the goods are delivered to another carrier in good order at the termination of its line. Adams Exp. Co. v. Wilson, 81 Ill. 339; Erie Ry. Co. v. Wilcox, 84 Ill. 239; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88; Carter v. Peck, 4 Sneed, 203; Western & A. R. Co. v. McElwee, 6 Heisk. 208; East Tennessee & V. R. Co. v. Rogers, Id. 143; Louisville & N. R. Co. v. Campbell, 7 Heisk. 253; Angle v. Mississippi & M. R. Co., 9 Iowa, 487; Mulligan v. Illinois Cent. R. Co., 36 Iowa, 181; Bennett v. Filyau, 1 Fla. 403; Bradford v. South Carolina R. Co., 7 Rich. Law, 201; Kyle v. Laurens R. Co., 10 Rich. Law, 382; Mosher v. Southern Exp. Co., 38 Ga. 37; Southern Exp. Co. v. Shea, Id. 519; Mobile & G. R. Co. v. Copeland, 63 Ala. 219; Nashua Lock Co. v. Worcester & N. R. Co., 48 N. H. 339. But in Gray v. Jackson, 51 N. H. 9, the court held that whether the contract was for through transportation or not, so as to make the first carrier liable for a loss off of its line, was a question of fact.

The rule as stated above, though followed by many of the American courts, is called the "English rule," and was first laid down in Muschamp v. Lancaster & P. J. Ry. Co., 8 Mees. & W. 421, where it was held that when a carrier accepts for carriage goods directed to a destination beyond its own route, it assumes by the very act of acceptance, in the absence of any express contract upon the subject, the obligation to transport them to the place to which they are directed. Scothorn v. South Staffordshire Ry. Co., 8 Exch. 341; Crouch v. Great Western Ry. Co., 2 Hurl. & N. 491; Great Western Ry. Co. v. Crouch, 3 Hurl. & N. 183; Wilby v. West Cornwall Ry. Co., 2 Hurl. & N. 703; Watson v. Ambergate, N. & B. Ry. Co., 3 Eng. Law & Eq. 497; Collins v. Bristol & E. Ry. Co., 11 Exch. 790, 7 H. L. Cas. 194.

On the other hand, many of our courts have held that in the absence of contract, except such as is generally to be implied from the acceptance of goods for carriage, the obligation of the carrier extends only to the transportation to the end of its own route, and a delivery there to the next succeeding carrier to forward or complete the transportation. And this is frequently called the "American rule," in distinction to that laid down by the English courts. Nutting v. Connecticut River R. Co., 1 Gray, 502; Darling v. Boston & W. R. Co., 11 Allen, 295; Perkins v. Portland, S. & P. R. Co., 47 Me. 589; Skinner v. Hall, 60 Me. 477; Plantation v. Hall, 61 Me. 517; McMillan v. Michigan, S. & N. I. R. Co., 16 Mich. 120; Burroughs v. Norwich & W. R. Co., 100 Mass. 26; Baltimore & O. R. Co. v. Schumacher, 29 Md. 176; Condict v. Grand Trunk Ry. Co., 54 N. Y. 502; Van Santvoord v. St. John, 6 Hill, 158; Elmore v. Naugatuck R. Co., 23 Conn. 457; Hood v. New York & N. H. R. Co., 22 Conn. 502; Irish v. Milwaukee & St. P. Ry. Co., 19 Minn. 376 [Gil. 323]; Camden & A. R. Co. v. Forsyth, 61 Pa. St. 81; Crawford v. Southern R. Ass'n, 51 Miss. 222; Farmers' & Mechanics' Bank v. Champlain Transp. Co., 23 Vt. 186; Brintnall v. Saratoga & W. R. Co., 32 Vt. 665; Railroad Co. v. Manufacturing Co., 16 Wall. [83 U. S.] 318; Railroad Co. v. Pratt, 22 Wall. [89 U. S.] 123; Phillips v. North Carolina R. Co., 78 N. C. 294; Stewart v. Terre Haute & I. R. Co. [3 Fed. 768.]

Where goods are shipped on a "through freight contract," and in through cars, to a point beyond the line of the first carrier, such carrier is liable for loss beyond its line, under the terms of the bill of lading, notwithstanding the same limited the liability to loss on its own line. Toledo, P. & W. Ry. Co. v. Merriman, 52 Ill. 123. As to what constitutes a through bill of lading, and the duties of the carrier thereunder, consult Dixon v. Columbus, etc., R. Co. [Case No. 3,929]; Woodward v. Illinois Cent. R. Co. [Cases Nos. 18,006 and 18,007], and notes to those cases.

[In a writ of error the case was taken to the supreme court, where the judgment of this court was reversed, and the case remanded for a new trial. 107 U. S. 102, 1 Sup. Ct. 425.]

MYRICK (WATERBURY v.). See Case No. 17,253.

MYTINGER v. The FLOATING ZEPHYR. See Case No. 7,462.

[3] [From 11 Chi. Leg. News, 151.]

N.

Case No. 10,002.

The NABOB.

[Brown, Adm. 115.] [1]

District Court, E. D. Michigan. April, 1864.[2]

COLLISION—RIGHT OF ALIEN OWNER TO SUE—WHEN FORFEITURE BECOMES OPERATIVE—TUG AND SAILING VESSEL—LOOKOUT.

1. The fact that prior to the collision, an interest in the injured vessel had been transferred to an alien, and a forfeiture thereby incurred, does not prevent such alien owner from joining in the libel, the forfeiture never having been judicially declared by a condemnation.

2. A tug having vessels in tow, when meeting a sailing vessel, is subject to the rules applicable to ordinary steamers.

[Cited in The Excelsior, 12 Fed. 205.]

3. A tug having only a mate and wheelsman on deck is insufficiently manned. A lookout is absolutely necessary.

[Cited in The Excelsior, 12 Fed. 200, 201.]

Libel and cross libel for collision. The libel was filed to recover damages from the owners of the Nabob, for colliding with and sinking the steamtug John Martin, the alleged property of the libellants. The schooner Nabob was on her voyage from Buffalo to Milwaukee. Having been towed out of the St. Clair river into Lake Huron, on the evening of May 16th, 1863, she anchored in the lake for want of wind to continue her voyage. She remained at anchor until midnight, when she again started on her voyage up the lake, her course being north by west, for Pointe aux Barques. The tug John Martin, engaged in the business of towage, and in search of vessels in Lake Huron, took in tow the bark British Lion, a short distance above the village of Lexington, and about thirty miles from the river St. Clair, and headed for the river, designing to procure other vessels, which she expected on her way down, her course being south or about south half east, and four miles from shore. Just about daybreak she was run into by the Nabob, which struck her amidships, and so forcibly that she immediately went to the bottom. It was further alleged and proved, that the tug John Martin having been duly enrolled and licensed, was in January, 1863, transferred in part by John Pridgeon, her owner, to William K. Muir, one of the libellants, who was at the time a subject of her Britannic majesty; that subsequent to her enrolment and license as the sole property of Pridgeon, libellants knowingly and unlawfully used such enrolment and license, together with the custom house certificate thereof. It was also admitted upon the trial, that Pridgeon made oath at the custom house, in Detroit, that he and Muir were both citizens of the United States, and not subjects of any foreign power. This oath was not true, as Muir had never been naturalized, but had simply declared his intention to become a citizen, though Pridgeon had taken the oath under the erroneous impression that his declaration of intention had actually made him a citizen.

W. A. Moore, Wm. Gray, H. H. Emmons, Geo. Jerome, and Geo. V. N. Lothrop, for libellants.

J. S. Newberry and Alfred Russell, for respondents and cross libellants.

Pridgeon and Muir, at the time of the collision, and at the time of bringing suit had no title to the tug John Martin. The title was in the United States.

(1) The evidence shows that John Pridgeon sold one-third of the tug (being then an enrolled and licensed vessel) to Muir, who was then a British subject. This forfeited the vessel. Act 1793, § 32 [1 Stat. 316], Brightly, Dig. p. 149, § 46; Act 1792, § 16 [1 Stat. 295], Brightly, Dig. p. 829, § 16.

(2) On April 28th, 1863, Pridgeon took and subscribed an oath at the custom house, stating Muir to be a citizen, which was not true, and obtained a new enrolment and license upon the oath. This forfeited the vessel. Act 1792, § 4 [1 Stat. 289]; Brightly, Dig. p. 824, § 4.

(3) No title passed to Muir by the sale; he was a foreigner—incapacitated to receive a title to an American built vessel—consequently, as one of the joint libellants never had any title to the tug, the suit must fail.

(4) Pridgeon's title was divested from him and vested in the United States at the moment of sale to Muir, so that neither libellant had title to their interest.

In U. S. v. 1960 Bags of Coffee, 8 Cranch [12 U. S.] 405, it was held that a sale to a bona fide purchaser for value without notice did not prevent condemnation. See also Conk. Treat. (3d Ed.) 526, and cases cited; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311; Caldwell v. U. S., 8 How. [49 U. S.] 366, 381; McLane v. U. S., 6 Pet. [31 U. S.] 427.

No proceedings to condemnation are necessary to effect a change of title—in fact the United States never get any record or paper title. The Florenzo [Case No. 4,886].

WILKINS, District Judge. The severe penalty prescribed by the statute was undoubtedly intended to prevent false swearing in taking the oath necessary to obtain enrolment, and the fact that the oath was taken in haste and in ignorance that Muir had only declared his intention of becoming a citizen, would be no excuse in a prosecution for a forfeiture. By the 7th section of the act of

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

[2] [Affirmed by the circuit court; case unreported.]

1792, in regulation of the coasting trade, the certificate of enrolment is to be solely used for the vessel for which it is granted, nor can it be sold or disposed of to any person whatsoever, but shall be delivered up under the circumstances described, to the collector of the district; and if any foreigner shall purchase the whole, or any part of the ship, the delivery of the certificate shall be made within seven days. By the 16th section, if such sale be made to a foreigner, and be not reported and made known, such ship, her tackle, apparel and furniture shall be forfeited. This section clearly contemplates a trial before the forfeiture is incurred.

The proofs establish the fact that, previous to the collision, one-third of the John Martin was conveyed by Pridgeon, one of the libellants, to the other libellant Muir, and that Muir was not then, and is not now a citizen of the United States. It is contended by the claimants that, by this alien ownership, the tug was eo instanti forfeited to the United States, and that one of the libellants having no title, this action cannot be maintained. The case of The Mohawk [3 Wall. (70 U. S.) 566], though not exactly this case, was a proceeding for a forfeiture under the act of 1792. There was, however, a subsequent purchaser, without notice and before condemnation, whose interest was involved in the controversy. This, however, is a case of collision, by which a trespass was committed by the claimants, and for which damages are sought to be recovered. The res, though forfeited under the act of congress, yet that forfeiture never having been enforced by the government, nor the vessel seized, it has remained in the possession of its alien owner. No information was made until the close of this trial, and the government has since remitted the penalties. It is true the language, "shall be forfeited," is positive; but the forfeiture was never judicially consummated, nor the vessel condemned. It is true the libellants, being the transgressors, cannot plead want of notice or ignorance of the act whereby the forfeiture was incurred, but they were still in possession at the time of the trespass; no right or title had been asserted by the United States, which might never see fit to enforce the forfeiture; and, until the assertion of a claim, the res remains under the protection of those in possession, who, at least, have a quasi title that would sustain an action of trespass against a wrongdoer. Whether there was a forfeiture or not is an issue not to be tried in this case.

Under the act of 1792, I am satisfied that no forfeiture is consummated until decree of condemnation. Where such decree is pronounced, it will, according to circumstances, modify or control subsequent transfers. The Bags of Coffee Case, 8 Cranch [12 U. S.] 398, involved the validity of a sale after forfeiture, though the purchase was made in good faith before condemnation. The question arose as to the title of the purchaser as against the United States, and it was held the condemnation consummated the forfeiture. This case certainly does not apply to the facts now before the court, as there has been no decree, and by the act of the government in omitting to prosecute, the owners implicated in the offence remained in possession until the collision. The case of Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311, simply exonerated the officer from trespass in making the seizure, but held him to respond in damages where no forfeiture was proved at the trial, and no certificate of probable cause given. In Caldwell v. U. S., 8 How. [49 U. S.] 366, the rule is clearly stated, that the United States acquires no title by the mere forfeiture, but, in order to avoid sales between forfeiture and decree, the latter has relation back to the offence. There must be a consummation by judicial decree to vest title in any one as against the owners. If otherwise, how can the ship be protected? Is she to rot at the wharf until prosecution is commenced? Is she to be abandoned when no one claims her possession? When negligently damaged by others, who is to sue for recovery? What provision thus makes the vessel an outlaw? I do not think the act, in directing a prosecution and trial, contemplates an instantaneous forfeiture upon the commission of the offence, and therefore hold that the libellants are rightfully in court.

This collision occurred in Lake Huron, the Nabob being on a northerly course up the lake, and the Martin with her tow steering south by east, and bound for the river St. Clair. It is conceded that if the Nabob, being a sailing vessel, kept her course, she was not in fault, and the Martin is responsible. This is a simple question of fact. Much time was consumed in the examination of the proofs, as to the direction of the wind, though not with a view to an argument that if the wind was not free to the Martin, she is measurably exculpated. To such a proposition I could not assent for one moment. The Martin was propelled by steam power, and, whether the wind was free or not, she must avoid a sailing vessel, the law considering the propulsive power of a steamer as tantamount to a free wind. But the direction of the wind becomes important simply in regard to the course of the Nabob at the time of collision; for if the Nabob, after weighing anchor, took her course after midnight north by west, with the wind west southwest, she had a free wind, and could easily keep her course; but otherwise, if the wind was north of west. Upon this point the proofs were conflicting, and to so great and so painful an extent that the court is compelled to believe that there is either willful perjury on one side or the other, or that the wind, within the period of half an hour, was most wonderfully capricious. There is great difficulty in the settlement of facts where the crews of antagonistic vessels come in conflict in court. Abeel, the second

mate of the Nabob, swears that the wind was W. N. W. when he made the light of the tug, and he is followed by Byron, Clancey, Willes, and Bensly, of the crew of the Nabob; while Barret, Allen, Dumass, and others, of the Martin and Lion, swear as positively to the wind being W. S. W. But it has been settled, in the case of The Genesee Chief [12 How. (53 U. S.) 463], that the crew of the sailing vessel, as to the direction of the wind, is most entitled to credit. Hilson, the captain of the Nabob, whose calm and deliberate manner, as a witness, most favorably impressed the court as to his truthfulness, says: "The wind varied in the space of one hour in four different directions, but that, near the time of the collision, it was W. N. W., free and steady, the Nabob keeping her course." This is a positive and credible declaration. The testimony of this witness is so conclusive on the main point in controversy, that the court has no hesitation in declaring, that, giving him credence, the libel must be dismissed. He says that "he was towed out of the river a little after 8 o'clock in the evening, and was left by the tug Eagle a mile out in the lake, and the wind being light, he came to anchor. That he got under weigh again shortly after midnight. The wind was then light, from the southwest; that he steered north by west. In a few minutes the wind hauled about to the northwest, and we headed then north by east. In a few minutes she came up north by west half west, and the wind was variable from that time until about two o'clock. It then settled into west northwest. I told the wheelsman if she would go as far as north by west half west, to let her go; if not, to keep her full and by. I was close by the compass, and noticed how she was heading at that time, about two o'clock. My watch commenced at midnight, with Abeel, Byron, and Clancey. Shortly after two o'clock I turned in, after giving the wheelsman directions to keep her on that course, which I also communicated to the second mate. I directed him to call me if he saw anything he did not understand. The wind was then west northwest, and my vessel was on her course at that time, and carrying a green light, all sails set except the square sail. We were on the port tack." This was when he left the deck. Further, he says: "On turning in, I only took off my boots, coat, and hat. Afterwards the mate called me, and I came on deck with what clothing I had on. Heard the tug's whistle; saw her on my lee bow, about two points, and heading across my bow, going pretty fast, and about five hundred feet off, and I immediately ordered my helm hard up." In response to a question propounded by the court, this witness said: "When I came back on deck, the Nabob was on the same course as when I turned in, and did not swing, or, if she did, she swung to the eastward." This is to the point. I repeat, then, if this witness is to be credited, the tug was in fault, and not the Nabob, because, 1st, the latter kept her course till the moment of collision; 2d, the Martin was heading across her bows; and 3d, his retiring from the deck, to obtain rest, and leaving the vessel in charge of the second mate, was not a fault contributing to the collision. If such neglect of duty caused the collision, or might have led to it, then it was such a fault as would have condemned his vessel. But he swears positively the Nabob was on the same course as when he left the deck, and, as positively, that the Martin was crossing his bows.

Aware of the importance of Captain Hilson's testimony, the libellants have undertaken to impeach his credibility; not on the ground of mistake or failure of memory, but for absolute corruption. Mistake in incidental particulars, or a failure of recollection as to collateral facts, or a disagreement between the witness and others as to material facts, will not impeach his credibility; but knowingly swearing falsely, or giving two different versions of the same transaction, must exclude the whole testimony from consideration. Now, Captain Barret, the master of the Martin, does not, in my estimation, so impeach the credibility of Hilson. Hilson swears he was on deck. This fact is not disproved by Barret's simply stating that he told him he was in bed. And, as to the conversation of which Barret testifies, it is but the adverse statements of the two masters, after the collision, when both were striving to exculpate their respective vessels, and under the excitement of the moment, when Barret's crew had been just rescued from drowning. He may or may not have made the statement; or, if made, and days after he denied it, his cool and firm denial of it in court frees him from the taint of willful perjury. It is but witness against witness. And, as to the alleged contradiction by Abeel calling him after the tug's whistle, it is not so conclusive or satisfactory as to warrant the entire rejection of Hilson's testimony, for the tug may have whistled both before and after the captain was called. I pass by Swartwourt, as to the tow bill, and Enwright, as to the steeve of the bowsprit, as unworthy of serious attention, in this connection. The rule of impeachment is not of such an iron character as to condemn a material fact as false which corresponds with other proof, because other statements made by the witness have been, by the preponderance of number, successfully contradicted. Money has purchased—power sometimes overawes—and it will not do to weigh testimony by the multiplicity of the witnesses, especially in hotly contested admiralty cases. Difficult as it sometimes is, I have always endeavored to get at the facts, through the manner and matter of the witness. If he carries the appearance of integrity and candor, and his testimony is consistent with itself and all the surrounding circumstances, I cannot but yield my confidence, despite trifling discrepancies. The rejection of Captain Hilson's testimony, however, could not change the determination

of the case. The law casts the burden of proof upon the master of the steamer who sues, to prove that his vessel exercised all proper care and diligence and prudence to avoid the collision. It will not do for the steamer to say that the sailing vessel was first in fault.

If the tug has violated the law and the rules of navigation, especially if such infraction be a primary omission or fault, she cannot recover, if the same has led to the casualty. Steamtugs are vessels propelled by steam. As such they are governed by the rules applicable to steamers; and as to precautionary regulations, having other vessels in tow and in peril, there is more reason for their strict observance by steamtugs than by steamers. The law in admiralty in regard to this is well settled. As early as The Genesee Chief, 12 How. [53 U. S.] 463, it was declared by Chief Justice Taney, that "it is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout besides the helmsman." "And whenever a collision occurs with a sailing vessel, and no other lookout is on board but the helmsman, such omission is prima facie evidence that the collision was occasioned by her fault."

From this decision, in 12 How., down to The Louisiana v. Fisher, in 21 How. [62 U. S. 29], there is one unvarying strong current of authority in the same direction; the last case making the rule more stringent in requiring proof of the competency of such lookout, and prescribing, as his station, the most suitable place for his observation. In the intervening case, in 18 How., the steamer was a tug, and the rule by Chief Justice Taney, in the 12th, applied by Mr. Justice Nelson, drawing no distinction between steamboats and steamtugs. Without referring to the other cases since The Genesee Chief [supra]—and they are numerous—the correct doctrine as to lookouts, thus collated and embodied is this: All vessels propelled by steam, navigating the highways of commerce, must have constant and vigilant lookouts, employed as such, and so stationed on deck as to possess timely and perfect observation of all approaching or passing vessels, so as readily to ascertain their courses and movements, so far as practicable under all the surrounding circumstances. By the proofs in this case, the mate, Allen, was the only lookout. He and the wheelsman were in charge of the tug at the time. Without reference to his competency, which has been assailed, I entertain no doubt that his gross neglect misled the tug across the bows of the Nabob, and caused the collision. A wheelsman is not a lookout. He cannot discharge that duty when steering by the compass. His attention is to his wheel and the compass—not over or beyond them. The mate, having the general command of the vessel, cannot perform lookout duty. He has the general supervision of the ship, and directs both the wheelsman and engineer. While so engaged searching for vessels, he cannot discharge the duty of lookout, as required by the law. This neglect, then, as to a lookout, was a fault, and, as such, if there was no other, must prevent a recovery by the libellants.

Libel dismissed and decree for cross libellants.

This case was affirmed on appeal to the circuit court. [Case unreported.]

NABORS v. ALEXANDER. See Case No. 2,064.

Case No. 10,003.

NACHTRIEB v. The HARMONY SETTLEMENT.

[3 Wall. Jr. 66;[1] 12 Leg. Int. 98.]

Circuit Court, W. D. Pennsylvania. April Term, 1855.

RELIGIOUS SOCIETIES—CONFIDENTIAL RELATIONS—ADMISSIONS AGAINST INTEREST — CONTROLLING POWER OF JUDICIAL LAW — SOCIAL PARTNERSHIP.

1. The relation of a spiritual ruler with his people is so confidential, and one of such inequality, that courts watch it narrowly as liable to abuse; and considering that free will can hardly be predicated of acts done by a person at the direction of such ruler or superior, will treat as of very little intrinsic value, receipts or releases, given by a person so dependent, by such direction against his own interest.

2. Admissions, such as might be considered the natural effusions of mortified pride or vanity, though clear and distinct against a party's interest, are entitled to but little weight as evidence against him.

3. The law allows no communities, however independent in their structure of general society —or however long established—or however much in the habit of regulating, as a community in a community, their own concerns,—to be above its constant and complete control. And even where such communities are well formed, and have been long existing with order and success, the court will neither enforce nor allow their peculiar arrangements, if against common right, further than the parties have agreed to enforce and allow them. In case of the violation by such a community, of a party's rights, as the law and the court deem rights, the court will interfere, and dealing with the community as a defendant, will override its administrations, plans and opinions; and will enforce rights and duties as it and such law deems them, irrespective and in violation of the general administration, plans or opinions.

4. In a social partnership, where an absolute community of property with right of survivorship, on the one hand, and care, by the community, of every member, through life, on the other—is the fundamental and pervading principle; if one member be unjustly expelled by an usurped though unquestioned authority, not having under the clear terms of the association any right to expel him, the court will not oblige him to return to the association (there not being on its part an offer of full and satisfactory reconciliation and reception), but will interfere with the fundamental and pervading principle; and though the expelled member brought nothing into the community, will give to him, for him-

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

self, a separated and individual part of the property. And where payment for the party's services at the ordinary rate of services like his—during many years that he was a member—would give to him more than his numerical proportion or share of the whole capital stock, and where the question of profits was a little obscure, the court regarding this as the simplest and most natural justice, gave to him his numerical share or proportion of the whole capital stock, from whatever source arising, as the same existed at the time he was expelled, irrespective of the amount which he found in the association when he became a member.

In the year 1805, one Rapp, calling himself the Reverend George Rapp, as chief or superintendent, with a number of his countrymen, emigrants from Germany, formed, by a solemn compact in writing, embracing many particulars, the well known social arrangement at Harmony, in Butler county, Pennsylvania, called sometimes Rapp's Settlement, and sometimes the Harmony Society. The causes which led to this association, were declared to be "the existing state of society and the Christian church, as well in America as Europe; and a conviction that this condition had been caused by a departure from the theory of common property and community of interests and of labor, set forth in the primitive apostolic church, and a firm persuasion that a return to the plan of the said primitive church would have the effect to promote the temporal and eternal happiness of all such as should embrace it." The compact, accordingly, had for its basis, "Christion fellowship, the principles of which being faithfully derived from the sacred Scriptures, include the government of the patriarchal age, united to the community of property adopted in the days of the apostles." It required on the part of the members severally, and in their social capacity, entire submission to the laws and regulations of the community, and a ready obedience towards the appointed superintendents thereof; and obliged the superintendents to a patriarchal, which included a pastoral and parental supervision, regard and fidelity. Many of the founders were poor. Some had property. All of them, severally and jointly, conveyed it in fee to Rapp and his successors, superintendents, for the mutual and equal participation and enjoyment of all the members; and the property itself, with the increase thereof, however contributed or arising, was declared to be, then and forever, joint and indivisible stock, with the right of survivorship to those who lived longest. The restoration of property is declared to be of "pernicious tendency, and which cannot be enforced with uniformity and fairness," and "should any individual withdraw from the society, it is declared that he is not to be entitled to demand an account of the contributions he may have made, whether in lands, goods, money or labor, or to claim anything from the society as a matter of right, but it shall be left altogether to the discretion of the superintendent to decide whether any, and if any, what allowance shall be made to such member as a donation." Since the foundation of the society in 1805, many of its members have died while in "communion" thereof. A large number of them were aged men and women. None ever left a last will or testament, or desired distribution of the contributions or earnings among their heirs at law, nor had administration ever been taken out in the settlement. Neither did any of them, except Rapp, appear to know anything about the property of the settlement. In 1847, Rapp himself, after a laborious devotion of forty-two years to the interests of his settlement, died intestate, leaving no property.

Celibacy was enforced, and except in one or two cases which Rapp allowed and judged of, incredibly few marriages had been allowed in the community in the course of half a century. "He taught," said the testimony, "not to marry at all, and that those that will marry, or would marry, would be damned, for they must leave the society. They could not live there. He won't suffer it at all. As he is father, king, and priest, he has the right to do with us as he thinks proper. Christ would ask him in the other world, if we were fit or suitable for the kingdom of God." Where married persons came into the society they were not allowed to cohabit, nor have intercourse as man and wife. The relations of parent and child, brother and sister, as well as those of husband and wife, were merged in the grand social obligation. The society was to take care of the sick and aged. (Of poor, and rich, of course, there were none.) If a mother was sick, and her daughter lived out of the limits, she could not be invited to come and see her; and the "reward" of the brother who brought his sister to their sick mother, would be "to be damned, or to be the last that came out of hell, or somehow, or in this manner;" such being the lucid conception that one of Rapp's disciples seemed to have of his master's dogma on this subject. The study of the English language was discouraged, and German was the ordinary tongue.

The compact contained no enumeration of offences by which a member should forfeit his rights and interest in the common stock—nor did it fix or refer to any tribunal which should have the power to inflict expulsion. And although the members all covenanted to give implicit obedience to "the laws and regulations of the community," it did not appear that they had ever made any code of regulations or bylaws. The will and word of Rapp was in fact the only law. The government was patriarchal, that is, absolute; Rapp exercising all power, civil, religious, temporal and spiritual. He was priest and king, having absolute control over the fate and fortunes of his followers, not only in this world, but (as they were told and appeared to believe) in the world to come. If they obeyed his precepts, their names were to be written in the "Lamb's Book of Life," otherwise, they

were to suffer in purgatory some millions of years, if not forever.

The members were allowed by Rapp to walk within the limits of the settlement, and to converse with one another; but to hold intercourse with any seceded members (of whom since the settlement in 1805, there had been several, some going on one or two occasions—as on a memorable one in 1832, under a Comte de Leon—in bodies) was a thing entirely forbidden. And when done, Rapp would deal with the offender in the way of discipline; sometimes excluding him from love-feasts, sometimes (as the testimony said), "to make it impressive," ordering him to be fed on bread and water, sometimes "to make it more impressive still," ordering that he should have no food at all, and sometimes, doubtless to give to it the consummation of effect, turning him directly out of the society.

Notwithstanding the peculiarity of this community, it had thus far been very prosperous. In the course of fifty years, not one single member of the society had ever been criminally prosecuted. External order, cleanliness, and apparent tranquility, marked the settlement; and though occasional "indiscretions" occurred among the women, and certain discontents appeared to prevail with the men, it had thus far been a moral, well-governed and contented body; and the social problem is considered by some persons as yet in a course of favorable solution.

But the more immediate case, to which the foregoing is a general, though not entirely irrelative preface, was this: One Joshua Nachtrieb had joined the society, without any property, in 1819; and had remained a peaceful and useful member for twenty-seven years. In 1846 certain seceding members, who professed to have claims against the society, and had given Rapp a good deal of anxiety, met Nachtrieb, with one or two others, and held a few short conversations with them on the subject of their demands and discontents. They inquired of Nachtrieb whether the society was willing to do anything for those who had left it and got nothing—whether Rapp had brought their request before the society; matters to which Nachtrieb answered that nothing had been done or said in the society about their getting anything. Rapp hearing of the meeting and colloquy, proceeded to discipline. Nachtrieb and the others were summoned to Rapp's house. "When Rapp came in," said the testimony, "he commenced on Joshua and said, 'Now let us give them fellows our judgment—Joshua, you are to blame for all this.' Joshua said, 'He did not know it was wrong or he would not have done it.' Rapp said, 'You intended to raise a mob.' Joshua said, 'No; if I had thought it was wrong to go there, I would not have done it.' Rapp then said, 'You must go right off and leave the town.' Joshua pleaded off, said he was sorry, said he would not go. Rapp said, 'No; we won't have you—you must go.' A night or two after this, the society being all present at a religious meeting, one of the elders, when the services were over, said to Rapp, 'There is something to be said.' Rapp then observed from the pulpit, 'Something has taken place lately—it is this: Joshua Nachtrieb and some others have gone out and conversed with their friends who left us. He must now leave the society; we cannot have such men.' Rapp then asked if he was present. Nachtrieb said, 'Yes, father, I am here.' Rapp said, 'What are you doing here? I thought you had gone.' Nachtrieb said, 'He was sorry if he had done anything wrong, and that if it had happened it should not happen again.' Rapp answered, 'Any fool can speak so; we cannot use such men; you must leave the society; you must be off.' Rapp then inquired of the society if they agreed with him—they said yes. Rapp then said to Nachtrieb, 'Now you know what you have to do: thy father himself, don't want you any longer.' Nachtrieb went away two days after, having previously received from Rapp $200, and signed this receipt, which it was not shown had been obtained by any specific fraud or misrepresentation: To-day I have withdrawn myself from the Harmony Society, and ceased to be a member thereof. I have also received from George Rapp, two hundred dollars as a donation, agreeably to the contract. Joshua Nachtrieb. Harmony, 18th June, 1846."

Soon after this Nachtrieb declared to several of the members, that he was glad to go away—was tired of the society—and that he did not depart from any compulsion. The property of the concern at this time amounted to $901,723.42, and there were 321 members. So that if Nachtrieb had received a full share of the concern, as on a division, he would have got about $2,809.10.

In this state of things, Nachtrieb having married after his departure, and got children, now filed a bill in chancery—this suit—against the Harmony elders or trustees, setting forth his joining the society in 1819, being then 21 years old; his faithful and diligent labors in its business, receiving nothing in return but a bare maintenance; and that in June, 1846, being then 48 years old, and worn out with labor, he was wrongfully excluded from the society, turned out of its possessions, and deprived of participation in its property and effects, by the fraud, &c., of Rapp and his associates. The bill prayed an account "of the sums due complainant, for his labor and services in said association, and of the share he was justly entitled to, in the property and estates of said association, and the profits accrued during his membership, and that the same may be decreed to him."

The respondents, in their answer, admitted that the complainant was a member of the

association, as stated in his bill, and that up to 1846 he had labored diligently in the affairs and business of the association, increasing its wealth and promoting its interest agreeably to the terms and spirit of their mutual compact—and that the association had prospered in its temporal affairs, having, from small beginnings, become the owner of property to a considerable amount.

It then averred that the complainant, during the period of his membership, enjoyed all the benefits, advantages, and comforts, individual, social, and religious, which were enjoyed by the fellow members, and all that were contemplated in forming the association and to which he was entitled by the terms and spirit of their agreements, and was entitled to be maintained, cherished, &c., by the association; one of the objects of the society being that of making old age comfortable and free from cares or the necessity of labor. But it denied that the defendant was wrongfully and unjustly excluded from the association. On the contrary, it averred that the complainant voluntarily and of his own free will separated himself from and abandoned said association, and consequently, according to the terms of their articles of association, was not entitled to any compensation for his labor and services, other than that which he received in his support and maintenance, instruction, &c., while he remained a member.

On this case, two questions arose:

1. A question of fact: Whether Nachtrieb had "withdrawn" from the society; and so, under the articles of compact, lost his right to demand any account of its property, and bound himself to take such allowance as "the discretion of the superintendent might decide should be made to him as a donation?" or whether he was improperly expelled, and had some further rights against the society?

2. A question of law: Supposing the last to be the case, viz., that he had been improperly expelled, what was the exact nature and extent of the remedy to be awarded him? Whether he was entitled to compensation for his labor during the time that he had been in the community? or whether he was entitled to a share of the profits made since he was there? or whether he was entitled to an equal and separated share of the whole property as it stood at the time of such expulsion? or finally, whether under so peculiar a kind of contract and arrangement as that which lay at the base of this community, he could, under any circumstances, ask more than a restoration to his ancient membership and its rights.

The whole capital of the Harmony Society when Nachtrieb entered, in 1819, was $368,690.92, and when he was expelled in 1846, it had increased, as has been already stated to $901,723.42. A numerical share being $1/321$ part, in this last sum would be $2,809.10. His labor, if paid for during the twenty-seven years, at what was proved to be the ordinary rate of labor, would give him $4,290, and this last, as giving him the largest compensation, was what he claimed. If the court, disallowing this claim, and thinking further that he was not entitled to a share of the capital of 1846, should think him entitled to profits only since he came in, then he regarded as profits the increase between 1819 and 1846, on the capital as found at these two dates, that is to say, $533,032.50, and claimed as his share of them the $1/321$ part.

The case was well argued by Mr. A. W. Loomis for the society, who, after insisting on the first point, the point of fact, that there was no expulsion, where he relied much on the word "withdrawn" in the receipt, contended on the second point, the point of law, as follows:

I. The complainant is not entitled to a decree for compensation for his labor during the time he remained in the society as a member. All his rights and claims spring from the articles of agreement or association. These create and define the rights and obligations of both parties. His right cannot arise from implication. There can be no pretence that the respondents have employed the complainant to perform services for them. The right to recover for such services must be found, if at all, in the agreements. Such a claim could never have been contemplated by the parties. Running through a period of twenty-seven years, (twenty-one beyond the limitation provided by law,) against a voluntary association, whose members have been continually changing, by the death and withdrawal of some, and the accession of others, such a claim against the present defendants only cannot be sustained upon any known legal or equitable principles.

Conceding the value of the services, the injustice of allowing the complainant to recover for services rendered, is thus shown: He claims $4,290 as compensation. The whole value of the property at the time he left was $901,723.42. This divided by 321, the number of members entitled to community of property at that time, yields $2,809.10. This deducted from $4,290, would leave a balance of $1,480.90 more in his favor than any remaining member would receive were the whole property of the society divided pro rata among the members. Again, the property belonging to the society, June, 1819, when the complainant became a member, amounted to the sum of $368,690.92. This sum deducted from $901,723.42, the amount of property belonging to the society when he left in June, 1846, would leave the sum of $533,032.50, which, divided by 321 would yield $1,660.53, which deducted from $4,290.00, the value of his services, would leave $2,629.47 to be received by him more than the other members, or more than

his share of the increase of the property of the society during the time he was a member thereof.

II. When we consider the complainant's claim of a share of the profits while he was a member. The whole property of the society amounted, at the time the complainant left, to less than $902,000.00. What, then, were the profits of the society during the period of complainant's membership, from June, 1819, to June, 1846, a period of twenty-seven years? Deduct from $901,723.42, the amount of property when he left, the sum of $368,690.92, the amount of property owned by the society when he became a member, and add to the latter sum interest thereon for the period of twenty-seven years, and his share of the profits, if any, will be ascertained:

Amount of property owned by the society, in June, 1819.....	$368,690 92
Interest for twenty-seven years..	597,279 29
Principal and interest	$965,970 21
	901,723 42
Exceeding amount of property owned by society in 1846.....	$ 64,246 79

—And showing that during the twenty-seven years of complainant's membership the society made no profits; but, on the other hand, taking into consideration the capital and interest thereon, there was a deficiency of said sum of $64,246.79.

Equity would seem to require that the complainant should pay to the society his share of this loss, rather than that the society should pay anything to him.

III. Neither is the complainant entitled to an equal share of the whole property as it stood, when he left the society in 1846. What was his interest in the property at that time? The character of that interest had been fixed and established by his own free and voluntary action. He had no individual right to it whatever; it was declared "forever joint and indivisible stock;" he could transfer no title to another; no interest could pass from him by devise or descent. He could only enjoy the property or benefits secured by his contracts so long as he continued a member of the association. How then can he obtain a decree for his share of the property? His right is to secure sustenance, &c., during membership; his claim is to recover compensation for services, and to a share of the property of the association, to be held and enjoyed in severalty. This he cannot recover, so long as he remains a member of the association, for the reason that no several enjoyment is permitted by the letter or spirit of the agreement, so long as he continues a member, nor afterwards, for the reason that the property is expressly declared by the agreement forever indivisible. The right to its enjoyment is incident to membership, and membership is essential to the right of enjoyment. Individual ownership and dominion, possession and enjoyment in severalty, are utterly inconsistent with the nature of the title, the quality of the estate, and the incident of tenure. The character of neither can be changed by the election of an individual, or without the assent of the owners. The validity of such an agreement as that entered into by Nachtrieb with the society is clearly recognized by the supreme court of the United States in a case very like this. Goesele v. Bimeler, 14 How. [55 U. S.] 590, was the case of some religious separatists from Germany, who founded a society at Zoar, in Ohio, on the principle of "a community of property." A member having died, his heirs sought to have his share of the property; but McLean, J., in delivering the opinion of the court, declares that the ancestor of the complainant renounced "individual ownership of property, and an agreement was made to labor for the community, in common with others, for their comfortable maintenance; all individual right of property became merged in the general right of the association; he had no individual right, and could transmit none to his heirs." If he had no individual right, and could transmit none to his heirs, how, it may be asked, could he pass such right to another, or claim to enjoy it himself in severalty? Yet that is what the complainant here seeks to do.

So long as the complainant continued a member of the association, so long his right to the participation and enjoyment of all its stipulated privileges, immunities and benefits was complete and perfect. If he withdrew from the society and ceased to be a member thereof, his interests in its rights and property ceased. If he were wrongfully and unjustly excluded from the association; turned out of his possession, and deprived of all share and participation in its property and effects, its benefits and advantages, by fraud and combination, such exclusion and deprivation did not divest him of any property, or terminate any of his rights. His interest in the property of the society would remain precisely the same after such exclusion as it was before. Such exclusion could not change either its nature, duration or extent, nor extinguish any of his rights.

IV. The complainant has, therefore, mistaken his remedy, which is restoration to membership. The society is bound in equity to the performance of its contracts. By that contract the complainant was bound to contribute his services, if in health, for the benefit of the association; he was entitled to the enjoyment of its property whilst a member, in connection with the others, as joint and indivisible stock. He was entitled to food, clothing and sustenance when in health—to care, nurture and attention in sickness. He had a right to a home—the comforts and enjoyments of a home in the society. He could not be properly or legally deprived of these so long as he performed his own duties. If wrongfully excluded from the enjoyment of them, such exclusion could

not operate as a forfeiture of property or termination of right of enjoyment. He claims, as Judge McLean says, that the heir of Goesele did, in the case already cited, "pay for his labor." But the answer which the court gave in that case is our answer here also. "He has been paid for this in pursuance of his own contract. In sickness and in health he has been clothed and fed, and a home provided for him." It is not pretended by the complainant in his bill that, up to the time of his alleged expulsion, the society had not performed all its duties towards him; that he had not received and enjoyed all that had been stipulated or promised. Then it is clear that, up to that period, no recovery can be had for services, when the entire stipulated compensation had been provided and furnished by one party, and received and enjoyed by the other. It is equally clear that no account can be taken, or decree promised, for subsequent services, for the very obvious reason that none were rendered. His appropriate remedy is, then, a restoration to the enjoyment of that which his contract promised and secured; a performance by the society of what it promised to perform; a decree for complete and perfect restoration to the enjoyment of the rights and property of which he had been improperly deprived; a specific performance by the society of its agreement. This could be attained by petition and decree for restoration to the full and complete enjoyment of all his rights and privileges as a member; by restoring him to the bosom and privileges of the society, a full, complete and adequate support by the society, under the order, direction and supervision of the court or its officers. In the case of Com. v. St. Patrick's Benevolent Society, 2 Bin. 441, the supreme court of Pennsylvania ordered a peremptory mandamus to issue against the society, to compel the restoration of John Binns (who had been illegally and improperly excluded) to his standing as a member of the society. If a court of law could compel such restoration to standing as a member of a benevolent society, a court of equity can decree such restoration to the rights and privileges of a member in a voluntary association, whose articles expressly secure to the complainant the enjoyment of such rights and privileges, and bind the respondents to provide and furnish them. Such remedy is appropriate, but the complainant must seek it by a new bill, of different and appropriate structure and prayer.

After argument on the other side by Messrs. Shaler, Stanton, and Umbstaetter, the opinion of the court was given by

GRIER, Circuit Justice. On the first question; the question of fact: Although by the contract and agreement of the several members of this association, each had an equal right to and interest in their common property and had estopped himself from even setting up any claim for property or labor contributed to the common stock, in case of a voluntary withdrawal from the society; yet it contained no enumeration of offences by which a member should forfeit his rights and interest in their common property; it pointed out no tribunal which had a power to inflict the punishment of expulsion or forfeiture of all title to an immense property gained by their common contributions and labor. In dealing with rights of persons and property, the court can only look at the agreements of the parties, as written and signed by themselves. In these we have found no power conferred on Rapp to expel, at his mere whim and caprice, any unoffending or even offending member, and divest his title to the common property, after the labor of a life, spent in assisting to accumulate it. If he could expel one member in this way, he could another, and thus get rid of all the partners but himself, and retain the property for his own use.

That parties wrongfully expelled would have a right to the interference of courts of justice, has not been disputed. Nor has it been pretended that the evidence shows any case which could justify the expulsion of the complainant. He had been a faithful, diligent and laborious member of the association for thirty of the best years of his life, obeying every command and ordinance of Rapp, even to that of enforced celibacy. The only offence charged against him was holding a few minutes' conversation with some of his friends out of the society, who were anxious for some information as to the fortune of certain claims which they had made on the Harmony Society. No charge seems to have been made against him, save that of thinking and speaking about the concerns of the society to which he belonged.

We come, therefore, to the point on which this case turns. Did the complainant voluntarily and of his own accord abandon and forsake the society? or was he wrongfully and unjustly excluded or expelled therefrom? As we have seen, there was no proof of any act of the complainant which would justify his expulsion. The argument has therefore turned entirely on the fact of expulsion or voluntary abandonment.

Nachtrieb's receipt, in which he in terms declared that he has withdrawn from the society, is much relied on; and so have his own declarations soon after he went away, that he had left the society voluntarily.

In regard to the receipt, when we consider the nature and extent of the authority exercised by Rapp, over his followers—their reverence and fear of him, and their unbounded submission to his command—it must be evident that the signature of such a receipt would be but slender evidence that the complainant acted voluntarily in withdrawing himself from the society. It is plain that if Rapp commanded him to go, he would feel

bound to go, and that unless, after a servitude of thirty years, he was willing to go penniless, he must sign the receipt. It was the consideration for the means of departing without being reduced to beggary. As yet the complainant was not free from the shackles of the spiritual and temporal slavery to which he had been all his life subject; a power which forbade him to learn English, to marry, or if married, denied him intercourse with his wife. Free will can hardly be predicated of actions, performed at the command of a ruler believed to possess the keys both in this world and the next, and who taught that disobedience to his orders was a sin against the Holy Ghost, not to be forgiven, here or hereafter.

If the complainant departed from the society in obedience to the commands of Rapp, it may be said he obeyed them voluntarily, as there was no physical compulsion. But we may easily conceive of a social or spiritual excommunication, or a combination of both, which would leave as little choice to the party who feared them, as the rack or the inquisition. So also the declarations of the complainant, that he went away voluntarily, can have very little or no weight against the clear evidence of his expulsion. This sort of testimony is seldom worthy of any reliance. It cannot be contradicted. Conversations are always but partially recollected, never truly stated, and often purposely misrepresented. Besides, if the conversations stated, were literally and strictly true they amount to nothing. I presume every member of this society felt uneasy, as to what would be the state of it after Rapp's death; and may well have doubted, whether a community of property can well exist without an infallible apostle with patriarchal or absolute power, so that unity may be attained by having but one will in the society. That the complainant after his expulsion, may have exulted in his first taste of the sweets of liberty; that he may have frequently said that he came away of his own accord, may well be admitted. Probably there are few instances, where a man has been expelled from any respectable society, in which his personal vanity would not soften the word expulsion into withdrawal, in speaking of his change of connection with it. An expelled member seldom expresses much respect for those who have wrongfully ejected him, or affects to regret the loss of their society.

The plaintiff is therefore entitled to a decree, and the only question which remains is, what is the character and the extent of the relief which we shall give him. We shall not consider the objection to the form of the pleadings; for the case having been argued and considered on the merits, without objections, until a late time as to that point, we shall not go back to decide a game of sharps between the parties.

On the second question; the question of law: The complainant demands pay for his labor during the time he was a member. This would be the extreme and longest rate of compensation. The defendants, on the contrary, without tendering in their answer a reconciliation with the complainant, and a restoration of him to his rights, or intimating a willingness to receive his wife and children as members, now insist that the court can decree no other remedy than restoration to his rights as a member. Such a decree would compel him, perhaps, to forsake his wife and children, for the small hope of the survivorship in the tontine. This, we think, would be rendering very scant justice or recompense to a man for half his life's labor. The Pennsylvania case cited has no resemblance to the present. That was a corporation for benevolent purposes, where membership and not the ownership and enjoyment of property to the corporator's own use, was the object. Its members accumulated to give away, or to expend on charitable purposes. These accumulated for themselves. They have, by joint labor, accumulated property of great value, which they hold as joint owners. The complainant had an equal ownership with his three hundred and twenty partners. By their contract, it is to remain joint and indivisible stock forever, but the complainant has his right to enjoy it equally with his fellows. Their articles of partnership or association provide for the case of any partner who chooses to withdraw or depart from it; but makes no provision for those who are unjustly driven away and expelled. Whether the society be governed by prophet, priest, king, or majority, they are subject to the law of the land; and if the complainant has been wrongfully deprived of valuable rights of property, the law should afford him a remedy. I know of no other measure of satisfaction or compensation more just than to give the expelled and injured party his several share of their joint assets. The dissolution of the partnership by the wrongful act of the majority of the firm or association, necessarily dissolves, inter sese, viz., as between the expelled and the remaining partners, the covenants as to the indivisibility of their joint property. If this were otherwise, a majority could at any time expel the minority, and retain all the joint property. They who break the agreement as to perpetuity of the benefits of membership cannot be heard to allege it as to destination of the property. By their wrongful expulsion of the complainant, the whole power and force of the articles as between them is broken, and inter sese, annulled; and the complainant has a right to the separate use of his heretofore undivided interest in the property, because he is wrongfully deprived of his joint use of it. The wrong done to plaintiff, is capable of a compensation in money, without compelling him to leave his family, and spend his days among those who have injured him. And the proper measure

of his compensation is the amount of his interest or share at the time of his expulsion. It is not like a mere corporate privilege or office, to which a court of equity may restore a corporator who has been wrongfully expelled. It is a question of the enjoyment of property. His copartners have ejected him from his joint use and enjoyment of their common property; they have severed the tenure, as between him and themselves, and he has a right to his share in severalty. This is the proper measure of the complainant's compensation, and not wages for his labor during the time of his membership. Let the decree be for the 1/321 part of the whole property of the society, $901,723.42, at the time of his expulsion, with interest from that date; deducting what the complainant has received.

Decree accordingly.

NOTE. In a case brought by another complainant against these same defendants, there being imperfect evidence of any expulsion, and the defendants by their answer, "conceding the complainant's perfect right and liberty to return to the enjoyment of all the privileges, benefits, and advantages contemplated by the association, he discharging the duties incumbent on him as a member of it," the court refused to grant the complainant any relief, but dismissed his bill with costs. Lemix v. Harmony Society [unreported].

NAESEN, In re. See Case No. 10,288.

NAGLE (CAREY v.). See Case No. 2,403.

NAGLE (UNITED STATES v.). See Case No. 15,852.

Case No. 10,004.

NAILOR v. KEARNEY.

[1 Cranch, C. C. 112.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

BONDS—PAYABLE IN INSTALMENTS—ACTION AFTER FAILURE TO PAY FIRST INSTALMENT.

Upon a bond conditioned to pay certain instalments, an action may be brought upon failure to pay the first instalment.

Debt on a bond, conditioned to pay at three instalments, viz., 5th January, 5th April, and 5th July, 1802. Action brought on 17th March, 1802.

Mr. Peacock, for defendant, demurred to the declaration, because there was no cause of action at the time the suit was brought. Taylor v. Foster, Cro. Eliz. 807; Beckwith v. Nott, Cro. Jac. 504; Milles v. Milles, Cro. Car. 241; Rudder v. Price, 1 H. Bl. 547; Esp. N. P. 205.

Judgment for the plaintiff on the demurrer.

NAILOR (UNITED STATES v.). See Case No. 15,853.

NAIRAC (ECHEVERIA v.). See Case No. 4,261.

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

NAIRN (COUMBE v.). See Case No. 3,278.

NALAN (COOMBS v.). See Case No. 3,189.

Case No. 10,005.

NALL et al. v. The ILLINOIS et al.

[6 McLean, 413.] [1]

Circuit Court, D. Michigan. June Term, 1855.

APPEAL—REASONABLE DILIGENCE—MARITIME LIEN—HOME PORT—LOCAL LAW.

1. On an appeal in admiralty, from the district to the circuit court, reasonable diligence should be used in prosecuting the appeal.

2. If the party delay perfecting the appeal for six months, and until a day or two before the term of the circuit court, the appellee may, under the rule, notice the cause for a hearing, and the court will require him to take his depositions during the session of the court, so as to come to a hearing.

3. At the home port of a vessel, the local law must regulate the lien. A purely maritime lien may arise in every other port, under the maritime jurisdiction, unless it be in the home port. This must be regulated by the local law. The lien cannot arise under the local law and also under the maritime.

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

[This was a libel by James Nall, Jr., and others against the steamer Illinois and others for supplies.]

Mr. Howard, for libellants.

M. Newberry, for respondents.

OPINION OF THE COURT. This is an appeal in admiralty from the district court. The libel is for articles furnished the steamer Illinois, an account of which is stated and satisfactorily proved by the libellants. In their answer, the respondents allege that articles were furnished, but they deny that the claim in said libel mentioned is a lien upon the steamboat, her tackle, apparel, and furniture, &c.

In the libel there are some defects, which, if they had been taken advantage of in time, would have required amendment. The proceeding, though in the admiralty, is under the act of Michigan, which gives a lien on the vessel. In such a case the law should be specially referred to and substantially stated. So the tonnage of the vessel should be stated to show, that it comes under the admiralty jurisdiction and has a license. The libel asserts a lien on the vessel, by the maritime law, and the law of Michigan. This is inconsistent, as a lien must arise at the home port of the vessels under the local law. No lien attaches upon a domestic vessel, for work and labor done and performed on her, except by statute. Read v. Hull of a New Brig [Case No. 11,609]. By the common law, material men have no lien for articles furnished a vessel, whether she be foreign or domestic, and such is the law of the English

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

admiralty. But by the civil law, they have such a lien. In the United States they have it only in the cases of foreign ships, or ships of one of the states of the United States, furnished in another state. Zane v. The President [Id. 18,201]. It is of no importance how a lien arises under the local law, whether by statute, or common, or municipal law; whenever its existence is established, the jurisdiction of the admiralty attaches to it. The Marion [Id. 9,087]. A common law lien is always connected with the possession of the thing, and is simply a right to retain. But a maritime lien does not depend upon possession, but is an interest in the thing, and may be enforced, whenever the admiralty jurisdiction is exercised. The libel alleges, that, "the articles were delivered to the said steamer at Detroit aforesaid, to be used in furnishing and completing her; and it alleges some of them were put in and upon, and worked into said steamer by the work and labor of the libellant," &c. Now if the articles were not all so used, it would be difficult to say, what part of them were so used, and the libel could not be sustained. The averments should be positive, in order that the extent of the lien may be seen. Although the forms of procedure are less technical in admiralty, than at common law, yet there should be certainty in the material matters to give jurisdiction.

As an admiralty court, the district court has a general jurisdiction, yet it can enforce no liens against a vessel which is not of a size and character to engage in maritime navigation. It has been strongly suggested by some writers, that the lien under the statute is the same as the common law lien for mechanics, which depends for its validity on possession. But this point has not been raised in the pleadings, and it need not be examined. The maritime lien arose out of the conveniences, if not necessities, of commerce. The floating vessel is constantly changing its locality, and the master is often under the necessity of contracting debts for the repairs of his vessel, &c.; the work and labor done, or articles furnished for the ship, is presumed to be done or furnished on the credit of the vessel. A personal liability of the master only, would not be sufficient to meet the exigency. The vessel is, therefore, bound in such cases.

The motion which was made in this case for a continuance was overruled, on the ground that as the decree in the district court had been made six months before this court commenced, the appeal being filed a day or two before its commencement, showed such a want of diligence in the appellants in the prosecution of their appeal, as not to entitle them to further delay. A continuance would necessarily give a delay of eighteen months, from a decree in the district court. The court considered the circumstances as coming within the rule which authorized the appellants to notice the cause for trial; and that it would impose no unjust hardship on the defendants, to take their depositions during the present term. When this decision was announced, the court stated, all the time would be given, to take the depositions during the term, which could be given.

A statement has been made of what the defendants' counsel expected to prove, and which, if admitted, could not affect the justice of the case. The correctness of the charges is admitted by Mr. Newberry, who built the vessel, and also by Mr. McKnight, who purchased her. In addition to these admissions, the items are proved by the clerk who sold the articles. As these articles were used in building and furnishing the boat, under the Michigan law, they constitute a lien on the boat, whether it be in the hands of Newberry the builder, or McKnight the purchaser, both of whom are defendants. Upon the whole, the decree of the district court is affirmed with costs.

Case No. 10,006.

NALLY v. LAMBELL.

[1 Cranch, C. C. 365.] [1]

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

WITNESS — ATTACHMENT FOR FEES — DEMAND IN NAME OF WITNESS.

The court will not grant an attachment against a party for not paying his witness, unless payment shall have been demanded by a person having authority to receive payment, and unless that authority appear.

Motion for attachment by witness against the person at whose request he was summoned. Affidavit by Spaulding, that he was requested by Nally to demand, and that he did demand payment, which was refused.

THE COURT (FITZHUGH, Circuit Judge, absent,) refused the attachment, because Spaulding's authority did not appear.

Case No. 10,007.

NAN et al. v. MOXLEY et al.

[1 Cranch, C. C. 523.] [1]

Circuit Court, District of Columbia. Dec. Term, 1808.

SLAVERY—PETITION FOR FREEDOM—AFFIDAVIT TO SUPPORT—BY WHOM MADE.

The affidavit of a manumitted negro is sufficient ground for an order to issue a summons returnable immediately upon a petition for freedom.

Petition for freedom [by the negress Nan and children against D. Moxley and others]. Affidavit of the negro Charles, a manumitted negro, that his wife Nan (the petitioner) was about to be removed out of the District.

THE COURT (FITZHUGH, Circuit Judge,

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

absent,) allowed a subpoena, returnable immediately, to answer the petition just filed by Mr. F. S. Key.

Case No. 10,008.

The NANCY.

[1 Gall. 66.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

INFORMATION — HOW SHOULD CONCLUDE — MATERIAL AVERMENTS.

An information for a statute forfeiture should conclude against the form of the statute, or at least refer to some subsisting statute authorizing the forfeiture. A mere conclusion of an information against the form of a statute will not cure the defect of material averments to show that a forfeiture has accrued.

[Cited in Sears v. U. S., Case No. 12,592; U. S. v. Platt, Id. 16,054a; U. S. v. Seventy-Eight Cases of Books, Id. 16,258; U. S. v. Batchelder, Id. 14,540.]

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

[This was a libel against the sloop Nancy, Jabez Hatch, claimant, for violation of the embargo acts.]

G. Blake, for United States.

S. Dexter, for claimant.

STORY, Circuit Justice. The sloop Nancy was libelled in the district court, for exporting from the port of Boston divers goods and merchandizes, of domestic growth and manufacture, during the existence of the embargo, contrary to the prohibition of a certain act of the United States; and (2) for trading with, and putting on board of another ship or vessel a quantity of goods and merchandizes of domestic growth and manufacture, contrary to a certain other act of the United States.

The facts appear to be these; that the sloop Nancy is a lighter, whose employment has been confined to the port and bay of Boston, and as such, at the time of the seizure, she was under bonds at the custom house, pursuant to the provisions of the act of January 9, 1808, c. 8 [2 Stat. 453]. On the 15th of July, 1808, she departed from Boston, stood off into the bay, and at the distance of about four or five leagues met with another vessel, and immediately came along-side, and hoisted out into said vessel, all the cargo, which she had on board (which seems to have been flour), but the quantity does not appear. She remained along-side about an hour, and then quitted the other vessel. There seems no reason to doubt, that during this time a considerable quantity of flour was discharged. These facts present a clear case of a violation of the embargo acts, and if the libel contains sufficient allegations to enable the court to pronounce a sentence of forfeiture, it is their duty so to do. The first count seems to be founded upon the fourth section of the act of 12th March, 1808, c. 33 [2 Stat. 474], but it concludes against an act, whose title, as stated in the libel, is not known among our statutes. As this count stands, therefore, it does not warrant the court to proceed to condemnation. For it is a general rule, that where an offence is created by statute, it must, on the face of the information or libel conclude against the form of the statute, or at least refer to a subsisting statute authorising the offence; and we have so held the doctrine in other cases at this term.

The second count contains a very dry allegation, that the sloop on the high seas, in or near the harbor of Boston, on the 14th of July, 1808, did trade with, or put on board another certain ship or vessel, then being on the high seas, in or near the harbor of Boston, a quantity of goods, wares, and merchandizes of domestic growth and manufacture, to wit, flour, contrary to the act of 9th January, 1808, c. 8. Now it is material to observe, that it is not every trading with or putting on board of another vessel of such goods, wares, and merchandize, that subjects the property to forfeiture. The act declares, that it must be a trading with, or putting on board, contrary to that act, or the act of 22d December, 1807 [2 Stat. 451]. But a trading with, or putting on board in the port, where the goods are first laden, is not prohibited; and so it has been held by the supreme court of the United States. Nor is a trading, or putting on board by foreign vessels on the high seas, within the purview of the act. Sufficient matter, therefore, ought to have been alleged to have shown, that this trading or putting on board was clearly against the acts above stated. A mere conclusion against a statute has been uniformly held inadequate to supply the deficiency of material averments, to bring the case within the statute. It ought at least to have been averred, that the vessel was a vessel owned by citizens of the United States, and proceeded from some port of the United States, with her cargo, during the continuance of the embargo. As this libel now stands, without amendment, I do not feel at liberty to affirm the decree of the court below, and I shall, therefore, suspend a decree, until the question of amendment has been argued and considered.

After amendment allowed, the decree was affirmed.

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

NANCY, The (BRICE v.). See Case No. 1,855.

NANCY, The (BRITISH CONSUL v.). See Case No. 1,898.

NANCY, The (SCHUTZ v.). See Case No. 12,493.

NANCY, The (UNITED STATES v.). See Case No. 15,854.

NANNY, The (THOMSON v.). See Case No. 13,984.

NANTUCKET STEAMBOAT CO. (CITIZENS' BANK v.). See Case No. 2,730.

Case No. 10,009.

NAPIER et al. v. BARNEY.

[5 Blatchf. 191.] [1]

Circuit Court, S. D. New York. Nov. 11, 1863.

CUSTOMS DUTIES—SUGAR IMPORTED IN BAGS—DRAFT AND TARE.

1. Under the fifty-eighth section of the act of March 2, 1799 (1 Stat. 671), both draft and tare are allowable on sugar imported in bags, and subject to duty by weight.

[Cited in Moke v. Barney, Case No. 9,698.]

2. "Draft" and "tare," explained.

This was an action [by James Napier and others] against [Hiram Barney] the collector of the port of New York, to recover back an alleged excess of duties paid under protest, on the importation of five thousand bags of sugar.

Joseph S. Ridgway, for plaintiffs.

E. Delafield Smith, Dist. Atty, for defendant.

NELSON, Circuit Justice. The sugar in this case was imported from Brazil, on the 1st of December, 1861. The duties exacted were two cents per pound, by weight, under the act of March 2, 1861 (12 Stat. 178). There is no dispute as to the rate of the duty, or that it is to be charged according to weight. The dispute arises out of the allowances or deductions to be made to the merchant when the duties on the articles are to be ascertained by weight. The fifty-eighth section of the act of March 2, 1799 (1 Stat. 671), provides, that the following allowances shall be made for draft and tare on articles subject to duty by weight: "For draft on any quantity of one hundred weight, or one hundred and twelve pounds, one pound; on any quantity above one and not exceeding two hundred weight, two pounds;" and so on till the last clause, which is, "on any quantity above ten and not exceeding eighteen hundred weight, seven pounds; and on any quantity above eighteen hundred weight, nine pounds." This latter allowance is the maximum. "For tare on every whole chest of Bohea tea, seventy pounds;" and so on, enumerating half and quarter chests, and the different kinds of tea, with the quantity to be allowed for the tare; "on sugar other than loaf sugar, in casks, twelve per cent.; in boxes, fifteen per cent.; in bags or mats, five per cent." The fifty-eighth section of the act of 1799 is taken substantially from the thirty-fifth section of the act of August 4, 1790 (1 Stat. 166). The tare was allowed in this case, but the draft was refused.

Draft and tare, in a commercial sense and usage, have a separate and distinct meaning and application. The former is an allowance to the merchant when the duty is ascertained by weight, as in the present instance, to insure good weight to him. As defined in some of the books, it is "a small allowance in weighable goods, made by the king to the importer." It is to compensate for any loss that may occur from the handling of the scales, in the weighing, so that, when weighed the second time, the article will hold out good weight. The latter, tare, is allowed for the outside or covering of the article imported, whether it be box, barrel, bag, bale, mat, &c. Now, the tare in this case was allowed, but the allowance for the draft was refused. I cannot perceive any distinction between the two, as the right to the allowance of the one stands as express and as explicit, on the statute, as the right to the allowance of the other. Both might as well have been denied as either. It is a mistake to suppose that the allowance for the tare covers that for the draft, for, as is seen, it is intended to cover a different loss, one incident to the weighing of the article, while the other relates to the loss from the rough outside covering of it. Neither is there anything in the suggestion, made on the trial, of inequality in the weighing of large and small packages. If they are small, numbers, to the amount of fifteen or twenty, depending on the bulk or size, are weighed together.

The sixteenth section of the act of July 14, 1862 (12 Stat. 558), modified the allowance of the tare under the fifty-eighth section of the act of 1799, and repealed it altogether, as far as it related to the draft. I know of no other way of getting rid of a positive enactment, and hence must hold that the plaintiffs are entitled to recover.

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

Case No. 10,010.

NAPIER et al. v. SERVER et al

[2 Wkly. Notes Cas. 400.]

District Court, E. D. Pennsylvania. Dec. 28, 1875.

RESULTING TRUST—ELECTION BY PRINCIPAL OF SECURITIES IN DEBT OWED BY AGENT.

Money was given to an agent to purchase real estate, which the latter did in his own name, and, becoming insolvent, conveyed it to his principal. Eight months previously the latter had taken from the agent a single bill for all moneys advanced, including that with which the real estate was purchased, and this whole claim was proved against the agent's estate in bankruptcy. *Held*, that, as the consideration of the single bill included the money advanced to buy the real estate, no resulting trust could be asserted by the principal, and a reconveyance was ordered to the assignee.

[This was a bill in equity by A. D. Napier & Co., to the use of Jacobs, assignee, against Angelina A. Server and John P. Server.]

The case was heard on bill, answer, and proofs. On January 1, 1872, John P. Server, one of the defendants, purchased a house and lot in the city of Philadelphia; and on January 1, 1873, entered into articles of partnership with E. C. Wells and S. C. Gray, under the firm name of Wells, Gray & Server. On the same day he gave his mother, the other defendant in this case, a judgment note

for $8,690 which was subsequently proved against his estate in bankruptcy. On September 4, 1873, Wells, Gray & Server stopped payment. On the same day Server conveyed the premises in question to his mother without consideration. A petition in bankruptcy was subsequently filed against Wells, Gray & Server, and they were adjudicated bankrupts. Pending these proceedings, A. D. Napier & Co., firm creditors, filed this bill, alleging the above facts, and praying, inter alia, for a decree against Server's mother for a reconveyance of the premises to the assignee of the bankrupt firm.

Witnesses testified, on the part of the defendants, as follows: Mrs. Server, the defendant, had requested her son to buy the property for her, and had given him $4,000 to pay the purchase-money. He had stated at the time of the purchase to the agents of the vendor that he was buying the house for his mother. Mrs. Server had advanced to her son, in addition to the $4,000 to buy the house, at different times prior to 1875, various sums amounting to $8,690; but no sufficient resources were shown on Mrs. Server's part to have enabled her to have given her son the additional $4,000; and there was evidence that Server had stated to a creditor that he owned the house himself.

Wilson & Ward (with whom were Earle & White), for plaintiffs, argued that the conveyance by Server to his mother without consideration, on the day the firm of which he was a member stopped payment of their commercial paper, was prima facie in fraud of creditors, and the burden of proof was on the defendants to establish a resulting trust. Cook v. Fountain, 3 Swanst. 585; Kaine v. Weigley, 10 Har. [22 Pa. St.] 183; Shontz v. Brown, 3 Casey [27 Pa. St.] 123; Prevost v. Gratz, 6 Wheat. [19 U. S.] 481; Alexander v. Todd [Case No. 175]. That the declarations of Server at the time of the purchase of the house were insufficient to prove the trust. Sidle v. Walters, 5 Watts, 389; Lloyd v. Lynch, 4 Casey [28 Pa. St.] 419; Blyholder v. Gilson, 6 Har. [18 Pa. St.] 134. As the defendants had failed to prove that Mrs. Server had an estate sufficient to enable her to advance to her son $4,000 to purchase the house, in addition to $8,690, the consideration of the note of January 1, 1873, the acceptance of the note was a settlement of accounts between the parties, and Mrs. Server thereby elected her security, and the resulting trust fell.

Mr. Hepburn, contra, contended that the property having been purchased with Mrs. Server's money, a trust resulted in Server for her; that the conveyance of September 4, 1873, was a transfer of the legal title in accordance with her equitable interest; and that the failure of the defendants to prove the full consideration of the note for $8,690 did not affect Mrs. Server's equity, but she should be allowed to remit her claim, pro tanto; citing Post v. Corbin [Case No. 11,299]; Scammon v. Cole [Id. 12,432]; Fisher v. Henderson [Id. 4,820]; In re Brand [Id. 1,809]; In re Clark [Id. 2,806]. And that the plaintiffs had no equity by reason of the defendant controlling the individual creditors of John P. Server, and, therefore, that nothing but costs could result to the assignee in bankruptcy, the property being admitted to be the individual property of John P. Server.

CADWALADER, District Judge. I think it established that the defendant, Mrs. Server, furnished the money with which the equity of redemption of the house in Mount Vernon street was bought, and if the conveyance by her son, the bankrupt, to her had been made on or before the 1st of January, 1873, I would have considered it the mere execution by him of the trust in her favor, which resulted from her ownership of the money. But on the 1st of January, 1873, she accepted from him the single bill for $8,690, of which she has made proof in bankruptcy. If the consideration of this obligation included the $4,000 paid for the equity of redemption in question, there could be no subsequent assertion of a resulting trust. I do not think it would be safe to rely upon the testimony which is adduced by the defendant to show that the settlement of 1st January, 1873, on which the obligation for $8,690 was received, did not include the $4,000 in question. Her testimony, unsupported by that of her son, would not suffice, and his testimony is in this respect vague and improbable, and is contradicted by his statement to a creditor that he owned the house himself.

Therefore it is decreed that the defendant convey the house and lot of ground in question, with the appurtenances, to the complainant and his heirs, in trust for the uses and purposes of the trust vested in him under the bankrupt law of March, 1876, and the suppletory and amendatory acts of congress. But I think that the costs of this conveyance and the complainant's costs in this case ought to be paid out of the separate estate of the bankrupt, John P. Server, and that the defendant's proof, already made in the court of bankruptcy, should be allowed.

Case No. 10,011.

The NAPOLEON.

[7 Biss. 393; 4 N. Y. Wkly. Dig. 422; 9 Chi. Leg. News, 280.] [1]

District Court, E. D. Wisconsin. April, 1877.

MARITIME LIEN—WAIVER—TAKING NOTE—TRANSFER OF NOTE—PURCHASER WITH KNOWLEDGE—TRIAL—SURRENDER OF NOTE.

1. In the absence of express contract of waiver, or of an agreement that a note shall be taken

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 N. Y. Wkly. Dig. 422, contains only a partial report.]

in actual payment, a maritime lien is not waived or extinguished by giving credit for a limited time, nor by the acceptance of a note for the amount due on account of the service which is the foundation of the lien.

[Cited in The Illinois, Case No. 7,005.]

2. In the case of a note taken it is necessary that it should be surrendered at the hearing.

3. Although a maritime lien is strictly personal and is not assignable, yet if a note taken without waiver of the lien is discounted by a bank upon the indorsement of the person having the lien, and the indorser afterwards takes up the note, he still can enforce his lien, as such a transfer of the note does not extinguish it.

[Cited in The Emma L. Coyne, Case No. 4,466.]

4. The above principles apply where the vessel had been purchased by persons knowing of the existence of the lien.

5. Many cases cited and commented upon.

In admiralty. In 1873, Tyson, Sweet & Co. were the owners of the schooner Napoleon. The libelants composed a firm known as the Milwaukee Tug Boat Line, and were the owners of tugs engaged in towage service at the port of Milwaukee. Between the 13th of July, 1873, and the 19th of December of the same year, libelants' tugs rendered towage service for the Napoleon to the amount of $359. In February, 1874, the claimant purchased the vessel from Tyson, Sweet & Co., and received a conveyance. On the 12th day of May, 1874, the libelants took from Tyson, Sweet & Co. their note for the amount due for such towage service, payable in thirty days, which note included the amount due for a similar service rendered for the schooner Jason Parker, which vessel had been at the time of such service owned by Tyson, Sweet & Co., and was sold and conveyed to claimant at the same time that he received a conveyance of the Napoleon. Prior to the maturity of the note, the libelants presented it to the Second Ward Savings Bank, with their indorsement thereon, for discount. The note was discounted by the bank.

When the note fell due, it was presented to the makers for payment, was not paid, was protested for non-payment and notice given to the indorsers, the libelants. Libelants thereupon paid to the bank the amount due upon the note, and it came back to their hands. They then filed a libel against the vessel, thereby asserting a maritime lien for the towage service on account of which the note was originally given, and at the hearing surrendered the note.

H. H. Markham, for libelants.

N. J. Emmons, for claimant.

DYER, District Judge. For the towage service rendered by the libelants, they had a lien upon the vessel. Upon the testimony I must find that the claimant purchased with knowledge of libelants' claim. He therefore acquired and held title subject to the lien. Subsequent to the conveyance of the vessel, the libelants took from the former owners, their note for the amount due on account of the towage service. The lien existed and was in full force at the time the note was taken notwithstanding the previous purchase of the vessel by the claimant. The first question presented, is, did the acceptance of this note operate as a waiver of libelants' lien. The discussion of this question is unnecessary, since it is settled upon authority that in the absence of express contract of waiver, or of agreement that a note shall be taken in actual payment, a maritime lien is not waived or extinguished by giving credit for a limited time, nor by the acceptance of a note for the amount due on account of the service which is the foundation of the lien. The Nestor [Case No. 10,126]; The Chusan [Id. 2,717]; The Active [Id. 34]; The Eclipse [Id. 4,268], and cases there cited; The Gate City [Id. 5,267]; Harris v. The Kensington [Id. 6,122]; The Kimball, 3 Wall. [70 U. S.] 37; The Emily Souder, 17 Wall. [84 U. S.] 666; Raymond v. The Ellen Stewart [Case No. 11,594]. In the case of a note taken, it seems essential to the maintenance of a libel in rem, that the note be surrendered at the hearing.

Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611, is not in antagonism to the cases cited, and is to be distinguished from them. In that case the material man had received a negotiable note for the amount of his demand. The note was still outstanding when the libel was filed. It had not been surrendered, and it did not appear that it had not been negotiated and that it was not then in the hands of a third party. These being the circumstances, the supreme court held that the libel could not be maintained, resting the decision upon the fact that the note had not been given up or tendered at the hearing.

In the case at bar, the proofs tend to show, not only that it was not agreed, when the note was taken by libelants, that it should be received in absolute payment of their claim, but that it was understood that libelants' lien should be unaffected, and that if the note should not be paid, recourse would be had against the vessel.

The remaining and principal question in the case is this: Did the subsequent negotiation and transfer of the note by libelants to the bank, extinguish the lien? Libelants placed their indorsement on the note and presented it to the bank for discount. The bank discounted it on the strength of the indorsement, held the note till due, then presented it to Tyson, Sweet & Co. the makers, for payment, and upon its non-payment, protested it and gave notice to the indorsers, who paid the bank and took up the note. Was the lien, by this transaction extinguished? Or, upon the note coming back into the hands of the payees unpaid by the makers, could they, on surrender of the note, maintain proceedings against the vessel?

Whatever doubt once existed as to the assignability of a general maritime lien, the question has been put at rest by repeated adjudications. The lien of a salvor on account of salvage service, of a mariner for wages, of a material man for repairs or supplies, is strictly personal and does not pass to his assignee. The same must be said of a lien for towage. It is equally well settled that an assignment or transfer of the claim which constitutes the basis of the lien, extinguishes the lien.

The question whether the assignment by a mariner of his claim to unpaid wages, confers upon the assignee a right to maintain a suit in rem for the recovery of such wages, was fully discussed in the case of Patchin v. The A. D. Patchin [Case No. 10,794], and was answered in the negative. A distinction was taken between a claim of this character, and bottomry bonds, which are assignable because they are express hypothecations and bind the ship to the lender and his assigns, and bills of lading which are made negotiable for the benefit of trade and commerce. The rule that an assignment of a claim to secure which the maritime law gives a lien, divests the lien which originally existed in favor of the holder of the claim and confers no right in the assignee to claim reimbursement in a court of admiralty, was also laid down in the following cases: Sturtevant v. The George Nicholaus [Id. 13,578]; Logan v. The Aeolian [Id. 8,465]; Rusk v. The Freestone [Id. 12,143]; Reppert v. Robinson [Id. 11,703]; Harris v. The Kensington [supra]; The Champion [Case No. 2,583].

In the case at bar, as we have seen, the claimant purchased the vessel with notice of libelants' claim and lien. He therefore stands in no better position to contest the libelants' rights to a lien, than would Tyson, Sweet & Co. if they were yet the owners of the vessel. The case is not therefore one where the rights of innocent purchasers, without actual notice, are involved. Now, admitting the principle of law before stated, that the assignment or transfer by the original holder of a claim against a vessel extinguishes the lien, did libelants, by procuring the note which they had received from Tyson, Sweet & Co. to be discounted by the bank, in fact or effect transfer their claim against the vessel to the bank? If the transaction was such transfer or assignment, then it must be conceded the lien was divested and lost. But I am of the opinion that it was not. The execution of the note, as we have seen, was not a payment of libelants' demand against the vessel. Its acceptance was not a waiver of the lien. The original claim remained unimpaired, and would only be discharged on payment of the note. Pertinent to this point, is the language of Judge Sprague in Page v. Hubbard [Case No. 10,663]: "The creditor has received nothing except another promise of the debtor to pay the debt. This second promise is indeed in writing and negotiable, but it is a promise to pay the same debt. It acknowledges value received, but the only value received was the materials which went in the ship. The debt, therefore, cannot properly be said to be satisfied, merely because there had been two promises by the debtor to pay it, the one by parol, and the other in writing negotiable." It is true that while the note was outstanding the libelants could not pursue their remedy in rem, and this is for the reason, as the courts express it, that the debtor would still be responsible to the holder of the note, and he ought not to be twice liable in any form, on account of the same debt. And that he may not be subjected to this hazard the courts require "the production of the note to be cancelled when the judgment is rendered on the original promise." Though the remedy on the original claim was suspended while the note was outstanding, it does not necessarily follow that the discounting of the note by the bank operated as a transfer or assignment of the original debt or demand. The transaction between libelants and the bank, amounted to an advance of money on the note by the bank on the strength of libelants' indorsement. It was not an indorsement without recourse, but was in form such that upon notice of its non-payment by the makers, the libelants would become obligated to take up the note. Upon maturity and non-payment, the note came back into their hands, and I think that upon its surrender they were remitted to the privilege they would have had if the note had remained in their continuous possession until due, namely, the privilege to proceed in rem against the vessel. The transfer of the note to the bank was accompanied with libelants' contingent liability to take it up when due, which liability became absolute on non-payment by the makers and notice. The question I admit is not free from difficulty; but in view of the special circumstances of the case, the claimant having no better right to contest libelants' asserted lien, than would be possessed by Tyson, Sweet & Co. were they still the owners of the vessel, and the note having been discounted upon libelants' indorsement, and having come immediately back to their hands when due, I think it most consonant with correct reasoning to hold, that there was not such an assignment of libelants' claim against the vessel, or her owners, as extinguished the lien. In this view I am supported by Judge Betts, who, in the case of The Active [supra], held, that the taking of a promissory note was not a waiver of a lien on a vessel for supplies, as against a claimant who did not innocently and without notice acquire rights or interests in the vessel, and that while the note remained in circulation or outstanding, it operated as a suspension of the remedy on the lien; but on its surrender by the original creditor he was re-

mitted to his original privilege and could proceed in rem against the vessel.

A different view was taken by Judge Magrath in the case of Harris v. The Kensington [supra]. He admits that where a lien arises under the maritime law it is not waived or lost because a note or bill has been taken for it by the creditor, and that the acceptance of the note is not to be held a payment of the original demand unless so agreed. This conceded, it is then held that a transfer of the note transfers the original debt or claim and thereby extinguishes the lien, which cannot be revived by taking back the note. I am unwilling to adopt unreservedly this course of reasoning.

It may be observed that the precise point under consideration was not necessarily before the court for decision in either of the two cases last cited, as it did not appear in either case that the note taken by the original creditor had ever been transferred.

Admitting the full force of Judge Longyear's statement in the case of The Champion, supra, that the decisions of our own admiralty courts fully sustain the position that the lien which, for example, a material man has, "is strictly personal to himself, and does not pass to the assignee, that it is in fact extinguished by the assignment of his claim, so that neither he nor his assignee can come into a court of admiralty for its enforcement," I have been unable, after as diligent an examination as I could make, to find a case, where the principle was enforced, which did not upon the facts show an absolute assignment or transfer of the original debt or demand.

In Reppert v. Robinson [supra], the libelant had taken a due-bill for the amount of his claim, produced it at the trial and offered to surrender it. There was an assignment to a third party indorsed on the due-bill which bore date prior to the filing of the libel and which was erased. Judge Taney in his decision granting a decree, held that as the due-bill was produced by the libelant and offered to be surrendered and delivered up, he must be regarded as the lawful owner, and if it had been assigned, that it had again been returned to the libelant. It is evident that the right to a decree was here considered to rest upon the libelant's ownership of the due-bill when the libel was filed; and upon his offer to surrender it at the hearing; and that the fact that it might have been previously assigned was not deemed material as affecting the lien.

In the case at bar, I rest my conclusion upon the ground, that the transaction between the libelants and the bank, by which the note was discounted and again taken up, was not a transfer of the original debt or demand so as to bring the case within the principle of those authorities which hold that such transfer or assignment effects an extinguishment of the lien. Decree for libelants.

Case No. 10,012.

The NAPOLEON.

[Blatchf. Pr. Cas. 296.] [1]

District Court, S. D. New York. Dec., 1862.

PRIZE—PRACTICE—WHAT ISSUES ALLOWED—COLLATERAL SUBJECTS—OWNERSHIP—USE BY BELLIGERENTS.

1. A claim and answer in a prize suit cannot put in issue anything but the question of prize or no prize.

2. Collateral subjects can be controverted in prize cases only by means of pleadings and further proofs, specially authorized by the court after a decision on the first issue.

3. The vessel had, up to the time of her capture in enemy waters, been employed by the enemy for purposes connected with the operations of war and was found with the enemy's flag and the enemy's artillery on board. She was captured by the United States naval squadron, acting in co-operations with the land forces, in the attack upon Newbern. Her owner, though he was a loyal citizen of a loyal state, had left her in charge of an agent, who allowed her to be so employed, and it did not appear that she was taken by the enemy by duress or in fraud of her owner's right. Under such circumstances her owner is concluded from denying her hostile character.

4. No equity of lien or claim, however urgent, held by innocent third parties, is allowed to prevail, in a prize court, against property seized while in use by a belligerent.

5. Vessel condemned.

In admiralty.

BETTS, District Judge. The vessel proceeded against in this case was captured by the United States naval squadron, acting in co-operation with the land forces, in the attack on and seizure of Newbern, North Carolina, in March last. The vessel was totally abandoned, when taken possession of by the United States armed vessels. The evidence is, from reports prevalent at the time and place, that armed troops in the rebel service had been stationed on board of her until driven out by the close approach of the United States forces, and then left her without any crew, papers, or equipment, other than several pieces of artillery which were found on board, and were placed on shore by orders of the commandant of the United States squadron, and that the vessel was afterwards laden with rosin and other stores, and ordered to this port for adjudication. A libel was filed June 3, 1862, demanding the condemnation of the vessel. A claim and answer thereto, in the name of D. C. Murray, a citizen of and resident in the United States, was put in on the 27th of June thereafter, upon which two defences are raised: First, that the libel is indefinite in its charges and allegations, and, therefore, insufficient to found a conviction upon; and, secondly, that the averments in the answer present an adequate bar and defence to the suit, and, if not evidence of themselves, are entitled to be supported by proofs aliunde on the part of the claimant.

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

The rule of practice in prize suits upon these points is as fully settled in law, in this court, as it lies within the competency of the court to determine. The libel has all the fulness and particularity of statement demanded in prize suits, and the claimant cannot bring any other issue in contestation, by an answer to the libel, than the question of prize or no prize. 2 Wheat. [15 U. S.] note Append. 19; The Empress [Case No. 4,476]; The Delta [Id. 3,777]; and other cases in this court. Collateral subjects can be controverted in prize cases only by means of pleadings and further proofs, specially authorized by the court after a decision on the first issue. There having been a hostile seizure of the vessel, her tackle and equipments, in enemy waters, by a United States squadron co-operating with land forces in an attack upon Newbern, and in the capture of that place, she must be regarded as lawful prize, unless some fact showing her legal exemption from seizure be established, or be necessarily implied from the circumstances of the capture. If the fact be conceded that the Napoleon was bona fide the property of the claimant, and that he was loyally opposed to her being employed or held by the enemy, that would not relieve her from liability to condemnation in a prize court, unless she was taken out of the possession of her rightful owner, and held in use by the enemy by duress, or at least in fraud of his right. The true title may be in the claimant, but, as it came to him through the enemy holder, the law will presume that such retaining of possession by the vendor was by the consent or permission of the purchaser. It is not necessary that the vessel should be placed in the control of her possession with a view to her being employed in any warlike acts or in the commission of a wrong against others, but whether she was chartered or loaned, or how otherwise she was allowed to be employed by the subjects of a nation at war, prize courts will treat her as enemy property, equally as if full ownership of her had vested in the enemy. The external symbol of her employment by the enemy or his officers, for purposes immediately or mediately connected with the operations of war, concludes her real owner from denying her hostile character. The Carolina, 4 C. Rob. Adm. 256; The Orozembo, 6 C. Rob. Adm. 433; 3 Phil. Int. Law, § 272; Halleck, Int. Law, 641.

This vessel was, at the time of her capture, clothed with symbols of hostility. She was riding in enemy waters, had been occupied by enemy troops to the time of her seizure, and had on board the enemy's flag and a heavy armament of artillery. I think, also, that the reports of residents in the port, that she had been, previous to her seizure, used in running the blockade of that port, and had been also fitted out as a privateer, are legitimate evidence of her antecedent course of employment, although all these acts were without the sanction of and violently in opposition to the wishes of the claimant, who is personally a loyal citizen, of high character and integrity, and a resident merchant of this city, opposed strenuously to the Rebellion, and has been deeply injured pecuniarily by the misuse of his property on this occasion and otherwise; yet the acts of his agent, with whom the vessel was left by him, determine the character of the vessel, and the integrity of her real owner cannot secure her from the consequences of her illicit employment. The claimant must appeal to his government for relief from the forfeiture. The court is not empowered by the existing laws to adjudge the case upon principles of fair and reasonable equity, but must adhere to and apply the severe edicts of prize law. It is understood that congress may, at its present session, make provision for the protection of the property of loyal residents of the North which may be in the hands of the rebels, and subject to forfeiture for its criminal use by them. That is a matter to be controlled at the discretion of the legislature. The courts cannot, in time of war, depart from the strict behests of the law, by shielding property from the effects of a hostile character impressed upon it by the culpable conduct of those who are intrusted with it, or who so hold it that it can be turned to the aid of the enemy, or to a hostile use against our own government. No equity of lien or claim, however urgent, held by innocent third parties, is allowed to prevail in a prize court against property seized while in use by a belligerent. 1 Kent, Comm. 87. A decree of condemnation and forfeiture of the vessel, her tackle, &c., will be entered.

An appeal from this decree was taken to the circuit court. Subsequently the secretary of the treasury released seven-eighths of the vessel to the claimant, and the appeal as to the rest was abandoned.

[There was a rehearing allowed in this case, but the decree of forfeiture was allowed to stand. Case No. 10,013.]

Case No. 10,013.

The NAPOLEON.

[Blatchf. Pr. Cas. 357.] [1]

District Court, S. D. New York. May, 1863.

PRIZE — VIOLATING BLOCKADE — INSTRUCTIONS — ACTUAL INTENTION—REHEARING.

1. Rehearing, on further proofs furnished by the claimant of seven-eighths of the vessel.

2. One-eighth of the vessel being condemnable in any event, the libellants have a right to enforce their remedy against her as an entirety, whether they retain or remit the proceeds.

3. In the case of a vessel seized as prize by reason of her having violated a blockade, or been used by the enemy for warlike purposes, it is of no consequence that she was so employed without the knowledge or approbation of her owner.

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

4. In time of war, a neutral vessel is subject to forfeiture if run into a blockaded port by her commander, independently of proof of instructions by or actual intention on the part of her owner to evade the blockade, he having previous due notice of its existence and efficiency.

The former decision in this case [Case No. 10,012] confirmed for these reasons: 1. The vessel entered the port where she was captured, by violating the blockade. 2. One-eighth of the vessel was enemy property, lawfully seized in the enemy's country, in actual battle, by the United States military forces. 3. The remaining seven-eighths of the vessel, if legally the property of the claimant, is subject to forfeiture for holding commercial intercourse with the rebel states.

BETTS, District Judge. This case comes before the court, by consent of the counsel for both parties, in effect as upon a rehearing on further proofs, but without the formality of an issue on pleadings and proofs following the first hearing, and the decision on the libel, and the evidence taken in preparatorio. In that state of the proceedings, the vessel was condemned, as lawful prize of war, in December term last. It thus clearly belongs to the claimant to show, by further proofs, collated with such as shall be given by the libellants, that the vessel is not guilty of the offence charged in the libel. This burden the claimant assumes on his side, and insists that he has fulfilled it in the affidavits produced and read in his behalf; while the libellants contend that the weight of evidence, direct and presumptive, remains against the claimant, unchanged, and justifies the condemnation rendered. The Vigilantia, 1 C. Rob. Adm. 1; Harmony v. U. S., 2 How. [43 U. S.] 210.

It appears that the vessel was originally owned by a resident of North Carolina, who, in September, 1860, conveyed seven-eighths of her to the claimant, in satisfaction of a debt secured to him on that vessel. The vendor retained the possession and use of her subsequently, on different voyages, until he finally returned with her into port, in August, 1861; and it is not shown that his possession was afterwards changed until her capture by the libellants. It is to be remarked, that no legal exception is taken against the condemnation of one-eighth of the vessel. That portion of the decree must, therefore, stand unaffected by this rehearing; and the lien or special interest of the claimant in the residue of the vessel, if established, does not intercept or qualify the right of the United States to enforce its remedy against the vessel as an entirety, whether they retain or remit the whole proceeds involved in the condemnation.

The question before the court on this trial is as to the innocency or guilt of the vessel, as if the transaction in which she was implicated was one of personal violation on her part; and that inquiry may be resolved quite independently of the individual intentions or cognizance of the parties who are made pecuniarily responsible for acts of the vessel or of the property, which incur or have imputed to them forfeitures because of such acts. It is, accordingly, not sufficient for the claimant, in defence of this suit, to establish his own loyalty of character, and his disapproval of the connection of the vessel with the enemy, or with the illicit conduct alleged against her. The evidence on the first hearing was amply satisfactory in that respect, without the corroboration of subsequent proofs, which also show his unquestioned patriotism and rectitude as a citizen and a merchant, and that his most earnest efforts were exerted to prevent the prize from being in any way employed in aid of the enemy. But, notwithstanding his individual integrity, the vessel is responsible, in law, in rem, for the malfeasance of the agent who had control of her, in violating the penal laws of navigation. The most distinguished and unblemished reputation on the part of a ship-owner will not protect his vessel from confiscation, when it is engaged, though through untrustworthy agents, and without his knowledge, and against his prohibition, in illicit employments, in infractions of revenue and fiscal laws, and, pre-eminently, in violating the laws of war. The res culpabilis has meted out to it the mulct or confiscation legally applicable to an agent acting voluntarily in violation of law. Ships and cargoes of the largest values are constantly subject to forfeiture, without regard to the intentions of their owners, for being the means of smuggling property of trifling value into port, in evasion of restrictive laws of trade; and, in time of war, a neutral ship is subject to forfeiture if run into a blockaded port by her commander, independently of proof of instructions by or actual intention on the part of the owner, to evade the blockade, he having previous due notice of its existence and efficiency. In this case, no necessary intendment of law can arise, that the vessel, after the execution of a bill of sale of her to the claimant, was tortiously perverted from the possession and use of the claimant, nor that she did not remain with her original owner, and at his order, with the assent of the claimant. In this posture of the case, if the further proofs produced should establish all the facts alleged in respect to the equipment and acts of hostility charged against the prize vessel within the waters of North Carolina, they would fail to exonerate her from the decree of condemnation rendered against her on the first hearing; because she was, in fact, partly enemy property, and stationed in an enemy port, and was captured during an actual attack on such port by the United States forces, whilst it was defended by the military power of the enemy, and by the presence of the captured vessel; and, also, because the interest of the claimant in the vessel, entire or fractional, is confiscable under the general prize law, and by special enactments of congress, because

the vessel had commercial intercourse with an enemy port. Chit. Law Nat. 1; 12 Stat. 257, §§ 5, 6; Id. 319, § 1.

The particular point to which the further proof was prayed and offered by the claimant is, to show that the evidence in preparatorio was misapprehended by the court, or was grossly inaccurate in itself, so far as respects any illicit conduct of the vessel in aid of the enemy, and, most essentially, in the representation that she bore arms, or was in any way in a condition, at the time of her capture, to help the enemy in attacking the United States forces, or in defending the place they were assailing. To this end, various affidavits have been put in by the respective parties, taken ex parte, in North Carolina, since the decision of the cause on the first hearing. In most instances they are very loose, and wanting in precision in their statements and structure, and are subject to distrust, in being a literal repetition, by different witnesses, of facts ascertained by them at separate times and distant places, and without concurrent examinations. The prominent purpose aimed at by the claimant, in these proofs, is to contradict or countervail the evidence in preparatorio tending to prove that, when the vessel was captured, she was abandoned by all hands, leaving only her arms on board, which consisted of three 24-pounder guns and one 32-pounder, which were taken out of her by Captain Rowan, commander of the squadron, and put on shore at Newbern; and, by the testimony now offered, to disprove that the prize was armed and had artillery on board when captured. It does not appear to me that that fact is in any way material to the issue on trial, any further than as it may bear upon the credibility, in a general point of view, of the witnesses who give the evidence. The criminality of the vessel would be more certainly manifested if, when captured, she was fitted, manned and armed as a vessel-of-war, and was, in that way, taking part with the enemy; but she would be no less guilty and confiscable if she united in aiding and promoting the cause of the rebels against the government, otherwise than with arms and soldiers on board. Every act of intentional aid and assistance to the enemy, in whatever manner rendered by means of the vessel, would be visited upon her as an agent de facto in the offence, by the same consequences of condemnation and forfeiture as if it were committed by aggressive force and open hostilities. It, therefore, becomes of small moment to weigh critically the testimony with respect to the state of the vessel, in point of armament, at the instant of her capture; and it is a reasonable and fair interpretation of the affidavits given on both sides, except in two instances only, that the deponents speak of matters which must be derived from and known to them by general repute or belief, as having occurred within their personal knowledge, because it nowhere appears that they were members of the ship's company, or individually on board of her during the time she was within the waters where she was captured, or had been so since the war commenced. This circumstance is not adverted to as detracting from the general title of the witnesses to credit, but to mark the character of the evidence, as founded upon what the parties regarded as true according to common acceptation and belief, without assuming to assert it to be correct of their individual knowledge.

Admitting, then, to the fullest extent, the probity of the claimant in all his personal transactions in respect to the vessel and her voyages, and his loyalty and fair conduct towards the laws and rights of his own government, so far as his personal intentions or authority were concerned, the considerations set up and pressed in his behalf cannot be admitted as constituting a legal defence to the suit. They may supply a forcible ground of appeal to the executive department of the government, in respect to the ulterior disposition of the proceeds of the prize, but the judiciary have no competency to control that matter. In my judgment, therefore, the former decree in the suit must stand and be executed; because the court must judicially recognize that, in August, 1861, when it appears the vessel entered the ports of North Carolina, they were in a state of efficient blockade, publicly notified, and continued so to the time of the arrest of the vessel; because one-eighth of the vessel was enemy property, lawfully seized in the enemy country, in actual battle, by the United States military forces; and because the remaining seven-eighths of the vessel, if legally the property of the claimant, is subject to forfeiture for holding commercial intercourse with a rebel state. Decree accordingly.

An appeal from this decree was taken to the supreme court [case unreported]. Subsequently the secretary of the treasury released seven-eighths of the vessel to the claimant, and the appeal as to the rest was abandoned.

Case No. 10,014.

The NAPOLEON.

[Brown, Adm. 32.] [1]

District Court, D. Michigan. March, 1857.

COLLISION—VESSEL AGROUND IN NARROW CHANNEL—RIGHT OF WAY.

1. Where a tug is working at a vessel aground in the channel of St. Clair flats, it is her duty to obstruct navigation as little as possible, and to give way to passing vessels, though it may require a temporary suspension of her efforts.

[Cited in The Cherokee, 15 Fed. 123.]

2. In approaching a tug so engaged, the master of a steamer has a right to rely upon her observance of this duty, and the same precautions are not demanded of him as would be if no such obligation rested upon the tug.

On libel of Chester Kimball, for damages sustained by the steamtug J. D. Morton in

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

a collision upon the St. Clair flats. At the time of the collision, which was on the 30th of August, A. D. 1856, the Morton was engaged in getting off the Torrent, which was aground upon the St. Clair flats, on the southerly side of the channel, and about a quarter of a mile from the lower end. The tug had taken a line about 40 feet in length from the schooner, and was endeavoring by slackening and then going ahead at full speed, by a sudden jerk to start her off. The schooner Muskingum was also lying aground on the opposite or northerly side of the channel, and to the southwest of the Morton. In pulling on the Torrent, the Morton was headed up and partly across the channel, although it was charged in the libel that there was a clear passage of 10 rods wide between her and the northerly bank. While lying in this position, the propeller Napoleon came up the channel, passed to the northerly of the Muskingum, and ran into the Morton, striking her upon the port wheel nearly amidships, and doing her considerable damage.

Geo. S. Swift, for libellant, cited Davies v. Mann, 10 Mees. & W. 546; The Batavier, 2 W. Rob. Adm. 407; New-Haven Steamboat & Transp. Co. v. Vanderbilt, 16 Conn. 420; Cummins v. Presley, 4 Har. (Del.) 315; Brownell v. Flagler, 5 Hill, 282; The Girolamo, 3 Hagg. Adm. 169; Ralston v. The State Rights [Case No. 11,540].

Levi Bishop, for claimant, cited Bland. Mar. Law, 289, 299, 304; 1 Conk. Adm. 370; The Genesee Chief, 12 How. [53 U. S.] 461.

WILKINS, District Judge. The channel of St. Clair flats, where the collision in this case occurred, navigable for vessels drawing ten feet of water, does not exceed 180 feet in width. There is some conflict in the testimony as to the exact position of the Morton, but I am satisfied she was not lying parallel or nearly parallel with the channel, as she could not in this position have worked to any advantage in getting the Torrent off. Bearing in mind that the length of the Morton was 165 feet, and the distance between her stern and the bow of the Torrent 30 feet, she would naturally assume a position, in getting off the Torrent, that would throw her so far across the channel that it would be impossible for a tug, drawing so much water as the Napoleon, to pass her to the northward. I am satisfied that such was the fact. Of course, too, it would be out of the question for the Napoleon to pass between the two vessels so long as the line was taut. Evidence was given of a custom for tugs, while working at vessels aground upon the flats, to give way upon the approach of other vessels and permit them to pass. Considering the number of vessels using the narrow channel, and the frequency with which they ground there, I think that good seamanship and the interests of commerce require that tugs, in assisting stranded vessels, should obstruct the navigation of the channel as little as possible, and should yield a right of way to passing vessels, even if they are obliged to desist temporarily from their efforts. Had this course been pursued by the Morton in the present case, the collision would have been avoided. While it is true her failure to do this would not have justified the Napoleon in running her recklessly down, or in omitting the observance of ordinary care in approaching her, still her duty to give way, and the probability of her so doing, ought to be taken in consideration in determining what would be ordinary care under the circumstances—in other words the master of the Napoleon had a right to suppose he would conform to this well known custom, and to rely upon his observance of it, and would be excused from such precautions as would have been necessary had he known the Morton would not have given way. As she approached the group of vessels in question, the Napoleon passed to the northward of the Muskingum, which lay nearly abreast of the Torrent, and a little to the northward of the center of the channel, and as she passed her, her master hailed the Morton to stop his boat, back her, and let him go by. To this Capt. Kimball replied, "No, go round me"; and when Capt. Pridgeon, of the Napoleon, again said, "I am drawing too much water, and can't go round you," he still refused to move, and continued working his engine ahead. Seeing then that a collision was imminent, Capt. Pridgeon rang his bell successively to check, stop, back and back strong. This was immediately done, and the wheel of the Napoleon was working backward at the moment of collision. If the Morton had backed at once when requested, and opened a passageway, as she ought to have done, the Napoleon would have passed her without injury. There was not sufficient water for her to pass either to the southward of the Torrent or the northward of the Morton, and they were thus obstructing the only available channel there was at that point.

Bearing in mind that as against the Morton the Napoleon had the right of way, I cannot see that there was any omission of ordinary precautions on her part to avoid a collision, and she must therefore be exonerated from fault. Libel dismissed.

See The Thomas A. Scott [Case No. 13,921].

Case No. 10,015.

The NAPOLEON.

[Olc. 208.] [1]

District Court, S. D. New York. Oct., 1845.

SEAMEN—WAGES—PAYMENT—CONFLICT OF TESTIMONY—NUMERICAL PREPONDERANCE OF WITNESSES—JURISDICTION—FOREIGN VESSEL.

1. If, on the termination of a voyage, the master admits verbally that a balance of wages is due a mariner, and when sued therefor alleges, in his answer, that he has paid the amount in full

[1] [Reported by Edward R. Olcott, Esq.]

to him, it devolves upon the respondent to prove the payment.

2. When there is an irreconcilable conflict in the testimony of witnesses, and circumstances of suspicion attach to the credit of them on both sides, the balance of evidence will be regarded as in favor of the party having the greatest number.

3. The federal courts have jurisdiction of actions for wages for services on board foreign vessels.

4. These actions will be entertained of right in behalf of American seamen against foreign vessels, owners or masters; and will also be readily sustained in behalf of foreign seamen against masters or owners of foreign vessels, when the voyage terminates or is broken up in an American port, or foreign seamen are discharged from a foreign ship there, and are necessitous. But the courts are unwilling, under other circumstances, to support such actions, and discourage their prosecution in our tribunals.

[Cited in Davis v. Leslie, Case No. 3,639; The Hermine, Id. 6,409; The Lilian M. Vigus, Id. 8,346; The Maggie Hammond, 9 Wall. (76 U. S.) 450; The Topsy, 44 Fed. 635.]

5. An allegation in the answer that all the parties are foreigners, and the ship is foreign property, must be proved by the respondent or claimant.

The libellant sues in a summary action for wages earned on board the brig Napoleon, on a voyage from New York to Jamaica and back, and avers that he is an American seaman, and was discharged on the arrival of the vessel at this port, September 5th, without payment of his wages. The answer asserts that the vessel is a British bottom, owned at the port of St. John, New Brunswick, and excepts to the jurisdiction of this court over the subject matter. It admits the shipping and services of the libellant as charged by him, and that the vessel returned to the port of New-York or on about the 3d day of September last, and avers that the libellant "was then paid off and discharged, the voyage being ended." The answer reiterates, in the form of denial, the same allegation, asserting that the libellant was not discharged without having been first paid the wages due him, "but on the contrary thereof, the fact was that he, at the time of his discharge, received from the respondent the full amount of wages due him," &c., and proceeds to state in detail the manner and amount of payment. The libellant filed a general replication to the answer, and both parties put in their proofs under the issue. Four witnesses, two on each side, were examined before a commissioner, and their depositions have been read, and three others have been examined orally in court.

Nash & Manchester, for libellant.
P. Hamilton, for claimant.

BETTS, District Judge. There is no direct proof of the discharge of the libellant, but it appears that he left the vessel on her arrival here; and no objection being shown to his so doing, although he was repeatedly afterwards at the vessel, it must be taken as admitted by the answer, that he was discharged on the 3d or 4th of September, the day the vessel came up to the city from quarantine. The mate deposes that the libellant's wages were paid him in full by the captain in the afternoon of Monday, the 8th of September, in the cabin of the vessel, the mate and captain's wife being also present. Collateral facts in proof fix this to have been the time when the libellant carried a pitcher of water into the cabin at the request of the mate. The mate testifies he did not pay the money himself, nor have it in his hands. That the captain took a twenty dollar bill out of his pocketbook, laid it on the table, and then handed it to the libellant. The mate had made up the libellant's account of wages, and found there was due him twenty dollars, deducting payments he had previously received. The whole wages in arrear at the time amounted to about twenty-two dollars. The respondent, before this action was brought, tendered the libellant two dollars in specie, and the tender not being accepted, paid the sum into court, setting up the tender in his answer. Daniel Dwyer, a seaman on board, deposes that the libellant told him, a day or two after that Monday, that he had received all his wages of the captain, except about a dollar and a half, which he was trying to obtain. This representation is contradicted by the libellant's proofs. A clerk in the office of J. W. Hallett, Esq., testifies that the libellant came to the office to have his demand collected. On Thursday, the 11th September, he left his account for $22, and the same day notice was sent the respondent from the office advising him thereof, and requesting payment of that sum. That the master came to the office the same day, accompanied by his mate, and brought the note with him. He said the wages had been paid the libellant in full the Saturday previous, in the afternoon, towards evening; that he did not pay the money himself, but it was paid by his mate. The mate said nothing. He was directly alongside the master at the time that statement was made. The Saturday after (13th) the master came again to the office, and then said that the libellant had come to the vessel Monday morning (8th) for his wages, and he himself then paid him in full. The answer was sworn to by the master on the 17th September, six days after the statements made at Mr. Hallett's office, in the presence of the mate, and to which the assent of the mate must be implied; and the discrepancy between the answer and the declarations made by the captain, and the after testimony of the mate, is of a character to excite strong suspicions against the integrity of these parties. The answer avers, in positive terms, that the vessel arrived here on or about the 3d of September, "when the libellant was paid off and discharged, the voyage being ended"; and to demonstrate that his attention was fixed to this connection of facts, and that he meant to make it emphatic, in the next article of his answer he repels, by a positive denial, an assertion in the libel,

sworn to the 15th September, "that he (libellant) had been discharged out of and from the services of said vessel without being paid the balance of wages due him, &c., amounting to twenty dollars and upwards," and avers the fact to be, on the contrary, that the libellant, at the time of his discharge, received from the respondent the full amount of his wages.

The main fact stated, that the wages had been paid before suit brought, would be sufficient, if proved, to bar the action, although the time or place of payment might not correspond with the allegations of the answer, and the court would not regard such variations as material. But these particulars become of significant importance toward determining between conflicting proofs, whether the alleged payment was ever made. Three witnesses for the libellant testify that they went with him to the vessel the 8th of September, to procure his wages; it was the Monday afternoon referred to by the mate. They identify the time, as he does, by the circumstance of the pitcher of water brought by the libellant to the cabin. All these witnesses swear that neither the captain or mate were present in the cabin with the libellant at that time, and that he merely carried the pitcher of water there, and came immediately out. The master and his wife were on deck. The mate was there, also, with a book in his hand; and it appears, from other evidence, the vessel was at the time discharging cargo. The witnesses all saw the libellant go up to the master and address him, as if making some inquiry, and two of them, Joyce and Young, testified that they were standing near him and heard him ask the master if he would settle with him or pay his wages; and the master replied he would pay him as soon as the cargo was discharged or out; and all the witnesses swear that no money was paid him that day by the master. These two witnesses state further that they went again with the libellant to the vessel on Tuesday and Wednesday following that day. Both assert that the master was not on board on Tuesday, and say that the libellant asked the mate when the master would pay his wages, and the mate replied he would not pay them until the cargo was out. Young says the mate made the like answer to the same inquiry on Wednesday, the master not being on board; but Joyce says it was the master, and not the mate, who made that answer on Wednesday. Three witnesses, Joyce, Peterson and Young, all swear that Daniel Dwyer came to the libellant's boarding-house on Sunday, (the 14th,) and inquired for the libellant, and then asked him if he had got his wages from the master. The libellant replied he had not. Dwyer then told him that he would not get them without suing the master, and if he (Dwyer) had his things ashore, he would not go in the vessel. Upon the main fact of payment the two classes of witnesses stand in direct and positive contradiction with each other, and under circumstances which admit of no ground for supposing there is with them any mistake or forgetfulness in the matter. On the one side or the other, there is unequivocal perjury.

In considering the evidence to determine how the credibility preponderates upon that issue, the court cannot overlook the incongruity in some collateral particulars stated by the libellant's witnesses. Nor under circumstances awakening distrust as to the integrity and motives of the witnesses on each side, can it escape notice that the libellant and his witnesses are colored people, all lodging together, and that the keeper of this boarding-house has this suit chiefly under his own management and direction, and undoubtedly is to receive its proceeds. These circumstances afford color for suspicion of connivance between these parties, or at least that these witnesses have been brought to the stand strongly prepossessed for the libellant, and very much under the influence of their boarding-house keeper. These considerations would probably deserve weight beyond that of mere suspicion had the defense set up on the part of the respondent been ingenuous and consistent. The court might then feel compelled to disregard the fact of a greater number of witnesses on the part of the libellant, and decree conformably to the direct and positive testimony of the mate, corroborated by that of Dwyer, as to the admissions and declarations of the libellant. But the glaring discrepancy between the answer and the proofs, the confused and contradictory declarations of the master, in Mr. Hallett's office, the mate being present, and apparently assenting to the statements made by the master, and then testifying to one in direct opposition to them, in my judgment, tend to depreciate the reliableness of the defence quite as much as the disparaging circumstances bearing against the credibility of the libellant's witnesses do against the justness of the action.

In this confused and conflicting state of the testimony, the numerical superiority of witnesses with the libellant ought to be regarded as at least neutralizing the evidence of the respondent on this defence of payment. That the wages demanded had been earned, and were due to the libellant on the arrival of the vessel at this port, is admitted in substance by the answer. It devolves upon the respondent to discharge himself from that debt. The state of the pleading, as well as nature of the defence, casts the burthen of proving such satisfaction upon the respondent. It is always with the party who offers an affirmative fact in support of his case. Phelps v. Hartwell, 1 Mass. 71; Buckminster v. Perry, 4 Mass. 593. An answer alleging payment is of that character; it places the burthen of proof upon the respondent. The respondent is bound to maintain the allega-

tion by evidence clearly and satisfactorily overbalancing that of the demandant. It is not enough to do that for him to make out a probable case in his favor; he must render it reasonably certain.

Under this feature of the case, I shall decree that the libellant recover the wages claimed, together with summary costs, to be taxed. The two dollars deposited in court by the respondent is to be applied in part payment upon this decree. The exception taken to the jurisdiction of the court because of the foreign character of the vessel and her master, cannot prevail. It has not been proved that the libellant is an alien; and were it so, the law affords no exemption of foreigners or their vessels from the jurisdiction of this court. Nor if both parties were aliens would that fact affect the power of the court; it has cognizance of the subject matter, although, as a general usage, it forbears exercising its jurisdiction over controversies between foreign seamen and shipmasters. But it is no way probable it would withhold it in such case, when the suit is for wages by a seaman who had completed his contract and voyage, and was discharged from his vessel. Nor would its jurisdiction be denied in case the voyage was broken up in an American port, leaving the crew in a necessitous condition, with outstanding wages due them. Decree for the libellant.

NAPOLEON, The. See Case No. 4,500.

NAPOLEON, The (PEASE v.). See Case No. 10,883.

Case No. 10,016.

The NARRAGANSETT.

[5 Ben. 255.] [1]

District Court, E. D. New York. June, 1871.[2]

COLLISION—STEAMER PASSING STEAMER—RULES OF SUPERVISING INSPECTORS.

1. Two steamboats, the P. and the N., left their piers in the North river nearly together, both bound through the Sound. The P. left her pier first, but took a wider sweep, so that when the two vessels were in the East river, the N. was ahead. The P., moving faster than the N., overhauled her, so that when they arrived at Hell Gate the stem of the P. was ahead of the stem of the N., the vessels, however, being alongside. In this position they entered the Gate together, both vessels holding on, and a collision occurred, in which the P. was injured. Previous to the collision, the supervising inspectors had adopted a rule in reference to such navigation, but it had not been promulgated, and neither party knew of its existence at the time. *Held*, that the rule was not applicable to the case.

2. It was unlawful for two boats of such size, going in the same direction, to be in the Gate together, and the one which was chargeable with their being there together was responsible for their collision.

3. The P. had the right to pass the N. in the East river before reaching the Gate, if she could, but not having done so, it was her duty on reaching the Gate, to stop and go astern of the N. As she did not do so, she, and not the N., was liable for the collision.

[Cited in Milliken v. The C. H. Northam, 37 Fed. 240.]

In admiralty.

W. J. A. Fuller, for libellants.
Jos. G. Choate, for claimants.

BENEDICT, District Judge. This action is brought by the owners of the steamboat Providence, to recover for injuries sustained by that vessel in a collision with the steamboat Narragansett, which occurred in Hell Gate on the afternoon of the 24th day of April, 1869.

The controlling facts of the case are not involved in any doubt, and as little doubt exists as to the law to be applied.

The two steamboats left their respective piers in the North river, at nearly the same time, both bound for the Sound. The weather was fair and the tide flood. The Providence moved out in the North river ahead of the Narragansett, but in consequence of vessels off the Battery, took a wide sweep, going over towards Governor's Island and the Brooklyn side, in turning into the East river. The Narragansett took the inner course and passed close to the New York side as she turned. The result was, that when the two vessels headed up the East river along by the Wall street ferry, the Narragansett was some distance ahead of the Providence. Upon this point, which I consider the decisive point of the case, the proof appears conclusive.

As the two vessels continued their courses through the East river, the Providence, which was the larger and the faster boat, gained on the Narragansett, and when the channel west of Blackwell's Island was entered, the Providence had the Narragansett on her port quarter, her own bow being ahead of the bow of the other. Owing, however, to the strong suction occasioned by so large a vessel in that narrow channel, the Narragansett was enabled to maintain about that position, and when the upper end of Blackwell's Island was reached, and the Gate was to be entered, the Providence, although her bow was ahead of the bow of the Narragansett, had been unable to shake off that vessel, but still had her hanging on her port side and quarter. So situated relatively, the vessels entered the Gate and naturally came in contact before they were through, the Narragansett striking the Providence just aft the port paddle-box, and doing the injuries complained of.

I take no time to scrutinize the handling of the two vessels in the Gate, as I hold it unlawful for two boats of this size, going in the same direction, to be in the Gate together, and shall hold that one liable for the consequent damages, which is responsible

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

[2] [Affirmed in Case No. 10,018.]

for the presence of two such boats alongside each other in that dangerous tideway.

The Providence is the vessel so responsible. When she reached the upper end of Blackwell's Island, and began to near Flood Rock, she was in the face of a passage which she could not lawfully undertake alongside the Narragansett. The Narragansett was still on her quarter, pursuing a lawful course, and not liable to be called on by the Providence to stop. The right of the Providence to keep on terminated at the entrance of the Gate, which she could not, under the circumstances, enter alone, and could not lawfully enter otherwise. Her duty, therefore, was to stop while she could. This duty was imposed upon her by the presence of the Gate immediately ahead, which she could not then go through in the only way the law would permit. Instead of stopping, the Providence kept on, and thus found herself in the position of attempting to pass the Narragansett in the Gate. Having undertaken a dangerous manoeuvre and sustained damages in the attempt, she cannot now call upon the Narragansett to reimburse her.

The case may be stated another way. At the Wall street ferry the Providence was in a position astern of the Narragansett. It being unlawful for two steamers to pass the Gate together, the Providence, when she passed through, was bound to be either in a position astern of the Narragansett or in a position ahead of her. She had an undoubted right to take the latter position, if her power would enable her to do so, but in point of fact she found herself unable to attain that position before she was called on to enter the Gate. Not having been able to place herself in one of the only two positions which the law would permit her to occupy in passing the Gate, she was bound to place herself in the other, by stopping. This is no new law. It was held in the case of The Governor and The Worcester, that a river steamer desiring to pass another one ahead, was bound to select a place for effecting it which would not expose the latter to injury, and if the leading vessel be so placed, that safe room is not left to pass her, the passing boat must stop and await the opening of a sufficient passage [Case No. 5,645].

So in the case of The Rhode Island [Case No. 11,745], it was held that a passing steamer was not entitled to exact from the other anything more than to hold her own course, and not to embarrass or impede the efforts to pass. These cases were referred to and approved by the supreme court of the United States in Whitney v. Dill, 23 How. [64 U. S.] 454, and they furnish the rule which was binding upon these steamers, and according to which the Providence must be held in fault.

It was contended on the part of the libellant, not very strenuously, however, that the amended regulation of the supervising inspectors, which was determined on in January, 1869, prior to this collision, but never promulgated until July after this collision, furnished the rule of navigation to be applied by the court in this case. The collision occurred on the 24th of April, 1869, at which time, as the evidence showed, none of these parties knew of any new regulation; and the copies of the regulation, which the act required should be signed by the inspectors and furnished to every vessel, had never in fact been issued or signed. I am of the opinion that under such a state of facts the regulation referred to cannot be said to have gone into effect. The deliberations of the supervising inspectors are not public.

They have, by law, power to make regulations, which the law also requires them to promulgate over their signatures. Until that is done, I do not think any regulation can be said to have been established as required by the statute. The libellants cannot, therefore, derive any advantage in this action from the new regulation.

A decree must accordingly be entered dismissing the libel, with costs.

[This case was taken to the circuit court by the libellants, on appeal, and the decree of this court affirmed. Case No. 10,018.]

Case No. 10,017.

The NARRAGANSETT.

[1 Blatchf. 211; 1 Liv. Law Mag. 126.] [1]

Circuit Court, S. D. New York. April Term, 1847.[2]

APPEAL—COLLISION—DAMAGES—SALVAGE SERVICE — DAMAGE IN EFFORTS TO SAVE — LOSS OF SERVICES WHILE UNDERGOING REPAIR.

1. On an appeal in admiralty from the district court, in a case of collision, where the principle on which an allowance has been made by that court is sustained by authority, this court will not interfere with the amount of that allowance, unless it is very strikingly out of proportion to the service or damage.

[Cited in Egbert v. Baltimore & O. R. Co., Case No. 4,305; The Grace Girdler, 7 Wall. (74 U. S.) 204; The Juniata, 93 U. S. 339; The Lord Derby, 17 Fed. 268; The Albany, 48 Fed. 565.]

2. Accordingly, in such a case, though some of the items allowed by the district court appeared large in amount, *held*, that this court would not disturb them.

3. Allowances for salvage service discussed. (Per Betts, District Judge.)

4. Where a vessel is disabled by a collision, damage suffered by her in the course of reasonable and proper efforts to save her, is a consequence of the condition in which she is left by the wrong-doer, and therefore properly chargeable in an action founded on the collision.

5. The value of the services of a vessel while she is undergoing necessary repairs for injuries received by collision, is to be allowed as part of the damage sustained by her owners.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. 1 Liv. Law Mag. 126, contains only a partial report.]

[2] [Affirming Case No. 10,020.]

The maritime law is less stringent in this respect than the common law.

[Cited in Munch v. The Sucker State, Case No. 9,921; The Oler, Id. 10,485.]

[Cited in brief in Willey v. Fredericks, 10 Gray, 359.]

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

The owners of the sloop Corinthian and the owners of her cargo filed a joint libel in rem, in the district court, against the steamboat Narragansett, to recover damages for a collision. The case was this. On the 3d of January, 1845, the sloop sailed from New-Bedford, Mass., for New-York, with a cargo of sperm and whale oil, sperm candles, whalebone, soap, and spermaceti. She was heavily laden, and had a heavy deck load. About 8 o'clock p. m. on the 8th, while in Long Island Sound, about opposite Black Rock, and midway between the Long Island shore and the Connecticut shore, steering a south-west course, the wind being about west by north, the sloop came into collision with the steamboat. The latter was bound to the eastward. The bowsprit of the sloop was torn from its place, also her rail and bulwarks and windlass, and her bows were broken open, so that she sank in two or three minutes to the water's edge. The captain and mate and the two hands of the sloop got into her boat and remained by her till 5 o'clock a. m., and then rowed to Brookhaven, L. I., where they arrived about 9 a. m. The captain there procured two sloops, the Editor and the Emperor, to assist him. They were laid up in winter quarters, but crews were collected to man them, and about 11 a. m. they started for the Corinthian. When they got to her, about 1 p. m., some sloops and boats were picking up the cargo. Her deck load had been washed overboard, and she was capsized. The two sloops succeeded in righting her, and towed her into Black Rock, where they arrived the same evening about 9 o'clock. They worked till midnight in getting her ashore. Some of the cargo that was picked up was taken to Black Rock, some to Southport, and some to Bridgeport, but part of the deck load was never found. Where the Corinthian lay when the sloops reached her, was about nine miles from Brookhaven, and six miles from Black Rock. The captain of the Corinthian endeavored to make a bargain at Brookhaven with the masters and owners of the two sloops to go to the wreck. They refused to make any specific bargain, saying they could not tell how much their vessels would get damaged, or how much trouble they would have; but said they would go out and assist in getting the sloop in, and charge a fair compensation. The captain of the Corinthian made no offer to them of any distinct compensation. There were five or six men on board of each vessel. It was about seven days from the time of the collision till the Corinthian's cargo was discharged. The masters of the Editor and Emperor refused to give up the vessel or cargo, and instituted legal proceedings on their salvage claim, and the property was attached by an officer. The value of the property which the two sloops brought in was between eleven and twelve thousand dollars. The vessel and cargo, including the deck load picked up and brought in by others, were worth about $17,000. Under these circumstances, Mr. Jones, an insurance broker in New-York, who was employed by the underwriters to look after the wreck, allowed the Editor and Emperor $800 in settlement of their salvage claims, with the approval of the master of the Corinthian. Two schooners, the Despatch and the Union, were employed to convey the cargo from Black Rock to New-York, about seventy miles distance. They were paid $60 each, being for four days' services at $15 per day. The Corinthian, after her cargo was discharged, was temporarily repaired at Black Rock, and was then taken to New-Bedford for thorough repair, because the work could be done there better and cheaper. It took a month or more from the time of the collision before the sloop could be got up to the wharf at New-Bedford, so that the crew could be discharged, and it was then some time before she could be got to the ship-yard, because of the ice. She was hauled up for repairs on the 9th of March, and launched on the 2d of June. About half of the time she was under repair was occupied in making repairs that had no connection with the injuries caused by the collision. It was proved that such a vessel as the Corinthian could earn $200 per month, net profits. The capsizing of the Corinthian during the absence of her captain and crew at Brookhaven occurred in this way. The steamboat Eureka came alongside of the sloop, fastened a hawser to her, and attempted to tow her. She steered very well for a few minutes, but the cargo on deck got against her tiller and jammed it hard down, so as to give her a shear, and she capsized. The hawser was then cut, and the Eureka left. The deck load went overboard when the sloop capsized. The Corinthian was fifteen years old at the time of the accident, was in good order, had been thoroughly repaired two years before, had a new hull, a new mast, and new sails, and was of eighty-two tons burthen. It was proved that when new she would cost about $6,000; and that after the collision and before she was repaired, she was worth $1,000 to $1,200, and after she was repaired $3,500 to $4,000.

The district court decreed that the steamboat was in fault on the occasion of the collision, and the sloop without fault; that the libellants were entitled to recover their direct damages caused by the act of the steamboat; that on adjusting the damage in respect to the sloop, she was to be replaced at the expense of the claimants, substantially in the same situation she was in when injured; that the fair and reasonable cost of her necessary reparation was, under ordinary cir-

cumstances, to be referred to as measuring the damages with reasonable certainty; that the same principle applied to the cargo—the parts of it destroyed or lost by the collision to be paid for at their fair value, and the parts saved to be deducted, at their value as saved, less the reasonable and actual expenses of saving, from the amount estimated as a total loss; that no distinction was to be made in respect to the liability of the claimants for those parts of the cargo on deck which were deteriorated or lost by the capsizing of the sloop during the endeavors made by the steamboat Eureka to tow her into port; that the owners of the sloop should recover the amount of injury done to her, including a just proportion of the reasonable and actual salvage expenses and disbursements; and that the owners of the cargo should recover the value of the parts of the cargo owned by them respectively which were lost, and the amount of injury done to the parts saved, including a just proportion of the reasonable and actual expenses and disbursements included in the salvage of the same; and it was referred to a commissioner to ascertain and report the amounts. [Case No. 10,019.]

The commissioner reported that there was to be paid to the owners of the sloop $2,147.87, and to the owners of the cargo $2,960.01. He allowed $2,029.87 as salvage expenses, to be apportioned among the several owners of the vessel and cargo. On exception to his report by the claimants, the court disallowed $510.05 of the amount reported as salvage expenses, and a further item of $50 in the amount reported as due to the owners of the sloop. But among the items allowed by the court as salvage expenses, notwithstanding the claimants' exception, was the $800 paid to the sloops Editor and Emperor, and the $120 paid to the schooners Despatch and Union. The court also allowed to the owners of the vessel, under the claimants' exception, $500 for the value of the services of the sloop to her owners for two months and a half while she was undergoing repairs. [Case No. 10,020.]

In the district court, Betts, District Judge, in delivering the opinion of the court upon the exceptions taken by the claimants to the commissioner's report, said:

"The first objection touches the allowance of $800 paid the two sloops, the Editor and Emperor, for assisting in raising the Corinthian and towing her into Black Rock harbor. The claimants insist this was no salvage service, and that the amount is exorbitant as a quantum meruit, or compensation on the footing of wages earned. The work turned out to be of no great duration or hazard to the vessels or persons employed; but those particulars do not settle the character of the service and necessarily withdraw it from the class of maritime and salvage claims. Relief to a wrecked vessel does not lose its grade of salvage service, although it may be of the lowest character, and merit compensation only by measure of daily wages. The Emulous [Case No. 4,480]; Bearse v. 340 Pigs of Copper [Id. 1,193]; The Hector, 3 Hagg. Adm. 90; The Industry, Id. 203; The Clifton, Id. 120. In neither of the five cases cited, was the situation of the salved property so perilous as that of the Corinthian and her cargo, nor were the services rendered greater in extent or in hazard to the salvors.

"In this case, the owners of the two sloops arrested the Corinthian for their compensation, and their claim was adjusted by the master of the Corinthian, with the approval of Mr. Jones, agent of the underwriters, at $800. Those parties thought the compromise advantageous to all concerned in the wreck. Adjustment of salvage claims on the spot, by parties who suppose they are acting for their own interest, though not binding upon third parties, will yet be regarded favorably by maritime courts, as affording, probably, a safer rule of valuation than can be gathered from the ex parte depositions of witnesses. In view of the probable risk of the enterprise, and the value of the property saved, and the promptitude of the service rendered I am not inclined to disturb that adjustment, and am satisfied with the judgment of Mr. Jones that the arrangement was fair and just under the circumstances.

"The next exception is to the allowances to the schooners Union and Despatch. I do not think they should be restricted to mere ordinary freight, but it is reasonable and proper, under the circumstances of their employment, to allow them a compensation of $15 per day, each, for the time occupied in loading, transporting and unloading the cargo.

"The last point in dispute is an allowance of $500 for the value of the services of the vessel, which were lost to her owners while she was undergoing repairs. This particular is necessarily a good deal vague in itself. It is not to be expected that the evidence can fix with exactness the time indispensable for the repair of the injured vessel, or where the work could be most advantageously done, or the value of her services during the period of her disablement. These particulars must rest in a good degree upon estimates. I think the judgment of the witnesses examined on this subject, justifies the conclusion adopted by the commissioner, and I shall allow his report in this behalf to stand."

From the final decree of the district court the claimants appealed to this court.

Francis B. Cutting and Charles B. Moore, for libellants.

J. Prescott Hall and William M. Evarts, for claimants.

NELSON, Circuit Justice. I have examined the several questions presented in this cause, arising out of the damages decreed by the court below, and see no sufficient ground for disturbing the allowances made. Some of

the items appear large, but the principles upon which they have been allowed, seem to be sustained by authority. I cannot interfere with the amount unless it is very strikingly out of proportion to the service or damage.

The additional damage arising out of the upsetting of the Corinthian in the attempt made by the Eureka to tow her into harbor, is perhaps a close question. But the accident does not appear to have occurred from the use of improper means, or from proper means being unskilfully or negligently used. Damage arising from reasonable and proper efforts to save the disabled vessel, is a consequence of the condition in which she is left by the wrong-doer, and is therefore properly chargeable.

The item for the loss of the services of the vessel while undergoing necessary repairs, seems to be a proper allowance, according to the maritime law, which is less stringent in this respect than the common law. The loss of wages is to be taken into account, as part of the damage sustained. Decree affirmed.

Case No. 10,018.

The NARRAGANSETT.

[10 Blatchf. 475.] [1]

Circuit Court, E. D. New York. Feb. 25, 1873.[2]

COLLISION—VESSEL OVERTAKING—DUTY.

Two steamboats, the P. and the N., bound from New York, to go through Hell Gate, proceeded up the East river, the P. astern. On entering Hell Gate, the stem of the P., which was the faster boat, and the longer boat, had reached to a few feet in advance of the stem of the N.; the stern of the P. was not up to the stern of the N. The two vessels collided, and the P. was injured: *Held*, under article 17 of the rules in the act of April 29, 1864 (13 Stat. 61), that the P., as the overtaking vessel, was bound to keep out of the way of the N., and that the P. was in fault, and the N. was not in fault.

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

In admiralty.

Abbett & Fuller, for libellants.
Joseph H. Choate, for respondents.

WOODRUFF, Circuit Judge. The steamboat Providence, belonging to the libellants, and the steamboat Narragansett, were freight and passenger boats, running from the port of New York, through the East river and Long Island Sound, the former to Newport and Fall River, and the latter to Stonington. The berth or dock of the former was at the foot of Chambers street, on the North river, and the berth of the latter was at the foot of Jay street, on the North river, two piers, or about four hundred feet, higher up the river. The hour of departure for both was five o'clock in the afternoon. On the 24th day of April, 1869, the Providence started about twenty minutes after five, and, when partly out of her slip, the Narragansett started from her slip above. They proceeded towards the Battery, the Narragansett astern of the Providence, but, on nearing the Battery, the Providence, meeting a tow and other vessels, took a broad circuit, down to near Governor's Island, and over to very near the Brooklyn wharves, and then took her course up the East river, still, however, near the Brooklyn shore. As the Narragansett, much the shorter boat, neared the Battery, an opening presented itself, and she swung around close to the Battery, and took her course up the East river near the New York side of the river. The Providence was the faster boat, when each was at full speed. The speed of neither, while making their turns and passing up to Hell Gate, is given with much precision, by the testimony, but it is clear, upon all the evidence, that, when they were opposite Thirty-Fourth street, they were near each other, and the bow of the Providence lapped the after part of the Narragansett. There is great conflict, in the evidence, in regard to the relative position of the two bows before that time, as well as thence onward, until they were in Hell Gate; but, although the stem of the Providence was, while passing along Blackwell's Island, and on entering Hell Gate, a few feet in advance of the stem of the other boat, the testimony will not warrant the conclusion, that, in any part of that portion of their passage, the stern of the Providence was, at any time, up to the stern of the other. They entered Hell Gate thus, side by side, the stem of the Providence a few feet in advance, and to the starboard, of the Narragansett. In that dangerous, narrow and crooked channel, just after turning Hallett's Point, the Narragansett was drawn towards the Providence by what the witnesses call the suction of the latter, and her guards, at about midships, broke into the side of the upper works of the Providence, inflicting upon her the injury for which indemnity is sought in this cause. In the district court, the libel of her owners was dismissed [Case No. 10,016], and the libellants appealed to this court.

There is evidence tending to show that the Providence unnecessarily crowded upon the Narragansett, where it was easy and safe to have kept off more to the starboard, and that the Narragansett was, in fact, as far to port as was safe, and further than was ordinarily prudent. It is, on the other hand, denied, that the Providence did not give the other all the room consistent with safety to herself. If it was at all material to the decision, I should be constrained to find, upon the evidence, that the Providence brought the injury upon herself, by needlessly crowding to port, and upon the other boat, and ought to bear the consequences. But, in

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

[2] [Affirming Case No. 10,016.]

truth, the boats ought not to have been in any such position, in so narrow and difficult a passage, among the rocks of Hell Gate.

I concur fully in the opinion of the judge of the district court, which places the decision upon other and conclusive grounds. The decided preponderance of the evidence establishes, that the Providence, by her long circuit around, near Governor's Island and the Brooklyn wharves, was astern of the Narragansett, when the boats respectively straightened up the East river. She endeavored, and her somewhat greater speed enabled her, to come up with the other boat, so as to place herself in the position first above described; but, she at no time passed the other. She was, therefore, under the full operation of article seventeenth of the rules of navigation, enacted April 29, 1864 (13 Stat. 61): "Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel." It was her duty to keep out of the way of the Narragansett; and the next following rule made it the duty of the latter to keep her course. True, it is not the duty of a faster boat to remain behind when she overtakes a slower one; but she takes upon herself the risk and hazard of passing. She must choose a safe and sufficiently wide place, where it may be done with safety to both, the slower vessel doing nothing to prevent, other than keeping her own course. It is not enough, that the faster vessel has so far succeeded as to come alongside, or even project her bow beyond the bow of the other, so as to make it probable that she will pass. If she does this and persists, she does it at her peril. The rule has not then ceased to operate upon her. That rule is explicit, and neither greater speed, nor an attempt to dictate to the other, will excuse her, if collision ensues. It is not necessary to enquire whether any rule of the supervising inspectors would relieve her, if she violate this express statute; for, here, it is proved, that no rule had, at the time of this collision, been promulgated, which is in conflict with this view. It is unnecessary for me to repeat the further views of the rights, the conduct or the duty of the two vessels, expressed in the opinion of the court below. They are, I think, conclusive. Let the libel be dismissed, with costs, including costs of the appeal.

Case No. 10,019.

The NARRAGANSETT.

[Olc. 246.] [1]

District Court, S. D. New York. Feb. 1846.

COLLISION—WRONGFULLY IN TRACK—CONSEQUENTIAL DAMAGES—STEAMER AND SAIL VESSEL—LOSS IN ATTEMPTING TO SAVE.

1. If a steamer wrongfully placed herself in the track of another vessel, and in such circumstances as allowed the other no chance of avoiding a collision, the former is answerable for all the damages which might have been occasioned by her running into the other.

2. In case of collision, the party injured is entitled to recover the actual damages sustained, but cannot claim such as are merely consequential.

[Cited in brief in Austin v. New Jersey Steamboat Co., 43 N. Y. 78.]

3. If a steamer and sailing vessel are approaching each other in such directions that a collision may be reasonably apprehended, it is the duty of the steamer to take proper precautions for avoiding the sailing vessel, particularly so if the latter be close-hauled on a wind.

[Cited in The Cornelius C. Vanderbilt, Case No. 3,235.]

4. In determining the merits in a case of collision, the court will look chiefly to the facts in proof, and will pay but slight attention to the opinions and hypotheses of witnesses, especially those of each ship's company, in respect to the acts of the other.

5. Witnesses upon a vessel in motion, looking at another also in motion, cannot determine by the eye, unaided otherwise, with reliable exactness, either her course, distance or speed.

6. Plans and diagrams, intended to exhibit the courses, bearings and distances of two vessels approaching each other, are of no value as evidence, when framed merely upon the conjecture or opinion of witnesses as to the speed, relative bearing and distances of the vessels.

7. The actual damages sustained by a collision at sea are to be paid by the faulty vessel, both in respect to ship and cargo.

8. The colliding vessel is not exonerated from full damages, because after the wreck a portion of the cargo was injured or lost through the efforts of a third vessel to save it.

In admiralty.

Moore & Havens, for libellants.

Butler & Evarts, for claimant.

BETTS, District Judge. This was a case of collision. The sloop Corinthian, proceeding from New-Bedford to New-York, and the steamboat Narragansett, going in an opposite direction, up the Sound, came in collision on the night of January 8, 1845, in the middle of Long Island Sound, about opposite the harbor of Southport, on the Connecticut shore, in consequence of which the sloop was almost immediately sunk. This action seeks to recover the damages incurred thereby, with the expense of subsequently raising and saving the vessel, and also the damages and loss sustained by her cargo. By the pleadings, each party exonerates himself and imputes all the fault to the other; and the testimony, by persons on the respective vessels, and concerned in their management, is in direct opposition in respect to the acts of the vessels and the cause of the disaster. Their testimony, however, generally consists more in criticisms on the doings on the opposite vessel, than a clear statement of their own acts. The opinions and inferences of witnesses on a vessel under way, in relation to the manoeuvres of another also in motion, afford no satisfactory or reliable evidence of the actual facts of the transaction. This is es-

[1] [Reported by Edward R. Olcott, Esq.]

pecially so, if the occurrence be in the night, and the observations are made when the two are closely approximating each other. Courts accordingly, in this class of controversies, look most sedulously to the facts sworn to, independent of the judgment of witnesses, and in that aspect the knowledge of the witness is usually confined to what was done, ordered, or attempted to be done on his particular ship. It is out of the disaccord and clashing of these statements with the result, rather than the jarring opinions of the respective witnesses, that the court must determine where the fault lay. Twenty witnesses were examined, at large, between the parties on the hearing, and taking in view the pleadings in the case, and giving credit to the testimony of the master and mate of the sloop, and the two pilots and wheelsman on board the steamer, in their statements of any act done by them on board their respective vessels, I find the facts touching the collision of the vessels to be these: That the wind was west by north, light and dying away. That the sloop was deep loaded, and standing on a course about southwest by the compass, holding as close to the wind as she could lay, and was making about three knots the hour. The steamboat was steering east northeast, proceeding at the rate of about ten miles the hour. She had lights set in her bows and aloft, and was first seen from the sloop twenty or thirty minutes before the collision, and was then supposed to be eight or ten miles off. The sloop set a light in her rigging, which was seen from the steamboat one or two miles distance. The sloop held her course without deviation to the instant the collision was seen to be inevitable, and then her helm was thrown hard a starboard, but not in time to make any change in her direction perceptible to those on board. The steamboat, when the light of the sloop was descried, bore off one point south. The sloop, when next noticed by her, appeared to be coming head on to the steamer, and in the act of striking her at right angles. The wheel of the latter was instantly jammed over, by two men, with a view to wear her off, the vessels coming together nearly at the instant, and before the steamboat had yielded to her helm to any serviceable extent.

This statement of facts, if the case is to rest on them, would clearly prove the steamboat in fault. It was first her duty to take timely means to avoid the sailing vessel, and not press upon her so as to put her in jeopardy or alarm. The Shannon, 2 Hagg. Adm. 173; The Perth, 3 Hagg. Adm. 414. And, moreover, according to all the authorities, and upon the reason of the subject matter, the sloop could rightfully rely upon the steamer using due precaution to avoid her, and adhere to her course, particularly she being close-hauled upon the wind, and it would be incumbent on the steamer to adopt the measures which would leave her secure. Story, Bailm. §§ 608, 609, 611; The Thames, 5 C. Rob. Adm. 345; The Woodrop-Sims, 2 Dod. 83; The Jupiter, 3 Hagg. Adm. 320; The Chester, Id. 317; The Diana, 1 W. Rob. Adm. 131; The Harriett, Id. 182, 7 La. 222. The officers of the steamer seemed aware of the obligation, and attempt, in their evidence, to clear themselves of blameable conduct in their approach upon the sloop and the collision. Her pilots and wheelsman testify that the sloop, four or five minutes previous to reaching the steamer, changed her course, keeping off to the south, seeing which, the wheelsman says, two minutes before the blow was received, the pilot had seized hold of the wheel, and ordered it shoved hard a port, the sloop having gone off full to the south. Both these witnesses testify that the sloop, when they first discovered her, was off north from them, two points on the weather bow, steering southwest, or west southwest. It is proved that the bowsprit of the sloop, in the act of collision, crossed the deck of the steamboat nearly at right angles at the after-part of the forward gangway. The latter fact, it is contended, corroborates the evidence of the witnesses that the sloop had changed her course, and they allege that this wrongful manoeuvre caused the collision.

The witnesses on the other side represent the steamboat to have come upon the starboard quarter of the sloop, nearly stem on, and then as she passed by, in clearing her, pressed her round, bearing against the bowsprit, and wrenching it out of its bed and fastenings. The shipwright who repaired the sloop supported this version of the transaction, judging it must be so, from the appearance and place of the wound on the sloop, and the condition of the bowsprit and its fastenings. But the shipwright and others, who examined the steamboat the day after the collision, testify that they could discover no mark on her stem, not even the rubbing of its paint, and, in their opinion, the injuries could not have been inflicted by the striking of her stem against the sloop; but in their judgment the injury resulted in part from her lifting the bowsprit of the sloop out of its place, and chiefly by the wheels of the steamer breaking the timbers and beating in the starboard quarter of the sloop, as the two vessels hung alongside, and were separating from each other, the steamboat being high enough out of water, and having been kept under full way until after the separation of the two.

It does not appear to me, however, that the bearing of these facts authorizes the conclusion that the sloop had previously varied her course, or even if, at the instant, the movement of her rudder had slightly altered it, that she thereby became answerable for the collision. Various diagrams have been exhibited, and computations of bearings and distances have been made to demonstrate that the vessels could not have been brought

in contact under their relative speed and bearings, if, according to the rule of evidence, greatest credit is given to the outnumbering witnesses on the side of the claimants, in those particulars, in which the two classes differ. I confess I place slender confidence in this description of proof. The inferences from it depend wholly on the accuracy of the elements on which the computation is made, and a mis-estimate in trivial particulars of the courses, or distances, or speed of the two vessels, would take away all value from the hypotheses and conclusions upon which the plans are based. For instance, no confident reliance can be placed on the conjecture in this case, that the sloop was two points on the weather bow of the steamer, and one and a half miles off, when first descried from her. It was in the night, the bearings were not taken by compass, and no other examination was made than merely a glance at the sloop. These considerations would prevent the evidence having any important effect, however intelligent and confident the witnesses might be. The main witnesses, in this instance, do not concur in the cardinal facts. The pilot inferred the sloop was one distance, and the wheelsman, observing her at the same moment, judged she was a greater one, the two differing from a half to a mile. In exhibiting the positions of the vessels, on a chart or diagram, those variations necessarily destroy all certainty in the calculations and conclusions attempted to be founded upon them. It is far more satisfactory to reject these surmises and conjectures, and resort to the facts in proof to ascertain with which party, if either, the fault rests.

In my judgment the facts show a want of due precaution and proper management on the part of the steamer on this occasion. The pilot was aware the sloop was approaching him on a fresh wind, at a rate which, coupled with his speed and their short distance, either one or two miles apart, must bring the two vessels across the same line almost instantaneously, for, on his lowest estimate, they were approaching at a conjoined speed of a mile in from two to four minutes. These facts demanded of him the utmost vigilance and alertness, and he was inexcusable in not instantly taking such course as would place both vessels out of danger. So, also, it is clear, upon the testimony of the experienced nautical experts, Captains Thayer and Comstock, examined by the claimant, that it was the duty of the pilot, in the position of the two vessels, to have gone north of the sloop, or to have borne off more than one point, if intending to pass south of her. This should have been manifest to him, for on his own testimony, the bearing of the two was such that if the steamer had not changed her course, she must have come upon the sloop head on, and run her directly under. He regards it a happy movement that he swung off the steamer one point or more, thereby rescuing the sloop from certain destruction by a direct blow. But the proof is clear that the sloop had made no change of her course when the steamer bore off. Her pilot misapprehended the relative position of the two until nearly in the act of striking. Instead of passing her half a mile to the south, as he supposed he should do, by bearing off one point, his course, until that alteration, must have been directly on her, and the only effect probably produced by the change he made was to convert a perpendicular blow into one slightly glancing or oblique. The steamer, then, taking a direction east by north, and the sloop holding about southwest, would, as her stem passed the sloop, bring her beam nearly at right angles with the bow of the sloop, so that the bowsprit of the latter might cross the deck, as asserted by the witnesses who traced the mark. They do not state it to have been exactly at right angles to the steamer's side, but rather oblique towards her stern. Be the angle of contact what it may, I do not accede to the argument of the claimant's counsel that its direction is a demonstration that the sloop must have been heading south, or that her movement was the cause of the collision. Had she been at anchor, the drift and headway of the steamer passing under her bowsprit, might have produced a collision exhibiting the same external marks, though probably with less disastrous consequences. Nor is it of any importance in respect to the rights and liabilities of the two vessels, whether the sloop came into the steamer, or the latter ran upon the former. The steamer had wrongfully placed herself in the sloop's track, under circumstances leaving the latter no means of avoiding her. A collision, thus occasioned, would subject the steamer and owners to the same responsibilities as if the damage had been given by her running upon the sloop.

I do not think it important to discuss the differences between witnesses as to which vessel was to the north of the other when they came in sight, or what their actual bearing might be to each other's bows. I put the case essentially upon this, that the steamboat did not take due precautionary measures to avoid the sloop after it was ascertained the two vessels were running on courses which must bring them speedily across each other's track. In the night time, and in the uncertainty as to the velocity and proximity of the vessels, the duty of the steamboat was to go astern of the sloop, and not attempt to run under her bows; and though her pilot acted under the persuasion he could do it safely, and leave large room to the sloop to pass, the steamer must take the responsibility of the error in judgment, particularly as the claimants are unable to prove the sloop guilty of any fault contributing to the collision. Captain Comstock was called to prove that the mate of the sloop gave a statement of the occurrence, immediately after the collision, in which he admitted the sloop had changed her course, and payed off her sheet, and that the

two vessels came together at right angles, the bowsprit of the sloop running into the steamer's beam. The testimony is adverted to now only in elucidation of the justness of the rule which enjoins the strictest caution in acting upon proof of declarations or admissions of parties or witnesses; for although Captain Comstock thus makes the testimony given by the mate, before a commissioner, stand in open contradiction with that declaration, yet it is palpable that Captain Comstock is mistaken in his recollection, and that some other impression on his mind has been substituted for what he heard from the mate. He was employed to attend the examination of the mate before a commissioner, and was, at the time of the conversation, travelling in company with him, for that purpose, and says he paid very particular attention to the whole of his deposition, taken immediately after those admissions; that the mate was a very intelligent man, and seemed honest and candid, and that what he stated upon that examination corresponded exactly with the declarations he had so made to the witness. The impressions he then received, and under such circumstances, would be much more to be depended on than those collected from his memory a year after the event, and without association with a written record, to test the accuracy of his remembrance; and instead of operating as an impeachment of the mate's testimony, amounts to a strong confirmation of its truth.

The libellants are entitled to recover their actual damages incurred by the act of the steamboat, but they cannot claim damages that are remote and merely consequential. The collision caused the vessel and her cargo to sink, and, had they been thus wholly lost, the damages would have been the value of the two. The Iron Duke, 9 Jur. 476. In so far as the libellants have succeeded in rescuing either, to that extent the liability of the respondents is reduced or discharged. There can be no difficulty, under the rule, in adjusting the damages incurred by the sloop itself; she is to be replaced at the expense of the respondents substantially in the condition she was when injured, and the cost of her reparation will ordinarily measure with reasonable certainty, the amount of damage. The same principle applies to the cargo. That portion lost by the collision must be paid for at its fair value, and that rescued is to be deducted at its value as saved (including expenses of saving) from the amount estimated as a total loss. In other words, the libellants take the cargo rescued at its net value, and recover damages commensurate to that not restored.

A question is raised in respect to the liability of the steamer for part of the cargo on deck, which was deteriorated or lost, by the capsizing of the sloop in an endeavor made to tow her into port by the steamer Eureka. It is alleged that the unskillful and improper manner of conducting the salvage caused the loss, and that accordingly it was only consequential to the collision; or if the deterioration or actual loss is chargeable against the steamer, she is not liable for the expenses incurred in recovering that part of the cargo lost overboard on such attempt to save the sloop. I perceive no reason for a distinction in this respect, in favor of the steamer. If the Eureka had committed an act of trespass, or wilful wrong, it might be different. But she found the vessel under water, apparently abandoned, and applied those measures in her aid which seemed best calculated to afford relief. A hawser was carried out to her from the steamer, and efforts were then made to tow her into a harbor. The cargo had so shifted, however, as to render the sloop innavigable; after moving her a short distance, and finding she was careening, the hawser was cut, and the sloop remained under water, most of her deck load having in the operation, gone overboard. I do not think a fruitless effort to save the wreck, made in good faith, and so far as appears with good judgment, though leading, by its failure, perhaps to additional expense and loss to the wreck or cargo, can be regarded as wrongfully causing such damage, and thus exonerating the steamer from it. The mode of saving the vessel and cargo ultimately adopted was doubtless the most efficacious and judicious, but in the absence of the means afterwards obtained and applied, it could not be blameable to try any other at command which afforded a reasonable promise of success. In the then condition of vessel and cargo, those efforts were all apparently for the interests of the claimants. They being liable, in the first instance, for the entire value of both, their loss would be diminished in proportion to the amount of the property saved. Efforts directed alone to the saving of the wreck, although resulting disadvantageously and imposing enhanced expense in its final rescue, do not change the nature of the injury, and substitute a new cause and liability in place of the colliding ship. I shall, accordingly, decree for the libellants, to the amount of the injury done the sloop, the value of the property lost, and the expenses and disbursements necessarily incurred in the salvage of that which was preserved. The particulars will be more conveniently ascertained by a commissioner, and I shall order a reference for that purpose.

[NOTE. The commissioner's report was sustained by the court. Case No. 10,020. The cause was subsequently taken to the circuit court by the claimants on an appeal, from the final decree of the district court as to damages, which decree was affirmed in Case No. 10,017.]

Case No. 10,020.

The NARRAGANSETT.

[Olc. 388.] [1]

District Court, S. D. New York. Sept., 1846.[2]

COLLISION — DAMAGES — FULL RECOMPENSE — SALVAGE EXPENSES—COMMISSIONER'S REPORT.

1. Damages caused by a collision will be awarded against the colliding vessel, adequate to the full recompense of the injured vessel and cargo.

2. The loss of the use of the injured vessel whilst undergoing repairs is so directly consequential to the collision as to be entitled to compensation.

3. The owners of the injured vessel will be allowed salvage expenses and other charges necessarily paid by them in rescuing the vessel and cargo from perils they were placed in by the collision.

[Cited in The Rhode Island, Case No. 11,740a.]

4. Services of a salvage character, expended in saving and restoring the injured vessel and cargo, will be compensated by salvage rewards, and not limited to a quantum meruit for mere work and labor.

5. A bona fide adjustment of such claims and charges between parties interested in the vessel and cargo, will be accepted by the court as a proper mode of fixing the value of the services.

6. The commissioner's report of damages, when parties have been fully heard before him with their proofs, and no question of law is involved in his decision, will be adopted by the court, unless palpable errors or inadvertencies have been committed by him.

The commissioner, in his report of the damages sustained by the libellants by occasion of the collision sued for in this cause [see Case No. 10,019], made allowances for salvage compensations paid by the libellants to other persons and vessels for aiding to save and secure their vessel and cargo wrecked by the collision; for all direct damages and injury to the sloop and cargo, and also the consequential damages sustained by loss of the use and services of the vessel during the time she was out of employment for the purpose of repairs, &c. The claimants excepted to all these classes of allowances.

F. B. Cutting, for libellants.

J. P. Hall and W. M. Evarts, for claimants.

BETTS, District Judge. The report of the commissioner made in the cause, pursuant to the decree of the court upon the merits [Case No. 10,019], having been filed, the claimants excepted to it in various particulars, but more generally the exceptions call in question the amount of allowances stated than the principles adopted by the commissioner in making them.

The case was submitted to the court on the evidence before the commissioner, and written arguments of the counsel. As a general rule, a commissioner's report of damages upon the facts only, will be adopted by the court, unless errors or inadvertencies in his valuation are clearly established by the excepting party. It will be useless, in this case, to set forth twenty or thirty exceptions in detail, which these claimants have filed to the report. The essential ones will only be considered. Exception is taken to the allowances of a salvage compensation made two sloops, (the Emperor and Elector,) employed by the libellants to assist in raising the wrecked vessel and cargo, and towing them into Black Rock harbor. It rests on two objections: first, that no salvage service was rendered by the vessels; and second, that the allowances are exorbitant as a quantum meruit. The vessels were engaged in the service but a short time, and neither they or the crews were exposed to hazardous or severe services. These particulars do not, however, determine the character of the service, nor necessarily withdraw it from the class of salvage claims. Judge Story held, in The Emulous [Case No. 4,480], that whenever the service has been rendered in saving property on the sea, the service is, in the sense of the maritime law, a salvage service; and in a later case he adds, that compensation for such services is not to be estimated upon the footing of a mere quantum meruit for work and labor upon the dry principles of the common law, but upon the footing of a quantum meruit upon the enlarged principles and policy of maritime jurisprudence in salvage causes. Bearse v. 340 Pigs of Copper [Id. 1,193]. The rule in the English admiralty is of the same tenor. Sir John Nicholl rewarded as a salvage service the taking of an anchor to a ship coming into the Downs, by a lugger under contract to procure it from Dover and put it on board the ship. The anchor was necessary to the safety of the ship in her then condition. The lugger encountered heavy wind in a dark night in taking out the anchor. It was objected that the service was slight, and not of a salvage character. The judge held this a salvage service not to be paid for merely as work and labor; when fairly and honestly rendered, it is to be liberally rewarded without a minute inquiry into the quantum of labor. The Hector, 3 Hagg. Adm. 90. In another case he says, salvage reward is not a mere question of work and labor—not a mere calculation of hours. The Industry, Id. 203. In The Clifton, Id. 121, he enumerates the chief ingredients of a salvage service, some of which are prominent in the present case, with the reservation that where none or scarcely any of those ingredients exist, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration pro opere et labore. These cases present a succinct recapitulation of the doctrines which have always prevailed in this court, and sufficiently mark the distinction between salvage services and pilot services, or ordinary services of work and labor.

[1] [Reported by Edward R. Olcott, Esq.]

[2] [Affirmed in Case No. 10,017.]

In neither of the cases above cited was the situation of the salved property so perilous as that of the Corinthian and her cargo, nor were the services rendered greater in extent or hazard to the salvors or their vessels. The Emperor and Elector had been laid up; crews had to be collected, to man and fit them for this service; yet they were made ready and got alongside the wreck within three or four hours after the first notice and application to them. This was mid-winter. The wreck was found, when the sloops got to her, capsized and filled with water, and by their assistance she was righted and towed by them into Black Rock. The owners of the sloop attached the Corinthian at that place for their compensation, and their claims were adjusted by her master, with the approval of Mr. Jones, agent of the underwriters upon her, at $800. Those parties thought the compromise advantageous to all concerned in the vessel and cargo. An adjustment of salvage services by parties on the spot, who are dealing for their own interest, though not binding on parties not present or represented, will yet be regarded favorably by maritime courts, as affording probably a safer rule of valuation than can be gathered from the depositions of witnesses.

In view of the probable risk of the enterprise, and the value of the property saved, and the promptitude with which the succor was rendered, I am not inclined to disturb that adjustment. I concur in the judgment of Mr. Jones and the master of the wreck, that the arrangement was fair and just under the circumstances. The exception to this point is accordingly overruled.

The exception to the second and third items, being allowances to the schooners Union and Dispatch, to each $120, is in part well sustained. Those charges include a compensation for freight carried, and also for employment per diem, to search for the wrecked property. The vessels cannot come in on the footing of salvors upon claims for unsuccessful efforts to rescue or find the wrecked property. Their charges must be limited to services rendered by them beneficial to the wreck. The contract made with them by the insurance offices to search for the wreck cannot rightfully be thrown on the cargo or vessel, when neither is proved to have derived any advantage from it. [Talbot v. Leeman] 1 Cranch [5 U. S.] 1; [The Alerta v. Moran] 9 Cranch [13 U. S.] 367; Clarke v. The Dodge Healy [Case No. 2,849]; The Henry Ewbank [Id. 6,376]. I do not think the vessels should be restricted to mere ordinary freight; it is reasonable and proper, under the circumstances of their employment, to allow a per diem compensation for the time occupied in loading, transferring and re-loading the cargo. This was a special undertaking very different from the regular business of carrying freight; but, on the evidence, I consider $15 per day a reasonable remuneration for the time employed transporting and securing the cargo, and raise the allowance in the report to that amount.

The court does not intend, by this distinction, to discountenance the employment of vessels by the day in efforts to aid wrecked vessels to avoid salvage charges by others; nor to suggest that those expenditures may not be taken in account on a general average between the ship-owner and freighters. But I discover no principle which permits a charge to be laid on the vessel or cargo for a precautionary employment of other vessels, unattended with actual aid to the property in distress. Before these sloops discovered the wreck, she was safely in port, and their connection with it was to wait until the cargo could be unladen and transferred to them, and then to transport it a distance of seventy miles to New-York. The testimony does not fix clearly the time the sloops were engaged in the carriage of the cargo, but, without creating the expense of sending the case back to the commissioner for new proofs to that point, I shall assume, upon the evidence before me, that four days to each sloop would cover all the time reasonably required in the service performed, and shall accordingly reduce the allowance of the commissioner in these particulars to $60 for each vessel.

I think the exceptions to the allowance of items 4, 5, 12, 13, 16 and 17 are well taken. The decree contemplates only the payment of salvage reward, and though in the mode of stating those charges some of them would appear to include services which might fairly fall under that head, yet the proofs do not specify the quality or extent of those acts, so that the court can discriminate and apply a proper compensation to each. Items 4, 5 and 12 are of that character, and must accordingly be rejected. The other particulars embraced in those items, and the accompanying charges in 13, 16 and 17, not being any of them proved to have a necessary or just relation to the salvage of the property wrecked, must also be rejected. The damages decreed against the steamboat compose a fund out of which each party sustaining losses is to take his proper share. The report appears to have been made up upon the assumption that the steamboat contributing this fund is also bound to pay the charges of settling between the common claimants their respective interests in it. This is a mistake. The owners of the steamboat have no concern with, and cannot rightfully participate in that question. Accordingly, they ought not to be subjected to any of the charges incurred in making that distribution.

The principle involved in the last exceptions allowed will also dispose of that to the charges of R. Gibbs, Jr., for travelling expenses. It is not proved that there was any necessary or reasonable relation between

those services and the salvage of the wrecked property. Upon the testimony they are rather to be referred to the condition of the claims of the respective libellants and underwriters between themselves, and would more appropriately belong to general average allowances than salvage claims. These items are accordingly disallowed. The exception to the allowance made for injury to sails, cordage bill, painting and rigging, in all, $319.26, must be overruled. The testimony of Sheppard, Watkins and Hillman sufficiently supports these charges. The collision rendered it necessary to put this class of repairs on the vessel, and although the proof is not positive that they no more than reinstated the vessel in the condition she was before collision, yet the moderate amount charged, and the proof that such reparations were necessary, is evidence enough, in the first instance, to support the claim, none being offered by the claimants tending to show an overcharge. 2 Hagg. Adm. 90. I shall, therefore, allow that amount.

The last point in dispute is the allowance of $500 for the value of the services and use of the vessel lost to the owners whilst she was undergoing repairs. This is a subject for valuation and allowance, because the owner of the injured vessel is entitled to a full reparation of the injuries and losses caused by the collision. [The Apollon] 9 Wheat. [22 U. S.] 362; 2 Hagg. Adm. 30. Questions of consequential damages are necessarily vague in their nature. It is not to be expected that the evidence can fix with exactness the time indispensable for the repair of the injured vessel, nor where the work could be most advantageously done, or the value of her use to the owner during the period of her disablement. Those particulars must rest, in a good degree, upon estimates; and although there is a diversity of opinion with the witnesses, I think the conclusion adopted by the commissioner is reasonably sustained by the proofs, and accordingly I shall allow his report in this behalf to stand.

These rulings upon the exceptions will require $559.05 to be deducted from the sum of $2,147.87, reported payable to the libellants, and the decree will be entered in affirmance of the residue of the report, with costs.

[On appeal by the claimants to the circuit court, the final decree of the district court was affirmed. Case No. 10,017.]

NARRAGANSETT STEAMSHIP CO. v. CONNOLLY. See Case No. 1,891.

NARRAGANSETT STEAMSHIP CO. v. PONTON. See Cases Nos. 1,890 and 1,892.

NARVAEZ (UNITED STATES v.). See Case No. 15,855.

NASBAUM v. EMERY. See Case No. 10,381.

Case No. 10,021.

NASH v. LE CLERCQ et al.

[2 Cin. Law Bul. 146.]

Circuit Court, S. D. Ohio. 1877.

BANKRUPTCY—FRAUDULENT CONVEYANCES—SUIT TO SET ASIDE—VENDOR'S LIENS—DEED WITH CONDITION SUBSEQUENT.

[1. A mortgage given by a debtor to secure his indorsers, a few days before making an assignment, and under circumstances putting the grantees upon inquiry as to his financial condition, is void under the bankruptcy law, as creating a fraudulent preference; and such a mortgage cannot be sustained, as made in pursuance of a prior agreement to give security, unless that agreement was definite and specific as to the property to be mortgaged; in other words, such an one as a court of equity would enforce upon a bill for specific performance. Jackson Iron Co. v. Manufacturing Co., Case No. 7,153, followed.]

[2. A mortgage given to secure a prior loan three months before the debtor's assignment, but while he is still struggling to meet his liabilities, and when the mortgagee has no good reason to believe that these efforts will not succeed, is not void under the bankruptcy law as creating a fraudulent preference.]

[3. While the receipt of a personal note, bond, or other obligation of the vendee is no waiver of the vendor's lien, yet the taking of the obligation of a third party, or of a mortgage upon the property sold, or upon any other property, constitutes a waiver.]

[4. A conveyance made partly in consideration of the grantee's covenant to assume and discharge all indebtedness against the grantor growing out of a previously existing partnership between them does not create an implied lien upon the land, for the purpose of indemnifying the vendor in case the covenant is not performed, especially as the time of performance and the amount to be paid are indefinite, and depend upon a contingency.]

[5. A partner, upon withdrawing from the firm, conveyed his interest in the firm property, including real estate, to the remaining partners, "subject to his proportion of the debts and liabilities of said firm." The habendum clause was as follows: "The said [grantees], assuming and agreeing to pay my said interest's share of the debts and liabilities of the said firm, to have and to hold my said interest, being the undivided one-third part of the property, * * *; but subject to said interest's share of the debts and liabilities of said firm," etc. *Held*, that this was a conveyance upon a condition subsequent, and that upon failure to perform the condition a right of re-entry arose, although none was expressly reserved, and that consequently the vendor had a lien thereon superior to subsequent mortgagees, who must be held to have taken with notice of the condition.]

This was a bill in equity [by Samuel A. Nash, assignee], to set aside a number of mortgages upon the property of Francis L. Le Clercq and James A. Le Clercq, doing business under the firm name of Le Clercq Bros., and upon the separate property of the individual members of said firm. Seventeen answers were filed by persons claiming different interests in the property.

Before BROWN and SWING, District Judges.

BROWN, District Judge. No question is made with regard to any of the numerous

mortgages in this case, except those of the Fords, Adam Uhrig, James W. Steinberger, H. H. Menager and Roman Menager.

1. As to the mortgage to H. N. and Mary E. Ford. It seems that in November, 1872, H. N. Ford endorsed a note of Le Clercq Bros. for $800, discounted by Charles Creuzet, upon which Ford was afterward sued and a judgment rendered against him. In December, 1872, he endorsed another note for $750, discounted by the Ohio Valley Bank, which was subsequently renewed by the endorsements of himself and wife, and paid in January or February, 1874. January 10, 1873, Ford and wife endorsed still another note for $3,000, to be used by the firm as collateral security for loans to be made by the same bank. These loans were afterwards made, to the amount of $3,000, and paid by the Fords at the same time the note for $750 was paid. This last note was endorsed upon the faith of a promise of the firm to give a mortgage upon their real estate, to indemnify the Fords against their entire liability for the firm. Their clerk, under their instructions, drew up a mortgage upon the individual property of Francis Le Clercq, which was never signed, but was afterwards destroyed, and a mortgage finally given bearing the date September 2, 1873, which was not recorded, however, until October 7th, the day of, or the day before, the assignment. I think there is no doubt that the firm was actually insolvent within the meaning of the bankrupt law at the time this mortgage was given. They had been engaged in operating a woolen mill in Gallipolis; had suspended work in the spring of 1873, and had not resumed up to the time of the assignment, except about a month in the summer, when the mill was engaged in doing some small jobs for the country people about there. Their note for $25,000, due March 4th, 1873, had been returned dishonored. Another note for $500, endorsed by Uhrig, was protested September 14th, and was subsequently taken up by Uhrig. Another note for $1,000, endorsed by him, became due October 4th. Another note for one Bray was protested October 6th. After the closing of the mill in the spring, the Le Clercqs, finding themselves embarrassed, made ineffectual efforts to organize a corporation, and finally, October 7th or 8th, made a general assignment to Ford for the benefit of all their creditors. While it is not free from doubt, I think there is a preponderance of evidence showing that Ford had reasonable cause to believe that the firm was insolvent at the time the mortgage was given. He was the brother-in-law of the Le Clercqs, and lived in the other part of a double house occupied by Francis Le Clercq. He had endorsed for them in November and December, 1872, and in January, 1873. Whenever any of these notes became due, they were renewed. Nothing was ever paid upon either of them from the time of the first endorsement. When the $800 note, upon which he was endorser, became due, Le Clercq's agent brought it to him and he waived the protest; that, he says, was the last he heard of it until after the assignment. He does not recollect whether he ever saw the mortgage until after it was recorded, viz. about the time of the assignment. Living within three-quarters of a mile of the mill and next door to Francis Le Clercq, his brother-in-law, it is scarcely possible that he should not have known of the suspension of business during the summer, or of Le Clercq's efforts to organize a joint stock company, and that they were not paying their debts in the ordinary course of business, while the fact that the mortgage was not taken until a few days before the assignment, would seem to indicate that if he had been aware of the contemplated assignment, he would have taken it sooner. It is explained in his testimony that he supposed a mortgage had been given at the time the endorsements were made, and had relied upon that for his protection. We must then hold this mortgage to have been a fraudulent preference, unless it can be supported upon the theory that it was executed in pursuance of a prior agreement. Having had recent occasion in the case of Jackson Iron Manuf'g Co. [Case No. 7,153], to examine the question under what circumstances a mortgage will be sustained if made in pursuance of a prior agreement to give security, I then came to the conclusion, after a careful examination of the authorities, that to support such a mortgage the agreement must be definite and specific; such a one as a court of equity would enforce upon a bill for specific performance. In the case under consideration, the Fords endorsed the note for $3,000 upon the promise of Le Clercq to give a mortgage, but the property which the mortgage was to cover was not specified, and remained entirely uncertain until the mortgage was executed. In fact, a mortgage was drawn up by Wilson, a clerk of the firm, upon the individual property of one of the partners, but was never signed, and was subsequently destroyed. The mortgage afterward executed covered the mill property belonging to the firm, and cannot be said to have been executed in pursuance of a prior agreement. I think the circumstances were such as to put Ford upon his inquiry, and to constitute reasonable ground for believing the firm to be insolvent. The mortgage must be held invalid as a preference.

2. The mortgage to Adam Uhrig was given under very similar circumstances. Some time in April or May, 1873, one of the firm applied to Uhrig to endorse their note of $1,000, payable in sixty days. It was renewed at maturity, and Uhrig again became security for the further sum of $500, which notes were renewed from time to time until October 4th, when new notes were given for $500 and $1,000 respectively, payable in ninety days. The mortgage was given October 6th, but a day or two before the assignment. Uhrig knew that none of the notes which he had endorsed had been

paid at maturity; that the business of the firm had been suspended for several weeks before the execution of the mortgage, and he says he took the mortgage at the time because he found the firm was not in as good condition as when he endorsed the notes. There was also evidence tending to show that he had heard it said that the firm was liable to be adjudged bankrupts at any time. It seems that in this case also the endorsements had been made upon the promise of Le Clercq to give a mortgage of indemnity upon his real estate, but the promise was, if possible, less definite than that to Ford. There was no property specified, and no attempt made to procure the mortgage until a day or two before the assignment. I think that Uhrig must have known at this time that the firm was in extremis.

3. As to the mortgage to John W. Steinbergen, administrator, in 1871, Steinbergen having in his hands $1,000, belonging to the estate of Joseph Spencer, loaned the same to the Le Clercqs, taking their note endorsed by Rosena Le Clercq, their mother. The note was made payable a year from date, but we think the evidence shows that it was intended for an investment; that there was no desire or expectation that it would be promptly paid, and, in fact, Steinbergen told the firm, before the year was up, that the note might run another year. In May, 1873, the interest being due, he called for it. Le Clercq told him that he was a little pressed at that time, but would pay in a few days. Calling a second time, and not getting it, he requested a mortgage, and after some delay a mortgage was executed and delivered to him, bearing date June 30th, 1873. I am not satisfied that Steinbergen had reason to believe the firm was insolvent at the time this mortgage was given. Both LeClercq and Steinbergen deny it in most unequivocal and explicit language. The latter says, that he had heard they were embarrassed, but supposed and believed that their property would pay their debts. He says he does not remember hearing they could not get along, but did hear it said that it would be better for them to make a sale of their mill. Efforts were then being made to organize the joint stock company, and had not at that time failed. The only circumstance that would naturally put Steinbergen upon inquiry, was the fact that he was director of the Point Pleasant Bank, which had taken a mortgage from Le Clercq on the 5th of May, to secure a note for $2,065, and it seems that he knew this mortgage had been taken. He swears, however, that his real reason for taking the mortgage was that he had understood that the endorser upon the note had been traveling, and had spent more than her income; that she was liable to become irresponsible, and he deemed it his duty as trustee to take additional security. As a matter of fact, business men are usually more likely to look out for the security and safe investment of money which they hold in a fiduciary capacity, than for that which belongs to themselves individually. We are disposed to accept this theory of the case as the true one, and to sustain the mortgage. While the firm was undoubtedly somewhat embarrassed at the time it was given, they were evidently struggling to meet their liabilities and Steinbergen had not, then, good reasons to believe they would not succeed.

As to the claim of H. H. Menager, it appears that on the 17th day of November, 1869, Menager being the owner of certain real estate in West Virginia, sold the same to L. Le Clercq for $16,000, taking in part payment certain real estate in Gallipolis, at a valuation of $12,000. For the remaining fourth, Le Clercq gave his unsecured note. A settlement was had April 17, 1873, upon which there was found to be due $552. A new note was given for this amount, and as the note is still unpaid, Menager claims a vendor's lien upon the land. The land was afterwards incumbered by a mortgage, taken without notice of the vendor's lien, and it is conceded that Menager's claim is subject to this mortgage. That the vendor has a lien upon land sold for the purchase money, is now too well settled to admit of any doubt. Repeated adjudications of the supreme courts of Ohio and of West Virginia have firmly established the principle in those states. Tiernan v. Beam, 2 Ohio, 383; Neil v. Kinney, 11 Ohio St. 66; Brush v. Kinsley, 14 Ohio, 24; Edwards v. Edwards, 24 Ohio St. 411; Boos v. Ewing, 17 Ohio, 500; Redford v. Gibson, 12 Leigh, 332; Sinnett v. Cralle's Adm'r, 4 W. Va. 600. No security having been taken for the purchase money, we see nothing to indicate that the lien has been waived. The assignee, taking the property as he does, subject to all just liens, will be required to pay the amount of this claim, after payment of the mortgage.

As to claim of Roman Menager. He also claims a vendor's lien upon the woolen mill property in Gallipolis. The facts are substantially as follows: On September 7, 1870, Menager sold an undivided one-third of this property to the Le Clercq brothers, in consideration of which they secured to him by mortgage upon their property $16,000, as a part of the consideration, and for the residue thereof agreed to pay and discharge all indebtedness that then existed against Menager growing out of a firm partnership existing between the Le Clercqs and him. For this covenant Menager took no security or indemnity. At the time of this sale there existed an indebtedness growing out of the former partnership to one Samuel Couch for $1,178, for which Menager was liable. On January 12, 1875, he was compelled to pay this indebtedness which then amounted to $1,374.33. For this amount he asks a lien upon the property. It is admitted that by reason of a clause in the deed hereinafter mentioned the other mortgagees took with notice of this lien, if any

such existed. There can be no pretense of a lien so far as the $16,000 is concerned, for which an independent mortgage was taken. While the receipt of a personal note, bond, or other obligation of the vendee is clearly no waiver of lien, the receipt of the obligation of a third party, or the taking of a mortgage upon the property sold, or upon any other property, constitutes a waiver.

We think there is no implied lien in favor of the vendor for the remainder of the consideration, viz. the payment of that proportion of the debts for which Menager was liable. There is a marked distinction between a conveyance as for money paid with a separate security for the price, whether by covenant, bond, or note, and a conveyance expressed to be in consideration of a covenant entered into by the purchaser. Where, as a part of the consideration of the deed, there is a covenant to perform some collateral undertaking, especially if the time of the performance or the amount to be paid is indefinite, or dependent upon a contingency, there is no lien. In Clarke v. Royle, 3 Sim. 499, A. conveyed an estate to B., in consideration of B. entering into the covenant contained in the deed, for paying an annuity to A., and three thousand pounds to certain persons in the event of B. marrying, and it was held the covenant did not create a lien on the estate. "The deed plainly marks out that the consideration on the one side was the conveyance of the estate, and on the other the entering into the covenants." In Parrott v. Sweetland, 3 Mylne & K. 655, a vendor, in lieu of the price of three thousand pounds, agreed to accept an annuity of one hundred pounds for the joint lives of her intended husband and herself, in case the purchaser should so long live, the purchaser engaging that his personal representatives should within three months after his decease, in certain events, pay a further sum of three thousand pounds. This was held to be not a security, but a substitution for the price, and the lien of the vendor on the land was discharged. See, also, Buckland v. Pocknell, 13 Sim. 406. In Brawley v. Catron, 8 Leigh, 522, by agreement between the vendor and vendee of land, the vendee engaged, in consideration of the land, to pay off certain debts of the vendor, and to support him during his life, and two of his daughters until their marriage. Held, the agreement for supporting the vendor and his daughters constituted no lien upon the land. In McKillip v. McKillip, 8 Barb. 552, where A. conveyed land to B., and in consideration thereof B. covenanted with A. to support and maintain him and his lunatic son, the covenant was held to create no lien upon the land in favor of the son. In discussing the question of the vendor's lien, the court observed: "The doctrine should not be extended beyond the vendor and vendee, and privies in estate or in law, and then only for unpaid purchase money. Where a covenant of the vendee is substituted for the purchase money, or as a mode of payment of the price of the land, the land should be held discharged of the lien." In Patterson v. Edwards, 29 Miss. 67, a conveyance was made in consideration of the vendee's assuming to pay the principal and interest on certain notes, and it was held the lien was lost. "If the obligation consist of a collateral covenant, or be for the discharge of a liability to a third party, no lien is retained when the conveyance is absolute; and where the obligation of the vendee to discharge such liability appears to be substituted for the purchase money, the lien is lost." Had this deed been made simply in consideration of the sum of $16,000, and of the agreement of the vendee to pay the debts for which Menager was liable I should find no difficulty in holding there was no lien. It is insisted, however, that as the conveyance was made subject to the payment of these debts, there is thereby created a condition subsequent, for the breach of which there exists a right of re-entry, and consequently a lien. The recital of the consideration of the deed is, "Subject to his proportion of the debts and liabilities of said firm, so fully and entirely that said Francis L. Le Clercq and James A. Le Clercq stand in the place of Roman Menager thereto, taking his interest in and being liable for said interest's share of the losses, debts and liabilities of said firm." The habendum clause is as follows: "The said Francis L. Le Clercq and James A. Le Clercq, assuming and agreeing to pay my said interest's share of the debts and liabilities, of the said firm, to have and to hold my said interest, being the undivided one-third part of the property, real, personal, and mixed, above described unto the said Francis L. Le Clercq and James A. Le Clercq, their heirs and assigns; but subject to said interest's share of the debts and liabilities of said firm of Le Clercq & Co., which interest's share thereof the said Francis L. Le Clercq and James A. Le Clercq agree to pay and bear."

It is insisted that this is a grant upon a condition subsequent and that upon the nonperformance of this condition, the grantor has a right to re-enter without express reservation of such right, and consequently a right of lien. While it is very doubtful whether the defendant has a right to avail himself of this condition under the allegations of his answer, as this objection was not made by the complainant upon the argument or in his brief, I feel authorized to take the question in consideration. It is frequently a matter of great difficulty to determine whether words of this nature, inserted in a grant, are to be construed as qualifications of the estate granted, running with the land, or merely as personal covenants, binding only upon the grantee. With some hesitation we have come to the conclusion that the words in this deed were intended to create a condition subsequent. In Heist v. Baker, 49 Pa.

St. 9, the deed contained the provision, "under and subject to the payment" of a sum of money at the decease of a widow, to the children named, and it was held the purchaser took subject to an express lien for the amount. In Wolveridge v. Steward, 3 Moore & S. 561, also 1 Cromp. & M. 654, certain premises were assigned, subject to the payment of rent and to the performance of covenants and agreements reserved and contained in the original lease. It was held that the lessee was not liable in an action of covenant upon the grant, and that the words "subject to payment of rent," etc., were words of qualification, and not of contract. So, also, in Sanborn v. Woodman, 5 Cush. 36, a condition in a deed of land subject to a mortgage that the grantee should indemnify the grantor from the payment of the principal and interest secured by mortgage, was held to be broken by failure to pay interest when due, and that the grantor on paying the interest might immediately enter upon the land for breach of condition. In Stone v. Ellis, 9 Cush. 95, a deed contained the following clause: "The above premises are subject to mortgage, etc., and are conveyed upon the condition that the said grantee, his heirs and assigns, do assume and pay the same debt." It was held to create an estate upon condition, which, if not performed, would entitle the grantor to enter for a forfeiture. See, also, Tayl. Landl. & Ten. § 372; Kline v. Bowman, 19 Pa. St. 24. It is true that in this case there is no right of re-entry in terms reserved, but this seems to be unnecessary where the condition of a grant is express. Washb. Real Prop. bk. 1, c. 14, § 15; Gray v. Blanchard, 8 Pick. 291; Jackson v. Allen, 3 Cow. 220; Wheeler v. Walker, 2 Conn. 201. It seems to follow from these authorities that the right to re-enter for nonperformance of a condition subsequent creates a lien upon the premises, which may be enforced in this proceeding. Stephenson v. Haines, 16 Ohio St. 478. Under all the circumstances, we think that Menager must be held to have a lien upon the premises, and inasmuch as the subsequent mortgages took with notice of his rights, contained in the original deed, he must be preferred to these mortgagees, so far as an undivided one-third of this property is concerned.

We do not wish to be understood as expressing any opinion with regard to the sufficiency of the bill in this case. We have not had occasion to pass upon a bill praying, as this does, for the cancellation of separate mortgages upon distinct parcels of property, owned by different persons, none of the defendants apparently having any common interest in the question litigated. We assume that the litigation is amicable, at least so far as the form of the proceeding is concerned, or a demurrer would have been interposed by some of the twenty-three defendants for multifariousness. A decree will be entered in conformity with this opinion.

Case No. 10,022.

NASH v. The THEBES.

[12 Hunt. Mer. Mag. 82.]

District Court, D. Massachusetts. Sept., 1844.

PILOTAGE—RIGHT TO FEES UNDER MASSACHUSETTS STATUTE—VESSELS PASSING THROUGH HARBORS.

[1. Under the Massachusetts statute regulating the pilotage of vessels (Rev. St. c. 32, §§ 15–22), and the regulations made by the commissioners thereunder, a pilot of Boston Harbor, who tenders his services to vessels bound for Lynn or Dorchester, which reject the same, is not entitled to the pilotage fee, although such vessels must necessarily pass through parts of Boston Harbor, it appearing that they would not stop therein, and that if the pilot's services were accepted, he would leave the vessel while under way, and before she was moored.]

[2. The regulations made by the commissioners pursuant to the statute are of the same force as if they had been incorporated into it.]

[3. It is not the mere clearance for a port, but being actually bound into it, that imposes on a vessel the obligation to pay a pilot.]

This was the case of a libel by Nash, a duly-commissioned pilot for the port of Boston, against the schooner Thebes. It appeared that the libellant hailed the schooner Thebes, a foreign vessel, bound from Digby to Lynn, outside the line drawn from Harding's Rocks to the Outward Graves, and from thence to Nahant Head, and offered his services as a Boston pilot, which were refused because she was bound to Lynn. He subsequently twice spoke the same vessel outside the same line, when bound from Digby to Dorchester, and offered his services as a Boston pilot, which were refused because she was bound to Dorchester. Lynn and Dorchester have respectively harbors, not within the harbor of Boston; but, in order to reach them, it is necessary to pass some distance within the line above described; and it was testified by an experienced Boston pilot that he considered Boston Harbor to extend to that line, because it was named in the statute and regulations respecting pilotage, and that a Boston pilot on board a vessel bound to Lynn would leave her at a point some distance within that line, called the northwest head of Lynn, and, if bound to Dorchester, at a point some distance within that line, near Thompson's island. The libellant claimed full fees as a Boston pilot, for the several times his services were tendered.

SPRAGUE, District Judge. In the case of Com. v. Ricketson, 5 Metc. [Mass.] 412, it was held that the 11th section of the 32d chapter of the Revised Statutes of Massachusetts applied to the port of Boston; and that a pilot whose services are refused, when duly tendered to a vessel bound into that port, is entitled to full fees. It is agreed that the words "port" and "harbor," as used in the act, are synonymous. Was this vessel bound into the port or harbor of Boston, within the meaning of the law, so as to entitle the libellant to his stated fees as a pilot? The stat-

ute has neither prescribed the fees, nor defined the duties of pilots for the harbor of Boston, but has left that to be done by certain commissioners, who are authorized to appoint and commission pilots, and to make regulations respecting pilotage. Rev. St. c. 32, §§ 15–22. The commissioners have established the fee to be paid for piloting a vessel like the Thebes into the harbor of Boston, and one of the regulations is as follows: "It shall be the duty of every pilot, after having brought a vessel into the harbor of Boston, to have such vessel properly moored in the stream, or secured to a wharf, at the option of the master, within twenty-four hours after the arrival of said vessel, if the weather permits, without extra charge." Regulations, No. 8. The duty to be performed is entire, and the fee prescribed supposes the performance of the whole duty, including that of securing the vessel to a wharf, or mooring her in a place of safety. These regulations made pursuant to the statute, are of the same force as if they had been incorporated into it; and they do not contemplate a case in which only a part of the service can be performed within the harbor of Boston, and where it must be completed in another port. In the present case, if the track of the Thebes, in going to Lynn and Dorchester, would be over waters which may, for any purpose, be deemed within the limits of Boston Harbor, it does not appear that there was any anchorage or any place used as a harbor for repose or security, or where a vessel could be moored in safety, in any part of such track. And it is proved that she would pass beyond the limits of Boston Harbor before she could be moored or secured in the port to which she was bound; and if she had taken the libellant on board, he would have left her while still under way to her port of destination, and she must have sought another pilot for the residue of the voyage. Suppose a Lynn pilot, duly commissioned by the governor, under the statute, should take charge of a vessel bound to Lynn, outside the line from Harding's Rocks to the Outward Graves, and thence to Nahant Head, the construction contended for by the libellant would compel the master to pay a Boston pilot also, and that, too, for the service of perhaps but a moment; for if it be said that, within the strict letter, a vessel is bound into Boston Harbor if she be about to cross any of its waters, it may also be said that she is bound out of that harbor the instant she enters it, and the services of a Boston pilot would no longer be required for the purpose of bringing her into it. Another result of that construction would be, that a Lynn pilot, who should merely conduct a vessel from sea, directly to his own port, would incur the penalty imposed by the 23d section of the statute for piloting a vessel into Boston Harbor. Such construction is not required either by the language of the act, or its general scope and policy, and ought not, I think, to be adopted. The Thebes was cleared for Boston, but was in fair truth bound to Lynn and Dorchester respectively, and actually proceeded directly to those ports. It is usual at Digby to clear for Boston, although bound to those other ports, and there is no sufficient ground to presume that any fraud or evasion was intended. It is not the being cleared for a port, but being actually bound into it, that imposes on a vessel the obligation to pay a pilot. Libel dismissed, with costs.

NASH (UNITED STATES v.). See Case No. 15,856.

NASH (WESTON v.). See Case No. 17,454.

Case No. 10,023.

The NASHVILLE.

[4 Biss. 188.] [1]

District Court, D. Indiana. May, 1868.

SHIPPING—PUBLIC REGULATIONS—PENALTY—HOW RECOVERED—REVENUE LAWS.

1. A prosecution for a penalty under the third section of the act of July 4, 1864 [13 Stat. 390], regulating the carriage of passengers on steamships, &c., must be by action of debt, and not a libel in rem.

2. Revenue laws are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise

In admiralty.

Alfred Kilgore, U. S. Dist. Atty., and C. E. Marsh, for the United States.

Hanna & Knefler, for defendants.

McDONALD, District Judge. The libel in this case was filed by the United States on the 27th of September, 1867. It charges that on the 3rd of August, 1867, at Evansville, Indiana, a port of delivery, the steamboat Nashville, being subject to enrollment and license under the laws of the United States, and engaged in navigating the Ohio river along the shores of Indiana, and carrying cabin and steerage passengers for hire, and being wholly propelled by steam, and being temporarily moored at the Indiana shore in that city, while in the regular course of a voyage on said river, violated the revenue laws of the United States, by her master and owners then and there failing and neglecting "to place or keep in any conspicuous place in said vessel a duly certified copy of the paper or document required by law to be placed and kept, and known as the inspector's certificate, and described as such, and defined also by sections 9 and 25 of the act of congress entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes,' approved August 30, 1852, in a place where such copy of said certificate would have been most like-

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

ly to be seen by the steerage passengers of said vessel."

The libel claims, that, by reason of said facts, the steamer is subject to a penalty of one hundred dollars, and is liable to be seized, summarily proceeded against, and holden for the payment of that sum. And it prays that a warrant for the arrest of the boat issue accordingly, &c.

On the filing of the libel, a warrant was issued on which the marshal seized the steamer, and held her till the owner obtained a re-delivery of her by executing a bond under the provisions of the act of March 3, 1847 (9 Stat. 181).

The owner of the boat now appears, and demurs to the libel. In support of the demurrer it is argued that the present proceeding is fatally defective, as being a libel in rem, whereas it should have been an action of debt. Whether this objection is valid, must depend on the act of congress on which the proceeding is founded.

The act on which the libel is framed is that of July 4, 1864 (13 Stat. 390). The third section of that act provides, "that hereafter there shall be delivered to masters or owners of vessels three copies of the inspector's certificates, directed to be given them by collectors or other chief officers of the customs by the 25th section of the act entitled 'An act to amend an act entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam; and for other purposes,"' approved August 30, 1852, one of which copies shall be placed, and at all times kept, by said masters or owners, in some conspicuous place in the vessel, where it will be most likely to be discovered by steerage passengers, and the others as now provided by law; and the penalty for neglecting or refusing to place and keep up such additional copy shall be the same as is provided by the said 25th section in the other cases therein mentioned."

The twenty-fifth section referred to in the section above cited is as follows:

"That the collector or other chief officer of the customs shall retain on file all original certificates of the inspectors required by this act to be delivered to him, and shall give to the master or owner of the vessel therein named, two certified copies thereof, one of which shall be placed by such master or owner in some conspicuous place in the vessel, where it will be most likely to be observed by passengers and others, and there kept at all times; the other shall be retained by such master or owner, as evidence of the authority thereby conferred; and if any person shall receive or carry any passenger on board any such steamer not having a certified copy of the certificate of approval, as required by this act, placed and kept as aforesaid; or who shall receive or carry any gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, or materials which ignite by friction, as freight, on board any steamer carrying passengers, not having a certificate authorizing the same, and a certified copy thereof placed and kept as aforesaid; or who shall stow or carry any of said articles at a place or in a manner not authorized by such certificate, shall forfeit and pay for each offense one hundred dollars, to be recovered by action of debt in any court of competent jurisdiction." 10 Stat. 71.

The inspector's certificate referred to in the sections above cited is a certificate of the seaworthiness of the vessel, and by the ninth section of the act last aforesaid, is required to be annually obtained. 10 Stat. 63-65.

If we consider the two sections above copied separately from all other legislation on the subject, I think that we must draw from them the following deductions:

First. That both of them contemplate a personal penalty and judgment, and not a judgment in rem. The twenty-fifth section expressly declares that the recovery shall be "by an action of debt." It is singular enough that the verbs—"shall forfeit and pay"—in the twenty-fifth section, have grammatically no nominative. Whether the "master or owner," or the "steamer" shall forfeit and pay, is not expressed. So, the third section—the section on which this prosecution is founded—does not in terms declare who shall pay the penalty. It merely says, that "the penalty for neglecting and refusing to place and keep up such additional copy shall be the same as is provided by said 25th section." But I think it very plain that the twenty-fifth section intends that the master or owner shall incur the penalty, and not the steamer; and that the construction of the third section must, in this respect, follow that of the twenty-fifth.

Secondly. By the twenty-fifth section it is perfectly clear that the action must be in debt and not in rem; and, as the third section provides that the penalty "shall be the same as is provided by the said twenty-fifth section," I think it a fair deduction that the form of action shall also be the same. It is true that the section does not say that the form of action shall be the same, but only that the penalty shall be the same. But, as the third section does not expressly say anything about a form of action, and as, upon general principles, where a statute creates a penalty and fixes the amount, debt will lie for it; it seems to me fair to conclude that congress, as these two statutes are in pari materia, meant to give the same form of action in relation to both. I think, therefore, that, if no other act of congress controls this question, debt will lie for penalty under consideration. For, "if a statute prohibit the doing of an act under a penalty of forfeiture * * * and do not prescribe any mode of recovery, it may be recovered in this form of action." 1 Chit. Pl. 101. In this case, how-

ever, taking the two sections in question together, and irrespective of any other act, I think that these sections do prescribe the action of debt. And, if so, then the rule will apply that when a statute creates a penalty and prescribes a remedy, that remedy alone can be pursued. Stevens v. Evans, 2 Burrows, 1152.

It is insisted, in support of the libel, that the eighth section of the act of July 18, 1866 (14 Stat. 180), authorizes an action in rem in the present case. That section provides, "that in any case where a vessel, or the owner, master, or manager of a vessel, shall be subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty, in any district court of the United States having jurisdiction of the offense."

This section is decisive of the regularity of the present proceeding, if the offense charged in the libel is "a violation of the revenue laws of the United States." But is the third section of the act of July 4, 1864, a "revenue law" within the meaning of said eighth section?

The act of July 18, 1866, is undoubtedly a revenue law. But that is not the question. The question relates to the act of July 4, 1864, and especially to its third section on which this libel is founded. It is certain that this third section makes no provision whatever touching revenue. The act itself is entitled "An act further to regulate the carriage of passengers in steamships and other vessels." And, consisting of 10 sections, it contains no provision of any kind concerning revenue. The act, indeed, refers to and amends various sections of prior acts, found in 5 Stat. 306; 10 Stat. 71, 715, 719. But not one of these sections relates to the United States revenue, nor do the acts in which they are found. On the contrary, all these acts concern the protection of the lives of passengers on steamers.

Bouvier, in his Law Dictionary, defines revenue to be "the income of the government arising from taxation, duties, and the like." "Revenue laws" within the meaning of the section above cited from the act of July 18, 1866, should, then, mean laws relating to the income of the government, arising from taxation, duties, and the like.

The seventh section of the first article of the national constitution provides that "all bills for raising revenue shall originate in the house of representatives." I suppose that "bills for raising revenue" are, when passed, "revenue laws" within the meaning of the eighth section of the act of July 14, 1866. It may, therefore, throw light on the question under consideration to ascertain what has been the construction of said constitutional provision. It is certain that the practical construction of this provision by congress has been to confine its operation to bills the direct and principal object of which has been to raise revenue, and not as including bills out of which money may incidentally go into the treasury, or revenue incidentally arise.

What bills are properly "bills for raising revenue," in the sense of the constitution, has been matter of some discussion. A learned commentator (Tucker) supposes that every bill, which indirectly or consequentially may raise revenue, is, within the sense of the constitution, a revenue bill. He therefore thinks, that the bills for establishing the post office, and the mint, and regulating the value of foreign coin, belong to this class, and ought not to have originated (as in fact they did) in the senate. But the practical construction of the constitution has been against this opinion. And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed which merely regulated the value of foreign or domestic coin, or authorized the discharge of insolvent debtors upon assignment of their estates to the United States, giving a priority of payment to the United States in case of insolvency, although all of them might incidentally bring revenue into the treasury. Story, Const. § 880.

Counsel for the libel argue that all acts of congress regulating commerce, and navigation, and the carriage of passengers by water, are revenue laws, as they all, more or less, incidentally touch the interests of the United States treasury. And so they hold that, since by an act of congress the master or owner of a steamer must pay a certain sum of money for the inspector's certificate already alluded to, which money goes into the treasury, and since the gist of this action is the failure to put up in a certain place in the steamer Nashville a copy of that certificate; and since a part or the whole of the penalty sued for in this case will, if recovered, go into the treasury; therefore the law creating the penalty is a revenue law. But I cannot assent to this logic. I think it is too subtle. The thread of the argument is "long drawn out" and very attenuated. To me it appears that the obvious meaning and common sense of the thing is that the eighth section of the act of July 18, 1866, in employing the phrase, "revenue laws," intended those laws—and those only—which upon their face are plainly designed to raise revenue. The act on which this libel is founded was evidently not passed with any such design. Its sole design clearly was the protection of the persons and lives of steamboat and steamship passengers.

Many other questions have been raised on the argument of this demurrer. But the conclusion above arrived at renders a notice of them unnecessary. I am of opinion that the action in this case ought to have been debt; that a libel in rem does not lie in it; and that the libel must be quashed and the suit dismissed.

NASHVILLE & C. R. CO. (HALL v.). See Case No. 5,940.

Case No. 10,024.

NASON et al. v. UNITED STATES.

[1 Gall. 53.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

SALE—BILL OF SALE—CONSTRUCTION—QUESTION OF LAW.

The court have a right to instruct the jury as to all questions of law growing out of the facts of the cause. The construction of a bill of sale is a question of law.

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

At law.

C. Jackson, for plaintiff in error.

G. Blake, for the United States.

DAVIS, District Judge. The bill of exceptions in this case is grounded on an alleged error of the district judge, in Maine district, before whom the cause was tried, in his direction to the jury, in two particulars: 1. As to the operation of a bill of sale of a moiety of the offending vessel, from Maxwell to [Benjamin] Nason, one of the plaintiffs in error. 2. In regard to the evidence respecting Atkinson, the other plaintiff in error.

In regard to the first exception, it does not appear to be relied on by the counsel in this court, and it undoubtedly belonged to the judge to declare his opinions relative to the legal effect of the bill of sale in question in application to the action. As to the second objection, when this record was read, the court had an impression, that the judge had directed the jury, as to the weight of evidence, and that he had so far interfered with their exclusive province. But on a careful examination of the whole record, it does not appear, that the direction of the judge was erroneous. He declared and delivered an opinion to the jury (says the bill of exceptions), "that the several matters so produced and proved were sufficient to prove the issue aforesaid, on the part of the plaintiffs." It is not understood, that the judge declared the said several matters to be proved. That must be supposed to have been left to the jury to determine, unless admitted. But the bill of exceptions seems to admit the said matters to have been proved, and the judge must be considered as only declaring their legal operation. So with respect to Wells. The judge declares, "that Wells ought by law to be considered as the said Atkinson's agent, in all concerns respecting said vessel and cargo." The question appears to have been, as contemplated and embraced in the direction given by the district judge, not as to the existence of the acts of Wells; they must be considered as left to the jury to determine, or so fully proved, that they were not questioned. But the direction ought to be viewed as declaring the legal operation and extent of those acts. This it was competent to the judge to direct, and to declare, if such were his opinion, "that the acts of Wells ought to be considered as the acts of Atkinson." That the court is to judge of the law, and the jury to determine facts, is a rule so familiar, and so generally respected, that I do not recollect a writ of error grounded on its alleged violation. In summing up a cause to a jury, many facts are often so clearly proved, or remain uncontested, that the judge assumes them as a basis of argument, without suggesting to the jury their known and unquestionable right that they are to determine as to the truth of the facts alleged. But an ultimate reference to the opinion of the jury, as to any such facts, is always understood to be implied. If the court, in their direction, should undertake to give a decided opinion, as to the truth of an alleged fact, which is contested, it would undoubtedly be wrong, from its probable influence on a jury, though the right of the jury, notwithstanding such direction, would remain unimpaired. But from a full view of the record in this case, the court cannot infer, and ought not to presume, that the district judge did thus exceed his legitimate authority. The fair and just construction is, that he merely declared the legal operation of facts proved, and which the bill of exceptions admits to have been proved. Judgment affirmed.

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

Case No. 10,025.

The NASSAU.

[Blatchf. Pr. Cas. 198.] [1]

District Court, S. D. New York. July, 1862.

PRACTICE IN ADMIRALTY—PRIZE—PERISHING CONDITION—SALE PENDING HEARING.

On a motion for the sale of a cargo pending the hearing, on the ground that it is in a perishing condition, the judgment of the prize commissioners, founded on their inspection, as evidenced by their report, will prevail, unless controlling evidence is produced counteracting their judgment. A sale ordered in this case.

In admiralty.

BETTS, District Judge. On Saturday last, motions were made in behalf of the libellants, upon two reports of the prize commis-

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

sioners, supported, in respect to the vessel, by the affidavit of the marshal, and in relation to the arms, by the deposition of Orison Blunt, stating that, in the opinion of the commissioners, and on their examination and personal inspection, the rifles laden on board the prize vessel Nassau are deteriorated by swettage and rust from water, and that the vessel is rapidly leaking, and is kept afloat with difficulty, and that both the vessel and her cargo of arms are in a perishing condition. The reports advise the court that, for the causes aforesaid, the said vessel and arms should be immediately sold, which recommendations of the commissioners the United States attorney moves the court to have carried into effect. Mr. Edwards, on the part of the claimants, opposes the motion for the sale of either the vessel or the arms, upon a report of one of the port wardens, that, in his opinion, the leakage of the vessel is not such as to render her state a perishing one, and because neither portion of the seized property having been yet condemned, the court ought not to deprive the claimants of their rights to the property in kind, in case it be acquitted on trial of the charges on which it was captured as prize.

It appears to the court that, in a case of speculative differences of opinion between witnesses, whether the condition of property seized as prize "be perishing or perishable, or deteriorating in value," the judgment reported to the court by the commissioners should prevail, unless controlling evidence is produced counteracting their judgment; this matter being very pointedly placed by congress under their supervision. There is no such proof furnished in this instance. The balance of evidence, in particularity and precision, is in concurrence with the report of the commissioners, and the strong terms of the act (Act March 25, 1862, § 1 [12 Stat. 374]), would indicate that the proceedings of the court should be greatly guided by the judgment of these officers, who are specially charged with the duty of ascertaining and making known to the court these particulars. The general argument against the expediency of subjecting property to peremptory sale before condemnation or trial must yield to the provisions of positive law. It does not lie with the court to prejudice the manner in which the prize commissioners shall conduct their possession or management of prize property before sale. The facts now laid before the court are, in my judgment, abundantly sufficient to authorize the sale of the vessel and the arms specified in these motions. An order for such sale will be entered accordingly.

[NOTE. A decree of forfeiture and condemnation was entered against the prize on December 11, 1862. Case No. 10,026. This was affirmed upon appeal to the circuit court. Case unreported, but see Case No. 10,028. At a subsequent date the district court refused a special fee sought to be taxed for the benefit of counsel for captors. Id. 10,027. Harlan and others, who had made repairs on the Nassau in 1860, filed their libel against her. The case was first heard upon motion of libelants for an order directing sale of vessel because of her perishing condition. Id. 6,066. The United States intervened, claiming prize, and setting up the proceedings in prize court. Upon this intervention the libel was dismissed. Id. 6,067. An appeal was taken in the last case to the circuit court, where the decree dismissing the libel was affirmed. Id. 10,028. This was again affirmed upon appeal to the supreme court. 4 Wall. (71 U. S.) 634.]

Case No. 10,026.

The NASSAU.

[Blatchf. Pr. Cas. 271.] [1]

District Court, S. D. New York. Dec. 11, 1862.

PRIZE—VIOLATION OF BLOCKADE—CONTRABAND ARTICLES.

Vessel and cargo condemned for an attempt to violate the blockade, and for being engaged in transporting to an enemy port articles contraband of war.

[This case was first heard upon motion of libelants for an order to sell cargo as being in a perishing condition. Case No. 10,025.]

BETTS, District Judge. The proofs in this case show that the vessel, registered as English, evaded the blockade of the port of Wilmington, N. C., on the 1st of May, 1862, with a cargo of cotton and other produce of the enemy's country, destined to Nassau, N. P.; that at Nassau she immediately took on board a lading consisting of arms and ammunition; and that on the 22d of the same month she departed therefrom with such contraband cargo, and with papers by which her destination purported to be St. John, N. B., but took her course directly for Wilmington again, and was captured by the United States ship-of-war in its vicinity, and in the act of attempting to enter said port. The vessel, and cargo, with several of the officers and crew, were sent to this port. A libel was filed July 12, 1862, and a claim in behalf of British subjects was filed July 29 last, claiming the vessel and cargo to be British property, by the British vice-consul at this port, with his test oath attached, verifying the prize to be British property, according to the best of his knowledge and belief, derived from his position in the consulate, and from conversations with the officers and crew of the vessel. The vessel had a British certificate of registry, executed May 16, 1862, to Augustus John Adderly, at Nassau, N. P. She was built in New York in 1851. No bill of sale or paper transfer of her at the time of registry is produced. The bills of lading and clearance were made out on the 21st of May, as were also the shipping articles, at Nassau, for St. John, N. B. The master, the mate, the engineer, and the fireman, parcel of the ship's company, and three passengers on board, were examined on preparatory interrogatories. Upon the proofs, it is clearly shown that the

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

owners of the vessel and her lading, and the ship's company, well knew of the existence of the war, and of the blockade of the port of Wilmington, when the vessel departed from that port on her last previous voyage, and when she attempted to re-enter it at the time of her capture; that on both occasions she was acting with an intention to violate the blockade, and that on the last occasion she was transporting to Wilmington articles contraband of war. It is, therefore, not requisite to detail more minutely the particulars of the proofs, or the doctrines of public law which determine the guilt and confiscability of the property.

A decree of condemnation and forfeiture of the vessel and cargo is rendered.

This decree was affirmed, on appeal, by the circuit court, November 18, 1863. [Case unreported, but see Case No. 10,028.]

[NOTE. The court at a subsequent date refused a special fee bill in behalf of the counsel for the captors. Case No. 10,027. Harlan and others, who had made repairs on the Nassau in 1860, filed their libel against her. The case was first heard upon motion of libelants to sell vessel as in perishing condition. Case No. 6,066. The United States intervened in this suit, and set up the prize proceedings as a bar to the libel. It was so decided, and the libel dismissed. Case No. 6,067. From this decision an appeal was taken to the circuit court, which affirmed the decree dismissing the libel. Case No. 10,028. This was again affirmed upon appeal to the supreme court. 4 Wall. (71 U. S.) 634.]

Case No. 10,027.

The NASSAU.

[Blatchf. Pr. Cas. 601.] [1]

District Court, S. D. New York. Jan. 17, 1864.

PRIZE—PRACTICE—FEE BILL—COMPENSATION OF COUNSEL—FOR WHAT EMPLOYED.

1. The fee bill of February 26, 1853, discussed, in its application to prize suits.

2. The prize acts of March 25, 1862 (12 Stat. 375), and July 17, 1862 (12 Stat. 608), considered as affecting fees to counsel for the captors.

3. Congress intended, by these acts, that the employment of counsel in prize cases, in order to warrant their compensation out of the prize fund, should be for the assistance of the district attorney, and in protection of the interests of the captors in common, and should be authorized or recognized by the secretary of the navy.

4. The court in this case refused to charge on the prize fund the bill of costs of a counsel employed by the captors, who did not bring himself within this rule.

[This case was first heard upon motion of libelants to sell cargo as in a perishing condition. Case No. 10,025. Subsequently a decree of condemnation was entered. Case No. 10,026. It is now heard upon the question of taxation of costs.]

BETTS, District Judge. As some novel questions of law and practice have arisen in this case, the court has reserved the disposition of them for a few days in order to have an opportunity to state the reasons governing the decision rendered. Should the present condition of the law on the subject remain, and prize captures continue to be brought before the courts for adjudication, it may become important to the profession to understand the principles upon which the adjustment of costs in cases similar to this will be made by the court.

The above suit was instituted July 12, 1862, conformably to the usual course of practice, in the name of the United States, and by the attorney of the United States of this district officially. In form and character, it is an action within the admiralty cognizance of this court, and under the sole superintendence and control of the district attorney (1 Stat. 92, § 35; 2 Stat. 761, § 6; 10 Stat. 166, § 3; 12 Stat. 375), over which no other officer possesses any legal control, except it be conferred by statutory authority. In the progress of the suit, as appears by the papers on file, Mr. Arnoux, Mr. Sandford, and Mr. Upton, counsellors of the court, became concerned as counsel for the captors in the cause, under retainer directly, either by the commanding officers of the capturing vessel or by the secretary of the navy. The action was placed upon the trial docket of this court at the November term thereafter, and was brought to a final hearing at the December term, 1862, and the vessel and cargo were then condemned and forfeited as prize of war by decree of the court. The district attorney, Mr. Upton, and Mr. Sandford have each presented bills of costs in their own behalf for substantially the same items of services in the suit, in conducting it from its inception to its termination, claiming the right to have those costs adjusted and paid to them in the character of counsel for the libellants, under the provisions of the third section of the act of congress approved March 25, 1862. Mr. Arnoux has not as yet formally presented his bill in that capacity, although he has made known to the court his relation to the cause. The bills of costs prepared by the district attorney and Mr. Upton have been heretofore adjusted by the court, and, it is presumed, have been regularly acted upon by the accounting officers of the government. That of Mr. Sandford, now under consideration, stands upon circumstances distinguishable in important particulars from the claims of the district attorney and Mr. Upton, and their allowance supplies no authority or precedent, determining the course to be followed in respect to other officers of the court, holding only the relation of counsel for individual captors. The differences will be further adverted to subsequently. Counsel, merely in that character, have no provision made for them in the standing fee bill, regulating their fees or costs in suits in court, and either fixing the amount or the mode of recovering the same. 10 Stat. 161. District

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

attorneys are recognized therein in transacting the usual business of a suit, only in the capacity of attorneys, and are compensated as such. Id. § 1. That statute has been generally understood to have codified into positive enactments the vague allowances of costs to the officers of court designated in the act, and to have annulled the system for some time prevailing in the federal courts to compensate legal services by fees given at discretion by the courts. The first section expressly declares that the compensation fixed by statute shall be in lieu of all other rates or modes of allowance in the courts of the United States, reserving the right to solicitors, attorneys, and proctors to bargain with their clients, and receive, in addition to taxable costs, such reasonable satisfaction as may be agreed between the parties, or may be in accordance with general usage within the state where the services are rendered. By sections 3 and 5 all contradictory provisions of law are repealed; and it would be difficult, since the passage of that fee bill, to uphold any rate of charges for law services, resting upon the usage or practice of admiralty or prize courts, variant from the existing fee bill.

The argument in support of the bill of costs submitted to me for approval proceeds mainly on the assumption that the costs claimed are granted by the third section of the act of March 25, 1862. If this position be tenable, the claimant is of course relieved from the restrictions of the fee bill of 1853, and stands upon the ground of quantum meruit, or upon the rule of custom or usage, as to the rate of his counsel fee, so far as that guide may yet exist in this court on the subject. The act of March 25, 1862, has not yet been the subject of judicial interpretation in this respect, that I am aware of. It is painfully obscure in some of its vital provisions. The face of the third section does not limit the number of suitors who may come into a prize litigation individually, and be guaranteed their expenses out of the general fund on condemnation of the prize, whether they personally, or the vessel with which they were connected, had any concern in the capture or not; and the question must arise whether the court can avoid recognizing each man of a crew, or of a squadron, or of an entire fleet, as a competent party to be represented in court by counsel, and compelling compensation to such counsel without regard to the necessity of his aid or its intrinsic value. In this particular instance, three distinct counsel claim to be representatives of two officers of the capturing ships. They show no express appointment from any other individual. No authority from the subofficers and crews appears upon the files empowering those two persons to intervene and represent the body of captors, nor any that would entitle the other men composing the equipages of the capturing vessels to place themselves in the same attitude with those officers, and come into the suit in their own right, as captors. Mr. Upton alone acts under an appointment embracing the rest of the crew. By virtue of the act of July 17, 1862, the secretary of the navy authorized Mr. Upton to act in behalf of the unrepresented crew, which in this case is the whole of them. Official letter of the secretary of the navy of September 6, 1862. The language of the third section authorizes the fund to be charged with counsel fees for "the counsel for the captors." Can the commanding officers of separate ships claim to themselves a right to these fees without authentic powers of attorney from each member of the crew? or can they, virtute officii, represent the whole crew, and collect their distributive shares out of the prize proceeds? These and other uncertainties are not solved by the terms of the law, and must, therefore, be determined by legal construction of the meaning and purpose of the legislature. If that intention fails to be disclosed in the enactment itself, it may be sought in concurrent legislation in pari materia, and the more directly coincident in point of time a concurrent enactment may follow, the more impressive and effective it will become as a key of interpretation. On the 17th of July, in the same session, congress passed an enabling or declaratory clause respecting the prosecution of prize suits, providing, among other things, that "the secretary of the navy is hereby authorized to appoint an agent, or to employ counsel when the captors do not employ counsel themselves, in any case in which he may consider it necessary, to assist the district attorneys and protect the interests of the captors, with such compensation as he may think just and reasonable." 12 Stat. 608, § 12. This authority was executed by the secretary of the navy in the official letter above referred to. The secretary enumerates several conditions accompanying the appointment—"that of furnishing such information as the department may require in relation to cases pending or to be brought before the court," and "that the services would be expected to continue in every case, without further charge, until a termination of judicial proceedings." In reading together the concurrent clauses of these two acts, a strong implication is afforded that congress meant that the retainer and employment of counsel in prize causes, in order to warrant them compensation out of the prize fund, should be for the assistance of the district attorney in the suit, and in protection of the interests of the captors in common; and, in that way, and in so far as they are acting under the recognition and authority of the secretary of the navy, either by his direct selection, or their employment by the captors themselves, in cases in which he may consider it necessary, they would be entitled to compensation as provided in the law. The act of March 3, 1863 (12 Stat. 760, § 4), repealing and explaining the prior enactments

referred to on this subject, affords strong evidence that the prior provisions were only intended to cover and be "confined to compensation for such services as may be rendered necessary by reason of the captors having interests conflicting with those of the United States, and proper, in the opinion of the court, to be represented by separate counsel from those representing the United States."

I do not consider that the legislation of congress in regard to prize suits has annulled the principles of practice governing admiralty cases, and also equity and common law actions. The courts possess and will exercise their inherent powers to restrain, in cases presenting numerous parties possessing common rights of action or defense, the crowding of the pleadings and records of the court with multitudes of persons not necessary to determine the rights in litigation. Neither will parties be permitted to encumber and embarrass the proceedings of the courts by the introduction of needless numbers of proctors, solicitors, or attorneys into the control of, or interference with, the actings of the courts. A suitor may undoubtedly employ, at his own expense, attorneys or counsel at his discretion, but the court, when appealed to, must prevent the burden of such charge being transferred to and placed upon the subject in litigation, arbitrarily, at the discretion of particular suitors. I think that this suit, having been commenced in the name of the district attorney, and Mr. Upton, under the appointment of the secretary of the navy, having assisted in conducting the prosecution, from its institution, in favor of the captors, and having had the adjustment and payment of his costs therefor out of the proceeds of the prize, prior to the presentation of Mr. Sandford's bill of costs for allowance, and no order of the court, or of the secretary of the navy, having been previously made, connecting him, as counsel for the captors, with the suit, his claim cannot be lawfully adjusted by the court and charged upon the fund. Under these circumstances, his retainer, by the captors named, was a personal one, and they are individually liable to him, if at all, for his professional services. In that respect, such services may be eminently valuable to captors. Unjust and unreasonable charges brought against the fund may be defeated or diminished; the claims of competitor captors, or their counsel may be avoided; and the proceeds of the prize within the jurisdiction of the court may, through the watchfulness and diligence of the counsel for the captors, be protected from important losses through illegal disbursements in its collection or keeping, or improvident delays on the part of agents who hold it in possession without prompt distribution. It is those extrinsic acts of supervision and control which it must generally be most useful to have wisely and actively performed for captors by their counsel; and the court cannot intend that congress meant that each captor should be entitled to appoint counsel ad libitum, who should receive a full bill of costs out of the prize fund.

The written argument submitted by Mr. Sandford in this case was able and satisfactory. My certificate to his bill of costs is not withheld because of the inadequateness or want of force and pertinency of the argument, but on the ground that I do not consider his legal relation to the cause as authorizing the court to tax his costs against this fund. The distinction between the efficacy of the consent of the district attorney to the taxation of the gross bill of costs to Mr. Sandford, and the assent of the same officer to the taxation of Mr. Upton's costs, is, that the latter holds his connection with the suit directly through statutory appointment. It is proper to remark, that although I decline to allow Mr. Sandford's costs against the proceeds in court in this suit, without exceptions to the items charged in the bill, I do not mean to be understood as passing any opinion upon the legality or justness of those allowances. Those questions have never yet arisen before me for judicial determination. An allowance for compensation to the United States attorney has been adjusted by the court, in obedience to the peremptory terms of the third section of the act of March 25, 1862, but on the construction of all the laws applicable to the subject that he could not be paid, by virtue of the taxation and because of his services in prize cases, any sum exceeding his official salary; and, in respect to the counsel appointed by the secretary of the navy, his compensation was fixed, under the statute, by that officer, and was not originally taxable by the court. The question will, therefore, be open for adjudication before the court, in any cases arising on the taxation of costs to counsel for captors in prize suits, unaffected by any previous action of the court.

The opinion of the court in the present case, therefore, is, that the costs demanded by Mr. Sandford are not taxable by the court against the fund in this suit.

Case No. 10,028.

The NASSAU.

[Blatchf. Pr. Cas. 665.] [1]

Circuit Court, S. D. New York. Nov. 18, 1863.[2]

PRIZE—BY WHAT AUTHORITY SEIZED—HOW HELD—LIENS.

1. Property seized as prize of war under the law of nations is discharged from all latent liens or incumbrances, and in this respect is distinguishable from property seized as forfeited under the municipal laws of a state.

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

[2] [Affirmed in 4 Wall. (71 U. S.) 634.]

2. Vessels and cargoes seized for a violation of the laws of blockade, or as enemy property, are prize of war under the law of nations, and not under municipal authority.

3. Decree of the district court, refusing to recognize a lien upon the vessel for repairs made and materials furnished prior to the war, affirmed.

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

In admiralty.

NELSON, Circuit Justice. The Nassau was captured on the 28th of May, 1862, by the steamer State of Georgia, while attempting to break the blockade of the port of Wilmington, North Carolina. The vessel has been sold [Case No. 10,026], and a great portion of the cargo, consisting of arms and military equipments, has been appraised and turned over to the government. Harlan and others intervened in the court below, and claimed a lien upon the vessel as material men, and for repairs made upon her at their yard in Wilmington, in the state of Delaware, in the summer of 1860. The amount claimed is some $10,000 and upwards. It is admitted that property seized as prize of war, under the law of nations, is discharged from all latent liens or incumbrances, and, in this respect, is distinguishable from property seized as forfeited under the municipal laws of a state. The learned counsel for the claimants has, with great industry and ability, sought to bring the case of the seizure of the Nassau within the latter category; but, after the judgment of the court in the case of The Hiawatha [Case No. 6,451], and especially after a state of civil war was recognized by the war-making power under the constitution, there can be no well-founded doubt that vessels and cargoes seized for a violation of the laws of blockade, or as enemy property, are prize of war under the law of nations, and not under municipal authority. This vessel was, as we have seen, captured as late as May, 1862. The case of the claimants is, no doubt, a hard one. The remedy, however, is not in the courts, but in an appeal to the government, in whose hands are the proceeds of the vessel. Decree below affirmed. [Case No. 6,067.]

[The decree in this case was affirmed upon appeal to the supreme court. 4 Wall. (71 U. S.) 634. See note to Case No. 10,026.]

NASSAU, The (HARLAN v.). See Cases Nos. 6,066 and 6,067.

NATCHEZ, The (BATES v.). See Case No. 1,102.

NATCHEZ, The (FAWCETT v.). See Case No. 4,703.

NATHAN (UNITED STATES v.). See Case No. 15,857.

Case No. 10,029.

The NATHAN HANNAN.

District Court, S. D. Florida. March 11, 1859.

SALVAGE — VESSEL LOST — CARGO AND MATERIAL SAVED—AMOUNT OF SALVAGE.

[Cited in Pent v. The Ocean Belle, Case No. 10,961, as an instance in which salvage of 45 per centum was allowed, the amount saved being small.]

[This was a libel by Philip Baker and others against the cargo and materials of the ship Nathan Hannan for compensation for salvage services.]

Winer Bethel, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This ship being lost in this case and the materials sold for $1,682.14, and the cargo appraised at $2,872.25, making an aggregate of $4,559.39. It is ordered, and decreed, that the libellants have and recover in full compensation for their services, forty-five per cent. upon the net value of the property saved by them; the net value to be ascertained by deducting from the gross value the wharfage, storage, labor bills in landing and storing the cargo and reshipping it, merchants' commissions, and other charges; and upon the payment of said salvage, costs, and charges, the marshal restore said cargo to the master of said ship, for and on account of whom it may concern.

NATHANIEL HOLMES, The (MILLS v.). See Case No. 9,613.

Case No. 10,030.

The NATHANIEL HOOPER.

[1 Hunt, Mer. Mag. 331.]

District Court, D. Massachusetts. 1839.

GENERAL AVERAGE—JETTISON—AFFREIGHTMENT—FULL FREIGHT—PART PROFITS—CHARTER PARTY—CARGO LIABLE TO DETERIORATE.

The ship Nathaniel Hooper sailed from Havana, in the island of Cuba, in June, 1838, with a cargo of sugars, to be carried to St. Petersburgh, via Boston. In the course of the voyage, about the 8th of July, 1838, she struck on the South Shoal, so called, of Nantucket Island, and was there left by the master and crew, after an unsuccessful jettison of part of the cargo, about one thousand boxes of sugar. She was left by her captain, and in this situation, being discovered by the brig Olive Chamberlain, a mate and part of the crew thereof were placed on board. The ship had suffered by striking on the shoal and leaked badly. She was put on the course for Boston, and afterwards fell in

with a fishing schooner, the Climax, from which the assistance of an additional crew was obtained, and the ship then reached Boston about the 11th of July, and before the master himself arrived, who came round by land. She was immediately libelled for salvage, and the cause was heard by Judge Davis, of the district court of the United States. The evidence in the case was very voluminous, making nearly one thousand folio pages, and eight days were occupied in reading it.

Messrs. Mason, C. G. Loring, Betton, Choate, Bartlett, and Brigham, for salvors.

C. P. & B. R. Curtis and Blair & Parsons, for respondents.

DAVIS, District Judge, made a decree, giving to the salvors one-half of the nett proceeds, reserving some points, made by the owners and insurers, arising out of the alleged misconduct and perjury of a portion of the salvors, as bearing upon another part of the case, and to be decided when the question of the division of the salvage was considered. The opinion was quite brief. The judge decided that the Nathaniel Hooper, though not derelict when the master and crew first left her, because they left with the purpose of return, yet became derelict when the master and crew afterwards gave up the pursuit of her, in the belief that she had sunk. And, being thus a case of derelict, he felt bound by recent decisions to apply the rule of one-half, as he considered this rule now so firmly established as to leave the court almost without a discretion in the matter, unless there were manifest reasons for reducing the salvage, of extraordinary force, which reasons he could not clearly perceive in this case. From this decree the owners and insurers claimed an appeal. But the parties subsequently agreed among themselves upon the amount of salvage, and the decree of the district court was modified accordingly, to the effect that the whole sum to be awarded as salvage of the ship and cargo should be $25,000, and that a further sum of $2,000 should be charged on the funds in court for fees of the libelants' counsel, whereof the sum of $1,000 was to be paid to the counsel of the libelants in the original libel, and a like sum of $1,000 was to be paid to the counsel of the libelants in the supplemental libel.[1] The costs of the cause to be charged on the funds in court.

Case No. 10,031.

The NATHANIEL HOOPER.

[See Case No. 10,032.]

[1] In the case of The Henry Ewbank [Case No. 6,376], decided in 1834 in this court, there were ten counsellors engaged, and they were allowed, by consent of parties, $5,000.

Case No. 10,032.

The NATHANIEL HOOPER.

[3 Sumn. 542;[1] 2 Law Rep. 133, 165. 1 Hunt, Mer. Mag. 334.]

Circuit Court, D. Massachusetts. May Term, 1839.

AFFREIGHTMENT — GENERAL AVERAGE — VOYAGE WAIVED—CONTRIBUTION—PRIZE PROCEEDINGS—SALVAGE—DELIVERY OF SHIP—DETERIORATION OF CARGO.

1. Where a ship, bound from Havana to St. Petersburg, with a cargo of sugars, shipped in part on freight and in part on half profits, with a right to enter and clear at Boston, in order to obtain a clean bill of health, struck on the south shoal of Nantucket, and was there, after a jettison of part of her cargo, abandoned by the master and crew, and the ship afterwards floated off the shoal, and was met and brought into port by salvors, and there libelled for salvage; and the ship was there repaired and made ready for sea; but the cargo was in part sold on account of damage, and part sold to pay duties, and part was delivered on bail to underwriters, and part was held in the custody of the court; and the ship was ready to take on board the cargo, if ready, but afterwards, owing to the admiralty proceedings, she was sold; *held*, under all the circumstances of the case, that the full freight of the sugars, of which there was a jettison, for the voyage, was to be allowed as part of the general average to be borne by the ship and cargo, and the freight, (pro rata), saved.

[Cited in Hugg v. Augusta Insurance & Banking Co., 7 How. (48 U. S.) 606; The Julia Blake, Case No. 7,578.]

2. No freight was due upon the sugars, sold at Boston on account of damage and their perishable nature; nor upon the sugars sold to pay duties; nor upon the sugars applied to pay the salvage.

3. Full freight was not due for the voyage upon the sugars delivered to the underwriters; because the ship had been sold before they were delivered to them on bail by the court; and, taking all the circumstances, the case was to be treated as one, in which both the owners of the ship, and of this part of the cargo, had reluctantly acquiesced in waiving any further prosecution of the voyage, as to that part of the cargo.

[Cited in Sayward v. Stevens, 3 Gray, 104.]

4. Full freight was not due for the voyage for the sugars in the custody of the court; because neither party was in any default on account thereof, the detention being occasioned by the common calamity, and the proceedings for salvage; and the owners thereof never having been in a condition to re-ship them.

[Cited in The Harriman, 9 Wall. (76 U. S.) 172.]

[Cited in Leckie v. Sears, 109 Mass. 428.]

5. But a pro rata freight was due upon the sugars delivered to the underwriters, and upon those detained in the custody of the court, for the voyage from Havana to Boston, upon the ground that there had been a mutual dispensation, by both parties, of any farther prosecution of the voyage.

6. No claim for half profits was admissible, as the cargo never arrived at St. Petersburg, and non constat, that it ever would have arrived there, or if it had arrived, would have yielded any profit, the whole matter of profits resting in contingency.

7. The freight, earned pro rata for the voyage, ought to contribute to the salvage with the ship and cargo.

8. In general, freight for the entire voyage can only be earned by a due performance of the

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

voyage. The only acknowledged exception is, where there is no default or inability of the carrier-ship to perform the voyage, and the ship-owner is ready to forward them, but there is a default on the part of the owner of the cargo, or he waives a farther prosecution of the voyage.

[Cited in Donahoe v. Kettell, Case No. 3,980; Hart v. Shaw, Id. 6,155.]

[Cited in Brown v. Harris, 2 Gray, 360; Bailey v. Damon, 69 Mass. (3 Gray) 94; Indianapolis Ins. Co. v. Mason, 11 Ind. 189; Libby v. Gage, 14 Allen, 263; Love v. Sortwell, 124 Mass. 446. Cited in brief in Rogers v. West, 9 Ind. 407.]

9. Freight pro rata itineris is not ordinarily due, unless there has been a voluntary acceptance of the cargo at an intermediate port: and not where there has been an acceptance from mere necessity, occasioned by an overwhelming calamity or superior force.

[Cited in The Joseph Farwell, 31 Fed. 848.]

10. The doctrines of prize courts, in the administration of prize laws as to freight, are not generally applicable to cases of mere civil commercial adventures, or cases of civil salvage.

11. The capture of a neutral ship and cargo, if afterwards restitution is decreed, does not dissolve the contract of affreightment; but, at most, it only suspends it during the prize proceedings.

12. A mere unlivery of the cargo during the voyage, occasioned by prize proceedings, or by an overruling calamity, does not absolve the carrier ship from the obligation to carry the goods to the port of destination.

[Cited in The Star of Hope, Case No. 13,312.]

13. In case of prize proceedings, if a neutral ship, carrying a neutral cargo in no default, would earn her full freight, she must wait and be ready to take the cargo on to the port of destination, when restored; otherwise, at most (it seems), a pro rata freight only would be due.

14. The cases where freight has been allowed in prize proceedings reviewed.

15. Courts of admiralty have full jurisdiction, as incidental to cases of prize, and salvage, and other proceedings in rem, to decree freight to the ship owner in proper cases.

16. Where proceedings in rem are had in the admiralty for salvage, neither party is bound to obtain a delivery of the ship and cargo on bail; and it is no matter of default on either side, to wait for the regular termination of the salvage proceedings.

17. In suits for salvage, courts of admiralty will not ordinarily, without the consent of the salvors, deliver either ship or cargo on stipulation to the claimants, where, from the circumstances of the case, it is apparent to the court that a proportion, and not a specific or gross sum, ought to be allowed as salvage.

18. If the cargo is liable to deteriorate or perish, or the ship to be injured by the delay incident to the salvage proceedings, the proper course is to apply to the court for a sale thereof. It is not a matter of right of either party to have a delivery on bail in such cases.

19. Where a charter-party contained covenants that the general owner should equip, victual, man and sail the ship during the voyage, and carry the outward and homeward cargoes to their proper destinations, and the cabin and some part of the ship were retained by the owner; *held*, that the general owner remained owner for the voyage, although the cargoes were on joint account of himself and the co-charterer.

[Cited in Skolfield v. Potter, Case No. 12,925.]

[Cited in Sheriffs v. Pugh, 22 Wis. 276; Swift v. Tatner, 89 Ga. 660, 15 S. E. 844.]

20. Where the master agrees for a specific sum, half of a stipulated freight, to victual, man and navigate the ship on certain voyages under the direction of the owner, the master is not owner or part-owner for the voyage.

[Cited in Hill v. The Golden Gate, Case No. 6,491.]

21. The shipper of cargo is not entitled to salvage earned in the voyage, unless the stoppage and deviation were authorized by him. Under other circumstances, his only remedy for any loss, occasioned by the stoppage and deviation, is against the master and owner.

[Cited in The Colon, Case No. 3,024; The Persian Monarch, 23 Fed. 822, 823; The Dupuy de Lome, 55 Fed. 97; Compagnie Commerciale de Transport, etc., v. Charente Steamship Co., 9 C. C. A. 292, 60 Fed. 926.]

22. The grounds, on which salvage is allowed to the owner of the ship, stated, and the distinction between his case and that of the shipper of the cargo commented on and explained.

[Cited in The Camanche, 8 Wall. (75 U. S.) 473; The Persian Monarch, 23 Fed. 822, 823.]

23. In salvage cases the general rule is, to decree all the costs and charges in the case to be borne and paid by the property saved, and apportioned among the claimants according to their respective interests. The only admitted exceptions are, where the charges have been occasioned by the gross neglect or laches of the claimant, in which case they are to be borne by him; or where the right has been forfeited by the misconduct of the salvors, in which case the court refuse any allowance to them, and compel the guilty parties to bear their own costs, expenses and charges.

[Cited in The Liverpool Packet, Case No. 8,407; The Dupuy de Lome, 55 Fed. 98.]

[Cited in Merithew v. Sampson, 4 Allen, 195.]

This was a suit for salvage, brought by appeal from the decree of the district court, awarding a salvage of one moiety of the ship Nathaniel Hooper, and cargo, to the salvors. After the appeal, the amount of salvage was adjusted between the libellants and the claimants, and the decree of the district court was, by consent, modified accordingly. The whole salvage awarded on the ship and cargo, was, by agreement, $25,000. The claim, now brought before the court, was that of the owners of the ship, for freight to be paid to them on the remainder of the cargo, not exhausted by the claim for salvage, upon the ground of the ordinary lien belonging to the owners of the ship. The facts necessary to the understanding of the case, are as follow: Nicholson Broughton was the owner of three quarters of the ship, and John Bogardus, the master, was owner of the remaining fourth part. In the month of June, 1838, the ship, being at Havana, in the island of Cuba, took on board a cargo of sugars, shipped by George Knight & Co., to be carried to St. Petersburg, via Boston, (the object of stopping at Boston being merely to obtain a clean bill of health,) part of the sugars being shipped for a specific freight, and part on half profits. By the bills of lading, part of the sugars (about one third) were consigned and deliverable to Messrs. Cramer Brothers, at St. Petersburg, or assigns, and the other two third parts to the order of Messrs. Holford

& Co. of London, or assigns. But the whole cargo was to be forwarded to Messrs. Cramer Brothers, at St. Petersburg, who were to sell the same, and hold the proceeds of two thirds, to extinguish the claims of Messrs. Holford & Co. on the same. The ship sailed on the voyage with the cargo, and in the course thereof, about the 8th of July, 1838, struck on the South Shoal, so called, of Nantucket Island, and was there left by the master and crew, after an unsuccessful jettison of part of the cargo, about 1,000 boxes of sugar. She afterwards floated off the shoal, and went adrift to sea. In this situation she was discovered by the brig Olive Chamberlain, and the mate and part of the crew thereof were placed on board. The ship had suffered by striking on the shoal, and leaked badly; she was put on the course for Boston; and afterwards fell in with a fishing schooner, the Climax, from which the assistance of an additional crew was obtained; and the ship then reached Boston about the 11th of July. Admiralty proceedings, in rem, were immediately (on the next day) had against the ship and cargo for salvage; the cargo was unlivered; a survey thereof was directed by the order of the court; and the surveyor having reported, that a large part thereof was in a perishable condition, it was ordered by the court, that all the damaged sugars should be sold; and they were accordingly sold on the 17th of July, by the marshal of the district. On the 17th of July, upon the claim and petition of the owners of the ship, she was ordered to be delivered up to them upon stipulation to pay the salvage. The ship being so delivered up, and Broughton, who had procured insurance on the freight and half profits, having abandoned his right thereto to the underwriters, they refused to accept the abandonment, but authorized him to go on and repair the ship. Messrs. Bates & Co., to whom the ship was consigned at Boston for entry and despatch (meaning for the purpose of obtaining a clean bill of health), were the agents of Messrs. Cramer Brothers, in many commercial transactions, but were not their general agents. They had procured insurance on the one-third of the cargo consigned to Messrs. Cramer, from certain insurance companies in Boston, and on the 10th of July, abandoned the same to those companies, who accepted the same, and, within sixty days afterwards, paid a total loss thereon. On the 30th of July, the ship being fully repaired, Broughton, with the consent of the underwriters, gave notice to Messrs. Bates & Co., of Boston, that the ship was repaired and in readiness to receive the cargo of sugars to be carried forward to St. Petersburg. Messrs. Bates & Co. replied by stating, that they had no knowledge of the cargo of sugars, and had taken no cognizance thereof, except under the direction of the marshal. On the 7th of August, Messrs. Broughton and Bogardus severally filed in the district court the claim and petition for freight, upon which the present controversy turned, in which the foregoing facts were in substance stated. On the 8th of August, the libellants petitioned for an appraisement and sale of the residue of the cargo unsold, (the same being in the custody of the court), upon which an order was passed, on the 9th of October, by the court, to sell so much thereof as should be sufficient to pay the duties and charges due thereon; and it was accordingly sold by the marshal on the 24th of October. On the 10th of August, Broughton addressed letters to the Suffolk Insurance Company, the Columbian Insurance Company, and to William S. Skinner, agent for certain foreign underwriters, of a similar purport to his letter of the 30th of July to Messrs. Bates & Co. At this time the companies had not accepted the abandonment made to them respectively. On the 7th of September, one half of the ship was sold by the owners, and the other half on the 26th of the same month. It is a fact, also stated in the case, that Broughton was the owner of the brig General Glover, which arrived in Boston on the 27th of July, which was a good coppered vessel, and could have carried on the cargo to St. Petersburg, the harbor of which port closes with ice in October or November, and opens again in April or May of every year.

But to proceed with the historical facts. On the 2d of November, the Suffolk Insurance Company, the Columbian Insurance Company, and the Tremont Insurance Company, of Boston, to whom the one third of the sugars had been abandoned, and the abandonment had been accepted, and the loss paid as above mentioned, applied by claim and petition, to have the same appraised and delivered to them upon stipulation, which was accordingly granted by the court, no objection appearing to have been made thereto by any of the parties in interest before the court. On the 26th of February, 1839, Messrs. Bates & Co. addressed a letter to Broughton, for the owners of the ship, stating, that they had received advices from Messrs. Holford & Co., of London, to have the sound remaining sugars shipped to St. Petersburg without delay, asking him to decide either to send them forward, or not, so that application might be made to the court accordingly for a delivery on appraisement for that purpose; to which Broughton replied on the 1st of March, declining to have any thing farther done on his part in the business. On the same day, Messrs. Bates & Co. made application to the court for a delivery to them of the residue of the sugars in the custody of the court, belonging to Messrs. Holford & Co., and the underwriters on their account; which application was refused by the court; and the sugars still remained in the custody of the court. On the 15th of the same month, the insurance companies, which had underwritten upon the cargo, and Messrs. Bates & Co., for Holford & Co., intervened and made claim thereto, and answer to the

libels, in order to contest the claim to salvage. The final decree of the district court in the premises was made on the 11th of May, 1839, from which the present appeal was taken. The answer to the claim for freight was not put in the district court, the parties intending to appeal from the decree, and it was filed in this court by consent of all parties. It contested the general claim to freight, and insisted, that, if any whatever is due, it ought to contribute to the jettison as a general average, and ought to contribute towards the salvage, the latter having been apportioned by the decree on ship and cargo only.

Choate & Riley, for claimants.

Mr. Blair, Mr. Parsons, and B. R. Curtis, for respondents.

STORY, Circuit Justice. Such are the most material facts, in the present case, which are somewhat complicated, but all of which have been deemed important to be brought to the view of the court upon the present occasion. The question of freight has been accordingly argued under two aspects: (1) Whether a full freight is due upon any, and, if any, upon what part of the cargo; (2) if a full freight is not due, whether a pro rata freight is due upon any, and if upon any, upon what part of the cargo. There is certainly a great deal of novelty in some of the circumstances, under which the claim is presented; and the law, which ought to govern it, is by no means satisfactorily established in any of the authorities. To a certain extent, however, there are principles, which may safely conduct us to the correct conclusion.

There are one or two considerations presented by the case, which may be dismissed in a few words. In respect to the jettison of the cargo, it is clear, that it constitutes a case of general average, to be borne by the ship, freight, and cargo, ultimately saved; and of course in that contribution the entire freight of the cargo thrown overboard is to be added to the loss, as a part of the sacrifice, and is to be allowed to the ship-owners. This is the settled course in the adjustment of general average, and is so laid down in Lord Tenterden's work on the Law of Shipping. Abb. Shipp. (Am. Ed. 1829) pt. 3, c. 8, § 16, pp. 358–360. In respect to the sugars, which were damaged, and brought in and sold on account of their perishable nature, they are not liable to pay any freight whatsoever. As to them the entire voyage neither was, nor in fact could have been, performed, but it was defeated by an overwhelming calamity, common to the whole adventure, which made the sale a sale from necessity at an intermediate port. In such a case I conceive it to be now well settled, that no freight whatever is due. Many of the cases will be found collected in the text and the notes to the American edition of Abbott on Shipping, in 1829, pt. 3, c. 7, §§ 9–17 f, and notes pp. 300–329. But the cases on which I mainly rely are Armroyd v. Union Ins. Co. 3 Bin. 437; Hurtin v. Union Ins. Co. [Case No. 6,942]; Callender v. Ins. Co. of North America, 5 Bin. 525; Gray v. Waln, 2 Serg. & R. 229; Marine Ins. Co. v. United Ins. Co., 9 Johns. 186; Caze v. Baltimore Ins. Co., 7 Cranch [11 U. S.] 358; Liddard v. Lopes, 10 East, 526; and Hunter v. Prinsep, Id. 378; and the learned Commentaries of Mr. Chancellor Kent. 2 Kent, Comm. (3d Ed.) lect. 47, pp. 228, 229. There has here been no voluntary acceptance of the damaged sugars at an intermediate port, dispensing with the farther carriage of them, but an involuntary sale from necessity, to prevent them from there perishing by a total loss. There is no principle, which would justify a pro rata freight under such circumstances. I am aware of the decision of Lord Stowell (then Sir William Scott), in the case of The Friends, Edw. Adm. 246, the circumstances of which case are not very fully stated; and it does not appear, whether the sale of the ship and cargo, to pay salvage on a recapture, was involuntary, or with the consent of the parties interested. Certainly it does not appear, that the goods were perishable and sold from necessity. It is fair, however, to state, that his lordship does not appear to have decided the case upon any such distinction; but upon the broad principle, that, as the loss arose from the common incapacity both of the ship and the cargo to perform the voyage by reason of the blockade of the port of destination, equity suggested, that the loss should be divided; and he accordingly directed the ship and cargo to be restored upon payment of a moiety of the freight for the voyage. The case, therefore, was disposed of upon circumstances not strictly applicable to the present; for the sale of the ship and cargo seems not to have been held lawful or justifiable. I must also say, with all deference to so great a judge, that the case does not stand upon principles entirely satisfactory. Certainly it is not consistent with the doctrine of the supreme court, in Caze v. Baltimore Ins. Co., 7 Cranch [11 U. S.] 358; and its authority, as far as applies to the present case, is overcome by his subsequent judgment in The Louisa, 1 Dod. 317.

In regard to the goods sold to pay the duties, it seems to me, that they fall under the like predicament. The sale was a natural, if not a necessary, consequence, of the common calamity, and the unlading and other proceedings at the intermediate port, where the salvage was decreed; and therefore it was in a just sense proximate to the original cause of the loss. The owners were in no default for the sale, and were compelled to submit to it, as an involuntary, and not as a voluntary act—to discharge the superior claim of the government. Under such circumstances, as they have not co-

operated in the sale, they are not liable for any freight; not for a full freight, for the goods never were in a condition to be carried to St. Petersburg; and not for a pro rata freight, for the owners have not accepted them at an intermediate port, or dispensed with their farther carriage. We cannot presume, that they have derived any advantage from the sale here; and if they have, it cannot found a right to a pro rata freight, but was accidental, and without volition or election on their part. They were not bound to pay the duties out of other funds; and, indeed, it does not appear, that they had any other means on the spot to pay them.

In regard to the goods sold to pay the salvage, or moneys advanced to relieve the cargo from the salvage, to the extent of the salvage, they are to be treated exactly as if they had been lost on the voyage; for in the eye of the law it is a loss of them pro tanto, to the extent of the salvage; and therefore no freight whatsoever is due thereon. This doctrine was clearly settled in Luke v. Lyde, 2 Burrows, 882, where the owner had received his whole cargo, paying a moiety of their value as salvage; and Lord Mansfield expressly held, that, to the extent of that moiety, the cargo was to be considered as lost; so that half the goods were considered as lost, and half saved. Whatever may have been the doubts, entertained upon other points decided in that case, upon this point it has never been doubted or denied, at least to my knowledge. Lord Mansfield there took notice of a doctrine, not improper to be brought under review in the present case, that the salvors (in that case they were recaptors) are not bound to agree to a valuation, but might insist upon having the goods actually sold, if they had pleased, and taken their share of the produce of the sale, and thereby there would have been a total loss to that extent. What he thus states is ordinarily true; and probably is rarely or never departed from in the practice of courts of admiralty, unless by consent of the parties, where, from the circumstances of the case, the court clearly see that a proportion, and not a specific sum, ought to be allowed as salvage.

In regard to the claim for half profits, it is wholly inadmissible upon general principles. The half profits which were to be allowed, were the half profits upon a sale at St. Petersburg. The goods never have arrived there; and non constat, even independent of this calamity, that they ever could have arrived there, or when they had arrived there, if ever, what would have been the profits, if any. The whole claim, therefore, rests in mere possibilities and contingencies, which are incapable of being appreciated by a court of justice. The supreme court of the United States have on this account rejected the claim of profits, as an item of damages, even for a manifest tort committed on property, going on a foreign voyage, and intercepted by the wrongful act of the captors. The Amiable Nancy, 3 Wheat. [16 U. S.] 546, 560.

A suggestion has also been made at the argument, that if the petitioners have any claim to freight, the claim cannot be enforced by this court, because the lien for the freight has been displaced by the superior right of the salvors, and by the property having been transferred, by the possession of the marshal, to the custody of the court; and besides, as to Broughton's share, it has been transferred by the abandonment to the underwriters on freight. This last consideration is disposed of by the fact, that at the time, when the petition was entered, the underwriters on the freight had not accepted the abandonment. It was, therefore, rightfully filed to avail for the benefit of whom it might ultimately concern, like the claim of a trustee for his cestui que trust, or an assignor of a bond for the benefit of his assignee. The other grounds are equally untenable. The lien for freight, if any is due, is not displaced by the superior lien for salvage; but, subordinate to that, it has full validity and operation. The possession of the property by the court through its officers, is a possession protective of the interests of all concerned, and not displacing the rights or lien of any party. Nothing in point of jurisdiction is better founded, or in point of practice more extensively acted upon, than the rights of courts of admiralty to recognise and enforce all claims to freight, and, indeed, all other liens attached to property in their custody. In such cases the court considers itself as bound as matter of duty, to act in rem for the benefit of all concerned. See The Racehorse, 3 C. Rob. Adm. 101; The Martha, Id. 106, note; The Angerona, 1 Dod. 382.

The case, then, in the view, which I take of the matter, is reduced to the simple consideration, whether any freight is due upon the portion of the goods delivered to the underwriters, and on that which is still retained in the custody of the court, or on either. And let us first consider, whether full freight is due. The general principle of the maritime law certainly is, that the contract for the conveyance of merchandise on a voyage is in its nature an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due; for a partial conveyance is not within the terms or the intent of the contract; and unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due, and the merchant may well say: "Non in haec faedera veni." For this proposition no authorities need in the present state of law be cited, for it is established, as well upon principle, as authority. In Lord Tenterden's Treatise on Shipping (Abb. Shipp., Am. Ed. 1829, pt. 3, c. 7, § 1, p. 273); and in Mr. Chancellor Kent's Commentaries (3 Kent, Comm., 3d Ed., lect. 47, pp. 227, 228) it is laid down in broad terms; and in Caze v. Baltimore Ins.

Co., 7 Cranch [11 U. S.] 358, 362, the supreme court fully recognized it, saying: "Freight in general is not due, unless the voyage be performed." Such, then, being the general rule, and the voyage not having in the present case been performed by the transportation of the goods to St. Petersburg, it is certainly incumbent upon those who assert the claim, to show, that it falls within the spirit or sense of some exception. There are certainly exceptions to the general rule; but they all stand upon special and peculiar grounds. There are cases, where full freight is due, notwithstanding the goods have not arrived at the port of destination; and there are cases, where a pro rata freight is due, notwithstanding the like non-arrival. The latter will presently come under consideration. The former is properly before us in the view of the case, which I propose now to discuss. And I think the whole of the cases, in which the full freight is upon the ordinary principles of commercial law due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement, that the non-arrival has been occasioned by no default or inability of the carrier ship, but has been occasioned by the default or waiver of the merchant-shipper. In the former case, the merchant-shipper cannot avail himself of his own default to escape from the payment of freight; in the latter case he dispenses with the entire fulfilment of the original contract for his own interest and purposes. Thus, for example, if the goods be seized or detained at an intermediate port for the illegal conduct, or wrongful act, of the shipper, or if, at such intermediate port, he voluntarily insists upon receiving, and does receive his goods, the carrier ship being ready and able to carry them to their destination, there can be no doubt, that full freight is due for the whole voyage. I have said, that this is the result of the exceptions so far as they stand upon the ordinary principles of commercial law; and no case has been cited, where any of our courts of common law or equity have held any different doctrine. In the interpretation of commercial contracts, the decisions of these courts are entitled to the fullest consideration and weight; for, in general, they guide, although they do not always control, courts of admiralty in the exercise of their own judgment in the interpretation of such contracts. See The Louisa, 1 Dod. 317, 319; The Isabella Jacobina, 4 C. Rob. Adm. 77. I am aware, that in cases of prize and cases of capture and recapture, courts of admiralty have adopted some doctrines not seemingly in exact accordance with the doctrine above stated. But it is not safe or correct in many cases to reason from the peculiar doctrines arising out of the administration of international law and policy in courts of prize, to the ordinary exigencies of commerce, or the ordinary interpretation of common civil contracts. Courts of prize exercise a very peculiar and extensive jurisdiction sui generis, upon very enlarged views, and a sort of international discretion, which do not belong to the common functions of other courts, or even of courts of admiralty in the exercise of their jurisdiction, as instance courts.

With these principles in view, let us consider the cases cited at the bar on the subject of full freight. The first is the case of the The Racehorse, 3 C. Rob. Adm. 101, where a British ship was freighted from Liverpool in ballast to St. Martin's and Lisbon, to bring a cargo of fruit to Ireland; and was taken on her return voyage by a French privateer off Falmouth, and afterwards recaptured and brought in to Falmouth. Upon the capture the master was taken out; and, owing to that fact, no claim was given into the court of admiralty for the cargo until the 17th of July, the ship having been restored by consent on the 2d of July; and restitution of the cargo was not decreed until the 16th of November. A claim was made for the full freight of the voyage, although the vessel refused to wait until the restitution of the cargo, the owner of the ship being dead, and his administrator declining to interfere. Lord Stowell (then Sir William Scott) allowed the full freight, upon the ground that the ship was not bound to wait. On that occasion he said: "Something is to be conceded by way of accommodation; a reasonable time is to be allowed; and, if it is not allowed, a proportion of the freight is to be deducted. But I cannot say, that a ship shall wait all this time for the mere chance of taking on the cargo, if eventually it shall be restored. It is said, that the contract was totally dissolved; but by whose means happened it that it was so dissolved? It was in no degree owing to the owner of the ship; but that the owner of the cargo was not ready to proceed. Though he acted as discharged from his contract, he is substantially entitled to the benefit of it. Upon these grounds, I am of opinion, that the ship is entitled to the whole freight." But he deducted therefrom the contributory share of the freight for the salvage on the recapture. Now, with all possible respect for this eminent judge, I cannot accede to the doctrine here promulgated, under any of its aspects, at least as applicable to ordinary cases of civil salvage. And I must also say, that the reasoning itself is not quite consistent throughout. In the first place, it is an inadmissible assumption, that the capture dissolved the contract of affreightment. At most, it only suspended it; and it reattached upon the recapture. Recapture confers a title to salvage only, and restores, and does not extinguish, the rights of neutrals, and, a fortiori, not the rights of fellow-subjects upon the admitted principles of the British laws. But if the contract were dissolved by the common calamity of capture and recapture, the voyage being unperformed, how does that give any rights to the ship-owner, beyond those of the owner of the cargo? This dissolution takes place, without

any default on either side, by mere operation of law; and then the parties, as it seems to me, are entitled to stand in pari jure upon their contract. If the whole voyage is not performed, the freight is not due. Lord Stowell himself admits, that the ship was bound to wait a reasonable time, after she was restored, or, otherwise, a pro rata freight only would be due. But, if the contract was positively dissolved, and the cargo was not ready to proceed, what ground is there to say, that the ship-owner, being discharged from his contract, is bound to wait an hour? His rights, if any, are complete at the time of the dissolution of the contract. Surely he is not bound to wait to fulfil a duty, from which he is discharged. And, indeed, it does not strike me, that there is the least difference, upon the principle stated by his lordship, whether the cargo was ready to proceed or not. If the ship was ready, and the contract was dissolved, upon what grounds can the master be required to do an act, from which, as a matter of contract, he is released? In the case of The Martha, 3 C. Rob. Adm. 106, note, the same learned judge granted full freight under the following circumstances. An American ship, bound from America to Amsterdam, was captured in the Channel by a British cruiser, and brought in on the 20th of December, 1800; and the ship was restored on the 10th of January, 1801. On the 15th of January, a commission of unlivery passed; and on the 16th, one fourth of the goods composing the cargo was restored. It being necessary, in order to get at these goods, to unliver the rest of the cargo, the whole was accordingly unlivered. The claimant of the goods insisted on the ship's taking them on board again, offering to be at the expense of the reshipment, and to have them carried on to their destination upon the original freight. This was refused by the master; and the question was, whether he was entitled to full freight on these goods or not. Lord Stowell gave the full freight upon the mere dry authority of a decison of Sir James Marriott, which he thought himself bound to follow. For myself, I feel bound to say, that I should have been better pleased if the learned judge had applied his great mind to examine the case upon principle, and instructed us as to the grounds upon which such a doctrine is maintainable. I am unable to perceive any, either of law, or of reason, or even of common justice. Then came the case of The Hoffnung, 6 C. Rob. Adm. 231, before the same learned judge. It was the case of a capture of a neutral ship and cargo in August, 1805, made by a British cruiser. On the 1st of September, a decree of restitution of the ship was passed, and a commission of unlivery of the cargo was on the same day taken out by the captors, and the unlivery was completed on the 26th of September. Notice was given to the master before the unlivery of the whole of the cargo, that he would be required to carry it on the voyage. The claim for the cargo was given in on the 24th of September, and on the 28th of the same month the cargo was restored. The master was then required to take it on board again; but he refused, and made a claim for full freight. Lord Stowell, upon the footing of the case of The Martha, already cited, held the ship entitled to full freight, and said; "The contract between them (the parties) ceased by the act of unlading. At the moment of separation the vessel acquires a right to proceed; and it is by accident only, that she continues here. That accident cannot, I think, have the effect of reviving the contract, which had been before dissolved." To this case, as to the former, the same substantial objection applies. The capture of a neutral ship has never been admitted by the courts of the United States to operate a dissolution of the contract of affreightment. At most it only suspends it; and when restitution takes place, the parties are also restored to their antecedent rights. The vis major having ceased, the jus postliminii operates upon the case. In my humble judgment, it would be a most mischievous doctrine to the great interests of commerce and navigation, that a mere unlivery of cargo by superior force, or by the order of a court of prize, should operate to dissolve a contract made between mere neutrals. How is it in relation to other cases, arising in the common course of navigation? Suppose a ship meets with a calamity in the course of a voyage, and is compelled to put into a port to repair, and there the cargo is required to be unlivered, in order to make the repairs, or to insure its safety, or ascertain and repair the damage done to it; would such an unlivery dissolve the contract for the voyage? Certainly not. And if the contract is dissolved, by operation of law, how happens it, that the ship-owner can entitle himself to assert a right to freight, when he has not performed the voyage; and the owner of the cargo, who has been in no default, and is prevented by the peril or the loss, or by an unlawful capture, from receiving it, is to be treated, as if he had violated his contract? If dissolved, it seems to me, that the contract must be treated, as dissolved by an overwhelming calamity, which absolves both parties from all obligations under it. Neither party has contracted with reference to such a state of circumstances; and the law would seem to be manifestly unjust, if, in such a case, it threw the whole burthen on one side. The case of The Angerona, 1 Dod. 382, on the instance side of the court, requires but a single remark. The full freight was there given, avowedly upon the ground, that the owner of the cargo was in default, and that the sale of a part of the cargo at an intermediate port, for which freight was demanded, was occasioned by that default. Whether the facts of the case, which are very imperfectly stated, justified that conclusion or not, it is not for this court to say. But the decision proceeds upon a very clear principle of law, that the

whole freight is due, if the whole would have been earned but for the default of the owner of the cargo. In the case of The Isabella Jacobina, 4 C. Rob. Adm. 77, an application was made, on the part of a Swedish ship, for freight under a charter-party to go from Plymouth to Radstow, there to take in a cargo of pilchards for Venice. The ship had sailed to Radstow, and taken in her cargo there, and had proceeded a few days on her voyage, when she met with bad weather, and returned to Falmouth. A few days afterwards an embargo was laid on Swedish vessels; the cargo was unloaded, and restored to the owners, who were British merchants. Lord Stowell held, that no freight whatever was due, upon the ground, that the ship had performed but a small part of her voyage, and the Swedish embargo having taken place, it rendered the fulfilment of the contract impossible. The cargo could not wait till the embargo might be taken off, and, being British property, it was restored. Now, this case seems to proceed upon true principles. As an unlivery of the cargo had taken place under the authority of the British government, it seems not distinguishable from the cases already cited, except that the ship was not ready to go on, but the cargo was. If the contract was dissolved by the embargo and unlivery, which was of a hostile nature, there might have been room for the suggestion, that the rights of the ship-owner ought not to be affected thereby. In truth, however, if so dissolved, without any default on either side, the true doctrine applicable to such a case would seem to be, that neither party could claim any thing under the contract of affreightment. The case of The Louisa, 1 Dod. 317, approaches somewhat nearer to the present. There, the ship and cargo, bound on a voyage from Quebec to the island of Madeira, was captured in December, 1812, by an American privateer, and recaptured on the 11th of January, 1813, by a British ship of war. At the time of the recapture, the ship was in a distressed state, having had some of her masts carried away in a gale. A prize-master was put on board with orders to proceed to the first port in England; but the ship having twenty-four feet of water in the hold, and the crew being exhausted, it was found impossible to proceed to England; and the ship put into Corunna, where the cargo was disposed of under the authority of the British consul. On a suit for civil salvage in addition to military salvage for the recapture, the court sustained the claim for both; and a claim was made for freight. Lord Stowell refused the claim saying; "With respect to freight I am of opinion, as well upon the equity of the case as upon the authority, which has been cited (Hunter v. Prinsep, 10 East, 378), that none is due, the voyage having been totally defeated by the sale of the goods at Corunna." That is precisely in coincidence with the doctrine, which I have already had occasion to assert in the present opinion. See, also, The Wilelmina Elenora, 3 C. Rob. Adm. 234.

The cases in the admiralty, therefore, do not, in my judgment, in any manner shake the proper doctrine, which is deducible from the common law authorities upon the subject of freight in ordinary commercial adventures. Then, do the circumstances of the present case furnish any distinct ground for the claim of a full freight? It has been suggested, that the owners of the cargo have been guilty of some default in not obtaining a delivery of the cargo at an earlier period, when the ship was restored and repaired, and ready to receive it. It has been said, in reply, that there was no default on any side; but if there was any, it certainly was a prior default of the master and crew of the ship in deserting her, when she struck on the South Shoal, and leaving her to float off as a derelict; and that all the subsequent detention and loss have arisen from that cause. My opinion is, that there has been no default on either side. The striking on the shoal was a peril of the sea, and the desertion of the ship was an act justified by the necessities of the case. I agree, that the subsequent occupation of the ship by the salvors was a common and most valuable service consequent upon the abandonment of her; and that all the detention has arisen from that source. Still, it is but an incident to a common calamity. It is said, that the ship being ready on the 30th of July to receive the cargo, and due notice being given thereof, she was entitled to her full freight, because the cargo was not then ready to go on the voyage. That it was not ready, is admitted. But was this owing to any default of the owners, or was it a natural, if not a necessary, consequence of the common calamity? My opinion is, that it was the latter. What were the circumstances of the case at that time? The owners of the cargo were not upon the spot; but resided in a distant country. The Messrs. Holford and Company had no agent here, authorized to act for them, and to stipulate for their part of the goods on bail, if a delivery could have been obtained of them from the court. In cases of salvage, I do not know, that the owners of either ship or cargo have, as a matter of right, any claim to have either of them delivered on bail at an appraisement. If either of them be perishable, or may sustain injury from the delay of the salvage proceedings, a sale may be, and usually is, authorized by the court. But, unless the salvors assent to a delivery on bail, it is not the usual practice of the court to direct a delivery on appraisement. The salvors have quite as strong a right to insist upon having their claims fixed by a sale. And where the court clearly sees from the nature of the case, that the salvage ought to be, not a gross sum, but a proportion, I think it would be difficult to find any duty of the court to deliver on an appraisement. At least such a case would present a ground

for the exercise of sound discretion on the part of the court in refusing it. But here the owners were not only not upon the spot, but one-third of the cargo was abandoned by the agent of Messrs. Cramer to the underwriters on that part of the cargo on the 10th of July, long before the ship was repaired. The agents, therefore, could take no steps for the delivery on bail. The underwriters, if any persons, were bound to make the application. They did make it on the 2d of November, and with the consent of the salvors obtained a delivery on bail of the remaining sugars abandoned to them. But it was certainly then too late to carry them on to St. Petersburg that season. It is said, that they could by an application at an earlier period have obtained a delivery in time to have been sent on that season. I do not know, that there is any proof of that; and if there were, it would still remain to inquire, whether there was any duty on their part to submit to an appraisement and delivery on stipulation. My opinion is, that there was no such duty. It was an affair of discretion to be exercised by them or not at their own pleasure. They were in no default; for the property being brought into a court of admiralty by a claim of salvage, they had a right to wait the regular course of proceedings on such a claim, without being treated as wrong doers or defaulters. If the master and owner of the ship were so solicitous to proceed at once on the voyage, why did they not offer to procure such delivery on bail, and become themselves the stipulators for the underwriters?

But what is most material in this posture of the case, is, that in the intermediate time, between the 30th of July, when the notice was given, and the 2d of November, when the delivery was obtained, the owners of the ship had, in fact, sold her; one half on the 7th September, and the other half on the 26th of September. Now, this sale, in my judgment, was a complete discontinuance of the offer, admitting it to be a continuing offer up to that time, to receive the cargo on board, and carry it to St. Petersburg. They had then parted with their power and control over the ship; and they had no right to substitute any other ship or vehicle of conveyance in her stead. It was not a change of ship required or justified by necessity; but it was a sale from choice. So that it seems to me, that the sale of the ship was a withdrawal of the offer to carry the cargo to St. Petersburg, on the part of the owners of the ship; and the obtaining of the one third from the custody of the court, on stipulation, without any notice or request to carry on that part of the cargo to St. Petersburg, was a voluntary acceptance thereof by the underwriters at Boston, and a dispensation of the ship-owners from the duty of carrying them farther. In respect to the other part of the cargo belonging to Messrs. Holford and Company, there was, as has been stated, no agent here, who was authorized to require a delivery of them from the court; and certainly there was no duty on any party to require it; or if there was any such duty, it was a duty falling on the master of the ship. These goods still remain in the custody of the court. They have never been delivered to any party, and the court has refused to deliver them. But Messrs. Bates and Company, as agents of Messrs. Holford and Company, in February, 1839, gave notice to the ship-owners, that they wished them carried on to St. Petersburg; and the latter then declined to do so. From this period, therefore, there was a relinquishment of all attempts on either side to enforce a strict performance of the original contract. My opinion, upon these circumstances, is, that no claim is made out in law, or in equity, or in general justice, for a full freight. I think, that no party has been in default; and each has stood upon his rights, and has awaited, and had a right to await, the regular determination of the admiralty proceedings. If the ship-owners would have earned their entire freight, they were bound to perform their whole contract. The progress of the voyage was interrupted by a common calamity; and hitherto there has been no opportunity for the ship and cargo to resume the voyage, as the admiralty proceedings have not yet terminated. "Adhuc sub judice lis est." If the ship owners would have entitled themselves to an entire freight on the property saved from the salvage, and capable of being carried on, they should have waited, until the whole adventure could be resumed; and then have required the owners of the cargo to allow them to carry it forward, when it was released from the admiralty proceedings. They have elected a different course; and they are, in my judgment, bound by their election. They ask the court to give them full freight, although it has not been earned by a completion of the voyage, and although the other side has been guilty of no default, and has not freed them from the obligation. They sold their ship within a sort period after she was repaired for the voyage; and yet they ask a compensation, as if they had borne all the expenses, and burthens and perils of the subsequent part of the voyage. I repeat it, I can find no law, or equity, or justice, in such a claim, and therefore I do not hesitate to reject it.

The next question is, whether there is any just claim to a pro rata freight. I think there is. Taking all the circumstances together, I think the farther prosecution of the voyage has been abandoned or waived by both parties. The ship-owners have sold their ship, and can no longer complete it. The underwriters on the one third of the cargo have not asked to have the voyage prosecuted. The owners of the other two thirds have asked it; but under circumstances in which it became impossible for them to ship it. The parties have, therefore, withdrawn from the contest, without having

been able to prosecute the voyage, or effectually to seek its prosecution beyond the port of Boston. The just operation of law upon this state of things, in my judgment, is that which I have indicated. The owners of the cargo are content to take their goods here, and the ship-owners to leave them here. It is, if I may so say, a reluctant acquiescence forced upon them by an overruling necessity. I shall, therefore, decree a pro rata freight, leaving the amount to be ascertained by the auditor to be appointed by the court, according to the agreement of the parties. There is another point suggested at the argument, and that is, whether the freight pro rata ought to contribute either to the general average, or to the salvage, or to both. My opinion is, that it ought to contribute to both. To the general average, because it is one of the interests saved by the jettison; to the salvage, because it is an expense incurred, like the general average, for the benefit of all concerned. [2]

After the delivery of the foregoing opinion, another question was presented to the court. One of the salvor vessels was the brig Olive Chamberlain, of which Samuel C. Hunt was owner, and Zacheus Holmes was master. Salvage was awarded to the master and owner of the brig by the decree; and now a claim was interposed by John Dyer for a moiety of the salvage decreed to Hunt, upon the ground, that he was joint-owner of the brig with Hunt for the voyage, under a charter-party executed by Hunt on the one part, and Hunt and Dyer on the other part. He also claimed salvage as joint-owner of the cargo for the voyage with Hunt.

The charter-party was in substance as follows:

"This charter-party, made and concluded upon in the city of Boston, the twenty-fifth day of April, in the year one thousand eight hundred and thirty-eight, between Samuel C. Hunt, owner of the brig Olive Chamberlain, of Boston, of the burthen of two hundred and six tons, or thereabouts, register measurement, now lying in the harbor of Boston, of the first part, and John Dyer and Samuel C. Hunt of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, doth covenant and agree on the freighting and chartering of the said vessel unto the said party of the second part, for a voyage from Boston to the Havana, in the island of Cuba, and back to Boston, on the terms as following, that is to say: First.—The said party of the first part doth engage, that the said vessel in and during the said voyage shall be kept tight, stanch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such voyage. Second.—The said party of the first part doth further engage, that the whole of said vessel, (with the exception of the cabin, and the necessary room for the accommodation of the crew, and the stowage of the sails, cables and provisions), shall be at the sole use and disposal of the said party of the second part during the voyage aforesaid; and that no goods or merchandise whatever shall be laden on board, otherwise than from the said party of the second part, or their agent, without their consent, on pain of forfeiture of the amount of freight agreed upon for the same. Third.—The said party of the first part doth further engage to take and receive on board the said vessel during the aforesaid voyage, all such lawful goods and merchandize as the said party of the second part, or their agents, may think proper to ship.

"And the said party of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said party of the first part, doth covenant and agree, with the said party of the first part, to charter and hire the said vessel as aforesaid, on the terms following, that is to say: First.—The said party of the second part doth engage to provide and furnish to the said vessel, cargoes or ballast sufficient to proceed to sea. Second.—The said party of the second part doth further engage to pay to the said party of the first part or his agent for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say: fifteen hundred dollars for the voyage out and home, one half to be considered as earned on arrival in Havana; together with all foreign port charges and pilotage. The remaining half to be earned on delivery of a cargo in the United States; the whole payable in Boston, the port charges in the island of Cuba to be paid there free of commission.

"It is further agreed between the parties to this instrument, that the said party of the second part shall be allowed, for the loading and discharging of the vessel at the respective ports aforesaid, lay days as follows, that is to say: twenty-five running lay days from her entry in Havana, and in case the vessel is longer detained, the said party of the second part agrees to pay to the said party of the first part, demurrage at the rate of twenty Spanish milled dollars per day, for every day so detained, provided such detention shall happen by default of the said party of the second part, or his agent. It is also further understood and agreed, that the cargo or cargoes shall be received and delivered alongside of the vessel within reach of her tackles, or according to the custom and usages at the ports of loading and discharging. It is also further understood and agreed, that this charter shall commence

[2] See Mr. Phillip's edition of Stevens & Benecke on Average (page 220, notes a, l); The Dorothy Foster, 6 C. Rob. Adm. 88; The Progress, Edw. Adm. 210; The Racehorse, 3 C. Rob. Adm. 101.

when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to the party of the second part, or his agent. It is further understood and agreed that the party of the second part may send the brig to one or more ports in the island of Cuba, by paying demurrage as aforesaid from and after the twenty-five lay days aforesaid have expired; and should the brig proceed to a southern port of discharge the vessel will receive demurrage from the delivery of her cargo at a southern port until her final discharge in Boston. Should the brig take freight to Europe according to instructions this charter-party to be considered null and void."

["To the true performance of all and every of the foregoing covenants and agreements, the said parties each to the other, do hereby bind themselves, their heirs, executors administrators and assigns, (especially the said party of the first part the said vessel, her freight, tackle, and appurtenances; and the said party of the second part the merchandise to be laden on board,) each to the other, in the penal sum of fifteen hundred dollars.

["In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the day and year first above written. Samuel C. Hunt.

[John Dyer."] [3]

The master's deposition was taken and used in the cause. From that deposition it appeared, that he commanded the brig on the voyage from Boston to the Havana and back again in the summer of 1838, on which the salvage was earned, by bringing the ship Nathaniel Hooper, which was found derelict at sea, into the port of Boston. He sailed the brig under a verbal contract with Hunt, similar to a contract reduced to writing, which had been made between him and Hunt in the next preceding voyage, and of which he annexed a copy as follows—"Boston, January 10, 1838. It is agreed between S. C. Hunt, and Zacheus Holmes, that the said Zacheus Holmes shall receive from S. C. Hunt the sum of seven hundred and fifty dollars, being one half the charter for said brig for a voyage from Boston to the Havana and back, with the demurrage for sailing, victualling and manning the brig 'Olive Chamberlain, together with half cabin freight and all passage money, after deducting half port charges in Boston, as is customary. (Signed) Samuel C. Hunt."

He also received orders for the voyage signed by Hunt and Dyer as follows: "Charlestown, April 24, 1838. Capt. Zacheus Holmes. Sir,—You being master of the brig Olive Chamberlain, now loaded for Havana in Cuba, we wish you, on your arrival at that place, to advise with John Morland, Esq. as to the state of that market. We also wish you to dispose of our shipment to the best advantage; first obtaining the assistance of Mr. Morland, if his services can be had to our interests. We further wish you to obtain a cargo of molasses on the account of us or the brig, provided you can, without paying more than 3½ rials for a good sweet article. In case you do not get a cargo, as aforesaid, you are at liberty to take freight for the United States. We also give you further liberty to draw on us at sixty days for an amount sufficient to pay the balance which you may need for a cargo of molasses, after paying in the net proceeds of your outward cargo. In such case, you will sign your bills of lading in favor of Samuel C. Hunt, and draw on the same, which draft we both agree to protect. You will please be particular in stowing your cargo, and have it well fastened under deck. In case of no cargo or freight to the United States, you are at liberty to take freight to Europe, providing one offers at a high rate. We also give liberty to go to Mariel or other places of about equal distance, if for our interests. Wish for you to advise us of your doings as often as convenient. Sam'l C. Hunt. John Dyer."

The brig went on the voyage, and took on board, at Havana, a return cargo for Boston on the joint account of Hunt and Dyer; and the salvage was earned on the return voyage. The master also testified, that his contract to sail and victual and man the brig was wholly with Hunt, and he looked to him alone for pay; and that he acted for Hunt and Dyer only as to the cargo. The return cargo was purchased with funds sent out on the outward voyage.

[3][Upon this state of facts, Betton, of counsel for Dyer, made two points: (1) That Dyer was, under the charter party, joint owner of the brig for the voyage, and entitled to share in the salvage; (2) if not, that he was joint owner of the cargo and was entitled to salvage for that in common with Hunt.

[Betton in support of his points argued as follows: In April, 1838, Samuel C. Hunt was the owner of the brig Olive Chamberlain, of the value of $8,000. Zacheus Holmes was a master mariner, who had sailed her on some occasion previous, at half profits, he victualling and manning. John Dyer was a capitalist, and willing to furnish means to any enterprise, which might aid his neighbors and benefit himself. A voyage was concerted among these three persons and is evidenced by the charter party, the joint letter of instructions, and the deposition of Capt. Holmes. Holmes swears that he made the bargain with Hunt in the presence of Dyer, as to the sum for which he would victual, man and sail her, which was the sum of one half the charter $750, and one half the demurrage. Hunt and Dyer, by the charter party, were to furnish a cargo or ballast to

[3] [From 2 Law Rep. 165.]

[3] [From 2 Law Rep. 165.]

go to sea. The brig, by the letter of instructions of Hunt and Dyer, was to go to Havana, &c., for a cargo, and Captain Holmes, as agent for Hunt and Dyer, was directed to purchase a cargo of molasses, if he could purchase at a certain rate, and to pay for the same in part by the articles sent out by them, as cargo, and in part by bills, which Hunt and Dyer by the aforesaid letter agreed to meet. If he could not purchase a cargo of molasses, then by the charter party and instructions, the captain was to take a freight for the United States. If these both failed, he was at liberty to take a freight for Europe.

[Here were joint orders, in relation to the employment of the brig, the purchase of the cargo and the obtaining of freight, dated April 24, 1838. Another paper was drawn up, called a "charter party," dated April 25, 1838, in which Hunt agrees to become joint charterer with Dyer, and they are to pay for the brig victualled and manned and sailed, for the voyage or voyages, to Havana, &c. and back to the United States, cargo or no cargo, freight or no freight, fifteen hundred dollars; one half of which sum is for the use of the brig; the other half for the victualling, manning and sailing, that is, Hunt was to furnish the brig for $750, and Dyer was to pay for the victualling, manning and sailing, $750. The foreign port charges and demurrage were to be shared equally. The profits of the expedition were to be upon the cargo, or freights obtained, and to be shared equally by the charter party. Hunt and Dyer were, by this agreement, called a "charter party," to have the whole use, benefit and profit of the brig, so far as it could be appropriated to cargo or freight.

[Captain Holmes obtained—

35,850 gallons molasses, value at 32 cts.	$12,472 00
1 Box Sugar 426 lbs. at 13.....	55 38
36,500 Segars, on freight, supposed to be worth 16,—.....	584 38
	$13.111 76

—as stated by Mr. Hunt, and admitted to be correct by Dyer. The molasses and sugar for account of Hunt and Dyer as purchasers, and the segars on freight. Here was a joint undertaking of mercantile adventure by Hunt and Dyer. The vessel was put into common stock, at $750, for the use, and Dyer was to pay for victualling, manning and sailing, $750, and demurrage and port charges to be paid equally. He was to sail on joint account, in their joint employ.

[I submit that the joint letter was the appointment of the captain, who was to victual, man and sail for a round sum, to wit, $750, being one-half the charter, and demurrage, as he states in his deposition. It also makes him supercargo. I submit, then, that the reasonable construction of all the evidence, taken together, is, that Hunt and Dyer were owners for the voyage. That Hunt divested himself of the character, and responsibility of owner and stands in the character and with the responsibility of joint charterer of the vessel, as he is joint owner of the cargo, with Dyer. Holmes was in by special contract, and not as the servant or agent of the owner of the vessel as such—as appears by his deposition—and could not be removed by Hunt.][3]

In the case of Hooe v. Groverman, 1 Cranch [5 U. S.] 214, the question turned upon the fact, as to the ownership for the time being, that the vessel itself was not let, but only the tonnage. In the present case, there was a letting of the vessel itself by Hunt, or an agreement, that he and Dyer would have the whole use for all beneficial purposes, and Holmes was let in under a special contract; Hunt thereby divesting himself of the character of owner, and assuming the character of joint charterer. Hunt is not in possession as owner. The distinction between letting the vessel and taking the freight will be found in Abb. Shipp. 253; in Coggs v. Bernard, 2 Ld. Raym. 909; and in Cushing's Poth. Cont. art. 1, § 25, pp. 14–16. Lex Mercatoria Americana, 103, remarks on the case of Parish v. Crawford, 2 Strange, 1251. The general rule is, that in a freighting ship, that is, where freight is taken by the ton, or by measurement, or by the piece, the owners of the freight, as such, are not entitled to salvage. One reason is, the owner of the vessel is in possession as owner, with all the responsibilities of owner, and the captain is his servant, put in by him, and liable at any moment to be dismissed by him, and the owner is liable for any deviation or other misconduct of the captain. But such was not the case here. Another reason is, that it might bring, unnecessarily, too many parties before the court. But the court say, that this rule is not absolute, but is in the discretion of the court. In Bond v. The Cora [Case No. 1,621], and here, Hunt and Dyer claim in the libel salvage, as joint charterers of the Olive Chamberlain and joint owners of the cargo. Here, the owner of the vessel would not be liable for supplies furnished the vessel, according to Holmes' deposition and the other papers. Cutler v. Winsor, 6 Pick. 335; Thompson v. Hamilton, 12 Pick. 425. And as to freight taken, there was no privity of contract between Hunt, as owner, and the shippers. The contract was between Hunt and Dyer, as charterers, owners, pro hac vice, by Captain Holmes, their agent and supercargo, and the shippers. James v. Jones, 3 Esp. 27; Abb. Shipp. 27, 28; Jac. Sea Laws, 213, 214. Hunt, therefore, was not in possession as owner; was not liable for supplies as owner, and was not responsible, at least to Dyer, for the misconduct of the captain, as owner. If, then, upon the evidence of the agreement, called a charter-party, and the

[3] [From 2 Law Rep. 165.]

joint letter of instructions, and Captain Holmes' deposition, Hunt has divested himself of the character and responsibilities of owner, as it respects Dyer, and stands only as joint charterer, the salvage, awarded to the owners of the Olive Chamberlain and cargo, is to be equally divided between Hunt and Dyer.

2d. But if the court should be of the opinion, that, upon the legal construction of the evidence, Hunt remained owner of the vessel, pro hac vice, then the share of the brig, or the ratio which the value of the brig bears to the value of the brig and cargo, will belong exclusively to Hunt. And the next question is, to whom the salvage allowed for the value of the cargo will belong. Of the cargo, Hunt and Dyer are stated in the libel to be joint owners (and this is proved by Holmes), except the cigars, which they carried on freight. Salvage is allowed to the property put at risk. The court never allow the captain salvage for property by him put at risk. They do not allow him to become insurer. They do not encourage him to jeopard his owner's cargo and go a wrecking. His deposition is not evidence for himself, but only between Hunt and Dyer. He is allowed something for personal services, &c. Those positions are so universal in the books, as to need no citation of cases. Here the property was put in imminent hazard. The brig was leaky, and was left very short-handed. It appears by the letter of instructions, and the deposition of Captain Holmes, that in everything relating to cargo and freight he was agent of the charterers, Hunt and Dyer. In navigating, &c., he was his own agent under his contract. In committing the deviation, and saving the Nathaniel Hooper and cargo, and jeoparding the cargo of the Olive Chamberlain, he acted as agent of Hunt and Dyer; and Hunt would not be liable in case of loss, as owner, to Dyer. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. Holmes held the capacity of supercargo. For his powers, we cite Lawes, Chart. Part. 78, 319; Oliver, Law Summary, 321–343; and the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 248. The case of The Blaireau goes farther. Salvage was there given to one of the owners of the cargo, because his partner was on board the saving vessel, and assented, or was presumed to have assented to the attempt at salvage, and had thereby discharged the owner of the vessel from liability in case of loss. Now, a partner in a mercantile adventure could not as general copartner, bind his partner in a wrecking adventure without his knowledge and consent, it not being within the scope of the copartnership business; but yet the absent partner, as well as the present one, drew salvage in proportion to the value of his interest in the cargo.

In the case of The Jefferson in New York, cited by Judge Washington in Bond v. The Cora [Case No. 1,621], the owner of the ship was part owner of the cargo, and the captain was owner of the remainder of the cargo. The salvage was distributed in proportion to the value of the property put at risk. Hunt by his several contracts with Dyer and with Holmes took care to divest himself of the liabilities of owner, and why should he claim the exclusive right to the advantages, profits and Godsends of the voyage? Dyer, then, is entitled, if not to half the salvage awarded to the owners of the Olive Chamberlain and cargo, certainly to the ratio of half the value of the cargo, to the value of the brig and cargo.

[Mr. Choate, for Hunt, argued e contra, as follows:

[The question here is as to the right of Dyer to a part of the salvage awarded to the brig Olive Chamberlain, her owners, officers and crew. The facts, upon which it is to be determined, are supplied by the evidence introduced by Dyer, that is to say, the instrument called a charter-party—the letter of instructions, and the deposition of Holmes taken and offered by Dyer. The circumstance that Dyer unites in the libel with the others, is by express agreement, to benefit or prejudice nobody. He claimed—and to avoid expense—he was united in the libel, without prejudice.][3]

We resist the application of Dyer, on the general ground, that, upon the proofs supplied and relied on by him, he is, in point of law, a mere shipper of goods, on board a vessel navigated by Hunt's agent, for whose acts, in the course of navigation, Hunt is responsible to Dyer. In cases, where a party ships goods in another's vessel, and has a claim upon the owner, for the deviation of the captain, if injured by it, he is not entitled to salvage. This never was doubted. Bond v. The Cora [Case No. 1,621]; also, Taylor v. The Cato [Id. 13,786]. The sole question is, therefore, whether, in this case, the captain was so far the agent of Dyer, that Dyer could not claim of Hunt for the deviation of the captain. The general rule, or prevailing practice in the admiralty, seems to have been to hold, as between owners of ships, and those who take them for freight or charter, that the latter are not entitled to salvage. So expressly declared in Taylor v. The Cato, ubi supra. An inspection of what is called the charter-party, in this case, conclusively evinces, that according to settled distinctions upon the subject, Dyer is not owner of the vessel, nor joint owner pro hac vice, and that the captain, in the specific matter of navigating the vessel, is not his agent,—but the general owner's. The general owner, Hunt, is to transport the cargo by his own men, hired, paid, and provisioned by himself. For this, he is to be compensated by the freight, or in freight. In so far as the sale of outward, or purchase of homeward cargo is concerned, he

[3] [From 2 Law Rep. 165.]

and Dyer are jointly interested. But the matter of transportation and navigation is wholly Hunt's. He furnishes a vessel, keeps her in repair, hires her officers and men, may hire any captain he pleases, and any crew, and pays and provisions them. It is plain, that, on this contract, Hunt is required to hire no particular individual. He may put any body on board, and Dyer cannot interpose.

[If so, Hunt assumes the responsibleness of their behavior.

[The claimant, Dyer, puts in Holmes' deposition, but it is decisive against him. He proves, that so far as navigating the ship is concerned, Holmes is Hunt's sole agent, and that he acts for Dyer also, only in port, in procuring and disposing of cargo. Just so, it may be in the commonest case of a shipment of the smallest quantity of goods in a general ship. There the captain is the agent of the shipper, or may be so, and his agent only, or may be so, in disposing of the adventure. In sailing the ship, he is not. Holmes swears, that Hunt alone contracted with him. He contracted with him, for himself, not for himself and Dyer. He looked to Hunt only for his pay. He sailed the ship for him. It is impossible to maintain, that in the deposition, there is anything to control unfavorably to Hunt, the effect of the charter party. The letter of instructions proves that Dyer does not intermeddle with the sailing of the ship. This is not the appointment of the captain. This is not a contract of hiring the captain. That appointment was made by another contract between Hunt and Holmes, and that fixed the rule and mode of Holmes' compensation. But this letter is addressed to Holmes, only, in his capacity of an agent to dispose of or buy a cargo. It presupposes him captain, by another bargain. It says nothing of his manner of performing the voyage. It does not even admonish him to make dispatch. It begins with him on his arrival.][3]

A comparison of the charter party and the proofs with Marcardier v. Chesapeake Ins. Co., 8 Cranch [12 U. S.] 39; McIntyre v. Bowne, 1 Johns. 229; Hallet v. Columbian Ins. Co., 8 Johns. 272; Cheriot v. Barker, 2 Johns. 346; Fletcher v. Braddick, 2 Bos. & P. [N. S.] 182; The Volunteer [Case No. 16,991]; and Certain Logs of Mahogany [Id. 2,559],—seems to leave no doubt, that the general owner remains the owner for the voyage; that the captain is his agent, and that he is responsible for his acts.

[The charter party in Marcardier v. Chesapeake Ins. Co., ut supra, is exactly this charter party. I forbear to comment on that or the other cases. There really seems to be no room for a question. It is said that Hunt, by his contract with Holmes, relieves himself from his responsibilities as owner for this voyage; and the case in 6 Pick. 335, is cited. The truth is that this arrangement between Hunt and Holmes does not, in the slightest degree, affect Dyer's right, on the charter party, to treat Holmes as Hunt's agent. By that instrument, Hunt is to sail the ship. He is to man her. Whomsoever he may put on board, and by whatever contract, as between Dyer and Hunt, they are Hunt's agents when on board. From this responsibility and this relation, Hunt cannot exempt himself, by any species of contract with the men whom he hired.][3]

Even as between Hunt and Holmes, Holmes is not so far owner as to exempt Hunt from responsibleness for his acts, or from his general responsibleness as owner. The case, between those parties, is no more than this; Hunt has made a contract of affeightment with Dyer, by which he is to man, provision, and sail a vessel, on a given voyage, for a given freight. He then hires Holmes for that specific adventure, and agrees to pay him a specific sum for supplying the men and provisions, and taking command. This contract is made subsequently to the charter-party, and the operation is to leave Hunt in possession, and navigating his own vessel by a master hired for the specific enterprise. As to the world, but certainly as to Dyer, Hunt remains the owner, acting by an agent.

STORY, Circuit Justice. The first question, which arises, is, who was owner for the voyage? It has been suggested, that, perhaps, Holmes might, under the special agreement, be deemed owner for the voyage, upon the authority of Cutler v. Winsor, 6 Pick. 335, and Thompson v. Hamilton, 12 Pick. 425, although the point was rather hinted at, than made. Without meaning in the slightest degree to doubt or impugn the decision in these cases, I think, that I may say, that they go to the very verge of the law on this subject. Perhaps they will be found not easily reconcilable with some of the English authorities, where a sharing in the profits, or in the net earnings of the vessel, has been thought to make the voyage a partnership adventure, and the master and owner of the ship to be joint owners thereof for the voyage. See Dry v. Boswell, 1 Camp. 329. But the present case is clearly distinguishable from those cases, as the owner contracted to pay the master a specific sum for the voyage, for sailing, victualling, and manning the brig, with demurrage, and half cabin freight, &c., subject to certain deductions. It was, therefore, a mere mode of compensation of the master, like a contract for a share of the gross earnings of the voyage, the owner retaining the sole control and direction of the voyage for his own purposes. The point, however, is not material to the decision of the claim of Dyer; for, whether the master, or Hunt, were

[3] [From 2 Law Rep. 165.]

[3] [From 2 Law Rep. 165.]

owner for the voyage, unless he, Dyer, was also owner, he could not participate in the salvage awarded to the brig.

The question then arises directly in judgment, whether Dyer was a part owner of the brig for the voyage under the charter-party. It appears to me, clearly, that he was not. In whatever light that instrument is viewed, it is but a contract for freighting and chartering the brig for the voyage to Havana and back again to Boston, to carry cargoes for the joint account of Hunt and Dyer. Hunt was to equip, man, and provision the vessel for the voyage; and the whole of the vessel was not let for the voyage; but the whole, with the exception of the cabin and necessary accommodations for the crew and the stowage of the sails, cables, and provisions, was to be "at the sole use and disposal" of Hunt and Dyer jointly; and Hunt engaged to take and receive on board all lawful goods which Hunt and Dyer, or their agents, should think proper to ship. Hunt and Dyer covenant (and although at law, the covenant, being with Hunt, would be incapable of being enforced, yet in a court of equity it would be held valid and binding), to furnish cargoes, and to pay fifteen hundred dollars for the voyage out and home, with the port charges and pilotage. It seems to me, that the whole structure of the charter-party manifestly contemplates, that, as between Hunt and Dyer, Hunt is to remain sole owner for the voyage, and that all his covenants require that he should be so treated. He is to appoint and pay the master and crew, and provision the vessel; he is to retain possession of her, and to have an exclusive possession and right to her cabin and other parts for the accommodation of the crew and equipage; and he is to receive and deliver the cargoes. The case, therefore, falls entirely within the reasoning of the supreme court of the United States in Hooe v. Groverman, 1 Cranch [5 U. S.] 224, and Marcardier v. Chesapeake Ins. Co., 8 Cranch [12 U. S.] 39, and must be governed by the authority of those cases. I had occasion to consider the bearing of those cases in The Volunteer [Case No. 16,991]; and to that decision I deliberately adhere. I am aware of the decision in the king's bench and the house of lords in Colvin v. Newberry, 8 Barn. & C. 166, and 6 Bligh, [N. S.] 167, 189, which is distinguishable from the present. But, if it were not, I should, upon reason, as well as the authority of the supreme court, follow out the doctrines in 1 Cranch [5 U. S.] 214, and 8 Cranch [12 U. S.] 39. The mere fact, that the vessel sails under a charter-party, does not divest the absolute owner of his right to salvage, or entitle the charterer to salvage, unless he thereby becomes owner for the voyage. The case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, sufficiently establishes this position.

The next question is, whether Dyer, as joint owner of the cargo with Hunt, is entitled to share in the salvage. And here we must meet the case, exactly as if Hunt were a stranger, and had no interest in the cargo. The question, therefore, resolves itself into this, whether the owner of the cargo, whose property is thus put at risk, without his own consent, by a stoppage or deviation from the voyage for the purpose of earning salvage, is entitled to share in that salvage. In the present case, Hunt was not on board of the brig at the time of the stoppage or deviation, or assenting thereto; and, therefore, Dyer cannot claim any title to share in the salvage, upon the ground, that he, by his partner, assented thereto; and so he would be in the same predicament with the joint charterers and owners of cargo (Christie and Young,) in the case of Mason v. The Blaireau. As to Dyer, therefore, the stoppage was a clear deviation, and if the cargo had been subsequently lost, Hunt, in a court of equity, if not at law, would have been responsible, as ship-owner, to Dyer, for the full amount of that loss. Has he, then, any title to share in the salvage? In the case of the ship-owner, we all know, that he is now universally held entitled to share in the salvage, upon the general ground, that, by the stoppage and deviation, the ship and the cargo (whether the cargo belong to the ship-owner or not) are put completely at the risk of the ship-owner; and therefore, as he runs the risk, he ought to share in the salvage. If this were the sole ground of the maritime rule on this subject, it would be difficult to distinguish the case of the owner of the ship from that of the owner of the cargo. In each case the property of the owner is put at his own risk, and (it is said) without his consent. In each case (it is also said) there is a remedy over against the master by the owner of the ship for the deviation; and against both of them by the owner of the cargo for the same wrongful act. If this be true and there be nothing further, the distinction between the owner of ship and the owner of cargo would seem to be almost, if not entirely, evanescent. But I apprehend, that there is a foundation for a distinction, established upon maritime policy, as well as general reasoning. In the first place, it is by no means clear, in the case of a deviation by the master for salvage, that although the underwriters are discharged, yet that the master, if he has acted in good faith, and in the exercise of a sound discretion, is responsible to the ship-owner for any subsequent loss occasioned thereby. It is the universal custom, I believe, of all maritime nations, to encourage salvage services and to give suitable rewards therefor, for the very purpose of protecting commerce and navigation upon the high seas, against the extraordinary perils incident thereto. Every merchant has a deep interest in maintaining this doctrine in its fullest extent, if I may so say, in the language of the admiralty upon another subject, sub mutuae vicissitudinis obtentu. I have not supposed, that the master of a ship was, by the nature

and duties of his office, precluded from rendering such services; or that anything short of a positive prohibition of the owner could take away or control his discretion, as to the time, and the manner, and the circumstances, under which such salvage services ought to be undertaken. On the contrary, I have always supposed, that the master had an implied authority, from the nature of his office, to render such services, giving a proportionate share and benefit to his owner, in all cases, where he should deem it to be for the interest of his owner. It is upon this ground, and this ground only, in my judgment, that the owner of the ship can ever entitle himself, in an equitable view, to any salvage whatever, at least, to any salvage beyond the mere compensation for the risk, or the premium of insurance lost. And if ever a case should occur, (which I can hardly suppose) in which a ship-owner should prohibit his master from rendering salvage services, I, for one, should hold him bound to this limited compensation, and leave him to the scanty fruits of his own selfishness, and illiberality. The salvage, ordinarily due to the owner, would, in such a case most properly be awarded to the master, since he would then have borne the whole risk and burthen of the enterprise.

There is, doubtless, another auxiliary ground, upon which the maritime law proceeds, as a matter of policy. It is, that by the owner's becoming entitled to share liberally in the salvage, the master is under no temptation to deviate from his proper duty to his owner by any undue hopes of selfish gain, or by assuming unreasonable or unjustifiable risks. The maritime policy, therefore, which thus links his own interests to those of his owner, is as wise, as it is beneficent. It gives a security to the owner against any abuse of the master's authority, by making the interest of the latter subordinate to that of the former. Now, in respect to both of these considerations, the case of the owner of the ship differs from that of the owner of the cargo. The master is the general agent of the owner of the ship; but he is the special agent only of the owner of the cargo, to carry the same to the port of destination. He has, therefore, no implied authority from the latter to deviate from the voyage for salvage purposes; and the general contract of the ship-owner and master is to deliver the goods at the port of destination, the perils of the seas, and the acts of God, only excepted. The salvage service falls within neither predicament, if it is to save property, and not merely to save life. In the latter case, Christianity imposes a higher duty, the duty of saving life, if practicable, by any reasonable sacrifice. It is impossible, therefore, to infer any consent of the owner of the cargo to the salvage service, which alone would furnish a sufficient ground for him to share in the reward. Neither does the maritime policy, as to temptation of the master to deviate for his own selfish objects, apply to the shipper of goods, as it does to the owner of the ship. The former has the double security of the ship-owner and the master, to compensate him for any unjustifiable deviation; the latter must rely solely on the pecuniary ability of the master, and the just confidence reposed in him, as his security and indemnity. The master is under little temptation to deviate from his duty against the shipper, unless he may thereby promote the interest of the ship-owner, as well as of himself. But, at all events, the shipper is content, from the very nature of his contract for the shipment, to rest satisfied with the ordinary responsibility of the owner and master of the carrier ship, for his indemnity against losses occasioned by the misconduct of either.

Thus far, the point has been considered upon principle. But how stands the case upon practice and authority? In the first place, although the case must be of frequent occurrence in suits for salvage, yet it does not appear that any such general claim has ever been allowed in practice, or by courts of justice. The omission to make any such general claim, under such circumstances, cannot but be very significant, and expressive of the general sense of the community. In the next place, not only is there no authority in favor of such a general claim, but there are authorities directly against it. In the case of Bond v. The Cora [Case No. 1,620], the learned judge of the district court, and afterwards on appeal my late brother, Mr. Justice Washington, whose judgments upon all subjects are entitled to very great weight, from his patience of research, and sound discriminating learning, decreed upon full argument against the claim. In Taylor v. The Cato [Id. 13,786], Judge Peters also rejected the claim of the shippers of goods. I follow his reasoning with an undoubting approbation; and think, that it satisfactorily establishes the doctrine, that in ordinary cases the shipper of cargo is not entitled to share in the salvage, unless indeed, he has expressly assented to the deviation, and thereby released the owner of the ship from his responsibility therefor. My opinion, therefore, is, that Dyer is not in the present case entitled to any share in the salvage, and his claim ought to be dismissed.

The merits of the case having been disposed of by the former decrees of the court, a question arose as to the apportionment of a part of the costs. In the course of the admiralty proceedings all the cargo had been delivered on bail and appraisement to the various claimants, except the sugars claimed on behalf of Messrs. Holford and Company, London, by their agents, Messrs. Bates and Company, of Boston. These goods remained in the custody of the court up to the final decree. All the other costs and charges had been made a charge on the whole property in controversy; and the question now put to

the court was, whether the charges of the custody of these goods should be borne exclusively by Messrs. Holford and Company, or should be apportioned, like the other costs and charges, upon the whole property.

The question was briefly spoken to by Blair, for Messrs. Holford and Company, and by Parsons, for the parties having an adverse interest.

STORY, Circuit Justice. I do not think there is any real ground for controversy in the present case. The charges for the custody of these goods ought, like the other costs and charges in the case, to be borne by, and apportioned upon, the whole property saved. In salvage cases, the general rule is that the costs and charges are to be paid out of the property saved, and to be charged and apportioned upon the respective claimants thereof accordingly. The only exceptions, as far as I recollect, which have been admitted, are, where the charges have been occasioned by the gross neglect, or laches, or improper conduct of the claimant himself, in which case they are to be borne be himself alone; or where the right has been forfeited by some gross misconduct of the salvors in the salvage service, in which case the court constantly refuse any allowance to them, and compel the guilty parties to bear their own costs, charges, and expenses, as a suitable punishment ex delicto. This is especially true in all cases of embezzlements and of losses by the gross negligence of salvors. In the present case there is not the slightest ground to impute any negligence, laches, or impropriety to Messrs. Holford and Company, and therefore the general rule must prevail.

Case No. 10,033.

The NATHANIEL KIMBALL.

[4 Adm. Rec. 679.]

District Court, S. D. Florida. Jan., 1853.

SALVAGE — VESSEL ON REEF — PERIL — BAD WEATHER—AMOUNT.

[Cited in Baker v. The Slobodna, 35 Fed. 541, as an instance in which a salvage allowance of thirty per centum was given on the cargo saved dry, and fifty per centum on that saved by diving and working in the water; the vessel having gone ashore nine miles out from Key West, and cargo amounting to $56,093 saved by seven vessels and ninety-nine men.]

[This was a libel by George W. Carey and others against the cargo and materials of the wrecked ship Nathaniel Kimball for salvage compensation.]

The ship Nathaniel Kimball, from New Orleans to Liverpool, laden with cotton, during the night of the 16th of January last, ran ashore on that part of the Florida Reef known as the "Easternmost Dry Rocks," situated nine miles from this town. The weather was very boisterous, and the wind heavy. Soon after striking the reef the ship bilged, fell over on her larboard side, and filled with water. The master cut away the masts, to ease the ship, the sea making a complete breach over her. In the morning, the 17th of January, the libellants, being the masters and crews of the schooners Euphemia, G. L. Browne, Relampago, Champion, Lafayette, H. B. Hawkins, and Larinia,—in all ninety-nine men,—proceeded from Key West to the wreck. With considerable difficulty and danger they succeeded in boarding the wreck and in taking off the master and crew, who, to say the least, were very uncomfortably situated if not exposed to considerable peril. On the 18th, the gale having somewhat abated, the libellants commenced to save the cotton and ship's materials. They saved seven hundred and seventy-three bales of cotton in a dry and undamaged state, and about twelve hundred wet. The value of all the cargo and materials saved is $64,610.79. While the wreckers were employed in this service, the weather was more than commonly boisterous and windy, and the sea was high; so that their labors were often interrupted by the badness of the weather. In consequence of these interruptions their labors ran through a period of more than a month.

O. B. Hart, for libellants.

Wm. McCall, for claimants.

MARVIN, District Judge. Referring to the libel and answer for the more minute particulars of the case, I proceed to award the salvage which I think ought to be allowed. It is ordered, adjudged, and decreed, that there be allowed and paid to the owners, masters, and crews of the vessels composing the "first consortship," to wit, the Euphemia, G. L. Browne, Schr. Relampago, Champion, Lafayette, H. B. Hawkins, and Larinia, thirty per cent. upon the nett value of the property saved by them, after first deducting therefrom the costs and expenses of this suit, the wharfage, storage, and bills for labor in landing and storing and arranging for sale the cargo and materials; the gross value of the cargo and materials saved by the said first consortship being, according to the marshal's account sales and the appraisement $30,639.78; marshal's sales, $23,040.49; sold by Bowne and Curry, $2,413.62; in all $56,093.89. That there be allowed to the second consortship, composed of the same vessels with some difference in the men, $291.11, being thirty per cent. of the value of the property saved by them. That there be allowed to the third and subsequent consortships as numbered and set forth in the marshal's account sales the one-half of the proceeds of the sales of the property according to said account sales; the property having been saved by diving and working in the water. That there be allowed to the boats Union, Water Witch, and Caroline and Isaac $110.61, being the one-half of the pro-

ceeds of the sale of materials saved by them and sold by Bowne and Curry. That there be allowed to the boats Union, Water Witch, and Caroline $150.60, being the one-half of the proceeds of sales of materials saved by them and sold by Bowne and Curry. That the marshal restore that part of the cargo remaining unsold to the master for and on account of whom it may concern. That the clerk pay the costs and expenses of the suit, the wharfage, storage, and bills for labor out of the proceeds of sales in court, and restore the residue to the master for and on account of whom it may concern.

Case No. 10,034.

NATIONAL BANK v. COLTON.

[Cited in Cronkhite v. Herrin, 15 Fed. 890. This is a state case, and is reported sub nom. National Bank v. Cotton, 53 Wis. 31, 9 N. W. 926.]

Case No. 10,035.

NATIONAL BANK v. DODGE.

[The case reported under above title in 25 Int. Rev. Rec. 304, is the same as Case No. 10,053.]

NATIONAL BANK-NOTE CO. (TAPPAN v.). See Case No. 14,100.

NATIONAL BANK-NOTE CO. (TOPPAN v.). See Case No. 14,100.

NATIONAL BANK OF CLEVELAND v. SIMMONS. See Case No. 3,062.

Case No. 10,036.

NATIONAL BANK OF COMMERCE v. BOOTH.

[5 Biss. 129.] [1]

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

NOTES—BANKRUPTCY OF MAKER—ACTION AGAINST INDORSER.

1. In Illinois, the indorsee of a promissory note, the maker of which has been adjudicated bankrupt, may proceed at once against the indorser.

2. The case is not similar to that of a deceased maker of a note, where the holder must pursue the estate of the maker in the probate court.

Assumpsit against Alfred Booth as indorsee of a promissory note of Barnum, Mason & Co.

BLODGETT, District Judge. Judgment must go against the defendant in this case. Mr. Booth is sued as the indorser of a promissory note made by the firm of Barnum, Mason & Co. He pleads that Barnum, Mason & Co. have been thrown into bankruptcy, and that their assets are in the hands of the assignee and will produce fifty cents on the dollar, and insists that the holders of the note can not proceed against him as indorser until they have exhausted the assets in bankruptcy.

The statute of this state provides that an indorser shall not be liable unless the holder shall have used due diligence by the institution and prosecution of a suit against the maker of a note, except under certain conditions. In this case, the institution and prosecution of a suit against Barnum, Mason & Co. is entirely impossible, they having been by the act of their creditors, declared bankrupts, adjudicated as such, and no suits on their old indebtedness could be maintained against them.

It was contended very strenuously on the part of the defendant in this case, that the case was similar to that of a deceased maker of a note; and there are some adjudications of Indiana and Kentucky to the effect that the holder of the note must first pursue the estate of the deceased in the probate court, and exhaust his remedy against the estate of the deceased in the surrogate or probate courts; but on examination, I find the statute of Illinois is broader than the statutes of Indiana and Kentucky, and it seems to convey the idea that the institution and prosecution of a suit against the maker of the note is the diligence, or kind of diligence, that is required to fix the liability of the indorser. There being no adjudicated case to sustain the position taken by counsel for defendant in this case, I am inclined to hold to the doctrine that sufficient is shown by the declaration in this case,—by the averment of the bankruptcy of the makers of the note,—to dispense with any diligence against them. Judgment for plaintiff.

NOTE. The statute referred to will be found in 1 Gross (1871) p. 461, § 5. For the present statute, see Rev. St. 1874, p. 719, § 7. These provide if "such suit would have been unavailing," when brought against the maker, the indorser shall be immediately liable.

NATIONAL BANK OF COMMERCE (MERCHANTS' NAT. BANK v.). See Case No. 9,446.

NATIONAL BANK OF FAYETTEVILLE (MEAD v.). See Case No. 9,366.

Case No. 10,037.

NATIONAL BANK OF FREDERICKSBURG v. CONWAY et al.

[1 Hughes, 37; 14 N. B. R. 175, 513.] [1]

Circuit Court, E. D. Virginia. June 6, 1876.

DEEDS—ACKNOWLEDGMENT—INTEREST OF NOTARY—BANKRUPTCY—ASSIGNMENT EXECUTED.

1. A notary public is competent to acknowledge and certify a deed of trust, although he is interested as one of the beneficiaries in the trust.

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

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 14 N. B. R. 175, 513, contains only a partial report.]

2. If a deed of trust is actually delivered to the trustee, with power to record it when he deems proper, it is valid as against the assignee in bankruptcy, although it is not recorded until after the grantor's failure.

[Cited in Re Oliver, Case No. 10,492.]

[Cited in Collender Co. v. Marshall, 57 Vt. 234.]

[3. Cited in Bank of Benson v. Hove, 45 Minn. 43, 47 N. W. 449, to the point that recording is notice to a subsequent mortgagee notwithstanding the fact that the notary taking the acknowledgment was disqualified on account of interest, such disqualification not appearing on the face of the instrument.]

On July 20, 1875, Montgomery Slaughter executed to W. P. Conway a deed, conveying to him certain real estate in Fredericksburg, Virginia, in trust, to secure the payment of four negotiable notes drawn and indorsed by M. Slaughter & Son, a firm of which Montgomery Slaughter was the senior partner, payable at the banking house in Fredericksburg of Conway, Gordon & Garnett, a firm of which W. P. Conway was a member; one of the notes for one thousand dollars, payable on the 25th of September, 1875; another for fifteen hundred dollars, payable on the 15th of October, 1875; another for one thousand dollars, payable the 25th of November, 1875; and the fourth for two thousand dollars, payable on the 23d of December, 1875. This last note was dated July 20, 1875. This deed was acknowledged by the grantor and certified by G. W. Garnett, a member of the firm of Conway, Gordon & Garnett, on the day it was executed. At the time of the execution of the deed, Conway, Gordon & Garnett were holders and owners of the three first-named notes, aggregating three thousand five hundred dollars in amount, and they became owners of the note for two thousand dollars, shortly after the date of the deed. The note due the 25th of September was paid at maturity. That due the 15th of October was not paid but was protested. On the afternoon of this same day, the deed of trust, which had been kept in the safe of his bank, by W. P. Conway, trustee, ever since the 20th of July, was taken out and deposited for record in the office of the clerk of the proper court in Fredericksburg. At the time this deed was recorded the firm of Conway, Gordon & Garnett were holders and owners of the remaining three notes secured by the deed, aggregating four thousand five hundred dollars. On the 27th of October, 1875, a creditors' petition was brought in the district court of the United States, for this district, as a court of bankruptcy, praying that the said Montgomery Slaughter, and his firm, M. Slaughter & Son, and his son W. L. Slaughter might be adjudicated bankrupts; and, without contest, they were afterwards duly so adjudicated, in accordance with the prayer of the creditors' petition. On the 11th of November, 1875, the National Bank of Fredericksburg, a creditor of the bankrupt, brought their bill on the equity side of this court, with the usual allegations and charges, praying that the deed of M. Slaughter to W. P. Conway, of the 20th of July, 1875, might be set aside, as giving a preference to Conway, Gordon & Garnett, in contravention of the provisions of the 35th section of the general bankruptcy act of congress (Rev. St. § 5128 [14 Stat. 534]). To this bill, Conway, Gordon & Garnett have made answer, claiming that the deed was in fact bona fide, that it was legal under the laws of Virginia, and that it was not in contravention of the bankrupt act and its amendments, because it was made more than two months before the petition in involuntary bankruptcy was filed, and because, as they allege, M. Slaughter and M. Slaughter & Son, until unexpectedly protested on the 15th of October, 1875, had the confidence of the entire community; were considered entirely solvent; were believed to be gentlemen of extraordinary business qualifications, engaged in an exceedingly profitable business; that their paper rated with the best at the respondent's bank; and that their failure on the 15th of October, 1875, astounded the whole community.

The respondents also allege, in their answer, that their dealings in the paper of the bankrupt firm were always with the senior member, Montgomery Slaughter; that this bankrupt always refused to comply with the rule of their bank requiring a responsible indorser on all paper of the firm, on the ground that as he never indorsed for others he would not ask others to indorse for his house: and that instead of an indorser, the custom of said Slaughter, with the house of Conway, Gordon & Garnett, was always to give deeds of trust on the property of M. Slaughter embraced in the deed of the 20th of July, 1875, to secure the notes discounted for Slaughter & Son by the firm; that in no instance did said Slaughter fail to give such a lien in the previous five or six years, although the transactions were numerous; that in all of these transactions, the custom was to leave the deed of trust in the hands of W. P. Conway, the trustee, to be recorded when he thought proper, or when the holders of the notes discounted by C., G. & G. might require. In a statement of facts, agreed between all parties, it is further alleged, that it had been the usage of Conway, Gordon & Garnett to take these deeds from M. Slaughter, and to destroy them when the notes were paid, never putting any of them on record until this last deed. In a statement of facts by M. Slaughter, accepted by all parties as evidence, by consent, Mr. M. Slaughter alludes to several previous transactions, "similar to that of the 20th of July, 1875, in which the notes had been paid, and the deeds cancelled."

The Code of Virginia (1873, c. 114, § 5, p. 897) provides that "every deed of trust, etc., conveying real estate and goods and chattels, shall be void as to creditors, etc., until and except from the time it is duly admitted

to record in the county or corporation wherein the property embraced in the said deed may lie."

HUGHES, District Judge. There is no question here of actual fraud or of moral wrong-doing. The transaction of the 20th of July, 1875, was between men of the highest character, socially and in their pecuniary dealings. There is but one question in the case, which is, whether the writing, signed and acknowledged on the 20th of July, 1875, kept in the iron safe of Conway, Gordon & Garnett until the paper of Slaughter & Son had gone to protest on the 15th of October, 1875, and on the afternoon of that day recorded, is valid under section 5128 of the Revised Statutes of the United States. This statute is not a statute of frauds, but of disabilities. It establishes a policy. It makes it against the policy of the law for men, knowing the insolvency of their debtors, to exact or take deeds of preference from them. State laws permit this, and indeed encourage it. But congress declares a different policy, and places failing debtors in the same condition as to deeds, grants, and conveyances of preference, in which state laws place minors and femes covert as to contracts, and in which state laws place all adults who are in debt, but sui juris, as to deeds of gift. The word "fraud" occurs but once in this section 5128, and then not as implying moral or actual fraud, but only as implying a breach of the policy of the law just mentioned; the phrase in which the word occurs being "in fraud of the provisions of this act." I have nothing to do, therefore, with fraud as a crime, moral or legal. I have only to inquire whether the writing between M. Slaughter and Walter P. Conway, trustee, signed and acknowledged on the 20th of July, 1875, was in violation of the policy of section 5128, Rev. St., and therefore void.

The question whether this writing was properly acknowledged or not, which was so ably and elaborately argued at bar, is only a secondary one in the case. The primary question is, when did this writing become a deed as between the grantor and grantee? The acknowledgment of the writing by the grantor had reference only to its being recorded, and thereby made valid as against his creditors. If the question were only as to acknowledgment, I should decide, without hesitation, that it was properly acknowledged; for the teaching of the cases cited at bar seems to me plainly to be, that an interested person may take the acknowledgment of a deed when the act is merely ministerial; though if the act be judicial, such as taking the acknowledgment, after privy examination, of a married woman, an interested person cannot take it. Harkins v. Forsyth, 11 Leigh, 294; Carper v. McDowell, 5 Grat. 212; Horsley v. Garth, 2 Grat. 471; Taliaferro v. Pryor, 12 Grat. 277; Johnston v. Slater, 11 Grat. 321; Turner v. Stip, 1 Wash. [Va.] 319; Hampton v. Stevens [1871] 10 Am. Law Reg. 107; Boswell v. Flockheart, 8 Leigh, 364; Dimes v. Grand Junction Canal Co., 16 Eng. Law & Eq. 63. Though the acknowledgment of this writing of the 20th of July, 1875, were good, that fact might not invalidate the deed; for it has been recently decided, by the supreme court of the United States, in Sawyer v. Turpin, 91 U. S. 114, that the recording of a deed may be within the period of prohibition imposed by the bankrupt law, and yet the deed itself be good against an assignee in bankruptcy, if executed before the period. Were it necessary, I should hold that that decision does not govern this case. A clear distinction may be drawn between this case (relating to real estate) and that decided in Sawyer v. Turpin (relating to personalty), founded on the distinction between the respective laws of Massachusetts and Virginia relating to fraudulent conveyances. The law of Massachusetts, on which the decision in Sawyer v. Turpin was rendered, declares that mortgages of personal property shall not be valid against any other person than the parties thereto, unless, etc., etc., the mortgage be recorded, etc. Whereas, the law of Virginia declares that every deed of trust, conveying real estate or goods and chattels, shall be void as to creditors, until and except from the time it is duly recorded. The deed of Montgomery Slaughter, signed and acknowledged the 20th of July, 1875 was void as to creditors, and was not a deed at all, until the 15th of October, 1875; and I doubt if the supreme court of the United States would hold that it took effect any earlier as to the assignee in bankruptcy representing the general creditors of the bankrupt. But, assuming that the decision in Sawyer v. Turpin governs this case, as to deeds which have become deeds between the parties to them, previously to the period of two months before bankruptcy, but recorded within that time, the further question is, when did this writing of the 20th of July, 1875, become a deed, good as between M. Slaughter and W. P. Conway, the parties to it? It cannot be claimed that this writing was, in the hands of W. P. Conway, until the 15th of October, 1875, an escrow; for, in strict law, an escrow is a deed delivered to a stranger, which is to become valid on the happening of some definite future contingency. From this writing having been delivered to the grantee by the grantor, and not to a stranger, it cannot be called, with technical accuracy, an escrow.

But was it in truth and in law a deed, so delivered and so accepted, until the day it was recorded in the office of the corporation of Fredericksburg? This I assume, of course, to depend upon the understanding or contract as to it, which was had between M. Slaughter and W. P. Conway, either tacitly or expressly, on the day it was signed. The transaction of the 20th of July, 1875, is stated by Conway, Gordon & Garnett, in their answer, to have been "precisely similar" to numerous

others that had preceded it for five or six years. These writings had never been treated as passing title, but as papers which might be treated as nullities after awhile and cancelled. No previous one of these writings had been recorded; no previous one had been treated as a deed of conveyance requiring release. All had been treated as writings that might become deeds in the option of the trustee, or of the holders of the notes of M. Slaughter & Son. All of them had been held privately by W. P. Conway, and by him torn up and cancelled whenever he so elected to do.

Now, the very question in this case is, whether the writing of the 20th of July, 1875, signed and acknowledged by M. Slaughter, and delivered by him to W. P. Conway, with the understanding that it was to be cancelled on the payment of the notes which it secured, was intrusted to him in a way that made it a nullity from the beginning, except in case of default; was intrusted to him in a way to pass no title and requiring no release except on default. I say the very question is, whether such writing was a deed, to be taken and treated, as a deed as of the 20th of July, 1875. Was it a deed at all until the 15th of October, 1875, when W. P. Conway elected to treat it as such? I see no reason and know of no precedent which requires a paper, in form a deed, but delivered upon condition that it is not to be treated as a deed passing title, except on the future election of the holder of it, to be held in law as an absolute deed from its date, contrary to the intention of both grantor and grantee in making it.

In the case before me, the intention of both grantor and grantee was, that the deed was not only not to go upon record, to bind creditors, but was not to be a deed passing title, in such a way as to require a release of title, until the grantee should elect so to treat it. I do not think that a paper in form of a deed, which both parties to it agree is not to be treated as a deed except upon a future contingency, can become a deed until the happening of that contingency. I therefore hold that the paper which was signed and acknowledged by Slaughter, and accepted by Conway on the 20th of July, 1875, did not become a deed until Conway, on the 15th of October, elected to treat it as such, and put it upon record. Section 5128 makes void any conveyance which, directly or indirectly, absolutely or conditionally, creates a preference of one creditor over others within two months before the filing of the petition. As the deed in question was void by law as to creditors until the 15th of October, 1875, and, as between parties, was a private, inchoate, defeasible writing until that date, I think that it did not take the character of a deed of conveyance or pass any title until that date; and, therefore, that it falls within the inhibition of section 5128 of the Revised Statutes. I so decide; and will sign a decree in accordance with the prayer of the bill, declaring the deed of Slaughter to Conway void, and setting it aside.

From that decree an appeal was taken, on the hearing of which the chief justice decided as follows:

WAITE, Circuit Justice. The supreme court of the United States decided at its last term, in Sawyer v. Turpin [91 U. S. 114], that if a mortgage to secure a pre-existing debt was executed more than four months before the filing of a petition for the adjudication of the mortgagor a bankrupt, it would be good as against the assignee in bankruptcy when appointed, if recorded before his rights attached but within the four months. This case arose before the act of June 22, 1874 (18 Stat. 180), changing the time of the prohibited preference to a period within two months next preceding the filing of the petition, instead of four, as it originally stood. Upon the principle established in that case, this deed of trust is not invalid under the provision of section 35 of the bankrupt act as amended and enforced at the time of its execution. The deed was delivered to Conway when it was executed, and held by him as security for the notes it described. The testimony is clear upon this point. The failure to record previous deeds of the same character, their surrender for cancellation without a formal reconveyance after payment of the notes, and their acknowledgment before the defendant Garnett as a notary, are all circumstances proper for consideration when determining what the real character of this transaction was; but, in our opinion, they are not sufficient to overcome the positive testimony of all the parties to the effect that the delivery was complete, that the object on both sides was to secure the debts provided for, and that Conway, the trustee, was fully authorized to cause the record to be made whenever he or his beneficiaries thought it desirable to do so. The deed was good as between the parties without record, but until recorded it was void against creditors. Code Va. 1873, p. 897, c. 114. No deed can be admitted to record until proved or acknowledged in the manner provided for. Id. p. 905, § 117. A record without the requisite proof or acknowledgment does not affect creditors. A deed may be acknowledged by the grantor before a notary public, and, upon the certificate of the notary to that effect in proper form, recorded. The form of the certificate in this case is correct, but it is insisted that because Garnett, the notary, was interested as one of the beneficiaries in the trust, he was incompetent in law to receive and certify the acknowledgment. This presents the principal question in the case for our consideration.

The law provides only for the acknowledgment of a deed before a notary public. It does not require, in express terms certainly, that he shall be disinterested. A notary public is an officer provided for by statute. He

must give bond for the faithful performance of his duties. Code Va. 1873, p. 903, c. 116. It has been frequently decided that an acknowledgment before a grantee named in a deed was of no effect. Beaman v. Whitney, 20 Me. 413; Wilson v. Traer, 20 Iowa, 233; Stevens v. Hampton, 46 Mo. 404; Groesbeck v. Seeley, 13 Mich. 345. It has also been held that a party interested in a deed cannot take and certify the acknowledgment of a married woman requiring a privy examination. Withers v. Baird, 7 Watts, 228. The taking of such an acknowledgment is, in some respects, a judicial act, and not ministerial only, but in the case of an ordinary acknowledgment it is purely a ministerial act. Truman v. Lore's Lessee, 14 Ohio St. 144; Lynch v. Livingston, 2 Seld. [6 N. Y.] 434. Upon this principle it was decided in Dussuame v. Burnett, 5 Iowa, 95, that an acknowledgment before one not a grantee named in the deed, but interested in the conveyance, was good. The same distinction was recognized in Stevens v. Hampton, before cited. In October last the judge of the Rockbridge circuit court of Virginia held, in the case of Lady v. Lady [unreported], pending before him, that a grantee named in a deed, though a trustee only, was incompetent to take the acknowledgment of a married woman, the grantor, which required a privy examination. An acknowledgment of that kind, it was said, was of such sanctity as to make it necessary for the officer taking it to be disinterested. The recording acts are intended for the security of titles and the prevention of frauds. They are to be construed liberally to that end. As the record, when made, is constructive notice to all having the legal right to rely upon it for protection, public policy requires that it shall import as near absolute verity as is consistent with a due regard to the rights of the parties interested. A deed acknowledged before one named as grantee, carries upon its face notice of that fact, or, what is equivalent, notice of circumstances sufficient to put a reasonable man upon inquiry. But when the name of the officer taking the acknowledgment does not appear as grantee, or as otherwise interested, no such notice or presumption accompanies the deed or its record. A certificate of acknowledgment is required to perfect a deed for record. The grantor can select such authorized officer for that purpose as he chooses. He has full power to protect himself against frauds by interested parties as certifying officers, for he may refuse to make his acknowledgment before them.

The question we have now before us is not whether as between these parties the certificate can be impeached, but whether it is sufficient in law to authorize the record. It states only facts. The deed was actually acknowledged before a notary public. A recorder receiving it in its present form, and not knowing that the certifying officer was interested in the conveyance, would certainly be justified in putting it on record. The deed itself did not carry notice to him of the supposed disqualification any more than it did to others. It was no part of his duty to detect the secret interest of the certifying officer. If the instrument was apparently sufficient in form, he had nothing to do but to receive and record it. All this the grantor knew, or ought to have known. Every man is held responsible for the necessary consequences of his own voluntary acts. This is a familiar rule, and as old as the principles of common honesty. A grantor acknowledges a deed for the purpose of putting it in a condition for record. The object of the record is to give public notice of what had been done with the property. The public are expected to examine and act upon this evidence. Having voluntarily acknowledged and delivered his deed, the grantor is presumed to have voluntarily consented to its record. He must, therefore, be charged with all the legitimate consequences of such an act. If his deed is found on record, apparently executed according to the forms of law, and without any circumstances of suspicion against it, the plainest principles of equity would hold him estopped from setting up an undisclosed interest of the officer before whom he made his acknowledgment, to defeat his conveyance, as against an innocent purchaser relying upon the record as the evidence of his title. But this defence would be open to him if his acknowledgment were actually void. Void acts are as no acts; they bind no one. Voidable acts are good until avoided, and they cannot be avoided as against rights actually vested under them. As against the grantee, a deed is as much voidable after record as before. So far as he is concerned, the effect of the record is only to change the burden of proof, to some extent, from him to the grantor. After a record duly made, the law presumes that all has been done which is necessary, to give the instrument validity, but this presumption may always be rebutted as against the grantee. And as against third parties, it may be shown that a deed was never signed, sealed, or delivered.

Clearly, therefore, it is against the policy of the recording acts to hold an acknowledgment void because of the secret interest of an officer taking and certifying it. The effort should be to prevent rather than allow hidden defects in the evidence of public records. If voidable only, it is sufficient to authorize the record, if not previously avoided. So, too, as has been seen, it may be avoided at any time after record and before the rights of third parties have attached. This, as it seems to us, furnishes the grantor with all the protection he has the right to demand as against the consequences of his own acts, and at the same time leaves to the recording acts their legitimate power and effect. We conclude, therefore, that the acknowledgment in this case before Garnett was sufficient to au-

thorize the record of the deed to Conway. The acknowledgment may, however, as between these parties, be avoided for fraud if established. But there is no proof of fraud. On the contrary, all parties agree that the acknowledgment was freely and fairly made in the belief that it was in all respects sufficient to vest the title in the trustee for the purposes specified.

The decree of the district court annulling the deed is therefore reversed; but inasmuch as the trustee named in the deed is interested in the debt secured by the trust, the sale advertised by him should be enjoined, and another trustee appointed to execute the trust in that behalf. A decree may be prepared in accordance with this opinion.

Case No. 10,038.

NATIONAL BANK OF MADISON v. DAVIS et al.

[8 Biss. 100; 6 Cent. Law J. 106; 5 Reporter, 258; 1 Thomp. Nat. Bank Cas. 350; 10 Chi. Leg. News, 156.] [1]

Circuit Court, D. Indiana. Oct., 1877.

USURY—RENEWAL NOTE—AMOUNT RECOVERED—STATUTE OF LIMITATIONS—NATIONAL BANK.

1. Where a national bank discounts a note, reserving a usurious rate of interest, and the borrower gives a new note in renewal at legal interest, the bank is entitled to recover the amount of the renewal note, with interest, less the amount of the usury reserved on the original discount, credited as of that date.

[Cited in Hill v. National Bank of Barre, 15 Fed. 433.]

2. Usury, paid more than two years before the commencement of the suit, cannot be recovered nor credited upon the principal of the note.

Assumpsit on a promissory note. The plaintiff, on the 19th of May, 1869, for the defendants, Jacob Davis [and others] discounted his note for $3,000 at four months, with two indorsers, at the rate of 12 per cent. per annum, paying Davis the proceeds less $128.50, the interest reserved. There were divers renewals of this note, each renewal being for the full amount of the principal, Davis actually paying the interest in advance, the bank reserving nothing out of the proceeds of the discount. The indorsers were accommodation indorsers, and there were different indorsers upon different renewals. In 1873, Davis paid $700 on the principal, thus reducing his loan to $2,300, for which sum four different renewal notes were given. On December 9, 1873, Davis paid on one of these renewals 12 per cent. interest in advance. This was the last usurious interest paid. From that date the plaintiff received only legal interest at the rate of 10 per cent. per annum. On April 1, 1875, Davis renewed his loan by giving his two notes for like amounts, maturing at different dates, and the note sued on was given in renewal of one of these notes.

C. E. Walker and C. L. Holstein, for plaintiff.

Herod & Winter, for defendants.

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

GRESHAM, District Judge. Section 30 of the national bank act (13 Stat. 108), approved June 3, 1864, reads as follows:

"Section 30. And be it further enacted, that every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run.

"And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: provided, that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale of a bona fide bill of exchange, payable at any other place than the place of such purchase, discount or sale, at no more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

If a national bank discount a note at a usurious rate of interest, paying the borrower the proceeds less the interest, and suit be brought to recover the loan, and the borrower plead the usury, the bank will recover the face of the note less the entire interest taken out, received or reserved, and no more. It will thus collect the sum of money it actually paid out, being punished for receiving interest in excess of the legal rate by forfeiting all interest. But if the note thus discounted be renewed for the same amount, the borrower paying usurious interest out of his pocket in advance, and suit be brought on the renewed note, the de-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 5 Reporter, 258, contains only a partial report.]

fendant may recoup double the amount of the entire interest actually paid on renewal, or in an independent action of debt he may recover from the bank double the amount of the entire interest thus paid.

In either case the punishment of the bank is the same. In the latter case the bank forfeits double the amount of the interest paid, and yet recovers the amount it actually paid out, for it will be remembered the note sued on includes the amount of interest originally reserved. True, if the note be renewed in the same manner more than once, and the borrower be allowed to recoup, or in an independent action, recover double the amount of usurious interest paid, the bank will lose part of the principal as well as all of the interest. But forfeiture of double the entire interest paid is barred after the lapse of two years.

If, instead of paying the usurious interest at each renewal of the loan, the same be added to the principal and included in the renewal notes, the bank, if the usury be pleaded, will recover the amount it originally paid to the borrower; that is to say, it will recover the amount of the last of the renewal series sued on, less all interest included in it.

Usury forfeited the entire loan or debt under the banking act of February 25, 1863 [12 Stat. 665]. This, congress thought, was too severe, and the act of 1864, with the exception already noticed, limits the forfeiture to the interest only.

In the case of Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29, the court say: "In the act of 1864 the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount when the interest had been actually paid."

The only forfeitures visited upon national banks, when they stipulate for or receive illegal interest, are those found in the banking act. They are not subject to any penalties or forfeitures contained in state statutes. Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29.

It is a familiar principle that forfeitures are never favored. All actual payments in excess of the legal rate were made more than two years before the defendant's plea of usury was filed, and, in fact, more than two years before this suit was brought. The plaintiff is entitled to recover the amount of the note in suit with interest, less $128.50, the interest reserved on the original discount, which is to be credited as of the date of the reservation, all other interest having been actually paid.

NATIONAL BANK OF MISSOURI (LEVI v.). See Case No. 8,289.

NATIONAL BANK OF MISSOURI v. PAPIN. See Case No. 12,239.

Case No. 10,039.

NATIONAL BANK OF THE REPUBLIC v. BROOKLYN CITY & N. R. CO. et al.

[14 Blatchf. 242.] [1]

Circuit Court, S. D. New York. May 26, 1877.[2]

NOTES—WRONGFUL TRANSFER TO INNOCENT HOLDER—EQUITIES—ESTOPPEL—JUDGMENT IN FAVOR OF ENDORSER—ACTION AGAINST MAKER.

1. H., having a promissory note made by B., wrongfully diverted it and transferred it to N., as collateral security for a precedent debt due by H. to N., who took it in good faith: *Held*, that N. could not be affected by any equities between B. and H.

[Cited in Bank of The Metropolis v. First Nat. Bank of Jersey City, 19 Fed. 302; First Nat. Bank of Circleville v. Bank of Monroe, 33 Fed. 410.]

2. N. sued an endorser of the note in a state court, and was defeated, on the ground that the law, as held by the state court, was, that N. having taken the note as security for a precedent debt, took it subject to the equities between the prior parties. Afterwards N. sued the maker on the same note: *Held*, that the judgment in the suit against the endorser was not a bar in favor of the maker.

[This was an action by the National Bank of the Republic against the Brooklyn City & Newtown Railroad Company.]

Rodman & Adams, for plaintiff.
Field & Deyo, for defendant.

WALLACE, District Judge. The diversion of the note in suit by Hutchinson & Ingersoll cannot avail the defendants, the makers, because, within the authority of Swift v. Tyson, 16 Pet. [41 U. S.] 1, the plaintiff, having taken the note in good faith from Hutchinson & Ingersoll, though only as collateral to a pre-existing debt of the latter, cannot be affected by the equities between the antecedent parties. It is useless to review or discuss the numerous cases which hold that, where a note is thus taken as security, and there is no agreement, express or implied from the circumstances, that the creditor is to forbear or extend the loan, he is not a holder for a valuable consideration, and cannot recover against the maker, when the note has been fraudulently put in circulation or diverted. It suffices to say, that this is the conclusion reached in nearly all the cases in England and in this country where the question has arisen, and is in accord with the doctrine of courts of equity, that he who does not part with some new consideration, or assume some new obligation, is not a purchaser for a valuable consideration, and has no better rights than the party from whom he purchases. Text writers and commentators of very respectable authority have expressed the opinion that no new agreement between the creditor and the party transferring the paper is essential, for the reason that, if such an agreement is not implied, at least there follows a remission of that vigi-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]
[2] [Affirmed in 102 U. S. 14.]

lance which might otherwise have secured satisfaction of the debt, and because the acceptance of the security imposes new obligations on the part of the creditor toward the debtor. Daniel, Neg. Inst. § 829; Byles, Bills, 125, note by Judge Sharswood. Whether this reasoning is satisfactory or not I shall not now stop to inquire. The case of Swift v. Tyson [supra], was one where the bill was taken in payment of a note held by the plaintiff against the person who transferred the bill, but no weight was placed upon the fact that plaintiff accepted the note in payment and thus satisfied the original debt; and it has been generally accepted as committing the supreme court to the broad proposition, that the mere acceptance of negotiable paper as security entitled the holder to all the rights of a purchaser for a valuable consideration. McBride v. Farmers' Bank, 26 N. Y. 450; Atkinson v. Brooks, 26 Vt. 569; Allaire v. Hartshorne, 1 Zab. [21 N. J. Law] 665; Gibson v. Conner, 3 Ga. 47; Fellows v. Harris, 12 Smedes & M. 462; Blanchard v. Stevens, 3 Cush. 162. Until a more decisive expression from that tribunal, I must yield to the accepted import of that decision, and hold adversely to the position of the defendant.

It is insisted for the defendant, that the judgment recovered in the suit brought by the plaintiff against the endorsers of the note in suit is a bar to this action against the maker. That suit was brought in the state court, and decided, not upon any defence peculiar to the endorsers, but in accordance with the rule as held in this state, by which the holder of a note, who has taken it as security for a precedent debt, takes it subject to the equities existing between the prior parties. The simple question, then, is whether a judgment in favor of an endorser, in an action by the holder of the note, is an estoppel in an action brought against the maker, where the defence is upon ground common to both the maker and endorser. It would hardly be contended that a judgment in favor of the creditor against the principal would estop a surety from contesting the same issue when sued by the creditor; and it has been decided, in several cases, that a judgment in favor of the principal, when sued by the creditor, will not preclude a subsequent recovery by the creditor against the surety. Townsend v. Riddle, 2 N. H. 448; Bank of the State v. Robinson, 8 Eng. [13 Ark.] 214; Barker v. Casidy, 16 Barb. 177. Where there is no agreement, express or implied from the nature of the contract, that a surety shall be bound by a suit against the principal, the surety is not affected by the result. He is in the position of a stranger to the controversy. If the surety is not precluded by a judgment against the principal, the creditor is not, because estoppel must equally affect both parties. I entertain no doubt that the former suit is not a bar. To the extent its payment operated as a satisfaction of the plaintiff's debt, the defendant is entitled to be relieved. It has no other effect. The plaintiff is entitled to judgment for the amount of the debt unpaid, for which the note in suit was taken as collateral.

[On appeal to the supreme court the judgment of this court was affirmed. 102 U. S. 14.]

Case No. 10,040.

NATIONAL BANK OF WESTERN ARKANSAS v. SEBASTIAN COUNTY.

[5 Dill. 414.] [1]

Circuit Court, W. D. Arkansas. 1879.

COURTS — FEDERAL JURISDICTION — HOW DERIVED — CONSTITUTIONAL LAW — LAWS VIOLATING THE OBLIGATION OF CONTRACTS — ACTION AGAINST COUNTY.

1. The jurisdiction of the federal courts is derived from the constitution and laws of the United States, and the same cannot be enlarged, diminished, or affected by state laws. Such jurisdiction over controversies cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.

2. The constitution of the United States prohibits the states from passing any law which impairs the obligation of contracts. The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. The constitution embraces those laws alike which affect its validity, construction, discharge, and enforcement.

3. An act of a state legislature which provides that counties are no longer corporations—that they cannot be sued—is void as to obligations legally issued by such counties when the law of the state provided they could be sued, when set up against a party seeking a remedy upon the obligations of a county in a federal court, because the state legislature cannot take away the right of a holder of such county obligations to sue in a federal court when such right is given him by the constitution and laws of the United States, and because such a law impairs the obligation of such contracts.

[Cited in Vincent v. Lincoln County, 30 Fed. 752.]

This is an action brought by plaintiff on several county warrants issued at different times by defendant county. Suit was commenced on the 4th of January, 1879. To the complaint the defendant, by its attorney, on the 5th of May, A. D. 1879, filed an answer, setting up as a defence that since the commencement of this action, to-wit, on the 27th of February, 1879, the legislature of the state of Arkansas passed a law repealing certain sections of the general law of the state providing that the several counties thereof could sue and be sued; the law of the state, in other words, takes away the suable character of the counties. To this answer the plaintiff filed a general demurrer, alleging "that the facts set forth in said answer are not sufficient to constitute a defence to the plaintiff's cause of action;" and upon this demurrer the case was submitted to the court.

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

Messrs. Clendenning and Sandels, for plaintiff.

R. B. Rutherford, for defendant.

PARKER, District Judge. The plaintiff in this action had a right, at the time suit was brought, to bring its action in a district or circuit court of the United States. Sections 629, 563, Rev. St.; Kennedy v. Gibson, 8 Wall. [75 U. S.] 506; Cadle v. Tracy [Case No. 2,279].

The county, at the time of the issue by it of the several warrants in suit in this case, had a right to issue such warrants. Section 605, Gantt, Dig. And when such warrants were issued by the county they were evidences of a promise by the county to pay whoever might be the holder thereof. They were so far negotiable as to pass by delivery, and only lacked that commercial character given by the law merchant to certain kinds of commercial instruments, which, when they are received by a bona fide, innocent holder for value before they are overdue, come to him freed from any equities to be set up by the maker against them.

The bank received these warrants in the course of its business, having paid a valuable consideration for them. This it had a right to do. At the time of the issue of these warrants, when they were received by the bank, and when suit was brought upon them, the defendant, under the laws of the state, was a body corporate and politic, and, by its name, it could sue and be sued, plead and be impleaded, defend and be defended, in any court. Section 937, Gantt, Dig., provides "that each county which now exists, or which may hereafter be established, shall be a body corporate and politic." Section 938 provides that "all suits brought by or against a county shall be brought in the name of or against the county by name, and by its name it may sue and be sued, plead and be impleaded, defend and be defended." This was the law of the contract looking to the remedy at the time it was made.

On the 27th of February, 1879 [Laws 1879, p. 13], the legislature of the state passed a law, the 1st section of which provides for the repeal of certain sections of the general law of the state which gave to counties their corporate character and provided that they might be sued. Section 2 is as follows: "That hereafter all persons having demands against any county shall present the same, duly verified according to law, to the county court of such county, for allowance or rejection." * * *

The suit in this case had been brought, and was pending in the federal court, at the time this law was passed. At that time this court had obtained jurisdiction. This act was evidently passed by the legislature with the intent to take away the right of the holders of obligations issued by the several counties of the state to bring suit on them in the federal courts, although they might have this right under the constitution and laws of the United States. Can this be done? In the case of U. S. v. Drennan [Case No. 14,992], it is held that "the jurisdiction of the federal courts is derived from the constitution and laws of the United States, and cannot be enlarged, diminished, or affected by state laws." This principle is sustained by Livingston v. Jefferson [Id. 8,411]; also by the case of Mason v. Boom Co. (3 Wall. [70 U. S.] 252).

The power to contract with citizens of other states, who have a right to sue in the federal courts, or with a national bank, which has the same right, implies liability to suit by such citizens or such national bank, and no statute limitation of suability can defeat a jurisdiction given by the constitution or laws of the United States. Cowles v. Mercer County, 7 Wall. [74 U. S.] 118. I think it clear that the jurisdiction of the courts of the United States over controversies cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. Hyde v. Stone, 20 How. [61 U. S.] 175; Suydam v. Broadnax, 14 Pet. [39 U. S.] 67; Union Bank v. Jolly's Adm'r, 18 How. [59 U. S.] 503; Payne v. Hook, 7 Wall. [74 U. S.] 425.

Now, at the time of the passage of this law the county had made its contract; its promise to pay was out; its liability on its promise was clear; the obligation of its contract was in existence. Could the state legislature do anything to impair the obligation of this contract of the county? "No state shall pass any law impairing the obligation of contracts," is the language of the supreme law of the land (article 10, § 1, Const. U. S). What is the obligation of the contract? It consists in the power and efficacy of the law which applies to and imposes performance of the contract or the payment of an equivalent for non-performance. Ogden v. Saunders, 12 Wheat. [25 U. S.] 213.

The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. The constitution embraces those laws alike which affect its validity, construction, discharge, and enforcement. Von Hoffman v. Quincy, 4 Wall. [71 U. S.] 535; Walker v. Whitehead, 16 Wall. [83 U. S.] 314; Edwards v. Kearzey, 96 U. S. 595.

In the case of Edwards v. Kearzey, Mr. Justice Swayne says: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of 'those imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable." "Want of right and want of remedy are the same

thing." 1 Bac. Abr. tit. "Actions in General," letter B. To be in conflict with the constitution, it is not necessary that the act of the legislature should import an actual destruction of the obligation of contracts. It is sufficient that the act imports an impairment of the obligation. If by the legislative act the obligation of contracts is in any degree impaired, or, what is the same thing, if the obligation is weakened or rendered less operative, the constitution is violated, and the act is so far inoperative.

It is a proposition not debatable that the legislature of the state cannot take away the right of the plaintiff to sue in a federal court, as such right is secured by a law of congress, which, with the constitution of the United States, is the supreme law of the land. The demurrer must therefore be sustained. Judgment accordingly.

See U. S. v. Lincoln County [Case No. 15,503]; Foote v Johnson County [Id. 4,912].

Case No. 10,041.

NATIONAL EXCH. BANK v. MOORE.

[2 Bond, 170;[1] 1 N. B. R. 470 (Quarto, 123); 1 Am. Law T. Rep. Bankr. 74.]

District Court, S. D. Ohio. Feb. Term, 1868.

USURY—NATIONAL BANKING ACT—FORFEITURE OF DOUBLE INTEREST—PRINCIPAL DEBT—VITIATED CONTRACT.

1. Section 30 of the national banking act of June 3, 1864 [13 Stat. 99], restricts banks organized under the act to the rate of interest on loans and discounts authorized by the laws of the state in which a bank is located; and provides, that charging or reserving a higher rate of interest shall subject the bank to the forfeiture of all the interest charged or paid, with a right by the person paying the same to sue for and recover double the amount paid.

[Cited in Darby v. Boatmen's Sav. Inst., Case No. 3,571; Re Pittock, Id. 11,189; Hill v. National Bank of Barre, 15 Fed. 433.]

2. But the statute does not provide for the forfeiture of the principal debt; and although interest has been reserved, by a bank in Ohio, in excess of the rate of interest allowed by the law of the state, the bank has a valid claim against the debtor for the principal debt.

[Cited in Re Pittock, Case No. 11,189.]

3. Although the reservation of an illegal rate of interest is in violation of the statute, there is no provision for the forfeiture of the principal debt; and, the statute having provided for the forfeiture of twice the amount of the illegal interest charged, the fair implication is, that it was the intention of congress that such forfeiture should be the only penalty.

4. The reservation of ten per cent. interest being in excess of the rate prescribed by the state, does not involve such moral turpitude as on the principles of the common law to vitiate the contract.

In bankruptcy.

H. C. Noble, for petitioner.

C. N. Olds, Mr. Baldwin, and Mr. English, for bankrupt.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

LEAVITT, District Judge. The petition alleges that the National Exchange Bank of Columbus is a creditor of Addison Moore in a sum exceeding three hundred dollars, upon a liability created by his indorsement of a promissory note given to said bank by one W. W. Moore, payable to the order of said Addison Moore three months after June 1, 1867, which was not paid at maturity, though payment was duly demanded, and the indorser notified of the non-payment. The petition then avers several acts of bankruptcy, in making payments and transfers of property to certain creditors, with a knowledge of his insolvency, and with intent to prefer them. The prayer of the petition is, that for these acts the said Moore may be declared a bankrupt, pursuant to the act of congress, approved March 2, 1867 [14 Stat. 517]. The alleged bankrupt, having been duly notified of the time and place of hearing, has appeared by counsel and filed his answer to the allegations of the petition charging the acts of bankruptcy, and also averring that the debt claimed as due to the said bank is not a demand provable under the bankrupt act, and that the promissory note indorsed by him is a nullity, for the reason that in its discount by the bank interest was reserved and paid at a higher rate than six per cent. per annum. The legality and provability of the petitioner's debt precedes the question whether the alleged acts of bankruptcy have been committed, and therefore first requires the consideration of the court. The bankrupt act, in terms, makes it necessary that the petitioning creditor should allege and prove a valid and legal demand against the person proceeded against as a bankrupt; and it is obvious, therefore, if this exception is sustained he has no standing in court, and his petition must be dismissed, unless some other creditor shall choose to prosecute as the petitioner.

It is admitted, by the counsel for Moore, that the petitioning creditor, the National Exchange Bank of Columbus, is a banking institution, legally organized and doing business as such, under the authority of the national banking law of June 3, 1864. It is admitted, by the counsel for the bank, that the note described was discounted by that institution, and that interest on the same, charged and reserved, was at the rate of ten per cent. per annum. And it is insisted, that the interest so charged and reserved, being in excess of six per cent. per annum, is usurious, and the discount of the note beyond the corporate power of the bank; and, therefore, that the note indorsed by said Moore is void, and cannot be viewed as creating a valid debt provable under the bankrupt act. The question thus presented involves the construction of the provisions of the national banking act prescribing the rate of interest which banks organized under it may charge and reserve, and the legal effect of charging and reserving a higher rate than that limited

by the act. The court has no information that this question has been judicially decided as arising under the bankrupt act of 1867, and is therefore without any precedent to aid it in reaching a conclusion. That it is one of great practical importance, and not free from doubt, may be readily conceded. Regretting that the pressure of other duties has not permitted a more thorough investigation of the point, I will proceed to state the views I entertain.

Section 30 of the national banking act provides, "that any banking association may take, receive, reserve, and charge, on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where, by the laws of the state or territory, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And where no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, and charge a rate not exceeding seven per centum; and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged to be a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association receiving the same."

The question arising under this provision of the banking law of the United States has been fully and ably argued by the counsel on both sides, and numerous authorities have been cited. On the one hand, it is insisted that as by the law of Ohio six per cent. per annum is established as the legal rate of interest, the reservation of a higher rate by a national bank is an excess of its corporate power and usurious in its character; and that the writing or evidence of debt, on which interest is thus reserved or paid, is a nullity and can have no legal force. On the other hand, it is contended that although such reservation of interest is in conflict with the statute and therefore illegal, the statute has affixed, as the penalty of the illegal act, not the forfeiture of the principal debt, but of the entire interest illegally reserved, with the right, to the party paying it, to recover, by suit against the bank, double the sum of the interest paid. The cases cited by the counsel, urging this exception to the demand of the petitioning creditor, are harmonious in holding that a contract or agreement against public policy, or founded upon an immoral consideration, or in conflict with an explicit statutory provision, is invalid and can not be enforced in a court of justice. It is, undoubtedly, a sound legal principle, that courts will not lend their aid to enforce contracts or transactions to which such objections apply. But, it occurs to the court, that the point presented in this case is not fully met by the cases cited. This court is called upon to give a construction to the section of the national banking law, which has been quoted. And the rule of interpretation is, to ascertain, from the whole section, what was the intention of the legislature in enacting it. In prescribing a rate of interest legally chargeable, and declaring an excess of such rate to be illegal, was it intended that the contract should be an entire nullity, and the principal, with twice the amount of interest charged, be forfeited; or, was it intended that the forfeiture of double the interest charged should be the penalty for the illegal act, without invalidating the right of the bank to enforce the payment of the principal debt? It was clearly within the legislative power to have declared that the penalty for charging or receiving illegal interest should be the forfeiture of both principal and twice the amount of interest. But, if this had been intended, would not such an intention have been expressed in explicit language. There is no reason to doubt that if the section referred to had stopped with the prohibition of taking or reserving interest in excess of the rate prescribed, a loan made by a bank in conflict with such prohibition could not be enforced. It would unquestionably be held to be an illegal and void act. But the legislature has chosen to prescribe a specific penalty for the illegal act, namely, the forfeiture of double the sum of the entire interest charged or paid, and have not declared that the principal debt should be forfeited. It is certainly not reasonable to infer that it was the intention of congress to provide a double penalty for the illegal reservation of interest on loans. Yet such would be the effect of the construction of the section referred to, as insisted on by the counsel for the alleged bankrupt. So far as the court is advised, there is no law in any of the states of the Union on the subject of usurious interest, which provides for the forfeiture of the entire debt on which such interest has been charged and paid, together with the interest and a liability on the part of the creditor to pay twice the amount of the interest to the debtor. I am therefore led to the conclusion that by a fair implication, it was not intended by congress, in the enactment of the section referred to, to punish a bank for reserving interest in excess of the statute, by the forfeiture not only of the principal debt, but double the interest charged or received. It was held by the supreme court of the United States, in the case of U. S. v. Babbitt, 1 Black, 61, that "what is implied in a statute, pleading,

contract, or will, is as much a part of it as what is expressed." From the provisions of section 30, it would seem to be fairly implied that while the specific forfeiture named is enforceable, the transaction as to the principal debt is not invalidated.

This view, in my judgment, violates no principle of sound morality or of public policy. It was clearly competent for the congress of the United States, in the creation of the national banking system, to visit the banks with a severe penalty for taking excessive interest, without a forfeiture of the debt. In this age of commercial enterprise and activity, many solvent and perfectly responsible persons find that they can make profit by borrowing money at a rate of interest above the legal standard. If the rate charged is not so high as to be unconscionable and oppressive, no wrong is perpetrated on the borrower, and no just reason is perceived for absolving him from his liability to pay the principal debt, unless the legislative will to that effect is clearly expressed. It may be right and expedient that proper guards should be provided by law against extortionate charges for the loan of money. Usury, in its odious sense, is immoral and reprehensible; but if one voluntarily borrows money from a bank or an individual, and in good faith promises payment, with interest beyond the legal rate, there is no justice in visiting upon the lender the forfeiture not only of the debt, but subjecting him to a liability, at the suit of the borrower, to double the amount of interest charged. If there is culpability in such a transaction, both parties are equally implicated; but the construction of the statute insisted upon, places it in the power of the borrower, not only to relieve himself from the entire debt, but to make dishonorable gain by suing for and recovering double the amount of interest reserved. In the absence of any clear statutory provision for this purpose, I am unwilling to sanction such a construction of the section of the law referred to as will lead to the results indicated. There is high judicial authority for the doctrine that an act may be unlawful as within the prohibition of a statute, and yet a debt or obligation growing out of the act be valid, unless it appears by a fair construction of the statute that it was the intention of the legislature that it should be void. The case of Harris v. Runnels, 12 How. [53 U. S.] 79, seems to be directly in point on this proposition. The defendant was sued on a promissory note, the consideration of which was the price of certain slaves taken to the state of Mississippi, in violation of a law of that state. Upon the question whether the note was void, the court held that the intention of the legislature as to the validity of the note, must be decisive of the question. In their opinion, the court say: "Whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, it is not to be taken for granted that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice." And further: "It is true that a statute containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be inferred, a contract in contravention of it is void. It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption may be inferred from those rules of interpretation, to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislators do not think the rule one of universal obligation, or that upon grounds of public policy it should always be applied, is very certain. For in some statutes, it is said in terms that such contracts are void; in others, that they are not so. In one statute there is no prohibition expressed, and only a penalty; in another, there is prohibition and penalty, in some of which, contracts in violation of them are void or not, according to the subject-matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts in contravention of them." The case cited seems strongly to sustain the principle that unless it is clear, from the words of a prohibitory statute, that an agreement in violation of it is void, courts will not so declare it, but will give effect to the agreement. The intention of the legislature is to be made out by referring to the whole statute, and such intention will control the courts in giving it a construction. And, as before remarked, there being nothing in the national banking act from which an intention to invalidate a contract, by which illegal interest is reserved, is fairly implied, and there being ground for the presumption, from the specific penalty provided, that such effect was not intended, I am led to the conclusion that the note in question is not void, and must be recognized as a provable debt under the bankrupt law.

The case of Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 527, is cited by counsel as sustaining the doctrine that all contracts prohibited by law are unconditionally void, and not to be enforced, even if there is no express provision declaring their nullity. The principle

held in that case is, however, explained and modified by the later case of Harris v. Runnells, before referred to. And it may be remarked that the facts in the case in 2 Pet. were of a character requiring the most stringent application of law to secure the ends of justice. There was flagrant and oppressive usury on the part of the bank, as well as a clear violation of its charter. The interest reserved, as stated in the opinion of the court, was equivalent to forty-five per cent. for three years, being about fifteen per cent. per annum in excess of the legal interest. Every instinct of justice required that relief from this hardship should be afforded the injured party. But the case before this court does not present any of the repulsive features of the case referred to. It involves no moral turpitude, vitiating the contract on general principles. It is simply the case of a voluntary indorsement of a promissory note, in the discount of which interest was reserved at the rate of ten per cent. per annum. There is no pretense that any unjust advantage was taken of the necessities of the borrower, or that anything transpired which would shock the conscience of the most upright person. If, therefore, the note in question is void, it must be because the statute makes it so, and not on the general principles of the common law. It is insisted, however, by the counsel for the alleged bankrupt, that the discounting the note in question, with a reservation of illegal interest, was beyond the corporate power of the bank, and imports an excess of authority which invalidates the note. It is doubtless true, as a general principle, that every corporation must adhere strictly to the law of its creation, and can exercise no power not expressly granted or necessarily implied. But the cases are numerous to the effect, that where a banking institution is vested by its charter with authority to make loans by the discount of paper, its legal rights and responsibilities as to such a transaction are the same as those applicable to private persons. The laws of all the states of the Union prescribe the rate of interest which may be charged in the ordinary transactions of life, and affix a penalty for any excess beyond the rates fixed. But the same rule applies to such transactions as applies to corporations deriving their authority from their charters. In this respect there seems to be no difference between natural persons and corporate entities. This principle was fully discussed and settled in two cases to which the attention of the court has been called, after full consideration. The cases referred to are Farmers' Bank v. Burchard, 33 Vt. 346, and Commercial Bank of Manchester v. Nolan, 7 How. (Miss.) 508. These cases, with many others that might be cited, distinctly hold that where a bank reserves illegal interest in its loans, unless its charter expressly declares that the contract of loans shall be void, it is void only as to the excess of interest charged, and not as to the principal. And it may not be inaptly noticed that this is the spirit of nearly all the modern legislation of the states on this subject. With few exceptions, the forfeiture of the illegal interest, or the whole of the interest reserved, is the penalty declared. And can it be reasonably doubted that the congress of the United States, in the enactment of section 30 of the national banking law, intended the same result, but superadding to the forfeiture of the entire interest, and as a further penalty, a liability to pay twice the sum of the entire interest reserved.

The counsel for Moore have referred to sections 9 and 53 of the national banking law, as showing the excess of corporate power of the bank in discounting the note in question at the rate of ten per cent. per annum. Section 9 requires each director of a national bank to take an oath that he will not knowingly violate, or willingly permit to be violated, any of the provisions of the act. And section 53 provides that the knowingly violating, or permitting the violation, of any of the provisions of the act by a director shall be a ground of forfeiture of all the rights and franchises granted, to be adjudged by a court of the United States, in a suit for that purpose, prosecuted by the comptroller of the currency. These are doubtless wise and just provisions to secure the faithful performance of the duties of directors. If complaint is made against them under the provisions of section 53, in the manner prescribed, the corporation is subject to forfeiture of all its rights and franchises, upon a proper adjudication by a court of the United States. But it is not perceived that this provision can affect the construction of section 30, fixing the rate of interest which may be charged, and the penalty for charging a rate in excess of that prescribed. The illegal interest is made a ground for the forfeiture of the charter, but it does not follow that a contract of loan by which illegal interest is reserved shall be void as to the principal debt, or that, as between the parties to the transaction, any other result would follow, beyond the liability of the bank to forfeit twice the sum of interest received. On this subject the remark of Judge Story, in the case of Fleckner v. Bank of U. S., 8 Wheat. [21 U. S.] 388, seems directly in point. That learned judge, delivering the opinion of the court, says: "The taking of interest by the bank beyond the sum authorized by the charter, would doubtless be a violation of its charter, for which a remedy might be applied by the government; but as the act of congress (the charter of the bank) does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery."

In closing this opinion, I may remark that the pressure of other duties has prevented me from noticing in detail the several cases

cited by the counsel for Moore to sustain the exception to the debt of the petitioning creditor. It did not seem to the court necessary that this should be done. The cases cited from the Ohio Reports, and the Reports of courts in other states, have no direct application to the question before this court. The decisions referred to were based on state statutes, the language of which, in relation to the reservation of illegal interest, was not in terms, or substantially, the same as that used in the national banking act under which the present question arises. In reaching the conclusion indicated, namely, that the debt of the National Exchange Bank of Columbus, so far as the principle is concerned, was not intended to be invalidated by section 30 of the national banking law, and is a debt provable under the bankrupt act, candor requires me to say that I am not altogether free from doubt. The question, as it bears upon the present proceeding, is not important to the parties. Under the bankrupt law, if the debt of the petitioning creditor is not valid, any other creditor may, by leave of the court, be made a party to the proceeding, and the petition may be brought to a final hearing on the merits. But in reference to the banking and commercial interests of the community, the question is one of vast practical importance. And doubtless it will soon be definitely settled by the court of the last resort. The exception to the petition is overruled, and the case will be heard on the facts which it alleges.

NATIONAL EXCH. BANK OF COLUMBUS, Ex parte. See Case No. 10,041.

NATIONAL EXP. & TRANSP. CO. (REYNOLDS v.). See Case No. 11,732.

Case No. 10,042.

NATIONAL FILTERING OIL CO. v. ARCTIC OIL CO. et al.

[8 Blatchf. 416; 4 Fish. Pat. Cas. 514; Merw. Pat. Inv. 325.] [1]

Circuit Court, S. D. New York. May 4, 1871.

PATENTS — PROCESS OF PURIFYING COAL OIL — FIRST INVENTION—EXPERIMENTS.

1. The letters patent granted to Robert A. Chesebrough, as inventor, August 22d, 1865, for an "improved process for purifying coal oil, &c.," are valid.

2. The claim of the patent is, "the use of bone-black for purifying petroleum or coal oils by filtration." The patentee commenced, in September or October, 1861, to experiment with bone-black, in filtering coal oil. He used the process, with considerable success, in filtering coal oil, in November, 1861. In the winter of 1861, or the early part of 1862, he filtered crude Pennsylvania petroleum, a light oil, through bone-black. Early in 1865 he began experimenting to filter crude West Virginia petroleum, a heavy oil, through bone-black, to obtain an oil for lubricating purposes, without distilling it. He was successful in producing such oil, and, in May, 1865, applied for his patent. Between 1861 and 1865 he made several experiments with bone-black, as well as other substances, to refine oil. One D. used bone-black to filter crude oil in May or June, 1862, and prepared and sold, in June or July, 1862, some one hundred barrels of petroleum, which was first distilled, then treated with chemicals, and then filtered through bone-black. He stopped manufacturing petroleum in July or August, 1862. He did not apply for a patent: *Held*, that Chesebrough invented the process in 1861; that D. did not invent it until 1862; that Chesebrough never abandoned his invention; and that, in law, Chesebrough was the first inventor.

3. It was impossible to tell, without experiment, whether coal oil or petroleum could be filtered through bone-black at all, much less so as to produce a useful effect, although it was known before that animal charcoal would render filthy water inodorous, and that rancid oils were deprived of their smell and taste by filtration through such charcoal, and that bone-black was a decolorizing agent.

In equity.

George T. Curtis and Francis R. Coudert, for plaintiffs.

Frank Loomis, for defendants.

BLATCHFORD, District Judge. The suit is founded on letters patent [No. 49,502] of the United States granted to Robert A. Chesebrough, August 22d, 1865, for an "improved process for purifying coal oil, &c.," and assigned by him to the plaintiffs, who are a corporation. The specification of the patent states the invention to be, "a new and useful method of purifying coal oil and petroleum by filtration." It says: "The nature of my invention consists in the use of bone-black for purifying petroleum or coal oils by filtration, by first distilling the crude oil or petroleum in a still with a condensing worm, such as is commonly used for distilling the same. The products of distillation are benzole, illuminating oil and heavy oil, which I then filter either separately or combined, as follows: The material I use for filtering through is bone-black, made of charred bones. The filter is made of wood or iron, of any suitable form or height. The filter is filled up with the bone-black as high as may be necessary, according to the quality of the oil. The oil is run in on top of the filtering material, and allowed to filter through the perforated bottom of the filter, where it is collected. The operation is continued by feeding the oil into the top of the filter as fast as it runs through the filtering material, until the filtered oil shall begin to assume a dark color, when the operation is suspended, and the filter replenished by fresh material. The coal oil or petroleum refined by this process will be sweet in odor, of a light color, and will need no other treatment. The crude petroleum from the wells may be purified by this process without any previous distillation, either for purpose of illumination or lubrication." The

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Merw. Pat. Inv. 325, contains only a partial report.]

claim is, "the use of bone-black for purifying petroleum or coal oils by filtration."

The defendants sued are the Arctic Oil Company, a corporation, E. H. Woodward, Roswell Haskell and Cornelius V. Deforest. The infringement charged in the bill is the manufacture and sale of lubricating oil made from petroleum oil by filtering the oil in the crude state through bone-black. The answer, which is that of the Arctic Oil Company alone, admits that that company has manufactured lubricating oil from petroleum and other oils by filtering the oil in its crude state through bone-black, but alleges that Chesebrough was not the original and first inventor of what is covered by his patent. It sets up prior knowledge of the invention by Cornelius V. Deforest, William T. Deforest, Cornelius I. Van Wyck, the Arctic Oil Company, J. H. Carrington, James L. Ely, and one Sylvester; that Chesebrough purchased from said William T. Deforest, such oil so made by said Cornelius V. Deforest by filtration through bone-black, for several years before Chesebrough applied for his patent; that Chesebrough obtained from said William T. Deforest the fact that said Cornelius V. Deforest used bone-black, made of charred bones, for purifying petroleum and coal oils; that Chesebrough had full knowledge of the use by said Cornelius V. Deforest of bone-black for purifying coal oil and petroleum at the time he applied for his patent; that the only effect produced upon coal oil or petroleum by filtration through bone-black, as described in the patent, is to decolorize it and remove foreign impurities from it, without regard to its gravity and whether it has been previously subjected to distillation or not; and that the property of bone-black to decolorize and remove foreign impurities from oils and other liquids was, before the invention of Chesebrough, described in certain public works—Blair's Chemistry, Thompson's Cyclopedia of Chemistry, Knight's English Encyclopedia, Chambers' Encyclopedia and Muspratt's Chemistry.

This case was brought to hearing in 1868, before Mr. Justice Nelson, on pleadings and proofs. He delivered an opinion, in October, 1868, arriving at the conclusion that there must be a decree for the defendants, on the ground that the patentee had been anticipated in the invention by Cornelius V. Deforest. Before any decree was entered, and in November, 1868, a motion was made by the plaintiffs that the case be re-opened and they be permitted to introduce further testimony, and that then the case be reheard. The motion was founded on affidavits of Chesebrough and others. The motion was granted, with leave to either party to introduce further testimony, the testimony theretofore taken in the cause to stand.

In his opinion, Judge Nelson says: "The only material question on the proofs, is, whether or not the patentee is the first and original inventor of this process or improvement; and this turns upon another, namely, whether he invented it before 1862. That the process was successfully used by Cornelius V. Deforest in the early part of that year, is not to be doubted, upon the evidence. At this time some three or four hundred barrels of oil were thus purified, some eighty barrels of which were sold to this patentee. The business was not profitable at the time, and was discontinued. The manufacture of this article, by the same process as described in the patent, is proved by Cornelius V. Deforest, the proprietor, Abraham Turner, Alexander McDonald, and Isaac Turner, workmen, and William T. Deforest, at the period above mentioned. It is claimed, however, that the patentee made the discovery prior to this time, and as early as 1861. The proof stands alone on his own testimony, though, if it is not mistaken, and is founded in fact, it could have been corroborated by other witnesses. Indeed, the circumstance that no other persons have been produced to establish the discovery at this early day, and some five years before his application for the patent, casts some suspicion upon his testimony; and besides which, he took out a patent dated June 27th, 1865, for an improved process of purifying, filtering and deodorizing petroleum, by the use of a combination of bone-dust, pulverized oyster shells and cotton cloth. The explanation given is not very satisfactory—that he took out this patent for bone-dust combined with oyster shells, thinking, at the time, that bone-dust was bone-black. The patentee says, that his principal experiments were in the fall of 1861, and the spring of 1865; that, in the fall of 1861, he had a number of filters made, which he took to Pittsburg, Pennsylvania, with a quantity of bone-black; that he there exhibited the process to several gentlemen with whom he was connected in business; and that he was fully persuaded of its value, but his friends objected to it on account of the expense of the process. William T. Deforest was examined as a witness, called to give rebuttal testimony to the complainants' evidence in reply. Some part of this testimony, I think, is exceptionable, in the order in which it was given. But a part of it is proper, as an explanation of the testimony of William H. Chesebrough, a witness in reply to the evidence in defence. This witness (William T. Deforest) had not been examined in the case, nor is he a party to the suit; yet his conversations with the patentee are freely given in evidence, as material, in the reply. It was competent, therefore, to call him to explain or contradict this evidence. It was the first opportunity the defendants had to give the explanation. He states a conversation he had with the patentee in February or March, 1865, and which, if true, shows that, at this time, the patentee had not perfected his improvement, but, on the contrary, had failed to make a market-

able article. The witness was almost daily with him in communications on the subject, explaining how the purification, by the use of bone-black, could be effected, and how Cornelius V. Deforest had accomplished it and the process. William H. Chesebrough had stated that this witness was in the habit of coming into the business establishment of his brother, and had detailed several conversations between them. I think, also, that there is evidence tending to show that the patentee got his first ideas of this improvement from Cornelius V. Deforest. Upon the whole, I am satisfied that Cornelius V. Deforest preceded the patentee in this improvement, and must decree for the defendants."

The aspect of the case is, in my judgment, entirely changed by the new proofs taken. It is to be noted, that the patent is for purifying, by filtration through bone-black, either petroleum or coal oil. Coal oil is an artificial oil, made by distilling cannel coal. Petroleum is a natural oil, obtained from the earth, by boring wells. The patent is for so purifying the oil either before it is subjected to distillation, or after it is subjected to distillation. By subjecting it to distillation, there are produced, as the products of such distillation, benzole, illuminating oil and heavy oil. These may then be filtered, either separately or combined, through bone-black.

The proofs show, that the patentee commenced, in September or October, 1861, to experiment with bone-black in filtering oil. The oil he then used was coal oil. By the 9th of November, 1861, he was so far satisfied of the value of the method of refining such oil by filtering it through bone-black, that he procured to be made a series of three tin filters, which fitted successively inside of each other, bone-black being used as a filterer in the upper two filters. These filters he took, with some bone-black, to Pittsburgh, Pennsylvania. At that place, between the 9th and 16th of November, 1861, he used the filters for filtering through bone-black coal oil which had been subjected to distillation. He exhibited the apparatus, and the process of filtering, and the material subjected to filtering, and the filtering material, and the product, to several persons who testify to the facts as witnesses. The oil, after such filtration, was sweet in odor and of a light straw color, while, before such filtration, it was darker in color and of an unpleasant odor. But the persons to whom the patentee exhibited this mode of refining in Pittsburg, were desirous of producing a purely white oil, and, although the oil then produced by the patentee and shown to them was much improved in color, yet, as it was of a light straw color and not perfectly white, they thought the process would not answer their purpose.

Petroleum was first introduced into market at New York, where the patentee was engaged in business, and conducted his experiments, in 1861, although it did not come generally into use until 1862. After he had filtered coal oil through bone-black, and in the winter of 1861 or the early part of 1862, he filtered petroleum through bone-black. Prior to the spring of 1865 the petroleum he used was the Pennsylvania petroleum. Crude Pennsylvania petroleum is a light oil. In the early spring of 1865 the patentee commenced experimenting on the crude West Virginia oil, which is a heavy, greasy oil, with a view to obtaining an oil suitable for lubricating purposes, by some process other than subjecting the oil to distillation and then treating it with chemicals. He discovered, in those experiments, that, by filtering the crude West Virginia oil through bone-black, without first subjecting it to distillation, it was refined and purified, without any injury to its lubricating qualities, which qualities were seriously impaired by subjecting it to the high heat required in distillation. By May, 1865, he was so satisfied of the value of his process of filtering in respect to the West Virginia oil, that he applied for his patent, which was issued in the following August, a patent having been issued to him in England, for the same invention, July 31st, 1865. His principal experiments with bone-black were made in the fall of 1861 and in the spring of 1865, although he made several experiments with it in the interim, besides using, during such interim, a variety of chemical substances to produce the result of refining the oil.

In regard to the use of bone-black by Cornelius V. Deforest to filter oil, there is no satisfactory evidence that he used it before the very end of May or the beginning of June, 1862. Commencing then, he experimented on a small scale in filtering crude oil through bone-black. He also subjected to the process of distillation a considerable quantity of petroleum, and afterwards treated it with chemicals, and afterwards filtered it through bone-black. He prepared in this way from seventy-five to one hundred barrels of petroleum, and sold them in the market, as illuminating oil, in June, and perhaps July, 1862. He stopped altogether manufacturing petroleum in July or August, 1862. Some seventy-five barrels of the oil so refined were sold, through William T. Deforest, to the patentee, in June, 1862, but the oil carried with it no evidence as to how it was refined, and there is no pretence that the patentee was in any manner informed as to the process by which it had been refined. Cornelius V. Deforest obtained no patent for his invention, and made no attempt to obtain one.

I am satisfied, that, as a question of fact, the patentee invented the process in 1861, and Cornelius V. Deforest did not invent it until 1862. The patentee never abandoned his invention. In taking out his patent of June, 1865, for filtering oil through a combination of bone dust, pulverized oyster shells, and cotton cloth, he meant by bone dust bone-black, as is abundantly shown now by the evidence. He never used bone dust—that is, bones ground to powder without having been

previously burned or charred—but he always used the ground product of charred bones; and it is proved that, in common speech, at the time, that article, when ground fine, was called bone dust, to distinguish it from the coarser bone-black.

I am also satisfied, on the present evidence, that there was no communication made by William T. Deforest, or any other person, to the patentee, as to the use of bone-black by Cornelius V. Deforest or William T. Deforest, or any other person, for refining coal oil or petroleum, or as to the capacity or value of the use of bone-black for such purpose, until after the patentee had obtained the patent now sued on; and, therefore, that the patentee did not get his first ideas of the improvement from Cornelius V. Deforest or any other person.

Certain well settled principles of law are applicable to the foregoing state of facts. In Adams v. Edwards [Case No. 53], Judge Woodbury said: "The law means, by invention, not maturity. It must be the idea struck out, the brilliant thought obtained, the great improvement in embryo. He must have that; but, if he has that, he may be years improving it—maturing it. It may require half a life. But, in that time, he must have devoted himself to it as much as circumstances would allow. But the period when he strikes out the plan which he afterwards patents, that is the time of the invention, that is the time when the discovery occurs." Again, in Colt v. Massachusetts Arms Co. [Id. 3,030], the same judge said: "The date of the invention is the date of the discovery of the principle involved, and the attempt to embody that in some machine—not the date of the perfecting of the instrument." In Cox v. Griggs [Id. 3,302], Judge Drummond says: "It is the right and privilege of a party, when an idea enters his mind in the essential form of invention—inasmuch as most inventions are the result of experiment, trial and effort, and few of them are worked out by mere will—to perfect, by experiment and reasonable diligence, his original idea, so as not to be deprived of the fruits of his skill and labor by a prior patent, if he is the first inventor." In White v. Allen [Id. 17,535], Judge Clifford says, that he who invents first has the prior right, if, as is prescribed in section 15 of the patent act [of 1836 (5 Stat. 123)], he is using reasonable diligence in adapting and perfecting the same, within the meaning of that provision. See, also, Sayles v. Hapgood [Id. 12,420].

In view of these principles, the patentee was the first inventor of this improvement. He never abandoned the prosecution of the idea which he developed in practice in the fall of 1861, before Cornelius V. Deforest did anything in the premises—that filtering coal oil through bone-black would refine it. He followed this up by operating in the same way on petroleum, but, as he testifies, exclusively, until the spring of 1865, on the Pennsylvania petroleum, and trying to refine that for illuminating purposes. The great value of the use of bone-black for refining oil did not disclose itself till the West Virginia petroleum came to market early in 1865. Between 1861 and 1865, he was trying other substances in addition to bone-black to refine oil, not certain that it was worth while to patent the invention, or that he had perfected it sufficiently to warrant a patent. That this was the case, and that he had not abandoned his invention, is shown by the fact that, when the heavy, greasy West Virginia petroleum came into notice as a good lubricating oil, but one needing to be refined, he recurred at once to his idea of refining petroleum by filtering it through bone-black, and applied the process to this West Virginia oil in its crude state, and with complete success. He then immediately applied for his patent, covering, as he had a right to do, from the use he had made of the process, the employment of it in refining, not only the products resulting from the application of the process of distillation to coal oil and petroleum, but also crude petroleum from the wells, which had not been subjected to any previous distillation, and this whether the result to be obtained was an oil for illumination or an oil for lubrication.

I do not think the various publications adduced by the defendants anticipate the invention on the point of novelty. It is true that they state that animal charcoal, prepared from the bones of animals, will render filthy water inodorous; that rancid oils are deprived of their smell and taste by repeated filtration through a stratum of such charcoal; that bone-black will render colorless water charged with almost any vegetable or animal solution; that bone-black is used as a decoloring agent in various chemical purposes; and that the yellowish tint of oil of olives may be removed by mixing with it animal charcoal, and the oleine be obtained colorless by subsequent filtration. But, notwithstanding all this, it was impossible to tell without experiment whether coal oil or petroleum could be filtered through bone-black at all, much less so as produce a useful effect. The patent is, therefore, valid, and there must be a decree for the plaintiffs for a perpetual injunction and an account of profits, with costs.

Case No. 10,043.

NATIONAL FIRE & MARINE INS. CO. v. LESTER.[1]

Circuit Court, D. Connecticut. July 16, 1875.

PRINCIPAL AND AGENT—INSURANCE COMPANIES—GENERAL AGENT—SUBAGENTS—SETTLEMENT OF BALANCES.

[The general agent for New England of an insurance company was to account for all sums due from his subagents, who received from the company powers of attorney to bind it by their acts in the insurance of property. The Boston agent also received a power of attorney for the

1 [Not previously reported.]

service of process in Massachusetts, and on the removal of the general agent was instructed that he might remit balances then unpaid directly to the home office. He did so, informing the removed general agent, but some items remained unsettled. The company thereafter demanded payment from the Boston agent for such unsettled claims. *Held*, that the liability of the general agent was not removed by the acts of the company.]

This action was tried by the court upon a written stipulation of the parties whereby a trial by jury was waived. The facts in the case which are found to have been proved and to be true are as follows:

The National Fire and Marine Insurance Company is a corporation which was incorporated by the legislature of the state of Pennsylvania, and was located in the city of Philadelphia, and was authorized and empowered by its charter to insure buildings and other property against loss by fire. Said corporation is now insolvent, and in March, 1875, made an assignment of all its property and assets, for the benefit of its creditors. Prior to July, 1872, the said company verbally made a contract with the defendant George S. Lester of the city of New Haven in the district of Connecticut to be their general agent and manager for the six New England states. No time was specified when said agency was to terminate. Said Lester was to receive, as compensation for his services, office expenses, clerk hire, and travelling expenses of himself and his clerks or adjusters, a commission of twenty-five per cent. upon all premiums upon policies or renewals of policies in said company issued or contracted to be issued by himself or his subagents within said territory. Said contract was verbal, and its terms are ascertained mainly from the subsequent letters and acts of the parties thereto. Said Lester thereafter selected about forty subagents or employees residing in different towns in said states. These agents received also a commission or power of attorney from the plaintiffs in the form hereunto annexed and marked "A." The monies which were collected by said subagents, they remitted to said Lester, and rendered their accounts to him. They also rendered to him daily reports of the business which they did for said company, and he transmitted these reports to the company, after entering the same, or the substance thereof, upon his own books. He allowed these agents fifteen per cent. commission upon the amount of premiums which they remitted to him, and was primarily accountable and liable to the plaintiff for all monies which were received by his subagents or for which they had given credit. As to the monies which became due to the company for premiums on polices, or renewals of policies issued by said Lester or his subagents, said Lester was indebted to said company, which, as to the transmission or payment of said monies, had no privity with any of his subagents. Preparations for commencing business were made by said Lester, and some business was done for said company prior to July 1, 1872. His agency substantially commenced on that day, when said company issued to him six powers of attorney, one for each of the New England states, which powers were in form and phraseology like Exhibit A. Prior to July 1, 1872, Mr. Lester appointed C. W. Sproat of Boston, Massachusetts, his subagent for the plaintiff's business in that city. Mr. Sproat received from said company a power of attorney like Exhibit A, and also received the power of attorney and appointment, a copy of which is hereto annexed, and marked "B." Mr. Lester was removed from the general agency of said company on December 7, 1872. On the next day an officer of said company went to Boston, and informed Mr. Sproat of said removal, and gave him the letter, a copy of which is hereto annexed, marked "C." Mr. Sproat subsequently paid $12,000 to said company. No monies were received by said Lester from said Sproat, and no accounts were transmitted to said Lester by said Sproat, between Nov. 1, 1872, and Dec. 7, 1872. Said Sproat remitted no money, after Dec. 7, 1872, to said Lester upon account of business which was done for said company after November 1, 1872, but sent to said Lester the daily reports of the business which was done at the Boston agency for said company prior to and until Dec. 7, 1872. Said Sproat is still indebted in about $12,000 for premiums received or credited prior to Dec. 7, 1872. Said Lester received from said Sproat a letter dated Dec. 13, 1872, in which, among other things not pertaining to this case, he says: "I have orders to remit (from Mr. Kauffmann) all premiums due the National direct to their home office. Hoping the arrangement will be satisfactory to you, I remain," &c. On April 4, 1873, the plaintiffs wrote to said Sproat the letter, a copy of which is hereto annexed, marked "D." The plaintiffs also demanded, on April 29, 1873, of said Lester the balance which was unpaid by Sproat.

The bill of particulars and the account of the plaintiffs relate to three classes of items.

1. The first class relates to and includes premiums upon policies issued or contracted for at the agencies in the New England states, other than at Boston, during the defendant's agency.

2. The second class includes and relates to premiums upon policies issued or contracted for at the Boston agency prior to Nov. 1, 1872.

It was admitted by the defendant that if, upon examination of either of these two classes of items, it shall appear that there is any error, omission or mistake in the defendant's account as rendered to the plaintiffs, by reason of which the company have not received the full amount due them, the plaintiffs are entitled to judgment for such deficiency.

3. The third class of items relates to and includes premiums upon policies issued or contracted for at the Boston agency after October 30, 1872. The defendant claimed that he was not liable for any monies which may be due to him or to the company under the third class. The general questions of law and of fact pertaining to the third class were the only questions which were submitted to the court and it was agreed that the questions of fact which might arise under the general principles which should be decided by the court to be applicable to the case, should be heard by a committee or referee to be appointed by the court under the practice of the state courts of Connecticut.

Under the third class of items two questions arise: 1st. Was said Lester ever liable for the payment of those premiums upon policies issued or contracted for by Mr. Sproat, after Oct. 30, which had not been paid to said company? 2nd. If said Lester was ever thus liable, has he been relieved from such liability by the acts of the plaintiffs?

SHIPMAN, District Judge. It has already been found as a matter of fact that Mr. Lester had agreed to be directly and primarily liable to the plaintiffs for all the premiums upon policies issued or contracted for by each one of the agents whom he employed in the New England States. He was appointed the general agent and manager of the plaintiffs' business throughout the territory of New England, receiving a commission of twenty-five per cent. upon all the business which might be done. He was to introduce the company to the people of New England, and to obtain for it position and business. For this purpose he was to select his employees, or subagents, who resided in different towns, and who, from their skill and experience as insurance solicitors or agents, would be likely to make the enterprise remunerative to himself and to his principals. While, as between the public and the company, these persons were the agents of the company, provided with powers of attorney which indicated that the company was bound by their acts in regard to insurance upon property, yet so far as their compensation and the disposition of the premiums which they received, and their accounts were concerned, they were the employees of Mr. Lester. He undertook, not as guarantor or surety, but primarily, to pay the company the premiums which might be payable from all of his subagents, and the company engaged to pay to him twenty-five per cent. of these premiums, as his compensation for the expensive and onerous business which he conducted. These premiums, after deducting the commission, were his own debt to the company. This contract in regard to his liability was a contract entered into in terms between the parties, and its existence is not now, and never has been, seriously denied by Mr. Lester. He has relied, alike before and since the commencement of this litigation, upon the belief that the plaintiff had relieved him from the liability which he assumed when he entered upon the agency.

I cannot perceive from the evidence that this legal liability for the payment of premiums has ever been changed. It is true that the plaintiffs improperly informed Mr. Sproat that he was at liberty to pay his receipts to them; it is also true that Mr. Sproat should have declined to accede to this suggestion, and should have remitted to Mr. Lester. But the legal relations between the contracting parties were not necessarily altered by this intermeddling on the part of the company with Mr. Lester's appropriate business. If he had been injuriously affected by this interference, or if he had been placed thereby pecuniarily in a worse position than he would otherwise have occupied, or if the difficulty of enforcing collections from Mr. Sproat had increased by reason of the acts of the company, then there might have been good ground for the claim that he was no longer liable to pay money, which their conduct had prevented him from receiving. No attempt was made on the trial by the defendant to show that any less money had been paid by Mr. Sproat than would have been paid had the remittances been made directly to Mr. Lester, or that his vigilance and activity in compelling Mr. Sproat to make payment had been relaxed by the acts of the plaintiffs. Mr. Lester was the general agent of the insurance company from July 1, 1872, until December 7, 1872, and was immediately and directly liable to them for the premiums upon the policies of the company which his subagents had agreed to issue prior to the termination of his agency. The company simply informed one of his subagents that he might remit to them the monies which should be collected upon business which had been done by him prior to December 7, 1872. This direction did not change the legal relations between the parties, and was productive of no harm to Mr. Lester, who remains still liable to the plaintiffs for all moneys due from him which they have not received. Let the account be taken upon the principles which have here been indicated.

A.

"Office of the National Fire and Marine Insurance Company, No. 904 Walnut Street, Philadelphia, Pa., ——, 18—. Be it known that —— of —— in the county of —— and state of ——, is appointed, and, by these presents, duly constituted agent of the National Fire and Marine Insurance Company, of the city of Philadelphia, with full power to receive proposals for insurance against loss or damage by fire, in —— and vicinity, to fix rates of premiums, to receive moneys, and to countersign, issue and renew policies of insurance signed by the president and attested by the secretary of the said National Fire and Marine Insurance Company,

subject to the rules and regulations of the said company, and to such instructions as may, from time to time, be given by its officers. In witness whereof, the said National Fire and Marine Insurance Company have affixed their seal to these presents and have cause the same to be signed by their president and attested by their secretary, in the city of Philadelphia, this —— day of ——, 18—. Simon J. Stine, President. W. D. Halfmann, Secretary."

B.

"Know all men by these presents, that the National Fire and Marine Insurance Company, of the city of Philadelphia in the state of Pennsylvania, desiring to transact business in the commonwealth of Massachusetts in conformity with the laws hereof, hereby constitutes and appoints Charles W. Sproat, Esq., of Boston, in the county of Suffolk and commonwealth aforesaid (who is a citizen of said commonwealth and resident therein), to be its general agent, and the true and lawful attorney of said company, in and for the commonwealth of Massachusetts, upon whom all lawful processes in any action of proceeding against said company in said commonwealth may be served in like manner and with the same effect as if said company existed therein. And the said company hereby stipulates and agrees, that any lawful process against said company which is served on its said general agent and attorney, shall be of the same legal force and validity as if served on said company. This appointment, and the authority of said general agent and attorney, shall continue in force, and shall not be revoked, so long as any liability remains outstanding against said company in said commonwealth, or until another general agent and attorney is duly substituted and appointed. In witness whereof, the aforesaid company, pursuant to a resolution of its board of directors, duly passed on the first day of July, A. D. 1872 (a certified copy whereof is hereto annexed), hath caused these presents to be subscribed by its president, and countersigned by its secretary, and the corporate seal of said company to be hereunto affixed, this first day of July in the year one thousand eight hundred and seventy two. Signed. Simon J. Stine, President. W. D. Halfmann, Secretary. (Fifty cent revenue stamp.)"

"State of Pennsylvania, County of Philadelphia, ss.—On this twenty-sixth day of July, A. D. 1872, before me, the subscriber, a commissioner for the commonwealth of Massachusetts, duly appointed and qualified, personally appeared the before-named Simon J. Stine, president, and W. D. Halfmann, secretary, of the National Fire and Marine Insurance Company (who are personally known to me), and severally acknowledged the execution of the foregoing instrument by them subscribed; and they severally made oath that they are respectively the afore-described officers of said insurance company; that the seal affixed to said instrument is its true and proper corporate seal; and that they subscribed said instrument, and said corporate seal was affixed, by virtue of authority duly conferred by said corporation. Witness my hand and official seal, at Philadelphia in the state and county aforesaid, the day and year above written. (Five cent revenue stamp.) Sam B. Huey, a Commissioner for Massachusetts in Pennsylvania. (Commissioner's stamp.)"

"(Copy.)

"At a meeting of the board of directors of the National Fire and Marine Insurance Company, duly held on the first day of July, A. D. 1872, a quorum being present, the following resolution was adopted: 'Resolved, that this company hereby appoints Chas. W. Sproat, Esq., of Boston, in the county of Suffolk and commonwealth of Massachusetts, to be its general agent, and true and lawful attorney, in and for said commonwealth, upon whom all lawful processes in any action or proceeding against this company in said commonwealth may be served in like manner and with the same effect as if this company existed therein. And this company hereby stipulates and agrees, that any lawful process against it, which is served on its said general agent and attorney, shall be of the same legal force and validity as if served on this company. This appointment, and the authority of said agent and attorney, shall continue in force, and shall not be revoked so long as any liability remains outstanding against this company in said commonwealth, or until another general agent and attorney is duly constituted and appointed; and the president and secretary are hereby authorized to execute, in the name of the company, and under its corporate seal, a certificate of authority or power of attorney to the said Chas. W. Sproat in conformity with this resolution and the laws of said commonwealth.'

"I hereby certify that the above is a true copy of the resolution of the directors of this company, authorizing the appointment of a general agent and attorney for the commonwealth of Massachusetts, as recorded by me. (Signed) W. D. Halfmann, Secretary. (Five cent revenue stamp.)"

C.

"Boston, Dec. 10, 1872. C. W. Sproat, Esq., In. Ag't, Boston, Mass.—Dear Sir: Mess. Alliger Bros. No. 10 Pine St., New York, have been appointed agents for the New England States for the National Fire and Marine Insurance Company of Philadelphia, in place of Mr. George S. Lester of New Haven, Conn. You will please make up your account to Mr. Lester at your earliest convenience. Remittances can be made

direct to the secretary, W. D. Halfmann, Esq., at Philadelphia, in sums of $500, as fast as collected, when duplicate receipts will be sent you in settlement of your account with Mr. Lester. Yours, &c. L. Kauffmann, Sup't of Agts. National Fire and Marine In. Co. of Phila."

D.

"National Fire and Marine Insurance Co. of Philadelphia. Office No. 400 Walnut Street, Philada. April 4th, 1873. C. W. Sproat, Esq.—Dear Sir: We enclose you copy of the proceedings of our board relative to the outstanding New England claims. The balance in your hands is still very large, and we trust you will make a determined effort to settle the account very soon. More than 5 months have elapsed since these insurances were made and more than ample time has been given you in which to make collections. We feel we have been very lenient towards you and trust you will show appreciation of the treatment we have shown you by making a vigorous effort to pay us what is owing. Yours very respectfully, W. D. Halfmann, Sec."

Case No. 10,044.

NATIONAL HAY-RAKE CO. v. HARBERT et al.

[2 Wkly. Notes Cas. 100.]

Circuit Court, E. D. Pennsylvania. Oct. 28, 1875.

PLEADING IN EQUITY — PATENTS — BILL FOR INJUNCTION AND DISCOVERY—CORPORATION.

1. Bill not sworn to, praying injunction and discovery under oath, *held* sufficient on demurrer.

2. Statement of locality or place of business of a corporation not required.

Hearing on bill and demurrer. This was a bill filed by complainants for infringement of certain letters patent praying injunctions, both preliminary and final, and an account of profits and assessment of damages. Interrogatories were appended, to which an answer under oath was required. Defendants demurred because (1) the bill did not state where the corporation complainant was located, nor where it had any place of business; (2) the bill was not sworn to.

Strawbridge, for complainants, cited Dorsey Harvester Rake Co. v. March [Case No. 4,014], Woodworth v. Edwards [Id. 18,014].

Mr. Fraley, for defendants, cited Mitf. Eq. Pl. 43; Daniell, Ch. Pl. & Prac. 362; Howe v. Harvey, 8 Paige, 73; Curt. Pat. § 406; Pond v. Hudson River R. Co., 17 How. Prac. 543; Rogers v. Abbot [Case No. 12,004]; rule 20 in equity.

Demurrer overruled.

Case No. 10,045.

In re NATIONAL IRON CO.

[8 N. B. R. 422;[1] 10 Phila. 274; 30 Leg. Int. 272; 20 Pittsb. Leg. J. 208.]

District Court, W. D. Pennsylvania. Aug. 13, 1873.

BANKRUPTCY—SALE BY ORDER OF COURT—LIENS —RECORDED MORTGAGES.

When the interests of all parties seem to demand it, the court is authorized to direct the assignee to sell the real estate of a bankrupt corporation free from all liens, except the existing and recorded mortgages.

In the case of the National Iron Company of Danville, Pa., Col. A. K. McClure, on behalf of A. H. Dill, Esq., assignee, presented a petition for an order of sale of the property, consisting of two furnaces, rolling mills and other real estate at Danville. Hon. H. B. Swope, representing creditors unsecured, to the amount of fifty-eight thousand dollars, and the president of the company, moved the court to dismiss the petition that the assignee might go on and sell under his general powers, subject to the encumbrances, there being mortgages to the amount of seven hundred and fifty thousand dollars, not due for twenty years to come, and it being manifest that a purchaser would give more for the property, if he could avail himself of the long payment on the mortgages than if he had to pay all cash at once on a sale divested of liens. Hon. Samuel Linn, of Williamsport, who represented a mortgage of two hundred and fifty thousand dollars, argued in support of the motion to dismiss. Mr. Grier, of Danville, representing unsecured and judgment creditors to the amount of some one hundred and forty thousand dollars, argued against the motion, and argued a sale divested of all liens, &c. John C. Bullett, Esq., of Philadelphia, representing a mortgage of five hundred thousand dollars, and other interests argued in support of the motion to dismiss. Mr. Stoner, of Pittsburgh, who appeared for certain bondholders, urged a sale subject to the existing liens. The argument was concluded by Col. McClure, for the assignee, who stated that the petition had been presented to relieve the assignee from responsibility, but that he was of opinion the property would bring the most money, if sold subject to the encumbrances.

McCANDLESS, District Judge. Although the petition in this case prays for an order of sale, it has been treated at the argument more as advisory of the assignee than an application for the sale of the property. The estate is largely encumbered with both judgments and mortgages, all of the former subsequent in date to the latter. It is moved to dismiss the petition that the property may be sold by the assignee under his general

[1] [Reprinted from 8 N. B. R. 422, by permission.]

powers, subject to existing legal liens and encumbrances. It is further moved to order a sale discharged of all liens except those given for security of the purchase money. We are not inclined to favor either of these propositions in the shape in which they are presented. The property should be sold for the purpose of paying the debts of the corporation. The proper inquiry for both the assignee and the court is, on what terms will it bring most for the creditors? It is conceded that the lien for the purchase money should be protected. Why should not also the security given for the bond of the company in the hands of innocent holders? The judgment creditors dealt with them on the faith of the corporation, and with recorded mortgages staring them in the face. What equity can they claim over the mortgage creditors? As to the validity of the five hundred thousand dollar mortgage, which has been impugned at the argument, this is not the stage of the case at which to attack it, nor the proper mode of attack. It can be assailed, if it be vulnerable, at another time, and before the proper forum. As presented now it is a valid lien, and entitled to the protection of the court.

Entertaining these views, the motion to dismiss the petition is refused, as also to sell discharged of all liens except the purchase money, and upon application the court will order a sale by the assignee, discharged of all liens and encumbrances, excepting the existing and recorded mortgages.

[Now, August 13, 1873, on motion of H. B. Swope, solicitor of the assignee, it is ordered that the assignee sell at public or private sale, as he may deem most advantageous to the creditors, the property described in his petition, divested of all judgments and liens except the three recorded mortgages (being the mortgages for $250,000, $500,000, and $8,000, respectively); sale to be made on due notice, in accordance with the rules of the court.][2]

Case No. 10,046.

In re NATIONAL LIFE INS. CO.

[6 Biss. 35.] [1]

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

BANKRUPTCY — CORPORATIONS — RECEIVER APPOINTED BY STATE COURT—AMENDMENT TO BANKRUPT ACT.

1. The amendment of February 13, 1873, to the bankrupt act [17 Stat. 436], does not deprive the bankruptcy courts of jurisdiction over a corporation of which a receiver had been appointed by a state court.

2. This amendment does not oust the federal courts of jurisdiction, but simply saves the acts done by the state court and receiver prior to the filing of the petition.

In bankruptcy. This was an answer to the petition in bankruptcy, in the nature of a plea to the jurisdiction. The answer sets up that the petition was filed on the 14th of February, 1874, alleging non-payment of a death-loss for $1,000; whereas, on the 15th of December, 1873, a bill was filed in the circuit court of Cook county, by the attorney-general, for the purpose of winding up the affairs of the company, and distributing its assets ratably, pursuant to the act of the general assembly of March 11, 1869 (Sess. Laws, 209); that in that suit a decree was subsequently made appointing Kirk Hawes receiver, with authority to take possession of all the assets of the company and divide the same among its creditors and those entitled thereto; that the receiver had taken full possession of the assets and property of the company in pursuance of such decree, and was proceeding to execute the decree and mandate of said court; wherefore respondent submits that this court has no jurisdiction to adjudge respondent a bankrupt.

Clarkson & Van Schaack, for petitioner.
Kirk Hawes, receiver, pro se.

BLODGETT, District Judge. This answer brings before the court for construction the act of congress passed on the 3d of February, 1873, amendatory of the bankrupt act. It is claimed that the state court having acquired jurisdiction of the debtor and its assets, under the laws of this state providing for winding up its affairs and distributing its assets, the amendment in question excepts the debtor from the operations of the bankrupt law, and leaves the debtor in the hands of the state courts.

Prior to the passage of this amendment the federal courts had uniformly held that the pendency of proceedings in the state courts to administer the affairs of an insolvent corporation did not prevent the federal courts from assuming full jurisdiction on a proper case made in bankruptcy. In re Merchants' Ins. Co. [Case No. 9,441.]

The language of the act in question is peculiar. It is as follows: "Be it enacted," etc., whenever a corporation created by the laws of any state, whose business is carried on wholly within the state creating the same, and also any insurance company so created, whether all its business shall be carried on in such state or not, has had proceedings duly commenced against such corporation or company before the courts of such state for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto, prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court, agreeably to the state law for the ratable distribution or payment

[2] [From 30 Leg. Int. 272.]

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

of any dividend of assets to the creditors of such corporation or company, while such state court shall remain actually or constructively in possession or control of the assets of such corporation or company, shall be deemed valid, notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company." Rev. St. U. S. 1874, § 5123.

It will be seen that it does not say that in case of proceedings in state courts the bankrupt court shall not take jurisdiction. It declares that all orders made by the state court agreeably to the state law for the ratable distribution or payment of dividends or assets, while such state court shall remain actually or constructively in possession of assets, shall be deemed valid. The phrase, "while the state court, by its receiver, is in possession of assets," seems to imply that the state court may be divested of possession at some time by the proceeding in bankruptcy, and the language of the act only says that the orders of the state court for the payment of dividends, while so in the possession, shall be valid. That is to say, the court in bankruptcy shall not set aside the orders and decrees of the state court, and begin the administration of the estate de novo, but shall take hold where the state court leaves off, or where it finds the debtor at the time of adjudication.

It seems very clear to me that if congress had intended to divest the bankrupt courts of jurisdiction over this class of debtors it would have said so clearly and unmistakably. The courts had so expounded the bankrupt law at the time this amendment was passed as to hold that jurisdiction was conferred over this class of debtors, notwithstanding the pendency of winding up proceedings, and if it had been the intention to leave these corporations in the hands of the state courts exclusively, congress would have said so.

Another consideration which has great weight with me on this point, is that fraudulent conveyances, gifts and preferences, which are prohibited by the bankrupt law, can only be reached and set aside by attack from the assignee in bankruptcy, after adjudication; and it seems to me congress did not intend to leave the creditors of such corporations remediless as to such transactions. The reasoning would seem to be this: The receiver of a state court can convert into money and divide the tangible assets and property of these corporations, perhaps as well as an assignee in bankruptcy, and what the state courts shall do in that direction, the bankrupt court shall not undo, but the creditors shall also have all the remedies of the bankrupt law for recovering fraudulent gifts and conveyances, and property or money paid by way of preference.

The objections on the ground of jurisdiction raised by the answer are, therefore, overruled. And it having been conceded on the argument that the acts of bankruptcy alleged in the petition are true and well-pleaded an adjudication will be entered according to the prayer of the petition.

As to the effect of possession of property by a receiver appointed by a state court, consult Bump, Bankr. (8th Ed.) 203, 305, and cases there cited.

NATIONAL LOAN BANK (HAMILTON v.). See Case No. 5,987.

NATIONAL MECHANICS' BANK (SHOEMAKER v.). See Case No. 12,801.

Case No. 10,047.

NATIONAL PARK BANK v. NICHOLS.

[2 Biss. 146; [1] 5 Am. Law T. Rep. 335; 1 Chi. Leg. News, 361; 5 Leg. Gaz. 341.]

Circuit Court, N. D. Illinois. May Term, 1869.

LIABILITY OF SHARE-HOLDERS.

1. It is the duty of a share-holder in a company to examine his certificate, and ascertain his actual position and liability.

2. Circumstances which make a share-holder liable for previously contracted debts, and effect of misrepresentations by agent.

3. Though a subscription be obtained by fraud, the stockholder may waive it by assuming its advantages.

4. If a share-holder assumes the benefits and advantages of a partner, he cannot, when called upon to respond for the contracts of the corporation, deny his liability.

This was an action at law [by the National Park Bank] [2] to charge the defendants [Joshua R. Nichols, George S. Bowen, J. H. Bowen, C. T. Brown, A. Sturges, B. Sturges, G. Hubbard, G. Carpenter, A. T. Hall, F. C. Smith, A. B. Meeker, J. Y. Scammon, C. M. Smith, A. F. Faucet, G. P. Lee, S. J. Walker, J. V. Farwell, R. M. Hatfield, and H. Martin], nineteen in number, as partners in a joint stock company known as the Butterfield Overland Dispatch Company. The cause of action was an indebtedness of this company, accruing at various times in the year 1865. The company was organized in March, 1865, under the laws of New York relating to joint stock companies. It was conceded that the legal effect of such organization was to make the associates co-partners. In July, 1865, an agent of the company made application to the defendants to take stock, stating that the company was organized for the transportation of material across the Western plains under a charter that would exempt the subscribers from personal liability, and that its capital stock was to be $3,000,000, one-half of which was to be paid in cash. The defendants engaged to take stock amounting in the aggregate to $250,000, and paid to the agents of the company fifty per cent. of the

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[2] [From 1 Chi. Leg. News, 361.]

sum subscribed. In September, certificates of stock were forwarded to the agent of the company in Chicago, and delivered to the defendants. These certificates referred to the articles of association in general terms, and, it was claimed by the plaintiff, were sufficient to put the defendants upon inquiry as to the mode of organization of the company. On the other hand, it was claimed by the defendants that, supposing that the certificates were in pursuance of the contract of subscription, they did not, in fact, examine them.

It appeared that on November 3d, 1865, all the defendants except Nichols, whose letters were relied on as equivalent, executed a power of attorney, as associates, authorizing the organization of the Butterfield Overland Dispatch Company into a corporation, under the laws of Kansas. It was, however, insisted by the defendants that at this time they supposed the company was organized as a corporation.

[It was in evidence, also, that][2] in the spring of 1866, the company failed, owing very large sums of money, and transferred its assets to the Holliday Overland Mail and Express company, and issued circulars to its stockholders announcing that they were legally liable to pay in full, as partners, the debts of the concern, calling an assessment of thirty-three and one-third per cent. on the subscriptions, and giving to the subscribers the alternative of taking stock in the Holliday Overland Mail and Express Company, or paying the assessment. All the defendants except Walker, Faucet, Scammon and Martin subscribed and paid for stock in the Holliday Overland Mail and Express Company, under this circular. All the defendants claimed that they had no knowledge, in fact, of the mode of organization, or that there existed a danger of personal liability, until the receipt of this circular [in the spring of 1866. An assessment was afterwards laid of forty per cent., which all the defendants][2] declined to pay.

It was claimed by the defendants: 1st. That they were induced to subscribe by fraudulent representations. 2d. That their subscription was, in any event, upon condition that the company should be organized under a charter, and with a fixed cash capital. 3d. That they could not be made liable by relation upon contracts made or debts accruing prior to their coming into the association.

On the part of the plaintiff it was insisted that if there was fraud in procuring the subscriptions, or if conditions were attached to them, yet,—1st. The fraud or condition had been waived. 2d. That the defendants, by their acts, were estopped from setting up such fraud or breach of conditions. 3d. That the defendants, in legal effect, became partners by relation to the date of the articles of association.

The facts relied upon as a waiver or estoppel were: 1st. The receipt and retention by the defendants of the certificates with their recitals. 2d. The execution of the power of attorney, with its recitals authorizing the organization of the company under the laws of Kansas. 3d. The receipt of the stock of the Holliday Overland Mail and Express Company. 4th. Various letters from several of the defendants, which, it was claimed, admitted their membership.

S. A. Goodwin and I. N. Arnold, for plaintiff.

Charles Hitchcock, Wirt Dexter, Corydon Beckwith, and Geo. C. Bates, for defendants.

DRUMMOND, District Judge (charging jury). This is an action by the National Park Bank of the city of New York, against the defendants, as partners in a joint stock company called the Butterfield Overland Dispatch Company; and the question is, whether as such partners they are liable for the claim of the plaintiff, consisting of moneys advanced to that company during the year 1865. The advances commenced on the 21st of April, and ended in November. It depends upon the fact whether these defendants were members of that company in such a way as to make them liable as partners of the company for the whole or for any part of these advances.

You will remark, that the plaintiff was not a party to many of the transactions which have passed in review before us in the evidence; that has related chiefly to the connection of the defendants with this company, and the manner in which they were induced to give it their names and money. With that it does not appear that the plaintiff as a corporation had anything to do. That was an act, apparently, of some of the members of the company called the Butterfield Overland Dispatch Company, and as between them and these defendants it must be admitted that there have been faults on both sides.

The leading fault with those in New York connected with the Butterfield Overland Dispatch Company, and one which cannot be excused, was the concealment of the fact that they, on the 20th day of March, 1865, commenced the formation of this joint stock company, and completed it by signing and acknowledging the articles of association, on the 12th day of April, 1865, containing stipulations by which they were bound, and by which it appeared it was an association under the sanction of the laws of New York.

Now it was the duty of all these men, or of any of them, in seeking for associates, to let them know distinctly what had been done, and what was the compact to be entered into by any one who was to become a party to the association called the Butterfield Overland Dispatch Company; and if they sought subscribers to their articles of association in

[2] [From 1 Chi. Leg. News, 361.]

Chicago, it was their duty to make known to these subscribers what their articles of association were. The primary thing to be established was their connection with the association; it was, therefore, indispensable that all who were to be connected with it should know its nature and character. But the various gentlemen who approached these defendants upon the subject of becoming parties to this company, did not communicate to any one of them, so far as we know, that there were articles of association signed, and which became operative by their terms, and which recognized that they were entered into with relation to the laws of New York. These gentlemen, so far as the evidence shows, were Mr. Nichols, Mr. Sturges, and Mr. Butterfield. I believe that no intimation was given by any of them that articles of association had already been subscribed, constituting the Butterfield Overland Dispatch Company. On the contrary, the propositions made were entirely inconsistent with this leading fact. If we believe the declaration of the defendants (and they have not been affected by any statements, so far as I know, introduced on the part of the plaintiff), the motives held out to them to induce them to become parties to such an association, were entirely different from those the actual state of facts would warrant.

Here was a company already organized, the parties to which were personally responsible for the debts of the concern, which may have been very large at the time. Of course, the action of the defendants under such a state of facts, if they had been communicated to them, might have been entirely different from what it was.

The first question, therefore, is, whether defendants became parties to this association, as partners, with a knowledge of the circumstances of its existence at the time, and with good faith exercised to them by those who induced them to become parties. If they did, of course they are bound by the position of affairs at the time. But this is not claimed, as I understand, by the plaintiff, for if the testimony which has been given by the defendants can be relied upon, the contract entered into and the money that was paid by these defendants was upon an entirely different supposition from that justified by the actual state of affairs. And, therefore, I think, if this testimony can be relied upon (of course you are to judge of the testimony), there can be no original liability on the part of these defendants on the ground of their knowledge of the condition of the Butterfield Overland Dispatch Company at the time that they became parties; and it is certainly a significant fact that Mr. William Sturges, who was the main instrument and agent by which these defendants were induced to subscribe and pay their money, has not been called by the plaintiff to affect in any degree the testimony of the defendants.

If, however, they were not parties in consequence of not understanding the position of affairs, misrepresentations being made to them of facts, it does not follow that they may not have become parties by subsequent acts of their own, with knowledge of the facts. And the next question is, have they so become parties? In order to determine this, you are to take the facts that are applicable to all the defendants, not those applicable to one or more of the defendants less than the whole; because if you find the defendants liable at all, you have to find them all liable, and you have only to apply the facts which have been proved as to all. If there have been facts proved as to some, not as to others, you have only to take those which apply to all, and determine whether they convince you whether the defendants have become parties to the articles of association.

The defendants were applied to, I think most of them, and subscribed and advanced their money in the summer of 1865. As I have already said, if we believe their testimony, they did not know at that time that the company had been organized under the laws of New York, and that there were large liabilities against the company which they might be called upon to assume. Have they done so since by any acts of their own? Have they become liable as partners?

In August, or in the early part of the fall of 1865, certificates of stock were made out and forwarded by the officers of the Butterfield Overland Dispatch Company to the subscribers and stockholders here, and they were received, as I understand, by the defendants. These certificates of stock (most of them) have been introduced, and it is admitted that they are all similar in character. Now, the certificate of stock which each of the defendants received, bore on its face that the holder was entitled to a certain number of shares of stock in the Butterfield Overland Dispatch Company, and also that the holder was subject in the future to the payment of such assessments as might be made in case of loss or other necessity, and to all the obligations and liabilities of the company, and also entitled to all the privileges of a member as fully as if he had signed the articles of association.

We have spoken of the faults of the gentlemen of New York; we must now refer to what must be considered a fault of the defendants.

Many of the defendants say that they received the certificates of stock without examining them. They certainly knew what they were. They purported to represent their interests in a company or organization, for which they had subscribed or paid their money. It is presumable, I think, that if the company had earned profits they would have claimed the profits under this evidence of their interest in the company.

It certainly was, therefore, their duty to examine the document which they had received, indicating the interest they had in

the company and the money they had paid. It may be true that men do not always examine certificates of stock, and yet there never has been known, I believe, an instance of a man who became a member, in this way, of a company, who, if the company realized profits, did not claim them by virtue of such certificate. Then, that being so, there would be a natural inference that, claiming the advantages and profits, he must bear the burdens and losses. But the only effect of this, in this case, is as to the conclusion to be drawn against the defendants by the circumstance that the certificates contained certain language that they were shareholders in the Butterfield Overland Dispatch Company, and that they were subject to the payment of assessments for losses or from other necessity, and entitled to all the privileges of the association as if they had actually signed the articles.

Now, if these had been given to the defendants, without any previous representation having been made, the effect of this might have been stronger than it was under the conceded state of facts. Because it is quite possible that those who did look at the certificates of stock might have regarded them under the influence of the representations which had been made by the agents who applied to them for subscriptions and for their money, and therefore they might not draw the same inference or conclusions from them that they would, had they been uninfluenced by such representations; and all that I can say to you, if you believe this testimony, is simply this: that if he examined these certificates of stock, it would seem to have been the duty of every stockholder to make some inquiry as to his relation with this Butterfield Overland Dispatch Company; to know, in other words, where he stood, what his responsibilities were as a member of the company, and if, in point of fact, he found himself in a different position from what he supposed he was from the representations that were made, to repudiate that connection, to disavow it at once, and have nothing more to do with it. That nothing of this kind was done was, I think, a fault on the part of some of the defendants, and, I must say, one not very creditable to their character as business men. But I cannot say that you can disregard, in connection with this aspect of the case, the bearing and effect of the representations that were made as inducements to them to become parties to the company. Because it is indispensable, I think, in order to make out a liability against these defendants, that they should be possessed of full knowledge of the circumstances of their connection with the company which was then organized; and if they accepted this stock with this full knowledge of the circumstances, then they were bound, as prudent and discreet business men, to follow up the intimation given in this certificate of stock, and to ascertain the position in which they stood, and are to be visited with all the consequences of partners in this association, but not otherwise.

Again, if they did become members of this association with the full knowledge of the circumstances connected with the position of the Butterfield Overland Dispatch Company, what is the measure, under the facts of the case, of their liability to this plaintiff? That is another and distinct question.

It is conceded that no one of these defendants was a member of the association at the time the contract was made between the company—the Dispatch Company—and the plaintiff for a loan of the money, on the 21st of April, 1865, by which it was agreed that the plaintiff should advance to the company $100,000, in sums as they might be wanted; and, in fact, on that day $10,000 were advanced, and on the 1st of May $55,000, and the 2d of May $20,000, and on the 3d of June $5,000—$90,000, advanced before, as I understand, any of these defendants became connected with this company.

Now, to say nothing of the $20,000 advanced in November, are these defendants responsible for the money which was advanced before they became connected with the company? Of course the only ground upon which they are liable is, that they associated themselves with the company, either by express declaration or by acts which admit of no reasonable doubt that they assumed, as members of the company, all the liabilities of the company at that time. It is only in that way, by relation back of the position of the company at the time they connected themselves with it, if they ever did, that they could become liable for the $90,000 advanced to the company before that connection. Of course, if with full knowledge of the facts they did become parties, either expressly or by implication, to this joint stock company, from the beginning, they are as responsible for the debts of the company as those who were original parties to articles of association, but not otherwise. They must have become parties with full knowledge of the facts, understanding their position and relations to the company.

As to the $20,000 advanced on the 15th of November, that would depend, of course, first, upon the fact whether they were partners, and secondly, whether, as such partners, they reaped the benefit of the advance that was made, and enjoyed its fruit. If they did, then I think they are estopped from asserting they are not liable. If they, at the time the $20,000 were advanced, were partners of the association, and had as such the full benefit of the advance, they would be liable equally with their associates for the advance. You will see, therefore, there are three questions which the court submits to you.

In the first place, whether these defendants became subscribers, and advanced their money to the company with full knowledge of the circumstances of its existence at the time,

and with the exercise of good faith, and true statements and representations made to them by the agents of the company when they subscribed their names and advanced their money. If you shall believe they did not become partners by that act, by anything that was done, then the next question the court submits to you is whether with full knowledge of the facts they have become partners since. It may be true that bad faith was used towards them at the time their subscriptions and money were obtained. It may be true that fraud was practiced; but it was competent for them, with knowledge of all the facts, to waive the fraud, and if they did —if they assumed the advantages of members and partners of the association—they cannot, when they are called upon to respond for the contracts of the association, be heard to deny their liability.

Thirdly, if they were partners and members of the association, what is the measure of their liability, and whether for the whole or only a part of the advance made by the plaintiff? It is to be observed that this is not an action by the Overland Dispatch Company against these defendants for assessments made against them, as shareholders, by the company. It is not a bill in equity calling upon the defendants to respond to the creditors of the company for advances which have been made; but it is an action at law against these defendants, as members of the association—partners—liable as partners for the debts of the company, and their liability must be measured by the rules which are applicable to a partnership concern, under which one member of a firm is liable for the debts of the firm; and in this aspect of the case, of course, the whole question turns upon the fact whether they were partners and members of the company.

[2] [A great deal of evidence has been introduced which really has but an insignificant bearing upon the case, viz. as to the conduct of these New York men in keeping their books, selling out to Ben. Holliday, to Brown, etc. All these are material upon this aspect of the case, viz. whether good faith was used by those persons who solicited the defendants to become parties, in the act of making them parties. But inasmuch as that is not seriously relied upon by the plaintiff in the argument which has been made, of course that testimony does not become material.

[I consider that the important testimony bearing upon the case is the subsequent acts of these defendants, by which it is claimed that they were connected with this company. If you shall find, gentlemen, under the facts and law, as it has been now stated to you by the court, that the defendants are liable for the advances that were made, it is for you to say whether, under the law and under the facts, they are liable for the whole; and if they are, then the plaintiff would be entitled to the whole amount advanced, with interest from the time that this money should have been returned under the contract, or, in the absence of any proof upon the subject, from the time the suit was commenced. If you shall find that they were only liable for a part, then you will allow such part, together with interest in the same way. If you find under the facts and under the law that the defendants are not liable at all, then, of course, you must simply say that you find for the defendants.

[I repeat what I said before, that you must apply the evidence only which bears upon all and against all the defendants. You cannot select out that evidence which applies only to some of the defendants, less than all; but you must take the evidence which applies to all, and by this I only mean that the proof must convince you of the liability of all. Because, if you find for the plaintiff, you must find against all or none of the defendants. This is the conceded rule of law in this form of action. I understand that there has been a recent statute of the legislature of this state which has changed this principle of the common law, but it has not yet been adopted by this court, and, of course, is not at present a law of this court.] [2]

[For proceedings on a motion to dismiss for want of jurisdiction, see Case No. 10,048.]

For a further discussion of the liabilities of stockholders, consult Upton v. Hansbrough [Case No. 16,801] and Same v. Burnham, January, 1873 [Cases Nos. 16,798 and 16,799], and cases there cited.

Case No. 10,048.

NATIONAL PARK BANK v. NICHOLS et al.

[4 Biss. 315.] [1]

Circuit Court, N. D. Illinois. March, 1869.

CORPORATION — SUIT OUT OF STATE WHERE CREATED—CITIZENSHIP OF CORPORATIONS.

1. A corporation which has a legal existence in any one state, can sue in the federal courts of any other state. It is not necessary that it be a corporation created by the laws of that state.

2. It is a presumption—which the courts will not allow to be rebutted—that if a corporation has a legal existence in a state, its corporators are citizens of the same state.

Assumpsit to charge the defendants [Joshua R. Nichols and others], as partners in the Butterfield Overland Despatch Company, on indebtedness of the company. The facts are fully stated in the report of the trial before Drummond, J. [Case No. 10,047]. This was a motion to dismiss for want of jurisdiction.

Charles Hitchcock, Wirt Dexter, Corydon Beckwith, and Geo. C. Bates, for the motion.

S. A. Goodwin and I. N. Arnold, opposed.

[2] [From 1 Chi. Leg. News, 361.]

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

[2] [From 1 Chi. Leg. News, 361.]

DAVIS, Circuit Justice. It is objected that the Park Bank cannot sue in this court, because it is not a corporation created by the laws of the state of New York. So far as the right to sue is concerned, it can make no difference that the bank is authorized by congress instead of the legislature of New York. If it is created by law, has its lawful place of business in New York and nowhere else, and its corporators are citizens of the state, it can bring a suit in any circuit court of the United States outside of the state of New York. This was substantially decided by Chief Justice Marshall in Bank of U. S. v. Deveaux, 5 Cranch [9 U. S.] 61, but he held that it was a matter of proof whether all the corporators of the Bank of the United States lived in the state of Pennsylvania. This doctrine has been modified, and it is now held by the supreme court to be a presumption which cannot be rebutted, that if the corporation has a legal existence in the state, its individual members are citizens of the state. Ohio & Mississippi R. Co. v. Wheeler, 1 Black [66 U. S.] 286.

There is no question but the Park Bank was authorized by congress to transact business in New York and nowhere else, and it therefore follows, as a legal presumption, that the shareholders of the bank are citizens of New York. If so, this suit can be maintained. Motion denied.

NOTE. A corporation created by the laws of the state in which a suit is brought in the federal court, must be considered a citizen of that state, whatever its status or citizenship is elsewhere by the laws of other states. Chicago & N. W. Ry. Co. v. Whiton, 13 Wall. [80 U. S.] 270.

A corporation created by and transacting business in a state, is to be deemed an inhabitant of that state, capable of being treated as a citizen, for all purposes of suing and being sued in a circuit court. Louisville, etc., R. Co. v. Letson, 2 How. [43 U. S.] 497; Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314; Greeley v. Smith [Case No. 5,747]; New York & E. R. R. v. Shepard [Id. 10,198].

A municipal corporation created by a state within its own limits may be sued in a circuit court, by a citizen of another state. Cowles v. Mercer Co., 7 Wall. [74 U. S.] 118. And the state legislature cannot prevent the jurisdiction of the federal courts from attaching. Id.

A national bank organized and located in any state, may sue a citizen of another state in the circuit court thereof. Manufacturers' Nat. Bank v. Baack [Case No. 9,052].

Case No. 10,049.

NATIONAL PARK BANK v. PEOPLE'S BANK et al.

[25 Int. Rev. Rec. 169; 8 Reporter, 8; 14 Phila. 405; 36 Leg. Int. 204; 26 Pittsb. Leg. J. 178.]

Circuit Court, E. D. Pennsylvania. May 13, 1879.

BANKRUPTCY — COMPOSITION WITH CREDITORS — PAYMENT OF CREDITORS REFUSING TO JOIN.

[A payment, by the debtor, of a creditor who refused to join in the composition agreement, out of funds reserved, and not included in the schedule, does not operate to the injury of creditors signing the composition, so as to give them any right to recover from the creditor paid a proportion of the money thus received.]

The facts of this case, very briefly, are as follows: Landenberger & Co., being in financial difficulties, entered into a composition deed with certain creditors, among whom was the Park Bank, by which the Philadelphia Trust & Safe Deposit Co., of Philadelphia, was designated as trustee. The People's Bank of Philadelphia, another creditor, refused to sign the deed, and commenced suit against Landenberger & Co. upon certain of their notes held by it. Landenberger & Co. instructed Stokes, Caldwell & Co. to take up these notes and charge them with the amount. Stokes, Caldwell & Co., who were indebted to Landenberger & Co., did take up the notes, amounting to $25,000, charged Landenberger & Co. with that sum, and, having handed over the notes to them, took their receipt for $25,000.

W. H. Sharpless and R. C. McMurtrie, for Park Bank.

Hood Gilpin and F. C. Brewster, for People's Bank and William H. Kemble.

William Ernst, for Stokes, Caldwell & Co.

[The People's Bank was not paid out of any of the schedule assets. How then was the trust injured? It was benefited, because the payment left no assets for the rest. The assignment of November 10, 1873, was a new mortgage. Corn Exchange National Bank v. Philadelphia Trust, etc., Co. [Case No. 3,244]. What standing has the Park Bank to ask the relief sought? If the assignment was binding, all the creditors should be parties. Henry v. Patterson, 57 Pa. St. 346. See, also, Lower v. Clement, 25 Pa. St. 63; Lane's Appeal, 82 Pa. St. 289; 2 Beav. 385; 3 Ves. Jr. 456. But even if the bank or Kemble is responsible, Stokes, Caldwell & Co. are not; they surely bought the notes; Kemble concealed his real character when called upon to speak out.] [2]

BUTLER, District Judge. The ground on which the plaintiffs seek to charge the People's Bank is, that by reason of the contract with Landenberger & Co., it sustains such relations to them that the money received on the notes must be treated as received on joint account; assuming that the bank is a party to the contract. The claim against Stokes, Caldwell & Co. rests on a similar basis. Taking the alternative that the bank is not a party to the contract, and not, therefore, responsible; that the notes were purchased by Stokes, Caldwell & Co. (as Mr. Kemble and others testify), and asserting that they, as such creditors of Landenberger & Co., entered into the contract, through the agency of Mr. Kemble; and that they were subsequently paid, the plaintiffs claim that

[2] [From 8 Reporter, 8.]

the money so paid must be treated as received on joint account. The ground on which Mr. Kemble is sought to be charged is different. The plaintiffs state it in the original bill as follows: "That William Kemble may be compelled, if it shall appear that the People's Bank is not bound by his acts, to make good the contract, he, by the composition agreement professed to make, as respects their claim." Possibly a similar charge of deceit in procuring the plaintiff's signature to the agreement is intended to be preferred by the plaintiffs against Stokes, Caldwell & Co. If such is intended the purpose is not plainly stated. In the view we take of the case, however, this, as will hereafter be seen, is unimportant.

A careful examination of the evidence has satisfied us that the bank had no interest in the notes when the contract was executed. All the testimony tends to this conclusion. Whether the transaction between it and Stokes, Caldwell & Co. be treated as a sale or a payment, its interest in the debt was gone. It is equally clear that the bank and those representing it had steadfastly resisted all efforts to compromise, and that the payment to them of the $25,000, was unaccompanied by any promise whatever. Being in a position to compel payment, it felt no interest in the proposed scheme of composition. Mr. Kemble was not authorized to enter into the contract for it, either by anything occurring at the time the claim was satisfied or afterwards. Nor in our judgment did he undertake to do so. When induced by Mr. Caldwell to sign the paper, he not only omitted his title as president of the bank, but affixed the term "attorney" to his name, as if to guard against an inference that he was representing that institution. The examination has also satisfied us that Stokes, Caldwell & Co. were not purchasers of the notes; that they paid them simply as agents for Landenberger & Co. About this we believe there can be no room for doubt. All they did was in pursuance of Landenberger & Co.'s instructions, and with their funds; and the notes, when obtained, were immediately handed over as paid. It would not be remarkable, however, that the officers of the bank should have regarded the transaction as a purchase by Stokes, Caldwell & Co. It was spoken of as such by Mr. Landenberger in his communications with the latter gentleman; and very probably in the same way by them in their communications with the bank. Mr. Dixey says, Landenberger, on being informed that Kemble declined to have any connection with the proposed settlement, requested Mr. Caldwell and himself to do the best they could with Kemble; to "buy the paper," if necessary, and charge the amount to him. Nevertheless, the transaction was a payment of the notes. Its substance, we have no doubt, is accurately stated in the following extract from the testimony of Mr. Stokes: "About the first of January, 1874, the paper matured, and Landenberger came to the store. I think he stated there that the paper would be immediately put in execution against the firm of Landenberger & Co. He requested my partner, Mr. Dixey, to take the composition deed to the bank, and see if he could get Kemble to sign it. Dixey returned in a very few minutes and said they declined to sign it. Landenberger then requested Stokes, Caldwell & Co. to take up the notes, and charge the amount to Landenberger & Co. Mr. Caldwell, I think, on that day,—perhaps not until the next or the day after; I know I was present at the time,—paid the paper, took Mr. Landenberger's receipt for $25,000, and surrendered the paper to him." This statement is substantially repeated by both Mr. Dixey and Mr. Caldwell. This view of the facts disposes of the claim made against the People's Bank, and Stokes, Caldwell & Co.; founded on the allegation that they are parties to the contract.

The claim against Mr. Kemble, as we have seen, rests upon different ground. Charging him with fraud in representing the notes as outstanding, while in fact they were paid or to be paid, from the reserved property of the debtor, the plaintiffs, in effect, say they were thus induced to bind themselves to the contract, believing the holder of these notes was taking his chances with them; and they ask, therefore, that this defendant be required to "make good the contract"; in other words, required to compensate them for the injury thus sustained. If a similar charge of deceit was intended to be preferred by the bill against any other of the defendants, what follows will apply to it with as much force as that stated against Mr. Kemble. Passing over all debatable ground, and coming directly to the question of injury, we find no evidence to support a decree in the plaintiffs' favor. It does not appear that their situation would have been improved by declining to unite in the contract; nor that they would have so declined if they had known the notes to be paid. Such payment did not, we think, render the agreement any less desirable; or in any respect injure the plaintiffs. It was not made from funds set apart for them, or over which they had any control. The argument that it withdrew from the debtor property with which he might have successfully conducted business, and earned the means of paying them, is wholly speculative. The money was quite as likely to have been lost, if left in his hands, as the large balance which he retained actually was. The vice of the argument consists in the assumption that the plaintiffs had any direct interest in this property. They certainly had not. It belonged to the debtor alone, who might use it as he pleased—waste it in extravagance, or pay it to any one whom he owed. If he had been defrauded of it, the plaintiffs would have had as good claim

against such wrong doer as they have against Mr. Kemble. They had no greater or other interest in the property than every creditor has in the property of his debtor. The application of it, therefore, to the payment of the notes, and the concealment or misrepresentation of this fact, cannot be said to have injured the plaintiffs. On the contrary, as the sequel has shown, this use of it, in relieving the debtor and the assigned estate from a large claim, is more likely to have benefited them than the retention of it in his hands.

And now, May 13, 1879, the above cause having been heard upon the pleadings and proofs, it is ordered, adjudged, and decreed by the court, that the complainant take nothing by its bill filed in the above case, and that the said bill of complaint be dismissed as to all the defendants in the above cause, without prejudice. And it is further ordered that the complainants pay the costs of this suit.

NATIONAL RUBBER CO. (COHN v.). See Case No. 2,968.

Case No. 10,050.

NATIONAL SCHOOL FURNITURE CO. v. PATON et al.

[16 Blatchf. 563; 4 Ban. & A. 432.] [1]

Circuit Court, S. D. New York. August 4, 1879.

PATENTS—INFRINGEMENT—PROCEEDINGS FOR CONTEMPT—MOTION TO DISSOLVE INJUNCTION—WHAT CONSIDERED.

Where a defendant, in opposing a motion for a preliminary injunction to restrain the infringement of a patent, which was granted, and in afterwards opposing a motion to punish him for a contempt in violating such injunction by making and selling a certain form of school desk, neglected to present to the court alleged facts as to his own manufacture and sale of such form of school desk at a date early enough to anticipate the patent, it was *held* that he ought not to be afterwards allowed to present such alleged facts, on a motion to dissolve such injunction.

[This was a suit by the National School Furniture Company against Robert Paton and others for infringement of patent on desks.]

Frederic H. Betts, for plaintiff.

Francis Forbes, for defendants.

BLATCHFORD, Circuit Judge. An injunction has been granted in this case, on patent No. 115,232. On a motion to punish the defendants for a contempt for violating that injunction, a certain form of desk, called by the defendants, a "normal desk," with a book-rest attachment, was held to be an infringement of said patent, and the defendants were held guilty of a contempt in violating said injunction, by making and selling said "normal desk" with said attachment. They now come in and move to dissolve the injunction for the future, as respects said "normal desk" with such attachment, on affidavits which they claim show that they actually made such form of "normal desk" with such attachment, as early as the year 1866, certainly as early as the year 1869, and before the invention covered by the plaintiff's patent was made, such patent having been issued in 1871. This form of desk, so alleged to have been made by the defendants in 1866 is claimed to have been made by them for Mr. Van Norman. Yet, neither in opposition to the motion for an injunction, nor in opposition to the motion to punish them for contempt in making such form of desk, did they, or either of them, or their foreman, or Mr. Van Norman, or any one else, testify that such form of desk had been made by them as early as the time now alleged. So far from this, in opposing the motion for an injunction, the defendants testified to, and produced a form of desk which they had made for Mr. Van Norman prior to the plaintiff's invention, but which was not the form now in question—the "normal desk" with the book-rest attachment. They had their books, their recollection, that of their foreman, capacity to find Mr. Van Norman, and the testimony as to the desk would have been as useful to them then as now, and they must have so understood it. Still more, in opposition to the contempt motion, the defendant Robert Paton testified, that he had made the "normal desk," with the book-rest attachment, "for several years," but assigned no specific date earlier than July, 1875. Under such circumstances, the defendants ought not to be heard to allege matter claimed to have been then existing, which they thus neglected to present to the court, and have the benefit of it now to dissolve an injunction properly granted. Woolworth v. Rogers [Case No. 18,018]. If this rule ought to be relaxed in any case, this is not one. The excuses offered by the defendants for not sooner bringing in the evidence now offered, are not, on all the facts before the court, satisfactory, and, under all the circumstances, the court cannot but regard it as doubtful whether in fact the defendants made any "normal desk" with the book-rest attachment, at an earlier date than that of the plaintiff's invention. The motion is, therefore, denied.

[In another case, at a later date, this patent was held void. See Peard v. Johnson, 23 Fed. 507.]

NATIONAL SHOE-TOE PROTECTOR CO. (AMERICAN SHOE-TIP CO. v.). See Case No. 317.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and Hubert A. Banning, Esq., and Henry Arden, Esq.; and here republished by permission.]

Case No. 10,051.

NATIONAL SPRING CO. v. UNION CAR SPRING MANUF'G CO.

[12 Blatchf. 80; 1 Ban. & A. 240; 6 O. G. 224; Merw. Pat. Inv. 451.] [1]

Circuit Court, S. D. New York. May 20, 1874.

PATENTS—REISSUE—RUBBER AND STEEL SPRING—INTERPOLATION—INVENTION REDUCED TO PRACTICE PRIOR TO FOREIGN PATENT.

1. The reissued letters patent granted to the National Spring Company, as assignees of Erastus T. Bussell, December 13th, 1870, for an "improvement in combined India rubber and steel springs," the original patent having been granted to Bussell, as inventor, November 29th, 1853, and extended for seven years from November 29th, 1867, are valid.

2. The original specification, drawings, and model exhibit fully what the reissue claims, and what the original fails to claim.

3. The original specification contains, on its face, sufficient evidence that there was inadvertence and mistake of some kind in preparing it.

4. The reissued patent is not open to the objection that it is not for the same invention as that embodied in the original patent, or that the specifications of the two patents are repugnant to each other.

5. The original specification states the invention of Bussell to be a combination of vulcanized India rubber with spiral steel, so arranged, with the spiral steel on the outside of the rubber, that each sustains the other, when they are both under longitudinal pressure, the result being independent of any fluting of the rubber. Therefore, although the claim of the original patent was, "The fluting a column of vulcanized India rubber longitudinally, and then so surrounding it with the helical spring, mine being an improvement upon Ray's spring," it was proper to claim, in the reissue, "The combination of a column of rubber, or its equivalent, whether solid or hollow, with a spiral metallic spring, when the said spring is arranged external to and surrounding the rubber, substantially as and for the purposes specified."

6. The original specification shows that Bussell supposed that a patent had been granted to Ray for surrounding a column of vulcanized India rubber with a helical spring; whereas, in fact, Ray had no such patent, and no specification of any patent to Ray disclosed such an arrangement, and all that any patent to Ray disclosed was a column of rubber with a spiral metal spring in its centre, such spring surrounding a bolt extending the length of the column of rubber, and there being detached rings of metal surrounding on the outside the column of rubber.

7. When the specification of the reissue speaks of a "solid" column of rubber, it means one which is not hollow, as distinguished from Ray's arrangement, in which the column of rubber is hollow.

8. The claim of the reissue, in speaking of a column of rubber, "whether solid or hollow," means only, a column of rubber, whether hollow or not hollow.

9. The reissued patent is infringed if the column of rubber is combined with a spiral metallic spring arranged external to and surrounding the rubber, whether there be or be not a longitudinal hole in the centre of the rubber, or whether there be or be not flutes in the rubber, or other provision for the vent of the rubber, under pressure.

10. The language of the specification of the reissue, that "any other material that is, for the purpose of a spring, the equivalent of India rubber, such as compressed animal and vegetable fibre, gutta percha, &c., may be employed in place of the rubber," when the original specification made no mention of such equivalents, is not to be regarded as an interpolation, or as determining that any particular thing is an equivalent, but is to be interpreted only as meaning, that, if the articles named be, for the purposes of a spring, the equivalents of India rubber, they may, when in a condition to be such equivalents, be employed in the place of the rubber.

11. The complete application for the reissue was filed March 12th, 1870, the fee or duty having been previously paid. The petition and specification were not signed by Bussell, although he was living, but were signed by the assignees, to whom the reissue was granted, and the oath was not made by Bussell. These proceedings were in conformity with the statutes in force when the 33d section of Act July 8, 1870 (16 Stat. 202), was enacted, requiring, in case of a reissue to an assignee, that the application be made, and the specification be sworn to by the inventor, if he be living. The 111th section of the latter act, while repealing the prior acts, provides that such repeal shall not take away any right existing under any of the prior laws, and that all applications for patents pending at the time of the passage of the act of 1870, "in cases where the duty has been paid, shall be proceeded with and acted on in the same manner as though filed after the passage thereof:" *Held*, that the application was to be proceeded with, and acted on, on the merits, in like manner as though filed after the passage of the act of 1870, with the requirements complied with which the 33d section of that act prescribes.

12. Observations on an attempt to impeach, by the testimony of the inventor, the validity of the reissue to his assignees.

13. An invention reduced to practice in the United States, prior to the granting of an English patent, sustained as against such patent.

In equity.

George Gifford and Josiah P. Fitch, for plaintiffs.

Charles H. Woodruff, for defendants.

BLATCHFORD, District Judge. This suit is brought on reissued letters patent [No. 4,202], granted to the plaintiffs, December 13th, 1870, as assignees of Erastus T. Bussell, for an "improvement in combined India rubber and steel springs," the original patent [No. 10,280] having been granted to Bussell, as inventor, November 29th, 1853, and extended for seven years from November 29th, 1867. The specification of the reissued patent is signed by the plaintiffs, who are a corporation, by their president, and is not signed by Bussell. It states that Bussell "invented a new and improved combination of vulcanized rubber and steel, forming thereby a spring useful for railroad cars, carriages, buggies, &c., of which the following is a specification:

"Figure 1 represents a column of vulcanized rubber, showing, also, metal caps on each end, such as may be used for bearings.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and Hubert A. Banning, Esq., and Henry Arden, Esq.; and here republished by permission. Merw. Pat. Inv. 451, contains only a partial report.]

[Drawings of reissued patent No. 4,202, granted to E. T. Bussell, December 13, 1870, published from the records of the United States patent office.]

Fig. 1.

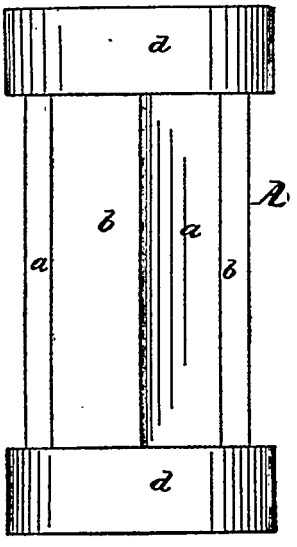

Fig. 2.

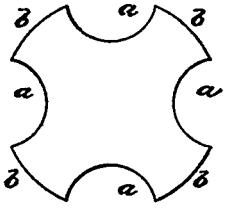

Fig. 3.

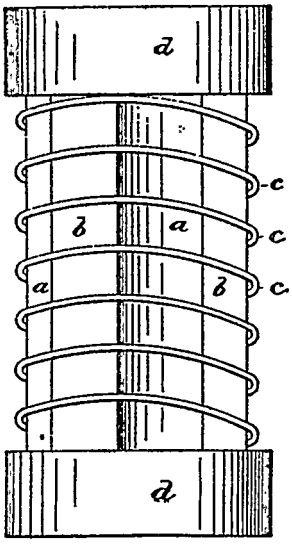

Figure 2 is a cross section of the same. Figure 3 is a view of the column of rubber surrounded by a spiral metal spring, showing, also, the before mentioned caps." The drawing designates the three figures on it as follows: "Fig. 1. Fluted column of vulcanized rubber, with the metallic caps on each end. Fig. 2. Transverse section of rubber column. Fig. 3. Compound vulcanized rubber and steel spring, with the metallic caps on each end." The drawing bears the signature, "Inventor, E. T. Bussell, by J. P. Fitch, his Att'y." The drawings show the column of rubber as being fluted by four flutes or grooves running lengthwise of it and equidistant from each other, the flutes being marked a, and the unfluted spaces being marked b. The specification says: "This invention consists in surrounding a column of India rubber, or its equivalent, by a spiral metallic spring, so arranged that each sustains the other, whereby a more perfect and serviceable spring for the purposes specified is produced than by any combination of rubber and metal hitherto known. A column of vulcanized rubber, A, is surrounded with a spiral metallic spring, c, c, c, Fig. 3, the two springs being of equal length, so as to have the same bearings at the ends, and the relative diameters of the two being such that the steel or metal spring will fit snugly on to the rubber column. The column of rubber may be fluted, as shown in the drawing, by several concavities running longitudinally, a, a, a. This construction is regarded as a desirable one, as it allows the rubber, when pressure is applied to the spring, to expand laterally into the said concavities, thus preventing it, to a degree, from being pressed outward between the coils of the metal spring, where it is liable to be chafed and worn. Any other material that is, for the purpose of a spring, the equivalent of India rubber, such as compressed animal and vegetable fibre, gutta percha, &c., may be employed in place of the rubber. The combination of spiral metallic springs with rubber, or its equivalents, for the purpose here described, is not new. Ray, in the year 1848, obtained a patent for such a combination. But he described and claimed a spiral metallic spring placed within a hollow rubber column or tube, and then supported the rubber externally by detached metal rings. The arrangement and combination of Bussell, here claimed, is distinct and different from, and is thought superior to, Ray's, both for the reason that it permits the use of a solid column of rubber, or its equivalent, which Ray's does not, and because the spring, when placed exterior to the rubber or its equivalent, performs alone the combined offices of both the spiral spring and the detached rings in Ray's, thus rendering Bussell's arrangement much the more simple and cheaper of the two. Another objection to arranging the spiral within the rubber tube is, that either the rubber tube has to be made objectionably large in diameter, or the spiral objectionably small. This difficulty is obviated in Bussell's combination, as is evident. It is not intended here to claim, broadly, the combination of rubber, or its

equivalent, with a spiral spring, for the purposes indicated; nor the combination of a spiral spring with a hollow cylinder of rubber, when the spring is placed within the cylinder. Neither is claimed the supporting of a column of rubber, or its equivalent, when used as a spring, by detached metallic rings arranged externally to the rubber." The claim is, "The combination of a column of rubber, or its equivalent, whether solid or hollow, with a spiral metallic spring, when the said spring is arranged external to and surrounding the rubber, substantially as and for the purposes specified."

The drawing annexed to the original patent is, in its three figures, and in the designation of them, and in the lettering of them, the same as the drawing of the reissue. The specification of the original states that Bussell has invented "a new and improved combination of vulcanized India rubber and steel, forming thereby a useful spring for railroad cars, carriages, buggies, &c., &c. * * * Fig. 1 is the fluted column of vulcanized rubber, with the metallic caps on each end; Fig. 2 is a transverse section of this column of rubber; and Fig. 3 is a view of the compound spring with the metallic caps on each end. My invention consists in a combination of vulcanized India rubber with spiral steel, so arranged that each sustains the other, and the good qualities of both are combined, so as to make a most perfect spring for elasticity and durability, which is applicable to railroad cars, carriages, buggies, &c. * * * Owing to many contingencies, that require springs to be of various degrees of stiffness, the diameter of my compound springs must necessarily vary much, but their length is to be graduated by the amount of motion desirable in a spring. For springs for railroad cars I take a fluted column of vulcanized India rubber, A, Fig. 1, about eight inches in diameter, and about eight inches long, these conditions depending upon the desirable strength of the spring and the amount of motion required. The column of rubber is fluted by four semi-concavities running longitudinally at equal distances from each other, a, a, a, a, the concavities leaving each intermediate point, b, b, b, b, equal to the span of each concavity. The depth of each one of these concavities is about one-fifth the diameter of the column of India rubber. For carriage springs the diameter of the rubber is about two inches. I then surround this fluted column of vulcanized rubber with a spiral steel spring, c, c, c, Fig. 3, the diameter of the wire constituting the spiral spring being about one-twentieth that of the column of rubber. I make the spiral spring to touch the points of rubber, b, b, b, b, thus serving as a self-adjusting base upon which the rubber can act centrifugally, each point, b, b, b, b, being a base to each rubber arch, a, a, a, a. By this arrangement and combination of vulcanized India rubber and steel, several important desideratums are filled, that have not hitherto been attained by any other spring, namely, it makes, 1st, a sprightly spring, one that responds quickly to any impression made upon it, steel being much more sprightly, in its movements, than vulcanized India rubber, and this element being incorporated into the compound spring; 2d, a durable spring, capable of sustaining burdens to an indefinite length of time, the rubber, in this shape, maintaining and resuming its normal shape better than in any other, the integrity of the elastic arches, a, a, a, Fig. 2, being most perfect; 3d, a strong spring, one that cannot be crushed by any reasonable weight, the steel effectually guarding the rubber against any such calamity, for, as the external surface of the rubber is shortened under compression, the resisting surface of the spiral steel, in its self-adjusting integrity, gathers and concentrates its coils around the compressed rubber, thus setting up a herculean barrier, circumscribing the bounds of the rubber within it; and, 4th, a sprightly, durable, and strong spring, that will admit of any desirable amount of motion, each concavity, a, a, a, a, serving as a vacuum for its elasticity and contracting volume to find vent in. Vulcanized India rubber being a durable substance, I thus have, in this arrangement, a combination of elements, in such a way as to make a spring possessing all the good qualities that can reasonably be expected. The rubber sustains the steel from any violence to its molecules from severe flexion, whilst the steel affords a self-adjusting base upon which the rubber can act at proper intervals, it yielding its sprightliness to the rubber at the same time, and the points, b, b, b, b, fig. 2, being in constant contact with the steel, serves to equalize the power of the rubber, whilst the concavities, a, a, a, a, give vent to and equalize its elasticity. * * * I do not claim the surrounding of columns of vulcanized India rubber with detached bands of metal at the ends, or any point between the ends, for springs, nor do I claim originality in the combination of metallic springs with vulcanized India rubber, as these are the subjects of patents heretofore granted to Fowler M. Ray, but, as well known forms of such springs and combinations, are liable to the following objections: 1st, an incapacity for great motion, this depending upon their outer surface being regular and surrounded by bands of metal whose diameters are unvarying, together with the incorporating into the centre of said rubber springs, helical or spiral springs of metal, whose diameters increase with their compression, causing them thus to encroach upon the rubber centrifugally; 2d, the liability of such springs losing their elasticity and becoming worthless from the unequal exercise of their different parts, the stretching to their utmost extent the fibres at the circumference, and this at the expense of their vitality, while the centrifugal action of the helical spring within serves further to embarrass it in its movements, so that a large mass of the rubber is

rendered partially inert by being confined between the almost lifeless circumferal rubber and the centrifugally acting helical spring—the rubber thus circumstanced may properly be compared to an elastic arch with the burden or force applied to its concave side, without any base upon which to rest that of its own external fibres; and, 3d, their great liability of being crushed by an overload, for the want of a continuous metallic support externally; and, inasmuch as fluting a column of vulcanized India rubber longitudinally on its external surface and surrounding it by a spiral steel spring, substantially as above described, produces a spring susceptible of much greater motion and much greater freedom in all its movements than any of the foregoing forms, the fluted concavities giving vent to the compressed rubber, and the diameter of the spiral spring increasing with its compression, thus yielding to and allowing the greater freedom to the expanding rubber within, the circumference of the rubber mass, being a series of elastic arches, brings the radial points of expansion almost equally near the surface in every direction, and the self-adjusting base afforded to each arch in the spiral spring that surrounds them, gives to them the capacity of multiplying strength in use, and of promptly resuming their normal shape—the rubber thus circumstanced, in contrast with other forms of rubber car springs, is a series of elastic arches, with the force applied to their convex sides, whilst their bases rest upon an accommodating metallic surface, which enables them to endure, without loss of vitality, almost indefinitely; and finally, inasmuch as the continuous coil of steel on the outside of the rubber approximates a solid broad band, when an overload is put upon the springs, thus guarding the rubber effectually against any mishap that other rubber springs are liable to, therefore, what I claim as my invention is not the surrounding a column of vulcanized India rubber with a helical spring, as that is the subject of a patent granted to F. M. Ray, but what I claim and desire to secure by letters patent is, The fluting a column of vulcanized India rubber longitudinally, and then so surrounding it with the helical spring, mine being an improvement upon Ray's spring."

This florid and ambitious original specification contains, on its face, sufficient evidence that there was inadvertence and mistake of some kind in preparing it. In one part of it, it speaks of patents having been theretofore granted to Ray, containing, as subjects, the surrounding of columns of vulcanized India rubber with detached bands of metal at the ends, or any point between the ends, for springs, and the combination of metallic springs with vulcanized India rubber, and says that the resulting springs have bands of metal of unvarying diameters surrounding the outer surfaces of the India rubber and helical or spiral springs of metal in the centre of the India rubber. In another part of it, it speaks of a patent granted to Ray as having for its subject the surrounding a column of vulcanized India rubber with a helical spring. Now, it is shown, that, in point of fact, Ray had no patent for surrounding a column of vulcanized India rubber with a helical metal spring, and that no specification of any patent to Ray disclosed such an arrangement. The only combination of a spiral metal spring with a column of rubber, disclosed in any patent to Ray, was one where the spiral metal spring was in the centre of the column of rubber, and surrounded a bolt extending the length of the column of rubber; and in connection with such arrangement there were detached rings of metal surrounding on the outside the column of rubber. The original specification states the invention of Bussell to be, a combination of vulcanized India rubber with spiral steel, so arranged that each sustains the other. This results from placing the spiral steel on the outside of the rubber. In such position each does sustain the other, when they are both under longitudinal pressure. When the steel is on the inside, they do not sustain each other. Again, in detailing the advantages of the arrangement of a spiral steel spring outside of and surrounding a column of rubber, the original specification sets forth, as an advantage, the strength of the spring, in that the steel prevents the rubber from being crushed, because, as the external surface of the rubber is shortened by compression, the coils of steel form a resisting surface against the rubber. This is independent of any fluting of the rubber, and is in contrast with the effect when the spiral steel is on the inside of the rubber. In another place, the original specification, speaking of the existing springs, with spiral springs of metal in the centre of the rubber, and detached bands of metal surrounding the rubber, in contrast with the arrangement of Bussell, points out, as an objection to the former, their liability to be crushed by an overload, for the want of a continuous metallic support externally. This, too, is a result independent of any fluting of the rubber. Then, as to fluting the column of rubber, the original specification points out that the rubber, when compressed, will find vent in the concavities.

The objection is taken to the reissued patent, that it is not for the same invention as that embodied in the original patent, and is, therefore, void; and, to maintain this, it is contended, that, on their faces, the two specifications are repugnant to each other. The argument is based on the view, that the original specification throughout speaks of the invention of Bussell as being one in which a fluted column of rubber is a constituent, and in which no column of rubber that is not fluted is spoken of as being a constituent, and that the claim is one to fluting a column of vulcanized India rubber longitudinally, and then surrounding it with a helical spring. But, the inference naturally to be drawn

from the language of the original specification, that Bussell does not claim, as his invention, "the surrounding a column of vulcanized India rubber with a helical spring, as that is the subject of a patent granted to F. M. Ray," is, that, as such original specification exhibits the surrounding a column of vulcanized India rubber with a helical spring, and points out the advantages of such an arrangement, Bussell would, but for his idea, now shown to have been a mistaken one, in regard to Ray's patent, have claimed, in such original specification, the surrounding a column of vulcanized India rubber with a helical spring. If so, why should it not be claimed in a reissue? It would seem that there could not be found any more proper occasion for the office of a reissue. The original specification, drawings, and model exhibit fully what the reissue claims, and what the original fails to claim.

Much criticism is made on the specification of the reissue, because it makes prominent the column of rubber, merely as a column, without calling it, as the original specification always does, a fluted column, and because it only says that it may be fluted, as a desirable construction, to allow the expansion of the rubber, under pressure, into the concavities. But, when it was to claim, as it lawfully might, the column of rubber, as a column, with the spiral metallic spring arranged external to and surrounding the column, it was entirely proper that it should describe it as a column. It is none the less a column because it is fluted. The fluting introduces provision for vent. The advantages of the columnar structure bound tightly in the grasp of the surrounding helix of metal exist independently of provision for vent. As has been shown, both of these features exist in the arrangement shown in the drawings and specification of the original patent. Bussell, in his original patent, limited his claim to an arrangement combining both features. He might have claimed therein the features of the column and the outside spiral metallic spring, leaving out the feature of the fluting, although his structure contained the fluting. This has now been done by the reissue.

It is also objected, that the specification of the reissue contains an interpolation, in saying that Bussell's arrangement is different from Ray's, because it "permits the use of a solid column of rubber," which Ray's does not. It is undoubtedly true, that Bussell's arrangement does permit the use of a column of rubber which has not a longitudinal hole in its centre, and that Ray's arrangement requires that there shall be a longitudinal hole in the centre of the column of rubber. In the connection in which the specification of the reissue thus speaks of a "solid" column of rubber, it speaks of one which is not hollow, Ray's being hollow. Bussell's drawing shows a column of rubber which has no longitudinal hole in its centre, and, therefore, shows a column which is solid, in the sense intended. To state this self-evident circumstance in the specification of the reissue is no interpolation, when the drawings of the original patent show clearly that the remark is a true one. So, too, the words of the claim, "whether solid or hollow"—"the combination of a column of rubber, or its equivalent, whether solid or hollow, with a spiral metallic spring, &c."—must be read with reference to the previous observation in the specification, that Ray's arrangement does not permit the use of a column of rubber which is not hollow, while Bussell's arrangement does. So read, the claim is one to the combination of a column of rubber, whether hollow or not hollow, with a spiral metallic spring. This claim means nothing different from what it would mean if the words "whether solid or hollow" were entirely omitted from it. The column of rubber, and the advantages resulting from combining it with a spiral metallic spring arranged external to and surrounding the rubber, exist as fully whether there is a longitudinal hole in the centre of the rubber or not. The advantages of a provision for vent, resulting from fluting the column, or from having a longitudinal hole in its centre, or longitudinal holes elsewhere in it, or spiral recesses in it, are a different thing. The reissued patent claims nothing in respect of such latter advantages, and does not claim any provision for vent. Its claim has reference solely to the embrace between the surrounding spiral metallic spring and the interior column of rubber. It may be that such embrace is more or less effective when it is spirally continuous, and not broken by recesses or flutes, and when there is no provision for vent. That is a question of degree of effectiveness of embrace. If, in the use of the embrace, it is made spirally continuous, it is none the less used. If, in the use of the embrace, provision is made for vent, in any of the ways above referred to, the embrace is none the less used. This view disposes of the criticisms, that Bussell did not invent a column of rubber having a spirally continuous embrace between the rubber and the external metallic spring, and did not invent a column of rubber having a longitudinal hole in its centre, or any provision for vent except by means of flutes. He invented what the reissued patent claims, as above explained, and if, in using that, an additional feature is added by the user, still the invention claimed is used.

It is also objected, that the specification of the reissue, in its body and in the claim, not only speaks of rubber "or its equivalent," but contains, in its body, this language, not found in the original specification: "Any other material that is, for the purpose of a spring, the equivalent of India rubber, such as compressed animal and vegetable fibre, gutta percha, &c., may be employed in place of the rubber." It is conceded, that the patent would cover any equivalent for the rubber, even if the words "or its equivalent" were

not found in the claim. But, it is objected, that the specification of the reissue undertakes to say what are equivalents, when the original specification made no mention of such equivalents, and that, therefore, the things mentioned are interpolations into the specification of the reissue. Certainly, any other material that is, for the purpose of a spring, the equivalent of India rubber, may be employed in place of the rubber. The employment of such other material would be within the patent, if nothing were said on the subject. Saying so does no harm. The point of the objection is, that it is asserted that the specification of the reissue points out "compressed animal or vegetable fibre, gutta percha, &c.," as being, necessarily, for the purpose of a spring, the equivalent of India rubber; that no such statement is found in the original specification; and that Bussell, when he took out his original patent, did not contemplate the use of compressed animal or vegetable fibre. But, I think the body of the specification of the reissue can fairly be interpreted only as meaning, that if "compressed animal or vegetable fibre, gutta percha, &c.," be, for the purpose of a spring, the equivalent of India rubber, it may, when in a condition to be such equivalent, be employed in place of the rubber. Under the claim, what is an equivalent is left to be determined in each case, as it arises; and the specification cannot properly be construed as determining that any particular thing is an equivalent.

The petition, oath and specification, on the application for the granting of the reissued patent sued on in this case, were filed in the patent office on the 7th of March, 1870. The fee or duty of $30 was paid on that day. A third drawing, completing the application, was filed on the 12th of March, 1870. The petition was not signed by Bussell, but was signed, "National Spring Company, by Rich'd Vose, President." It set forth, that the National Spring Company, who are the plaintiffs in this suit, and the grantees of the reissue, were the owners, by assignment, of the entire interest in the original patent, and stated that the company thereby appointed Josiah P. Fitch its attorney to prosecute the application. The specification was signed, "National Spring Company, by Richard Vose, President." It was not signed by Bussell. The oath to the specification was made on the 5th of March, 1870, by Richard Vose, and no oath thereto was made by Bussell. The 33d section of the act of July 8, 1870 (16 Stat. 202), provides, that "patents may be granted and issued or reissued to the assignee of the inventor or discoverer, the assignment thereof being first entered of record in the patent office, but, in such case, the application for the patent shall be made and the specification sworn to by the inventor or discoverer, and, also, if he be living, in case of an application for reissue." This provision requires that, when an application for a reissue is made, the inventor, if living, shall make the application and swear to the specification, and then the patent may be reissued to the assignee of the inventor, if the assignment be first entered of record in the patent office. The 111th section of the same act provides for the repeal of prior patent acts, including the acts of July 4, 1836, and March 3, 1837 (5 Stat. 117, 191), and then proceeds: "Provided, however, that the repeal hereby enacted shall not affect, impair or take away any right existing under any of said laws; * * * and provided, also, that all applications for patents pending at the time of the passage of this act, in cases where the duty has been paid, shall be proceeded with and acted on in the same manner as though filed after the passage thereof." The 13th section of the act of July 4th, 1836, provided for the reissue of a patent to the assignee of the original patent, but it did not require that the application should be made by the inventor, or that the new specification should be sworn to by him; and, although the 6th section of the act of March 3, 1837, providing for the issuing of a patent to the assignee of the inventor, enacted that the application therefor should be made by the inventor, and the specification should be sworn to by the inventor, yet it was never held by the courts, or by the patent office, that this provision of the act of 1837 applied to the case of the reissue of a patent. Hence, the provision of the 33d section of the act of 1870 was entirely new, so far as it required that, in case of a reissue to an assignee, the application therefor should be made by, and the new specification be sworn to by, the inventor, if living.

In the present case, the new specification was sworn to, and the application for the reissue was made, and the duty was paid, before the 8th of July, 1870. Such application was an application for a patent, within the meaning of the 111th section of the act of 1870, and was pending when that act passed, and the duty had been paid. It was, therefore, to be proceeded with and acted on in the same manner as though filed after the passage thereof. This means, that it was to be regarded as having been filed before the passage of the act, when filed in a complete form, before such passage, so as to be a pending application, with the duty paid, and then it was to be proceeded with and acted on, on the merits, in like manner as though filed after such passage, with the requirements complied with which the 33d section of the act of 1870 prescribes. To say, that the second proviso to the 111th section of the act of 1870 means, as is contended for by the defendants, that a pending application, made in conformity with the previous repealed laws, is to be filed anew and made to conform to the provisions of the new law found in section 33 thereof, and in the other sections relating to applications for patents, is to give no meaning whatever to such proviso, for, without such proviso, section 33 and such other sections would require that

the application should be made in conformity with the new law, as a prerequisite to the granting of the patent.

The enactment of the proviso was reasonable and proper, and the spirit and purpose which prompted it were still further carried out by the enactment of the act of March 3, 1871 (16 Stat. 583), providing that that part of section 33 of the act of July 8th, 1870, which requires that, in the case of an application by an assignee for the reissue of a patent, the application shall be made, and the specification be sworn to, by the inventor, if living, shall not be construed to apply to patents issued and assigned prior to July 8th, 1870. The view was, that an assignee who had, before July 8th, 1870, under the laws as they were before that date, purchased a patent, should have his rights in respect to obtaining a reissue measured by the former laws, and not affected by the new law. If he should become assignee on or after July 8th, 1870, he would do so with the knowledge that, in respect to a reissue, he must obtain the inventor, if living, to make and swear to the application for the reissue, and he could take steps, in becoming assignee, to secure that end, or, failing that, could refrain from becoming assignee. On any other view, an assignee who became such before July 8th, 1870, might be deprived practically of a substantial right.

In this connection it is proper to refer to the attempt made by the defendants to impeach the validity of the reissue, on the testimony of Bussell. Much criticism might be made on the degree of reliance which ought to be attached to the evidence of Bussell, in view of the attitude in which he presents himself on the record in this case; and a court would hesitate to allow him, by his evidence, to render valueless a patent which he had assigned and given credit to, with the invention shown by it, and the right of reissue appurtenant to it. But, an examination of his testimony, in view of the observations before made on the original and reissued specifications, will show that he states nothing which can affect the validity of the reissue. The point of his testimony, is that he had not, when he applied for his original patent, designed to use an externally plain cylinder, or a hollow cylinder, in combination with a surrounding metallic spiral spring, and he assumes that the claim of the reissue covers and claims the feature of having the external surface of the column of rubber a plain cylindrical surface, and also covers and claims the feature of having a longitudinal hole or holes in the column of rubber. But, as has been shown, the claim of the reissue does not claim either of these features. It may be an infringement of the claim to use, in combination with an external spiral metallic spring, a column of rubber having either of these features; but that is a totally different question. The infringement would arise from the use of a column of rubber, in the combination, and not from the use of either of the special features referred to. If a patent should be granted claiming the special feature of a longitudinal hole or holes in a column of rubber surrounded by an external spiral metallic spring, such patent would find no anticipation, in respect to such special feature, in the original patent to Bussell or in its reissue.

In regard to the alleged prior invention by Ray, the evidence shows, that whatever he did, in the way of making a structure containing the combination of the plaintiffs' patent, was wholly experimental and fruitless, and was abandoned. The evidence fails to establish that any car spring containing such combination was used before Bussell made his invention, or before the date of his original patent. I refer to the alleged use on the Naugatuck Railroad, the Housatonic Railroad, and the New Jersey Railroad. The temporary arrangement made by Kirtland on cars on the Housatonic Railroad was not the use of an organized combination or structure like the plaintiffs' spring, but was an incomplete and abandoned invention. In regard to the English patent to Asbury, the testimony shows that Bussell invented and reduced to practice the combination covered by the claim of the plaintiffs' patent prior to the granting of the patent to Asbury.

As it is admitted that the defendants have made and sold springs composed of a column of rubber surrounded by a spiral metallic spring, there must be a decree for the plaintiffs.

Case No. 10,052.

NATIONAL STATE BANK v. PIERCE.

[18 Alb. Law J. 16; 5 Reporter, 682; 5 Wkly. Notes Cas. 344; [1] 2 Nat. Bank Cas. (Browne) 177; 24 Int. Rev. Rec. 212; 25 Pittsb. Leg. J. 177.]

Circuit Court, E. D. Pennsylvania. April 23, 1878.

BANKS AND BANKING—TAXATION OF NATIONAL BANKS.

A national bank located in New Jersey for the convenience of persons in Philadelphia, kept a clerk in that city who received deposits. *Held*, that the bank did not become located in Philadelphia so as to be liable to taxation.

Bill to procure an injunction to restrain the bank assessors of the state of Pennsylvania from returning an assessment upon the capital stock to the auditor-general of the state and to have the assessment declared illegal. It appeared from the bill set forth that the plaintiff was a national bank engaged in business in New Jersey; that for the convenience of persons in Philadelphia desiring to deposit money therein, it kept a clerk in an office in that city, to receive deposits and to deliver them to the bank in Camden, N. J., at the close of each day; that the defendants, who were the bank assessors of the state of Pennsylvania, had

[1] [5 Wkly. Notes Cas. 344, contains only a partial report.]

served on the plaintiff a notice of an assessment of a tax upon the entire capital stock of the bank; that said assessment, which was made under acts of the assembly of Pennsylvania of April 12, 1867, April 2, 1868, and December 22, 1869, was contrary to law and void; that the plaintiff had taken an appeal from the assessment in due time, but the assessors refused to vacate or alter the assessment. [An injunction was prayed restraining the assessors from returning the assessment to the auditor general of Pennsylvania, and a decree that the assessment was illegal and contrary to law. The answer admitted the facts of the bill so far as within the defendant's knowledge, but claimed that the tax was properly assessed.] [2]

John Goforth (with him, C. S. Carson), for plaintiff.

S. G. Thompson, for defendants. The simple question is, is this a bank located in Pennsylvania? A bank may be either of discount or deposit. If it performs the function of either in a place, it becomes located there. If it does business in two places, it must be taxed in both.

CADWALADER, District Judge. It is a criminal offense to carry on banking business in the way suggested in Pennsylvania without a license obtained in a particular manner, but that does not make the offender a bank located in Pennsylvania. This is not an assessment upon a stockholder as such, but upon the bank.

McKENNAN, Circuit Judge (CADWALADER, District Judge, concurring). We have decided, after full discussion, that even when a corporation carries on business in a state, it does not thereby become an inhabitant of it, and we cannot go farther and say that by similar conduct a corporation becomes located therein.

Injunction granted.

NATIONAL STEAM-GAUGE CO. (FARLEY v.). See Case No. 4,648.

NATIONAL STEAM-NAV. CO. (DYER v.). See Case No. 4,225.

NATIONAL STEAMSHIP CO. (DYER v.). See Case No. 4,226.

NATIONAL STEAMSHIP CO. (GRAY v.). See Case No. 5,726.

NATIONAL STEAMSHIP CO. (NELSON v.). See Case No. 10,112.

NATIONAL TUBE CO. (LA MOTHE MANUF'G CO. v.). See Case No. 8,033.

Case No. 10,053.

NATIONAL UNION BANK v. DODGE et al.

[25 Int. Rev. Rec. 304; 2 N. Y. Law J. 333.]

Circuit Court, D. New Jersey. 1879.

FEDERAL JURISDICTION—CITIZENSHIP—REMOVAL OF CAUSES.

1. Federal jurisdiction is not lost in a suit between citizens of different states, merely because there may be found in it, as necessary parties, one or more defendants of the same state with the plaintiffs or some of the plaintiffs.

2. The 2d section of the act of 1875 [18 Stat. 470], which provides for the removal of all suits in which there is a controversy between citizens of different states, only authorizes "either party" to file the petition, and the uniform construction of the word "party," in this connection, has been that it includes all the plaintiffs, or all the defendants. Congress might have vested, but in fact it did not vest, the power in one of either to do it. The same section only grants the right of removal to one or more of several plaintiffs or defendants, where there is a suit in which there is a controversy that is wholly between citizens of different states, and which can be fully determined as between them.

[This was an action at law by the National Union Bank at Dover against George E. Dodge, Titus B. Meigs, and others. Heard on motion to remand the cause to the state court.]

H. C. Pitney, of counsel with plaintiff.

Ashbel Green and William C. Gulliver, of counsel with defendant Dodge.

NIXON, District Judge. This is a motion to remand a cause which has been removed into this court from the supreme court of the state of New Jersey.

The original action was an ordinary suit at law, brought by a corporation organized under the national banking act, and located in this state, against five defendants, as partners, and makers of divers promissory notes and endorsers of others. The declaration sets out a joint liability on the part of the defendants, only two of whom were served with process,—George E. Dodge, a citizen and resident of the state of New York, and Titus B. Meigs, a citizen and resident of the state of New Jersey. It nowhere appears in the record where the remaining defendants reside. The action is founded upon the 2d section of the act of the legislature of New Jersey entitled "An act concerning obligations" (Rev. St. N. J. 741), which provides that "all persons jointly indebted to any other person or persons, upon any joint contract, obligation, matter or thing for which a remedy might be had at law against such debtors, in case all were taken by process issued out of any court of this state, shall be answerable to their creditors separately for such debts; that is to say, such creditor or creditors may issue process against such joint debtors, and in case any of such joint debtors shall be taken and brought into court by virtue of such process, such of them so taken and brought into court shall answer to the plaintiff or plaintiffs; and if judgment shall pass for the plaintiff or plaintiffs, he, she, or they shall have his, her or their judgment and execution against such of them so brought into court, and against the other joint debtor or debtors named in the process, in the same manner as if they had been all taken and brought into court by virtue of the said process."

[2] [From 24 Int. Rev. Rec. 212.]

The two defendants served with process, Dodge and Meigs, have caused separate appearances to be entered, and have severally pleaded non assumpsit. Immediately after filing his plea, and before the occurrence of any term of court at which the cause could have been tried, the non-resident defendant, George E. Dodge, filed his petition for the removal of the cause into this court, and also a bond with satisfactory security.

The counsel for the plaintiff corporation insists that none of the acts of congress, authorizing removal of suits into the federal courts, embrace the present case.

The counsel for the petitioning defendant, Dodge, claims that it falls within the second clause of the second section of the act of March 3, 1875, which reads as follows: "And when in any suit mentioned in this section there shall be a controversy, which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The single question presented for consideration is, whether there is in the pending suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them? If there be, the cause is removable by any one or more of the parties—plaintiffs or defendants—actually interested in such controversy. And if there be not, the right or power of removal does not exist under the law. In order to answer the question intelligently reference must be had to the provisions of the constitution of the United States, and to the legislation of congress thereunder. Much of the confusion and apparent conflict of authority in the cases have doubtless arisen from not more carefully observing the several acts of congress, and their gradual extension to the verge of the constitutional limit of the right of the removal of causes. The first legislation on the subject was the judiciary act of 1789 [1 Stat. 73], and therein the right of removal was limited to suits commenced "by a citizen of the state in which the suit was brought against the citizen of another state," and the removal could be made only by the defendant, who must file his petition for removal at the time of entering his appearance to the action. It has never been thought that by this act the congress exhausted, or attempted to exhaust, the judicial power created by the constitution, but it went only so far as, in the judgment of the legislature, the condition of the country seemed to demand. The next act was that of July 27, 1866 [14 Stat. 306], which made another draft on the constitutional grant of power, and was an enlargement of the jurisdiction of the federal courts. It provided for the removal of a cause in part when one or more of the defendants were citizens of the same state with the plaintiff; and in which a controversy was involved between citizens of different states which could be determined without the presence of the other defendants, respecting whom the suit was to remain in the state court. In order to its removal, it required the suit in the state court to be brought by a plaintiff, who was a citizen of the state in which the suit was brought, and against a citizen of the same state and a citizen of another state as defendants. These conditions existing, and the application for removal being made by the non-resident defendant before the trial or final hearing of the cause in the state court, the cause was removable, so far as related to himself, provided that it was a suit brought for the purpose of restraining or enjoining him, or was a suit in which there could be a final determination of the controversy so far as concerned himself, without the presence of other defendants as parties in the cause. This act was followed by the amendment of March 2, 1867 [14 Stat. 558], which was a further extension of the right of removal,—affording it as well to plaintiffs as to defendants, but confining it to such persons as are non-residents of the state in which the suit is brought, and making prejudice and local influence, as well as the citizenship of the parties, a ground of removal. It was held, however, in the Cases of the Sewing Machine Companies, 18 Wall. [85 N. C.] 587, that under the last-named act "all the plaintiffs or all the defendants must join in the petition for removal, and all the parties petitioning must be non-residents." The last act on the subject was passed March 3, 1875, and was apparently passed to exhaust the legislative power, and to confer upon the circuit courts of the United States all the jurisdiction that was warranted by the constitution. To this end the language of the constitution was adopted, both in defining the jurisdiction in the first section, and the right of removal in the second section. Its title is "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the state courts." The second section treats of removals, designating the causes that are removable and the parties by whom the removal can be made. For the purposes of this case it is only necessary to say that the first clause of the section authorizes either party to remove any suit of a civil nature at law or in equity, brought in any state court, where the matter in dispute exceeds five hundred dollars, * * * in which there shall be a controversy between citizens of different states; and the second clause confers the same right, when in any suit there shall be a controversy, which is wholly between citizens of different states, and which can be fully determined as between them,—on either one or more of the

plaintiffs or defendants actually interested in such controversy.

There is no question but that in the present case the suit is a controversy between citizens of different states. It is that, and something more. It includes within it also a controversy in part between citizens of the same state. Whether this last-mentioned fact is sufficient to defeat the jurisdiction of the federal courts, and take away the right of removal, is a question which the supreme court has never decided; and, being open, I am permitted to follow the suggestions of my own judgment. I am of the opinion that the federal jurisdiction is not lost in a suit between citizens of different states because there may be found in it, as necessary parties, one or more defendants of the same state with the plaintiffs or some of the plaintiffs. Their presence makes it none the less a controversy between citizens of different states. To this effect are the opinions of Judge Dillon, in his Removal of Causes (page 30), of Justice Bradley in Girardey v. Moon [Case No. 5,462], and of Justice Strong in Taylor v. Rockefeller [Id. 13,802]. Judge Dillon says: "Looking at the purpose in the grant of the federal judicial power in the constitution, and the benefits which are felt to flow from the exercise of this jurisdiction, and the embarrassments which would result from a close and rigid construction of the constitution in this regard, we think the supreme court would be justified in holding that a case does not cease to be one between citizens of different states because one or more of the defendants are citizens of the same state with the plaintiffs or some of the plaintiffs, provided the other defendants are citizens of another or other states." Mr. Justice Bradley states his opinion to be "that, whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case citizens of the same state with a person or persons on the opposite side." Mr. Justice Strong plainly indicates his view when he says: "Whether since the act of 1875 the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same state with the plaintiffs, or some of them, is no doubt a very important question, not yet decided. It does not, if the rule of construction applied to the judiciary act of 1789 and the acts of 1866 and 1867 is applicable to the later act. But the later act for the first time adopts the language of the constitution, and seems to have been intended to confer on the circuit courts all the jurisdiction which, under the constitution, it was in the power of the congress to bestow. Certainly the case mentioned would be a controversy between citizens of different states, and the reasons which induced the framers of the constitution to give jurisdiction to the federal courts of controversies between citizens of different states apply as strongly to it as they do to a case in which all the defendants are citizens of a state other than that in which the plaintiffs are citizens; and, if that instrument is to be construed so as to carry out this intent, it would seem the question is to be answered in the affirmative."

Entertaining this view, if all the defendants had joined in the petition for removal, I should have had no difficulty in holding that the case was removed and properly removable under the first clause of the 2d section of the act of 1875, which provides for the removal of all suits in which there is a controversy between citizens of different states. But it only authorizes "either party" to file the petition, and the uniform construction of the word "party," in this connection, has been that it includes all the plaintiffs, or all the defendants. Congress might have vested, but in fact it did not vest, the power in one of either to do it. But the 2d clause of the same section grants the right of removal to one or more of several plaintiffs or defendants, where there "is a suit in which there is a controversy that is wholly between citizens of different states and which can be fully determined as between them." Is this such a case? The suit is upon an alleged joint contract or liability. For the purposes of this motion, and in the absence of evidence to the contrary, we must look to the pleadings for the character of the action. If the contract were several as well as joint, there might be as many controversies within the suit as there are persons charged with liability. A casual glance at the statute of the state regulating the methods of procedure in actions of this sort gives some support to the idea that the joint contractors are to be treated as if severally liable. But upon a closer inspection of the section, and looking at the interpretation which the legislature itself has given within the body of the statute, I incline to the opinion that "separately," as used therein, does not mean "severally," and that the whole intention of the provision is to require the defendants actually served with process in a suit on a joint contract to plead or answer without the other joint contractors against whom process has been issued but not served.

The resident plaintiff corporation insists that, on the proceedings under this statute, all the joint defendants are necessary parties to the action, and that no judgment can be taken, except jointly against all. The case has its peculiarities, and is not without its difficulties; but, upon the whole, I think that the above view of the plaintiff is correct. Upon establishing the joint liability the plaintiff is entitled to a judgment, not against those served with process only, but against all the defendants jointly; and I am not able to find in the suit any controversy which is wholly between citizens of different states, and which can be fully determined, as between them, without the presence of the other joint contractors in the proceedings. Some effect must be given to the words "wholly" and

"fully" in the statute respecting removals. The question of the alleged joint liability of the defendants depends upon the fact of the alleged partnership, and I am not able to perceive how that, as the question in the case, can be said to be wholly between the plaintiff and the petitioning defendant, or how it can be fully determined between them without vitally touching the interests of all the other defendants. With this view of the law and of the nature of the suit, the motion to remand must be sustained, and it is ordered accordingly.

NATIONAL UNION BANK OF MARYLAND (STEWART v.). See Case No. 13,435.

Case No. 10,054.

The NATIVE.

[14 Blatchf. 34.] [1]

Circuit Court, S. D. New York. Nov. 11, 1876.

APPEAL—OBJECTION TOO LATE—MARITIME LIEN—SUPPLIES IN FOREIGN PORT—NECESSITY FOR CREDIT—PRIOR HYPOTHECATION BY OWNER.

1. It is too late to object to an appeal where both parties have treated it as valid.

2. A maritime lien exists for supplies furnished to a vessel in a foreign port, which were necessary and were furnished on the credit of the vessel, unless the necessity for such credit be disproved by proper evidence.

3. A hypothecation of a vessel by her owner, to secure a pre-existing debt, which, in its origin, gave no lien on the vessel, gives no priority to such hypothecation over a prior maritime lien on the vessel.

In admiralty.

Franklin A. Wilcox, for libellants.
Ira D. Warren, for claimants.

JOHNSON, Circuit Judge. The decree of the district court, dismissing the libel, was entered under date of July 14th, 1857. [Case No. 1,152a.] Notice of appeal was given and filed July 20th, 1857, a petition of appeal, with a proper bond for costs, was filed August 16th, 1858, and the return of the clerk was filed in this court September 19th, 1859. A decree of reversal was taken by default, in favor of the libellants, in April, 1872, which was subsequently waived by the libellants. At the last October term, the claimants, on the cause being moved for hearing, asked to have the appeal dismissed. No steps had ever been taken to set aside the appeal. I think the claimants are too late now to object to the appeal, both parties having treated it as valid.

Upon the merits, it is quite clear that the learned judge who made the decree pursued what was then understood to be the law of the land, as construed by the supreme court of the United States, and announced in Pratt v. Reed, 19 How. [60 U. S.] 359. Since that decision, however, the cases of The Grapeshot, 9 Wall. [76 U. S.] 129; The James Guy, Id. 758; The Lulu, 10 Wall. [77 U. S.] 192; and The Kalorama and The Custer, Id. 204, have brought the subject again into discussion, and it is now settled, that a maritime lien exists for supplies furnished in a foreign port, which were necessary and were furnished on the credit of the vessel, unless the necessity for such credit be disproved by proper evidence, as pointed out in the several cases above cited.

The claim of the claimants is based upon an instrument given as security for a debt previously existing against the owner, and not originally incurred on account of the vessel in any respect. It was given by the owner in the port of New York. It engaged the owner absolutely to pay the amount named in it, with interest at seven per cent., in ten days after its date, and by it the owner hypothecates and assigns the vessel, &c., to the claimants, as security for the money named. It declares all risks of the seas, &c., to be for account of the owner, and is in no wise conditioned that any part of the money is put at hazard upon the vessel. For the debt before mentioned, the now claimants, the creditors of Cornelius, sued him in the state court, as a non-resident debtor, and obtained in that suit an attachment against his property; and the hypothecation was given, as the only witness on the subject stated, to satisfy the attachment of the vessel in the common law action. Under the attachment against the owner as non-resident, his interest only in the vessel could be made available for the benefit of the attaching creditor. The earlier maritime lien of the libellants for supplies could not be displaced by such attachment and seizure. The debt on which the attachment was issued was a mere personal demand against the owner. It was, therefore, not in the power of the owner and his creditor, by their mere agreement, to create, without any advance of money or new consideration, a lien which should defeat the existing maritime lien for supplies, by taking precedence over it. Whatever might be the rule in case money had been raised for such a purpose from a third person, the attaching creditor cannot be allowed, by agreement with the owner, to acquire a priority on behalf of a claim which, in its origin, gave no foundation for a lien upon the vessel. The Aurora, 1 Wheat. [14 U. S.] 96; 1 Pars. Shipp. & Adm. 154; Greely v. Smith [Case No. 5,750]. Such a hypothecation cannot carry a greater right than a sale of the vessel, and that obviously would not have cut off the prior lien. There must be a decree for the libellants.

NATIVE, The (BEACH v.). See Case No. 1,152a.

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

Case No. 10,055.

NATTERSTROM v. The HAZARD.

[Bee, 441; [1] 2 Hall, Law J. 359.]

District Court, D. Massachusetts. May 31, 1809.

SEAMEN'S WAGES—DEATH OF SEAMAN—SUIT BY LEGAL REPRESENTATIVES.

The law maritime will not sustain a suit for wages, by the legal representatives of a seaman beyond the time of his death, when the engagement was by the month.

John Taylor, on the 18th July, 1805, entered on board the ship Hazard [William Smith, late master] at Boston, as a mariner, for a voyage to the northwest coast of America, from thence to Canton, in China, and back to Boston, at the monthly wages of sixteen dollars, and signed articles in common form. The ship, soon afterwards, sailed on the proposed voyage, and on the 17th day of October, 1805, Taylor, with three other seamen, while manoeuvering the ship, in a gale of wind, were carried overboard by a sea, and drowned. The ship performed the contemplated voyage in safety, and returned to Boston on the 23d June, 1808. It appears that Taylor received thirty-two dollars advance wages, before the ship sailed from Boston, and that disbursements were made to him, on the voyage, by the master, to the amount of thirty-five dollars and fifty cents, exceeding, in the whole, the amount of wages, to the time of his death. The respondents [James and Thomas H. Perkins] allege, and it is not denied by the libellant, that by reason of the death of said Taylor, and of the three other seamen, who perished with him, the master of the ship was obliged to proceed to Rio Janeiro, where he arrived on the 11th November, 1805, there to hire four other seamen, which he accomplished at high and extravagant wages, to replace those who were lost, and to enable him to prosecute the voyage aforesaid; and they further allege, "that it is and ever has been the usage, custom, and practice of the trade, in which said ship was employed, in the voyage aforesaid, for the owner or master of the ship or vessel to pay, and the legal representatives of any mariner belonging to a ship or vessel, who had signed articles of agreement or a shipping paper, and happened to die on the voyage, to receive the wages accruing to such mariner, from the time of his entering on board such ship until his death, at the rate expressed in such articles or shipping paper, in full satisfaction of all claims and demands of such representative against the owner or master of said ship or vessel, for the wages or services of such deceased mariner."

This cause has been amply discussed, and it remains to determine the only question on which it depends; what is the legal effect and operation of the death of the mariner, Taylor, in manner and at the time above stated, on his wages? For the libellant it is contended, that the same amount is by law due, as if he had survived and continued in the service of the ship, during the whole voyage. On the other hand, it is contended for the respondents, that his wages, at the stipulated rate, are only to be reckoned to the time of his decease; and, of course, that the libel ought to be dismissed, as more than the amount of wages, due on that principle of computation, had been paid to the deceased.

The counsel for the libellant rests his claim on the seventh article of the Laws of Oleron, the nineteenth of Wisbuy, and the forty-fifth of the Hanse Towns; and on a late decision in the circuit court of Pennsylvania,—Sims v. Jackson [Case No. 12,890],—affirming a decree of the district judge, by which full wages, for the whole voyage, were given to the legal representative of a seaman who had engaged for a voyage from Philadelphia to Batavia, and back, and who died, in the course of the voyage, at Batavia.

DAVIS, District Judge. In the examination of this subject, I shall first inquire into the genuine meaning and import of the ancient ordinances above mentioned, in reference to the point under consideration. We have, I presume, a correct text of the Laws of Oleron, in the Us et Coustumes de la Mer, by Cleirac. The seventh article prescribes the duties of the master, when a mariner falls sick, in the service of the ship. It directs, that he shall be put on shore, and that suitable humane provision shall be made for him. The closing paragraph, which, alone, has special application to the question now under consideration, runs thus: "Et si la nef estoit preste à s'en partir, elle ne doit point demeurer pour luy; et s'il guarit, il doit avoir son loyer tout comptant, en rabatant les frais, si le maistre luy en a fait; et s'il meurt, sa femme et ses prochains le doivent avoir pour luy." "And if the vessel be ready for her departure, she ought not to stay for the said sick party; but if he recover, he ought to have his full wages, deducting only such charges as the master has been at for him. And if he dies, his wife or next of kin shall have it." I resort to the same author for the correspondent articles in the other ordinances, not having been able to find any copy of the original text.

Ordinances of Wisbuy, Art. 19.

Si le matelot tombe en infirmité de maladie, et qu'il convient le porter à terre, il y sera nourri comme il estoit dans le bord, garde et servy par un valet, et s'il vient en convalescence, *sera payé de ses gages;* et s'il decede, *ses gages et loyers seront payez* à sa vefue, ou à ses heretiers.	If a seaman falls ill of any disease, and 'tis convenient to put him ashore, he shall be fed as he was aboard, and have somebody to look after him there; and when he is recovered, *be paid his wages;* and if he dies, *his wages shall be paid to his widow or heirs.*

Laws of the Hanse Towns, Art. 45.

Que s'il revient en convalescence, *il sera payé de ses gages tout ainsi comme s'il avoit servy,* et s'il meurt, *ses* heretiers *les retireront entierement.*	If he recovers his health, *he shall be paid his wages, as much as if he had served out* THE WHOLE VOYAGE; and in case he dies his *heirs shall have what was due to him.*

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

I adopt the translation given in the "Sea Laws," first published in England, in the reign of Queen Anne, not from a respect to the translation of those ordinances, in general, as contained in that work, for in several instances it is palpably incorrect, but because, from its long standing in our language, it is entitled to consideration, and in the articles now cited, it gives, to my apprehension, the sense of the text, with sufficient correctness. Stress has been laid, by the respondents' counsel, on a supposed mistranslation of the article from the Laws of Oleron. It is said that the word "comptant" means "money down," and, that the addition of the word "tout," to the word "comptant," only renders the expression more emphatic. However this may be in modern French, and there are certainly respectable authorities in support of the criticism, I am convinced, that something more was intended by the phrase, as used in the article cited, and that it was designed to express not merely the mode of payment, but has reference to the quantum. It is evident from Cleirac's comment, that he so understood it; and I consider the meaning to be the same, as is conveyed by the word "entierement," which he uses in translating the cited article of the Laws of the Hanse Towns. Valin, in his discussions relative to wages, frequently uses the phrases "en entier" and "en plein," which are of equivalent import. But these modes of expression do not, necessarily and universally, imply an absolute payment of the wages for the whole voyage. Such, indeed, is their frequent application; but we also find expressions of this description employed, when a payment of wages, for a less time than the whole voyage, is most evidently intended.

The third article of the Laws of Wisbuy directs, that if a master discharge a seaman without just cause, after the commencement of the voyage, he shall pay him "entierement, tous les gages promis." This passage, in the Sea Laws, is rendered "all his wages as much as if he had performed the voyage." This is a free translation, but it gives the sense of the original; and the regulation corresponds with the principle of the eighteenth article of the Laws of Oleron, by which an offending seaman, if tendering amends, is to be retained, and if discharged after such offer, is entitled to full wages, as if he had continued in the ship. The expression there is "aussi bon loyer comme s'il estoit venu audedans"—"as good hire as if he had come in the ship," equivalent to "entierement, tous les gages promis," in the third article of the laws of Wisbuy, and to "tous leurs loyers," in the twentieth article of the Laws of Oleron, applied to a contract by the run, when the voyage is abridged by the act of the owner or the master, in proceeding, with the ship, to some port nearer to the place of departure and destined return, than was stipulated in the contract. Other instances might be cited, where this meaning must be understood, but there are also many, in which expressions of this description must have a more restrained construction. Valin, in commenting on a royal ordinance of France, framed to determine a question relative to ships ordered to a certain station, and there to wait for convoy, recites it in the following terms: "La solde des gens des équipages seroit payée en plein du jour que les navires auroient mis à la voile, jusqu'au jour qu'ils auroient mouillé dans la rade du convoi; que depuis qu'ils auroient mouillé jusqu'au jour de la flotte, ils n'auroient que la demi-solde, et qu'apres le depart, la solde leur seroit continué en entier, pour le reste du voyage"—"The wages of the crew shall be paid in full from the day of the vessels' sailing to the day of their mooring in the road of the convoy; from the time of their joining the convoy to the departure of the fleet, they shall have only half wages, and after the departure, their wages shall continue in full for the remainder of the voyage." It is here apparent that the phrases "en plein" and "en entier," apply to the rate of wages, and that for the portions of the voyage specified, they shall be without deduction. A similar use of this expression we find, relative to another ordinance, that of 17th October, 1748, respecting vessels waiting for convoy in the colonies. Speaking of the crew, he says: "Seront payés de leur salaries en entier, pendant le sejour que lesdits navires auront fait dans les desdites isles, jusqu'á concurrence du terme de six mois, et seulement de la moitié pour le temps excédent ledit terme"—"They shall be paid their hire in full while said vessels shall remain at the aforesaid islands, for the term of six months, and half wages, only, for the time exceeding said term." Volume 2, 698. The eleventh article of the ordinance of Louis XIV. relative to seamen's wages runs thus: "Le matelot qui sera blessé au service du navire, ou qui tombera malade pendant le voyage, sera payé de ses loyers et pansé aux depens du navire"—"A seaman who shall be wounded in the service of the ship, or who may fall sick during the voyage, shall be paid his wages, and be cured at the expense of the ship." As it relates to the wages of the sick seaman, this corresponds with the seventh article of the Laws of Oleron. The words "tout comptant," or terms equivalent, are not, indeed, inserted; but both Valin and Pothier understand the meaning to be the same as if it included such expressions. The latter writer, in commenting on this article, observes, "Le matelot tombé malade ou blessé au service du navire, gagne en entier son loyer, non seulement lorsqu'il est resté dans le navire, mais même, dans le cas auquel ayant été mis à terre, dans un port, ou le navire a relâché, il y auroit été laissé s'étant trouvé hors d'état d'être rembarqué, lorsque le navire est reparti"—"The seaman who may become sick or wounded, in the service of the ship, is entitled to his wages in full not only while remaining on

board the ship, but also if he should be put on shore in a port where the ship may have stopped, and should be there left, on account of his being unable to return on board the ship, at the time of her departure." Louage des Matelots, § 2. It is here apparent that the phrase "en entier," which must be admitted to be equally forcible with the words "tout comptant," is applied, by this very accurate writer, to express nothing more, than that there shall be no deduction for sickness, or for absence from the ship, from that cause. It may be said, that the commentator, in giving this construction to the article, had in view a subsequent article, of the same ordinance, article 13, which directs, that the heirs of a seaman engaged by the month, and who may die during the voyage, shall be paid his wages to the day of his decease. But the eleventh article in general, and its provisions in favour of a sick seaman, apply not merely to those engaged by the month, but to those engaged on other terms. Further, it is evident, from Pothier's comment on the thirteenth article, that his conceptions of the dispositions made by the eleventh article, were formed on distinct grounds, and instead of having a prospective view to the thirteenth article, while discussing the eleventh, he founds the application of the thirteenth article, relative to heirs, on the provisions made by the eleventh article, relative to the sick seaman while alive. The heirs, he says, shall, of course, have the wages accruing during sickness, and the disposition of this article is but an exact consequence of article eleven. "La disposition de cet article n'est qu'une consequence exact de l'article 11me." Louage des Matelots, § 2. In this there is, to my apprehension, a perfect correspondence between Pothier and Valin. The latter writer, commenting on the thirteenth article, which relates wholly to what the heirs shall recover, commences his remarks by stating, what the deceased seaman had acquired. "Le matelot ayant gagné ses loyers jusqu'à son décès arrivé pendant le voyage, et cela, aussi bien durant le temps de la maladie que pendant celui qu'il a rendu un service effectif au navire, il est bien juste qu'ils passent à sa veuve et heretiers." "The seaman having earned his wages to the time of his death, happening, during the voyage, as well during his sickness, as for the time when he rendered actual service on board the ship, it is just that they should go to his widow and heirs." In this passage, Valin evidently has reference to the eleventh article. In his comment, on that article, he denominates the disposition which it makes relative to wages of a sick seaman, as a right to wages en plein; an expression which must be understood, as it is used by Pothier, in this connexion, to intend, merely, that there shall be no diminution of wages on account of sickness.

It is to be understood, that I do not consider the dispositions made by the articles of this ordinance, as an authoritative settlement of the question; though they are most explicit in their terms. I only resort to them and to the commentators above mentioned, with a view to a right understanding of the phraseology employed in the articles of the Laws of Oleron, Wisbuy, and the Hanse Towns, all of which are given in the French language by Cleirac, and from whose work the received English translation appears to have been made. From this examination, I am satisfied, that the terms "tout comptant," "en entier," or "entierement," as applied to wages, do not, necessarily, mean wages for the whole voyage; that they admit of a different and more limited application, according to circumstances, and that the true meaning, in the respective instances, in which they are employed, must be determined from the subject matter and the connexion. "Noscitur ex sociis." I may further add, that it is not unfrequent, where the meaning might be otherwise equivocal, to add expressions, which render the sense perfectly certain, such as "comme s'il avoit servi tout le voyage," or the like. Applying these views of the language of the law, which we are considering, to the seventh article of the Laws of Oleron, and to the correspondent articles in the Laws of Wisbuy and of the Hanse Towns, I cannot find, that those articles either express or intend that the heirs of a seaman dying in the course of the voyage, shall recover wages in his right, as if he had lived and served out the voyage. The object of all those articles is to make suitable dispositions relative to seamen falling sick on a voyage. They direct how they shall be treated, and what shall be the results as respects their wages, in case of recovery, or of death. The expression, "tout comptant," in my apprehension, means nothing more, than that there shall be no deduction on account of sickness, either as against the seaman himself, if he recover and claim his wages, or against his heirs in case of his decease. Two interesting points were established by these articles, both wisely and humanely calculated to sooth the sorrows of the sick, or disabled mariner; that his calamity, if not produced by his own criminality or fault, should not diminish his stipulated wages, during the existence of his disability, or his necessary absence from the service of the ship from that cause; and, that in case of his death, all that was due to him should descend to his heirs. Both these provisions seem so perfectly reasonable, that, it may at first view appear, that a formal article could hardly be necessary to enforce them, and we may, on this ground, be induced to apprehend that something more was intended. But the first point is, even now, occasionally questioned by ship owners and masters, and, we may easily satisfy ourselves, that, it then appeared necessary that both should be declared. The application of the Roman law de locatione et conductione, to which Pothier expressly refers, for a construction of the contract of hiring of labour, in general, and for

the hire of seamen, in particular, would exclude a claim for compensation during the disability of the servant or labourer. But, as generous masters, says this esteemed commentator, will not insist on a strict enforcement of their rights, but continue the compensation of a sick servant, notwithstanding his disability to perform his stipulated services, so the law marine in relation to mariners converts into an obligation what, in other instances of hire, is the result of benevolence. The object of the law, he adds, is, for the encouragement of seamen, and as a compensation for the risk which they run of an entire loss of wages, from inevitable accidents occurring to the ship, or from a destruction of the voyage. Louage des Matelots.

Doubts derived from the rules of law relative to entirety of contracts, and perhaps also some principles of the law de societate, might have rendered necessary the express declaration, in favour of heirs, that is made by the articles under consideration. A similar provision was made by the Consolato del Mare, and we learn from Cleirac, that it was the express object of an ancient ordinance of France, to declare such right of succession in favour of the heirs of mariners, dying on the voyage. "Si le marinier meurt à voyage, les ordonances de France conservent ses biens à ses heretiers en termes generaux, sans parler precisement, comme fait ce jugement, des loyers ou gages meritez ou à meriter." "If a mariner die on the voyage, the ordinances of France preserve his property to his heirs, in general terms, without specifying, as this article does, wages earned or to be earned." Cleir. 34, on article 7 of Laws of Oleron. It is not necessary, therefore, in order to satisfy the expressions in the Laws of Oleron, and in the other ancient marine codes, to consider them, as giving to heirs of a mariner, dying on the voyage, the same amount of wages, as the deceased would have received, if he had lived until the termination of the voyage. I admit, indeed, that the phrase "tout comptant," in the Laws of Oleron, is to be understood to apply to the heirs as well as to the seaman, as the word "entierement" is, in the Laws of the Hanse Towns, and, that these terms are well enough rendered by the expression "full wages." Still it remains to be determined, what is the precise import of these expressions, used in this connexion.

The apparent or plausible ground, on which a diminution of wages may be claimed, by a master, against a seaman, being, in any case, suggested, will enable us to determine in what sense, the words "en entier" or "entierement" are to be understood. When a seaman is discharged without good cause, no question could occur to any reasonable mind, relative to his earnings to the time of his discharge. Whatever doubt might arise, in regard to his claim for wages, would respect the remainder of the voyage, from which he was wrongfully expelled. In such a case, therefore, we must understand the term "entierement," in the third article of the Laws of Wisbuy, to intend wages for the whole voyage. But in the cases supposed by the seventh article of the Laws of Oleron, the only ground, which could be suggested for a subtraction of wages, is the sickness and disability of the mariner; and when it is said, he shall, notwithstanding, receive his wages tout comptant, it is apparent, that nothing more is intended, than that no deduction shall be made on that account. An application of this construction to the different cases that might occur will test its solidity. 1st. With regard to the seaman himself. If he recover, says the law, he is to have his wages tout comptant. If, after such recovery, he join the ship, before the completion of the voyage, his right to wages tout comptant, or to full wages, must, in such a case, evidently mean, that no diminution shall be required on account of his non-performance of duty or absence from the ship by reason of sickness. His claim to wages, for the residue of the voyage, will depend on future services and circumstances, and not on the provisions made by the law relative to the operation of his sickness. A like construction of the article must, I apprehend, be given, if a seaman, who may be left abroad sick, should recover and return home before the arrival of the ship, and the ship should afterward arrive in safety. If the sickness be supposed to be of such continuance, that he be not able to return to the ship during the voyage, but he survives the prosperous termination of the voyage and returns home after the arrival of the vessel; he shall in like manner, by the articles cited, have wages tout comptant or entierement, or full wages. The wages in this case, would, indeed, be for the whole voyage; but the force and meaning of those operative expressions are the same as before. He shall receive wages for the whole voyage, not because tout comptant, entierement, or full wages, necessarily and exclusively mean wages for the whole voyage; but because, as in the other case, they protect him from a deduction from his wages on account of sickness, and the sickness or disability, which entitled him to indulgence, is supposed to have continued until the termination of the voyage. 2d. In regard to the heirs of such deceased seaman. I understand the same expressions, by fair implication, to extend to them, but in the same sense. If the sick seaman survive the prosperous termination of the voyage, and afterward die, without having recovered his wages, his heirs shall recover them entierement, or tout comptant. But, in this case, the same remarks are applicable, which have been suggested relative to a demand for wages by the seaman himself, after such conclusion of the voyage; and, for the same reason, the meaning of the terms "entierement" or "tout comptant," remains, in this case, equally unchanged. The right to wages, in such a case, for the whole voyage, results not from the mere force of those terms, but from this concur-

rent, essential fact, the continuance of the disability or absence from that cause, commensurate with the voyage.

The death of the seaman, before the termination of the voyage, presents a case involving the very point in question. In such case, also, the heirs shall receive the wages entierement or tout comptant. But we ought to understand those terms, in the same sense as they are evidently to be understood, in the preceding cases. If we construe them as giving to the heirs the wages, for the residue of the voyage, we, in fact, change their meaning, or include an idea not implied in those terms, in the other cases supposed. This would appear to me an inadmissible mode of construction, as the subject matter, to which the terms are applicable, is unchanged. In the case of a seaman wrongfully dismissed from a ship, his connexion with the ship is dissolved by the mere injurious act of the master. This act gives to the seaman an immediate right to wages for the whole voyage, subject, indeed to contingencies which may defeat the voyage, and of course his claim. But the object of the provisions relative to disability was not to give a new right to the seaman, in consequence of his falling sick, but to protect him from loss. I am satisfied, therefore, that the expressions referred to, must, in case of death during the voyage, be understood in the same sense as in the other cases, and that they mean nothing more than a security against any diminution of the wages, on account of sickness. In this manner, it appears to me, these articles were understood by the commentators; and I find no intimation, either in Cleirac or Valin, that they considered the heirs entitled to wages by these articles, beyond the death of the seaman, whom they might represent. Cleirac, under the seventh article of the Laws of Oleron, mentions the ordinances of Charles V. giving to the widow or heirs of a seaman, dying on the outward voyage, one half the wages agreed for, and, if dying on the homeward voyage, the whole wages. He remarks the correspondence of this provision with the dispositions made by the Consolato del Mare, which also provides, that the heirs of a seaman, who was engaged by the month, shall be paid according to the time that he may have served. He then proceeds to notice a more favourable provision for widows and heirs of deceased seamen in ships of war, on long voyages; that, if a man should die, on the first day after the commencement of the voyage, his heirs should be paid for the whole voyage. "Ses heretiers seront payés pour tout le long du voyage." If Cleirac intended to compare this generous provision with the disposition made by the Laws of Oleron, he could not denominate it, more favourable, on the construction contended for by the libellant's counsel in this case; for, on such construction, the provision by the seventh article of those laws, would be, in fact, the same as is noted by Cleirac, to have been observed on board ships of war. But if he is to be understood as making a comparison with the regulations of Charles V. and of the Consolato del Mare, previously mentioned in his note, it would still appear unaccountable, why this instance of such generous provision should be alone selected, and that he should be silent as to a like disposition, made by the very article on which he was commenting, according to the construction contended for by the counsel for the libellant. The strongest aspect in Cleirac, in another direction, is in the expression, "loyers ou gages meritéz ou à meriter," in the note above quoted. But I understand the word "meritéz" to refer to the wages earned while the mariner was performing service, and "à meriter," not to have reference to any supposed accruing of wages after death, but to those earned or considered as earned during sickness and disability, or absence from the ship from such causes. Valin, it is well known, is copious and minute; and abounds in references to the Laws of Oleron, Wisbuy, and the Hanse Towns, and to Cleirac's commentary. I cannot find, in his ample and very valuable work, any recognition of the doctrine, that by the Laws of Oleron, Wisbuy, or the Hanse Towns, the heirs of seamen dying on the voyage, should recover wages, as if such seaman had served out the voyage. The fifteenth article of the ordinance of Louis XIV. provides, that the wages of a seaman, killed in defending a ship shall be paid in full as if he had served the whole voyage, provided the ship arrive in safety. We should expect the commentator, under this article, to remark its correspondence with the Laws of Oleron, Wisbuy, and the Hanse Towns, relative to seamen dying from any other cause, if, in his opinion, those laws were to be thus understood. On such extended construction, also, of the seventh article of the Laws of Oleron, we should expect the commentator to notice its repugnancy to the eleventh article of the ordinance of Louis XIV. We find no such intimation; but from a careful inspection of his comments, particularly on articles 11, 13, and 14, I am satisfied, that this able writer did not understand the Laws of Oleron, Wisbuy and the Hanse Towns, as giving a claim to wages beyond the death of the mariner. It should be observed also, that if the seventh article of the Laws of Oleron, did, in true or received construction, give full wages for the whole voyage, in all cases of death on the voyage, without fault on the part of the mariner, there could be no necessity, as those laws constituted a portion of the marine law of France, to make the special and exclusive provision of that nature, for a seaman killed in defending the ship, as is done by the fifteenth article of the ordinance of Louis XIV.

It is material in the next place to inquire, how these ancient marine codes have been generally understood in the countries origi-

nating them. I can find no evidence, that they have, in any European country, been applied in the sense contended for, in this case, in support of the libellant's claim. It is well observed by Valin, that next to equity in a law, are its perspicuity and brevity. The seventh article of the Laws of Oleron and the correspondent articles in the other ordinances, are sufficiently brief. They are not remarkable for perspicuity, and on the construction contended for, in support of the present claim, would not be equitable. There would result one fixed, invariable rule, in case of the death of the seaman, during the voyage, whatever might be the nature of the engagement, whether by the month, for the voyage, part-profit, or freight. If there had been no other resource, some tolerable system might, by a course of decisions, have been founded on the basis of this article, relative to the cases of death of mariners during the voyage; but it does not appear that the law upon this subject has been extracted from this source, excepting so far as relates to the operation on wages of sickness, and disability of a seaman. The fact is, that exact and definite provisions, reasonably accommodated to the necessary diversity of occurrences, had before been established by an excellent and venerable code, originating among a very intelligent and highly commercial people. I refer to the Consolato del Mare; the 127th article of which expressly provides, that the heirs of a seaman, engaged by the month, and dying on the voyage, shall be paid his wages for the time of his service. "Se il marinaro è accordato a mesi, et morirà, sia pagato, et dato alli suoi heredi per quello, che havessi servito." The preceding article directs, that if the engagement be by the voyage, half or the whole shall be received by the heirs according to the period of the voyage, in which the death should occur.[2] These articles of the Consolato are quoted by Cleirac; and from the manner in which Valin refers to them, and to Cleirac's quotation, I understand him to mean, that they constituted a portion of the received marine law of France, on this subject. I have no means of information, of the application of the Laws of Wisbuy, in this particular, in the countries, where they may be supposed to have had special influence or authority. In determining on the application of the Laws of the Hanse Towns, it would have been satisfactory, to have consulted Kuricke's commentary on the revised code of those laws, of 1614. This work I have not been able to find; but in "the Ship and Sea Laws of Hamburg" as contained in Herman Langenbeck's treatise, published A. D. 1727, there appears to be an affirmance of the Laws of Oleron, as to the manner in which a seaman, falling sick on a voyage, shall be treated; and, if he dies on the outward passage, the heirs are to have half his wages and privilege, if on the return voyage, the whole; deducting the expenses of interment. In this principal city, therefore, of the Hanseatic confederacy, we find an express partial adoption of the provisions, made by the Consolato, on this subject, with this only difference, that the Hamburg law makes the same provision, whether the contract be for the month or for the voyage, which the Consolato distinguishes. It is observable, that we do not find, in Langenbeck's commentary, any intimation, that, by the Laws of the Hanse Towns, the heirs of a seaman, dying on the voyage, would be entitled to the whole sum, which such seaman would have earned, if he had lived to the end of the voyage. Such a disposition would have been materially different from that made by the thirtieth article of the Hamburg laws, on which he was commenting, and if such diversity, in true construction, really existed, we must suppose it would have been noticed. The Hamburg regulations disregard the distinction that is made by the Consolato del Mare, between an engagement by the month, or for the voyage, as respects the amount of wages to be paid, in case of death of a seaman during a voyage. The discrimination, made by the Consolato, is adopted by the ordinance of Louis XIV. and it is believed, was the previous maritime law of that country, by tacit adoption of that provision in the Consolato. Pothier suggests a reason for the distinction. The seaman, who is engaged by the month, does not sustain the risk of calms, contrary winds and other impediments, which may prolong the voyage: however protracted, if not interrupted, or broken, so as to defeat a claim for wages, they are commensurate with the length of the voyage. Whereas one engaged for the voyage, runs the risk of an inadequate compensation for his services, by an accidental protraction of the voyage, beyond the term contemplated as the measure of his reward, when the contract was made. On this ground, says Pothier, the ordinance proceeds, corresponding in this particular, with the Consolato del Mare, and, as a compensation for the different risks, is the distinction made. Louage des Matelots.

I proceed to inquire, how the law, on this subject, has been considered and received in

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[2] There is a diversity, in the different editions of this work, in the numbers of the chapters. The edition here quoted is that of Leyden; printed in 1704. In Cleirac's commentary, the chapter here referred to as the 127th, is quoted as the 130th. Valin cites it by double numbers. The Consolato del Mare contains precise regulations on several topics, not contained, or only incidentally mentioned, in the Laws of Oleron, of Wisbuy, or of the Hanse Towns. It is to be regretted that a work, so comprehensive and valuable, should be so rare, and it appears surprising that an English translation of this venerable code has never yet appeared. A French translation, with commentaries and dissertations of much promise, has recently been announced. Anthology, for February last. It may be hoped, that this example will be duly emulated, and that a long time will not elapse, before our Bibliotheca Legum shall present this valuable work, in our own language.

England; a question, for obvious reasons, of material importance. The rules and proceedings in maritime matters, in that country, became ours, by express adoption, in the first New England colony (Plymouth Colony Laws, 48); and the law on this subject, as understood and practised in that country, before our Revolution, may be considered as making a portion of our law, unless some other express provision, adverse decisions, or contrary received usages, either before or since the Revolution, should have effected an alteration. The foreign ordinances, on maritime affairs, have not the binding force or authority of law in England, not even the Laws of Oleron, to which that nation have long been, and still are, particularly partial. The extent of the adoption of any article of those laws, in that country, and the sense in which they are received, can only be learned from the decisions of their courts, and the approved treatises of their eminent juridical writers. To Godolphin's "View of the Admiral Jurisdiction" there is annexed an appendix containing a translation of the Laws of Oleron, with notes and observations. That part of the seventh article which is relied on in this case is thus rendered: "He ought to have his full wages or competent hire, rebating or deducting only such charges as the master hath been at for him, and, if he dies, his wife or next of kin to have it." To this is added the following note; "Executors of a deceased mariner ought to receive the wages due to him." I would here make the same remark as I have before suggested relative to the translation given in the "Sea Laws." I do not introduce the translation, inserted in that appendix, from a respect to its general correctness, for there are some palpable and some whimsical errors.[3] But the translation, given in the treatise, of the seventh article of the Laws of Oleron, with the note subjoined appears to me to evince, that this learned civilian did not receive the article in a sense, which would support the present claim. Molloy, in referring to the articles of the Laws of Oleron, copies the provisions relative to the seaman's right to wages, if he recover from his sickness, but altogether omits the provision respecting the heirs. He inserts the substance of that article of the Rhodian law, which subjects the master to the payment of a year's hire, to the heirs of a mariner, drowned in consequence of insufficient tackling. In both these instances, if it were part of the marine law, as received in that country, that in case of a seaman dying on the voyage, his heirs were entitled to recover wages as if he had lived and performed the voyage, it was certainly a strange and culpable omission not to insert or to intimate it, in an elaborate treatise "De Jure Maritimo." But my opinion, on this part of the subject, does not altogether rest on omissions of this sort. Later and more accurate English writers than Molloy are very clear and express on this point. Abbot considers the construction of the foreign ordinances as doubtful. In the English law books, he says, there is no general decision on the subject; but refers to a case (Cutter v. Powell, 6 Term R. 320), in which he says, it seems to have been admitted, that the representatives of a seaman, hired by the month, would be entitled to a proportion of wages to the time of the death. In a late respectable work, Abbot's statement is confirmed, by observations altogether similar. Com. Cont. 377. An inspection of authorities on this subject, as well as a respect for the accuracy of the writers of those digests, has satisfied me, that it is not, and never has been, the received law in England, either in the courts of common law or admiralty, that the heirs of a seaman, hired by the month, and who may have died in the course of a voyage, are entitled to recover wages, as if the mariner had lived and served out the voyage. In the case of Chandler v. Grieves, 2 H. Bl. 606, note, on the motion for a new trial, the court obtained a certificate from the admiralty, of the law marine, relative to the right of a disabled seaman to wages. It was certified, that according to the usage of the admiralty, a seaman disabled in the course of his duty, was holden to be entitled to wages for the whole voyage, though he had not performed the whole. The result was, that the rule was discharged. The amount actually recovered in the case, was not to the conclusion of the voyage, though it has been frequently so stated even by English writers; but, the rule being discharged, judgment must have been according to the verdict, which was only for wages to the time of the ship's departure from Philadelphia, where the disabled seaman was left. It is admitted, however, that the principle, certified from the admiralty, and on which, it may be presumed, the court of common pleas proceeded in discharging the rule to shew cause, would authorise and require a recovery of wages, under the circumstances of that case, for the whole voyage; and such I have observed to be the just construction of the Laws of Ole-

[3] A remark of this sort may seem to require verification. Two instances, only, will be mentioned in this place: Art. 14.—"Oster la toüaille trois fois," is understood, in this translation, to mean "three times lifting up the towel," and it is thus copied into Molloy. The true meaning, "a denial of the mess three times," is given in the Sea Laws and in other subsequent compilations. Art. 9—"Les mariniers doivent avoir un tonneau franc, et l'autre doit partir au ject." is thus translated. "The mariners, also, ought to have one tun free and another divided by cast of the dice." This rendering is followed in the Sea Laws, in Postlethwayt's Dictionary of Trade and Commerce, and in some later publications. It is evident from Cleirac's commentary, that the contribution to a jettison, intended here to be directed, is not to be decided by cast of the dice. The seamen are to have one ton free, and the remainder of their privilege is to contribute its proportion. The article, says the commentator, "ordonne pour les mariniers un tonneau franc en la contribution, et veut que la reste participe au jet."

ron and the other foreign ordinances. But we have no opinion from the admiralty, nor in the common law authorities, that wages are recoverable, after the death of a seaman, for the subsequent portion of the voyage; and it is observable, that such a position is not found to be maintained in argument, though, if correct, it would certainly, forcibly apply in several cases reported in the books. "In the case of a mariner's dying in the course of the voyage" says a learned judge of the court of common pleas, "it should seem that he is entitled to a proportionate part of his wages, unless he be excluded by the specific terms of his contract." Justice Heath, Beale v. Thompson, 3 Bos. & P. 425. An observation of this sort, from a learned judge of the court, and the dubious, qualified language of Abbot and Comyns, that a pro rata recovery of wages seems to be admitted in case of a death of a seaman on the voyage, who was hired by the month, indicate their views on this subject, and are inconsistent with the supposition that they considered the law as giving wages for the whole voyage in such case, or that such is the received law in England, on that subject. In our own country, the law and usage appear to have been the same; in Massachusetts I may say, uniformly so. We find, indeed, no decision. A demand of this description does not appear to have been made in legal shape, until since the late decision in Pennsylvania. The libellants' counsel was apprised, that the court would hear evidence, of any usage in support of this claim. None has been offered, and it was frankly admitted, that the contrary usage had prevailed, with the exception above expressed.

The uniform usage, as alleged by the respondents, is satisfactorily maintained. To introduce a different rule, would, in my opinion, be to give a construction of the contract, not contemplated by either of the contracting parties, and not consonant to the law, on the subject, at the time when the contract was made. I perceive, in the report of the case determined in Pennsylvania, it is intimated, that the extreme severity on ship owners, of the operation of the decisions in the district court, has produced a general practice of inserting a covenant in the shipping articles, that wages shall cease on the death of a seaman. The introduction of such provisions may be attended with difficulties, among a class of men, frequently uninstructed, attached to old forms and habits, and who may be jealous of an express stipulation, though, in reality, altogether consonant to a tacit construction, by which they had ever been governed. It would be injurious to require it, unless absolutely necessary. From my view of the law on this question, it does not appear to be requisite, unless it be to avoid controversy, on a subject, on which there is a diversity of sentiment. I regret this collision with opinions which I highly respect. It was incumbent on me, under such circumstances, to weigh, with great deliberation, the grounds of a different persuasion; but such being my opinion, after thorough examination, I consider it a duty to declare it. I ought here to suggest the relief afforded to my mind, in regard to difficulties of this description, by an interlocutory opinion expressed by the Hon. Judge Cushing, at the last circuit court in this district, in the case of Oystead v. The Perseverance [unreported], and by the consideration, that the decision now given, if erroneous, may be revised and corrected in a higher tribunal.

The examination which I have made of this subject, has led me to an affirmative conclusion on the following points. 1st. That, by general principles of law, on a contract of hire, no compensation can be claimed beyond the death of the party hired. 2d. That the Laws of Oleron, of Wisbuy, or of the Hanse Towns, do not provide, that, in case of the death of a seaman on a voyage, wages are recoverable beyond the time of his death. 3d. That the intent of those ancient ordinances, in the articles relied on in this case, was to determine the effect and operation of sickness or disability, incurred in the service of the ship, during the voyage, and to provide for payment of wages, without deduction on that account, either to the seaman, if he recover his health, or to his heirs, in case of his death. 4th. That it does not appear, that those ordinances have, in those countries where they are peculiarly authoritative, been used and applied as entitling the heirs to wages, for any time subsequent to the death of a seaman. 5th. That approved commentators, such as Cleirac and Vaiin, do not establish the construction contended for in support of this claim. 6th. That the Consolato del Mare, a work of approved authority, in case of an engagement by the month, and death on the voyage, expressly limits the wages to be recovered by heirs, to the time of the death of the mariner. 7th. That the law marine has not been otherwise understood and received in England, but in regard to an engagement by the month, and death on the voyage appears to be consonant to the Consolato del Mare. 8th. That in Massachusetts, the usage has uniformly been to make payment of wages, in such case, only to the time of the death of the seaman, and the law has been considered as consonant to the practice.

On these considerations, it is my opinion, that the law maritime, which I am to administer, will not sustain a claim for wages, by the legal representatives of a seaman, beyond the time of his death, when the engagement was by the month. In the present case, advances were made exceeding the amount of wages, due at the time of the seaman's death. I therefore decree, that the administrator take nothing by his libel. It is understood that no costs are claimed.

NAUGATUCK NAV. CO. v. The RHODE ISLAND. See Cases Nos. 11,740a, 11,743, and 11,745.

Case No. 10,056.

NAUGATUCK NAV. CO. v. The RHODE ISLAND.

[See Case No. 11,745.]

NAUGATUCK TRANSP. CO. v. The RHODE ISLAND. See Cases Nos. 11,740a, 11,743, and 11,745.

NAUMKEAG STEAM COTTON CO. (The EDWIN v.). See Case No. 4,301.

Case No. 10,057.

NAUNTON v. The OREGON.

[1 Pac. Law Mag. 242.]

District Court, D. California. March 22, 1867

COLLISION—STEAM AND SAIL—LIGHTS.

On the night of May 21st, 1866, about twenty miles from Carmen Island, the Oregon ran into and sunk the bark Kent, which was becalmed. Hence this libel. The steamer had all lights set required by the act of congress. The bark did not have her red and green lights set, as required by the act of parliament, which is identical with the act of congress. The bark was not discovered until the steamer was close upon her. The bark had a bright white light in her main rigging. Weather clear and sea calm. The captain saw the steamer some two miles off, but had no thought of a collision.

Held, that although the bark was in fault in not displaying the proper lights, still, under the circumstances, would the steamer have seen the bark if she had had the colored lights up? To apply the strict rule would be harsh. I hold, and shall, till otherwise instructed, that under the circumstances of a ship becalmed in a remote sea and in such weather, the damage to both ships must be divided.

Ordered, that the damage to both vessels be found and the libellants recover one-half that amount with costs.

Case No. 10,058.

The NAUTILUS.

[1 Ware, 529.] [1]

District Court, D. Maine. March 22, 1854.

COLLISION—BOTH IN FAULT—DAMAGES BY MOIETIES—DIFFERENCE OF VALUE OF VESSELS—INSCRUTABLE FAULT—FORTUITOUS COLLISION.

1. In cases of collision, occasioned by faults on both sides, the damages are divided between the two vessels by moieties without regard to the difference of their value.

2. The same rule, it seems, prevails when the collision is occasioned by faults, but they are inscrutable, and it cannot be determined whether they are imputable to one party or the other.

[Cited in The Comet, Case No. 3,050; The J. W. Everman, Id. 7,591.]

[See Bayard v. The Coal Valley, Case No. 1,128.]

3. Where the collision is purely fortuitous, by the law of this country each vessel bears its own loss, but by the maritime law of most European states it is divided between them by moieties.

[4. Cited in The Mary Patten, Case No. 9,223, and in Vanderbilt v. Reynolds, Id. 16,839, to the point that when collision is by fault of both parties, costs will be refused to both.]

This was a libel in a cause of damage by collision. The Nautilus, a steamboat of about one hundred and forty tons burden used as a tow-boat on the waters of the Penobscot, started from Bangor, November 8, 1853, with two vessels in tow, down the river. Leaving one at Frankfort, she proceeded with the other, and arrived at Bucksport Narrows between nine and ten o'clock in the evening. On rounding Fort Point, at the entrance of the Narrows, she saw a steamer coming up the river below Ralph's Point, another projection on the opposite side of the river. It proved to be the Malden, another tow-boat, which, having carried down her tow, was on her return. The Nautilus was descending with the ebb tide at the rate of about eight miles an hour, and the Malden ascending at the rate of four or five, the tide making about three miles difference in the progress of the vessels. There had been in the beginning of the evening a squall of snow, but that was past, and though the sky was overcast, yet the moon being at her second quarter, there was sufficient light for the men on board each boat to see the other at the distance of half a mile or more. The Malden, of about one hundred and five tons burden, had a crew of six hands. As they were ascending, and at the time of the collision, the mate was at the helm, the engineer in the engine-house, and the captain in the cook-house. She had no signal lights to be seen, except lights at two small windows looking forward from the engine room, and these could scarcely answer the purpose of signal lights. The Nautilus had a crew of seven men. From the time she rounded Fort Point and entered the Narrows, the master was at the wheel, the engineer in the engine-house, and Stubbs, one of the hands, forward on the look-out. She bore two signal lights, one on the top of the engine-room, and one hanging on the braces of the smoke pipe. These were the most material facts.

Rowe & Hubbard, for libellants.

Fessenden & Deblois, for respondents.

WARE, District Judge. It seems hardly possible that two vessels approaching each other, both moved by steam and thus having

[1] [Reported by Edward H. Daveis, Esq.]

the complete control of their own motions, in a river of ample width to allow a safe passage, and in an evening light enough for them to be seen, even without signal lights, at the distance of half a mile, should come in collision without faults on one side or the other, or both. The law in defining the rights and liabilities of vessels, in cases of collision, is quite well settled. If the collision happens by the fault of one of the vessels, she must repair the damage which has been occasioned by her fault. If it was purely fortuitous, or was occasioned vi majore, without fault or negligence in either party, this by the common law is held to be damnum fatale, and each vessel must bear her own loss; and this, in a recent case, has been held by the supreme court to be the rule of the maritime law of this country. But where the collision has not been purely fortuitous or an unavoidable accident, but has been occasioned by faults on both sides,—or it has been occasioned by faults, and they are entirely inscrutable, and it cannot be determined whether they are imputable to one party or the other,—in either of these cases the maritime law, by what has been called a "judicium rusticum," divides the loss between them by moieties, without regard to the comparative value of the vessels, and without undertaking to determine whether the faults were greater on one side or the other. The Scioto [Case No. 12,508]; 3 Kent, Comm. 231; Abb. Shipp. p. 229, where the authorities are collected. The maritime law, on principles of public policy, departs from the principles of natural law, by which no one can be held responsible for an injury until it is shown to be imputable to his fault, and it differs also from the rule of the common law applicable to analogous cases on land, which holds that the complaining party cannot recover for a damage where it appears that it was in part imputable to his own negligence or fault, although the defendant may also have been in fault; that when there are mutual faults, neither party has a remedy against the other. 2 Greenl. Ev. § 473.

Let these principles be applied to the present case. It cannot be pretended that a collision between these two vessels, approaching in plain sight of each other, and each seen from a half to three fourths of a mile distant, was unavoidable; nor is it pretended that the collision was occasioned by any wanton or wilful misconduct of either party. But in the sense of the law, under the term faults, for which a party is held responsible in these cases, is included not only wilful misconduct but the neglect of any proper precaution to avoid a collision, and any want of care, vigilance, or skill in the management of the vessel. In this sense of the word the Malden was in fault in not using the precaution which is required, not only by the general laws of the sea, in the navigation of narrow waters much frequented by vessels, of showing signal lights, to give notice to others of her position and movements, but which is expressly enjoined by the act of congress of July 7, 1838 (5 Stat. 306). It has been held by the supreme court, that this neglect alone is sufficient to throw on a vessel the burden of proving that the accident is not attributable to this omission. Waring v. Clarke, 5 How. [46 U. S.] 441. In the second place, my opinion is that there was not at the time of the collision a sufficient watch on deck. In this narrow passage of the river, where the currents are somewhat baffling, the master was below in the cook-room, leaving no one on deck but the man at the helm, and the engineer in the engine-house. When a boat was seen approaching in a part of the river where the navigation is so critical, the master, if not on deck, ought immediately to have been called. Had that been done the collision might perhaps have been avoided. My opinion is that there were faults on the part of the Malden that are a bar to her recovery for the full amount of damage she has sustained, and also for any part of it, unless it is shown that there were such faults on the part of the Nautilus as require, on the principles of law, the loss to be divided between the two.

And here the first fact that meets us in this misadventure is that it took place in the centre of the stream. By a law of the sea, perfectly well understood by all navigators, when two vessels are approaching each other, each party is bound to take the right and pass the other on her larboard. These two vessels were approaching in a narrow and winding part of the river, and each seeing the other at the distance of half or three quarters of a mile before they met. Each was entitled to the side of the stream on her right, and, to avoid the danger of collision, was bound to take it. Neither party had in strictness a right to the centre, and there was nothing in the currents that necessarily prevented either from keeping near his own shore. And yet they met in the centre. From this fact alone, in the absence of all explanation, the inference would be that both were in fault. In such cases neither party is justified in saying, I have as good a right to the centre as the other, and because his vessel is strong, take the risk of collision; because each party is bound, without regard to the course of the other, to employ every effort of vigilance and skill to avoid a collision. But what places the Nautilus under graver difficulties is, that at the time of the collision, she was heading towards the eastern shore, and putting herself directly into waters that belonged to the Malden. The reason given for this is that she was deceived by the movements of the Malden, and supposed that she was intending to pass on the western side. If she was so deceived, it may still be asked, was she necessarily so deceived? The fact is that the Malden was headed towards the eastern shore. In the excitement and confusion of an apprehended collision, it is not surprising that one should misjudge, and this

will certainly not be imputed as a crime. But in these cases the master is liable sometimes for errors of judgment. He may be responsible for a mistake which a more cool, vigilant, or skilful man would have avoided. On a consideration of all the evidence in the case, I am not satisfied that the faults were wholly on one side, and when this is the fact, the conclusion, as I understand the law, is that the loss shall be divided between the parties. The prevailing rule of the law of the continental states of Europe, is that the loss shall be divided, where the accident is simply fortuitous without faults in either party; and as a rule of expediency it is vindicated on the plausible, if not satisfactory reason that it tends to make large and strong vessels cautious in avoiding vessels of inferior size and strength, though the danger of injury to themselves may be small, and thus contributes to the general security of navigation. In our law the rule is settled otherwise. But when it is quite certain that the collision was not an inevitable accident, but was preceded and occasioned by errors, mistakes, and faults, and it is not clearly shown that the faults were all on one side, it seems to me to be a salutary rule to divide the loss between them. I am not aware of any case in which this precise point has been decided by our courts; and it may be objected that it is repugnant to the rule of the common law in analogous cases on land; but it appears to me in conformity with the spirit of the maritime law, which generally aims more at practical utility and the interests of navigation, than at a logical and scientific deduction of general and abstract principles. It seems also to have approved itself to the mind of that great jurisconsult and wise judge, Chancellor Kent.

The damages sustained by the Malden, according to a careful and particular estimate of the materials and labor required to repair her, are put at $591. That done to the Nautilus was small. A boat was destroyed, worth $35, and a slight injury to the hull, amounting to about $25; in the whole, $60. This, added to the damage of the Malden, makes the total damage $651, and divided between them gives to each $325.50. It was suggested at the argument, that there should be a deduction as in insurance cases, of one third of the repairs for the difference between new and old. No authority was cited for the application of this rule to cases of damage by collision, and I am not aware that it has ever been extended to these cases. Even if in some cases it might be equitable, I am not satisfied it would be in this. The principle on which the damages were estimated was, what would be the cost of putting the two vessels in as good a plight as they were before the collision, and that is the damage that ought to be repaired.

DECREE: The whole damage to be divided between the two vessels by moieties and each party to pay his own costs.

Case No. 10,059.

The NAVARRO.

[1 Olcott, 127.]

District Court, S. D. New York. April, 1845.

PLEADING IN ADMIRALTY—PLEAS—FORMALITIES—PRACTICE—CROSS ACTION—FORM OF ACTION.

1. By the rules of admiralty practice, pleas or exceptions must set forth the matter in dispute in perspicuous and definite terms, and it is not necessary that they should embody the formalities required in pleading at common law or in chancery.

2. A cross action cannot be maintained in this court, which seeks a re-trial of matters already adjudicated between the parties.

[Cited in The Dove, 91 U. S. 385.]

3. Nor is this rule varied when the subject matter is the same, although one action be in rem and the other in personam; the thing sued being regarded in admiralty as substituted for its owner, and when subject to his responsibilities, entitled at the same time to his immunities.

In admiralty.

O. Bushnell, for libellant.

B. Benedict, for claimants.

BETTS, District Judge. This is a cross action, in rem, on a charter-party, on which the claimants heretofore brought suit against the libellant, and had a decree in their favor in this court. The vessel was chartered to the libellant on a voyage from La Guyana to a plantation about twenty miles to the windward, from thence to La Guyana and Puerto Cabello, with the privilege of going to Maracaibo for a cargo. The libel charges that the vessel proceeded only to the port of Maracaibo, at the head of the lake, and no sufficient cargo being found for her there, the master was requested to proceed up Lake Maracaibo to other ports, where cargo would be found, which he refused to do; and it avers that the usage in that trade is, for vessels chartered to Maracaibo, to go up the lake for cargo when required, without mention of such obligation in the charter. Damages are demanded against the vessel because of the non-performance of such implied contract by the master.

The claimants, by way of exception, set up the former action and the decree of the court therein in bar of this suit, and aver that the same matters sought to be drawn in controversy in this cause have been adjudicated and decreed by this court between the libellant and the claimants herein, and pray that the libel be dismissed. The libellant, by an exceptive allegation, takes issue in law upon the sufficiency of the bar. The alleged insufficiencies of the bar might, most of them, be grounds of special demurrer at law; such as that the averments are not positive, but are merely by way of recital: the want of certainty as to the identity of the subject matter of the two suits; the want of proper form and verification of the plea, &c., &c. Others are inappropriate to this court, as that the

parties are not nominatively the same in the proceedings in both cases, this being in rem, the former in personam; that the issue tendered by the plea is partly en pais and in part to this court (Betts, Adm. 48), and that the particulars of the former action are not alleged in the plea.

The general principle governing pleas or exceptions in admiralty practice is that they must set forth the matter of defence in perspicuous and definite terms, and it is in no way necessary they should embody the formalities which obtain in common law pleas, or even those used in chancery. 2 Browne, Civ. Law, 110; Dunl. Adm. Prac. 196, 197; Betts, Adm. 48. The gist of the plea is, that the present claimants brought their action on this charter-party against the libellant, averring full performance of its engagements on their part; that the libellant contested the action, and the court, on the pleadings and proofs, decreed in favor of the claimants, and that the libellant now seeks to bring the same matters in controversy in this suit.

This defence is sufficient in its material point—the identity of the cause of action in this and the former suit. The substitution in this of the vessel for the owners does not constitute a distinct cause of action. The vessel being chargeable in admiralty with the responsibilities of her owners, takes, also, all their legal privileges and exemptions in respect to the charter-party, and it is substantially sufficient, in its frame, it not being necessary to the validity of the bar that more of the former pleadings be rehearsed than is here set forth. To do so would load the files to no useful end, and the rules of court inhibit all useless prolixities in referring to antecedent pleadings in a cause with a view to bring a point under the consideration of the court which may be material in a new proceeding. Rule 7. The exception to the plea is accordingly overruled, with costs, with leave to the libellant to reply to the plea within ten days.

Ordered and adjudged that the exception filed by the libellant to the plea of the respondents of a former trial and decree upon the subject matter of the suit be overruled, with costs to be taxed, the libel of the libellant be decreed barred and be dismissed, with costs to be taxed, unless the libellant shall elect to reply to said plea; and in that case, that he have leave to file a replication thereto within ten days, on payment of the costs created by such exception, to be taxed.

Case No. 10,060.

The NAYADE.

[See Case No. 7,046.]

NAYADE, The (INGRAHAM v.). See Case No. 7,046.

Case No. 10,061.

NAYLOR et al. v. BALTZELL et al.

[Taney, 55.] [1]

Circuit Court, D. Maryland. Nov. Term, 1841.

CARRIERS—CONTRACT—LEX CONTRACTUS—BILL OF LADING—SHIPPING—POWER OF MASTER TO BIND — BOTTOMRY BOND — SALE OF CARGO.

1. The ancient common law in relation to carriers is, undoubtedly, in force in Maryland, but there is no principle of jurisprudence upon which the court can expound a contract by the laws of that state, if it was not made there, nor was any part of it to be performed there.

2. The law of the domicil of the party does not govern the contract, nor determine his rights or obligation; they depend upon the law of the place where it was made, or where it was to be executed.

[Cited in Balfour v. Wilkins, Case No. 807.]

[Cited in Snashall v. Metropolitan R. Co., 19 D. C. 400. Cited in brief in Talbott v. Merchants' Despatch Transportation Co., 41 Iowa, 248.]

3. The master has a right to contract for the employment of the vessel, under circumstances of necessity, and the owners will be bound by it; but this right is derived from the maritime code, which is founded on the general usages and convenience of trade, and which has been adopted, to a certain extent, by all commercial nations.

[Cited in The Ole Oleson, 20 Fed. 387.]

4. The bill of lading is an instrument founded in the usages of trade, and not connected with any of the peculiar doctrines of the common law.

5. Where a vessel is injured by dangers of the seas, and is obliged to seek a port of distress, where she is found to be unable to proceed on her voyage, and the cargo is landed, the master becomes the agent of the cargo as well as the ship, and in that character, it is his duty to deal with the cargo, as a prudent and discreet owner would have done, if he had been on the spot at the time. He may transship it, and earn freight for his owners. If his own ship can be repaired in a reasonable time, he has a right to retain it until his own ship is ready, and, if necessary, may sell a part of the cargo, or hypothecate the whole, in order to obtain money for the necessary expenses of repairs; or he may abandon the voyage, and notify the owners of the cargo, of the disaster, and await their orders as to its future disposition.

6. As to the ship, the master may, in a foreign port, contract for repairs and supplies, and thereby bind the owners to the value of the ship and freight; or he may hypothecate the ship and freight, and thereby create a direct lien upon them for the security.

7. The authority of the master is limited to objects connected with the voyage, and if he transcends the prescribed limits, his acts become, in legal contemplation, mere nullities: and it is incumbent on the creditor to prove the actual existence of the necessity of those things which give rise to his demand.

8. The owners are not personally responsible for debts contracted by the master for repairs, beyond the value of the ship and freight.

[Cited in Force v. Providence Washington Ins. Co., 35 Fed. 778; The Scotia, Id. 912.]

9. Nor can any terms inserted in a bottomry-bond, by the master, make them responsible for a greater amount.

10. A bottomry-bond executed by the master, hypothecating as well the cargo as the ship and freight, will not render the owners of the ship

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

personally responsible to the owners of the cargo, beyond the value of the ship and freight.

[Cited in Miller v. O'Brien, 35 Fed. 782.]

11. The master has the power to pledge the ship and freight, only in cases of necessity—that is to say, where it is necessary for the interest of the owner, or there is reasonable ground to believe it will be for his interest; and the lender on bottomry is bound to show the existence of this necessity, otherwise, he is not entitled to recover, even against the ship and freight.

[Cited in The Scotia, 35 Fed. 912.]

12. And because it may sometimes be for the interest of the cargo to have the vessel repaired, the power is given to the master to sell a part, or hypothecate the whole, if necessary, to raise funds for that purpose; but the lender must show that the necessity existed, otherwise, he is not entitled to recover on his bond.

13. If the owner of the cargo stands by and suffers the cargo to be sold under the bottomry-bond, without requiring evidence of the necessity for the repairs, it will not avail him, in an action against the ship owners, to show that the necessity did not exist.

[14. Cited in brief in Talbott v. Merchants' Despatch Transportation Co., 41 Iowa, 249, to the point that a contract of affreightment is performed by delivery of the goods at the point of destination.]

[This was a suit by Jeremiah T. Naylor and others against Thomas Baltzell and Philip Baltzell to recover damages for the nondelivery of a certain cargo.]

J. Meredith, for plaintiffs.

J. Glenn and R. Johnson, for defendants.

TANEY, Circuit Justice. This action is brought to recover damages for the non-delivery of a cargo of copper ore, shipped in Chili, on board the brig Hope, Frederick Barkman, master, and consigned to the plaintiffs, who are merchants residing in Liverpool. The bill of lading is in the usual form, and was signed by the master on the 1st of July 1836, at Herradura de Carrisal, whereby he engaged to deliver the said cargo to the plaintiffs, at Swansea, in Wales, with the usual exception of the dangers of the seas.

It appears from the evidence, that the defendants, who reside in Baltimore, were the owners of the brig. She sailed from Baltimore, for Montevideo, on the 22d of October 1835, with a cargo of lumber, and was consigned to Carreras, Patrick & Butler, merchants of Montevideo, who were authorized to send her to any foreign port, with directions to remit the freight that might be earned to the defendants; this appears from the letter of Captain Barkman to the owners, written from Montevideo. The vessel arrived safely at Montevideo, and delivered her cargo; and the master, by the orders of the consignees, afterwards proceeded to Buenos Ayres, and signed there a charter party to Dickinson, Price & Co., by which the brig was to go round Cape Horn to Valparaiso, and to two ports in Chili, to take on board a cargo of copper ore, and then proceed to England, where the cargo was to be delivered. She sailed, accordingly, for Valparaiso, in February 1836, consigned to the charterers, and on the passage sprung a leak, which made it necessary to heave her down and make some repairs at that port; the exact amount of repairs and other expenses at Valparaiso, amounted to the sum of $3445, for which bills were drawn on the defendants, and paid by them.

After the repairs were made, the master called on Dickinson, Price & Co., and offered himself ready to proceed on the voyage, according to the charter-party; but they declined fulfilling the contract, alleging that the vessel was too old, and saying that they would have nothing to do with her. The master thereupon advertised her for charter, and after a delay of about fifteen days, succeeded in chartering her to Sewall & Patrickson, of Valparaiso, to proceed from that port to two ports in Chili, to load with copper ore for Swansea, in Wales, where the cargo was to be delivered to the plaintiffs. The cargo was taken on board pursuant to this charter, the master signed the bill of lading in the usual form, and the vessel sailed for her port of destination. In passing round Cape Horn, she was overtaken by severe weather, from which she suffered a great deal of damage in her hull and rigging, and was with difficulty kept from sinking, but succeeded in making the port of Pernambuco, where she arrived in great distress, and altogether unable to proceed on her voyage.

It does not appear that the master attempted to procure another vessel. He landed the cargo, and proceeded to make extensive repairs upon the brig. The whole cost of the repairs and expenses at that port amounted to the sum of £3150 sterling, for which sum with seventy per cent. premium, he hypothecated the ship, freight and cargo to the lender; the whole sum, including the premium, being £3780, for which a bond was executed, payable in ten days after the vessel should arrive at Swansea, in Wales. The brig proceeded to her port of destination, where she arrived safely about the middle of April, 1836. The money for which the hypothecation was given, not being paid, the lender proceeded in the admiralty court against the vessel, freight and cargo, and they were all sold by the decree of the court, no one having appeared on the part of the brig or cargo, to contest the claim of the bond-holder. The proceeds were not sufficient to pay the sum for which they were hypothecated.

It appears also that the portion of the aforesaid sum chargeable to the cargo, for the general and particular average, amounted to £642 8s. 11d., which was paid to the owners of the cargo by the underwriters; the freight amounted to £1189 5s. 1d.; the net proceeds of the cargo, sold under the bottomry, was £3396 19s. 5d.; and this suit was brought to recover from the owners of the ship the amount of the net proceeds of the cargo, after deducting the sum received from the underwriters and the freight.

The ship was charged, in the settlement of the general average, with £181 19s.; so that

the repairs put on the ship, and her expenses at Pernambuco, with which she was charged, over and above her portion of the general average, amounted to upwards of ten thousand dollars. She was bought by her owners in Baltimore, shortly before she sailed on her voyage from the port, for $4000, and she was sold under the bottomry for £600 sterling. The repairs at Pernambuco cost more than double as much as she was worth at Baltimore, before she sailed, or in England, after the repairs were put upon her.

It was admitted, that the ship was not insured, and that the owners had received nothing on account of the general average loss incurred as above stated. The ship and freight having thus been appropriated to the payment of the bottomry, and totally lost to the owners, the question raised here is, whether they are personally responsible to the owners of the cargo, for the loss sustained by them? And the first inquiry is, by what rule of law are we to measure the rights of the plaintiffs, and the liabilities of the defendants, under a contract like the one now sued on?

The plaintiffs insist that we must be governed by the rules of the common law; that the defendants, under the charter-party and bill of lading, were common carriers for hire, and as such were liable for any loss of the cargo, unless it happened by the act of God, or a public enemy, provided it did not fall within the exception of the dangers of the seas. But there is no sound reason for applying to this case the principles of the common law in relation to common carriers for hire. In the first place, the master, according to the doctrines of the common law, was not authorized to bind even the brig or her value, by a contract like this. In all of the cases (with the exception of that of Boucher v. Lawson, Lee t. Hardwicke, 194), in which the owner was held responsible as a common carrier, upon contracts made by the master, it appeared that the master was entrusted by the owner, not only to navigate the vessel, but also to make contracts for her employment, or to receive goods for certain ports at the customary freight. Without examining them all separately, it is sufficient to remark, that in the case of Ellis v. Turner, which is comparatively a late one (8 Term R. 531), in order to charge the owner, evidence was offered to show that it was not usual for the master to confer previously with the owners, as to the terms on which he was to take goods on board, he having a general authority or discretion to receive and convey goods for the customary freight between the ports there mentioned. And in the case of Boucher v. Lawson, above referred to, in which the court said that the owner would have been liable for the doubloons taken on board at Lisbon, to be carried to London, if it had appeared that the ship was employed in carrying goods for hire, Lord Hardwicke evidently meant that the owner would have been responsible, if it had appeared that he had given him authority so to employ her and to make such contracts. For the court decided against the liability of the owner, although the contract for the freight was made by the master, upon the ground, that it did not appear that the ship was employed in carrying goods for hire, and for aught that appeared, might have been sent to Lisbon for a special purpose. The office of master, therefore, was not, in that case, supposed to be sufficient authority, of itself, to enable him to bind the owner by a charter-party or a contract of affreightment: and upon that point it does not differ from the case of Ellis v. Turner, before cited, and the other cases upon the same subject. They all agree that in order to render the owner answerable for cargo lost, it is not sufficient to show that the contract for transporting it was made by the master; but the party claiming remuneration must go further, and show that the owner had given authority to the master to make such a contract. His appointment as master, does not, of itself, upon the principles of the common law, confer the authority.

In this case, the brig was consigned to Carreras, Patrick & Butler, at Montevideo, with directions to employ her, if they thought it proper to do so, in a voyage to some other foreign port; and they were instructed, if they did so employ her, to consign her to their friends, and to remit the freight, if any was earned, to the owners at Baltimore. It is in proof, therefore, that no authority was given, or intended to be given, by the owners, to the master, to charter the brig, nor to receive any goods or freight, except under the direction of the consignees or their agents; on the contrary, he was carefully excluded from all such authority by the owners, and confined to the duty of navigating the vessel, as master, upon the voyages determined upon by the proper agents. When Dickinson, Price & Co. refused to execute the contract made with the consignees, it was the duty of the master to notify them of what had happened, and to wait their orders; he had no right, according to the rules of the common law, in relation to principal and agent, or master and servant, to enter into the contract under which the voyage in question was performed; it was not within the scope of the authority conferred on him, and was not binding on the owners or their friends.

But assuming this contract to be obligatory upon the owners, upon common law principles, is there any ground for measuring the extent of their liability by its rules, founded on the ancient customs of England? The contract was made in Chili; the cargo was laden there; it was to be transported on the high seas to England, where it was to be delivered. Now, there can be no pretence for saying, that the principles of the common law, in relation to carriers for hire, prevail in Chili; and it is equally certain, that, upon a contract of this description, these ancient

rules are no longer the law of England. Since the statute of 53 Geo. III., it does not bind the owners beyond the value of the ship and freight. The words of the statute are abundantly plain; and the cases of Wilson v. Dickson, 2 Barn. & Ald. 2, and Cannan v. Meaburn, 1 Bing. 465, show how that statute has been expounded and applied in the common law courts. If the master had sold the whole of this cargo at Pernambuco, instead of hypothecating it, the owners would not have been answerable beyond the value of the ship and freight. In the country, therefore, where the contract was made, and in the country where it was to be finally executed, the rights and obligations of the parties did not depend upon the doctrines of the common law, in relation to carriers for hire. Upon what ground, then, can the court apply them here?

The ancient common law, in relation to carriers for hire, is, undoubtedly, in force in Maryland; but there is no principle of jurisprudence upon which the court can expound this contract by the laws of this state. It was not made here; and no part of it was to be performed within our territory. The shipowners, it is true, reside here; but the law of the domicil of the party does not govern the contract, nor determine his rights or obligations; they depend upon the law of the place where it was made, or where it was to be executed. In this case, the law of neither the one nor the other furnishes any ground for charging these defendants, according to the rules of the common law, in relation to carriers for hire; that law, therefore, cannot give the rule by which this court should decide the rights of the parties.

Undoubtedly, the master had a right to make this contract, under the circumstances in which he was placed, and the owners were bound by it; but this right is derived from the maritime code, which is founded in the general usages and convenience of trade, and which has been adopted, to a certain extent, by all commercial nations. The bill of lading (the contract on which this suit is brought) is an instrument founded on the usages of trade, and not connected with any of the peculiar doctrines of the common law. We must look, therefore, to the maritime code, as acknowledged and administered in this country, in order to expound this contract, and to determine the extent of the obligations it imposed upon the owners.

It is stated in Abb. Shipp. (Story's Ed. 1829), 90–93, that a charter-party, made by a master in a foreign port, in the usual course of the ship's employment, and under circumstances which do not afford evidence of fraud, binds the ship and freight; and therefore, to the amount of the value of the ship and freight, the owners are, by the maritime law, bound to the performance; and the same doctrine is laid down in 3 Kent, Comm. (3d Ed.) 162. At the time then that the vessel sailed for Swansea, where the ore had to be delivered, the ship and freight were bound for the performance of the contract into which the master had entered. It is not suggested, that anything happened before the arrival of the vessel at Pernambuco, which would render either the ship, or freight, or owners, answerable for the loss sustained by the cargo. The damage sustained in the voyage round Cape Horn was occasioned by the dangers of the seas, which made it necessary, for the safety and interest of all concerned, that the vessel should put into Pernambuco; and if the ship-owners are responsible for the cargo, their liability must arise from something that was done by the master at this port. Upon the arrival at Pernambuco, it was found, that the vessel was damaged to such an extent, that she was unable to proceed on her voyage, and the cargo was landed; under these circumstances, from the necessity of the case, the master became the agent for the cargo as well as the ship, and in that character, it was his duty to deal with the cargo as a prudent and discreet owner would have done, if he had been on the spot at the time. He might transship it, and earn freight for his owners. If his own ship could be repaired in a reasonable time, he had a right to retain it until his ship was ready; and, if necessary, might sell a part of the cargo, or hypothecate the whole, in order to obtain money for the necessary expenses of repairs; or he might abandon the voyage, and notify the owners of the cargo of the disaster which had happened, and await their orders as to its future disposition—so far as to his power over the cargo.

Now as to the ship—upon this point, the law has been laid down by the supreme court, in the case of The Aurora, 1 Wheat. [14 U. S.] 102, 106, and it is unnecessary, therefore, to multiply cases upon the subject. The master may, in a foreign port, contract for repairs and supplies, and thereby bind the owners to the value of the ship and freight, or he may hypothecate the ship and freight, and thereby create a direct lien upon them for the security of the creditors. But the authority of the master is limited to objects connected with the voyage, and if he transcends the prescribed limits, his acts become, in legal contemplation, mere nullities; and it is incumbent on the creditor to prove the actual existence of the necessity of those things which give rise to the demand. In the case of The Virgin, 8 Pet. [33 U. S.] 538, it was held, that the master could not pledge the personal credit of the owners, at the same time that he gave a bottomry on the ship; that if the bottomry-bond contained a clause to that effect, it would be void, and the owners be personally bound only to the extent of the pledged fund which actually came to their hands.

In the case before us, then, the master had a right to pledge the ship and freight, in which case, the owners are answerable no further than the amount of the pledged fund

which comes to their hands; or he might have pledged the personal responsibility of the owners to the value of the ship and freight, in which case, if the ship had been lost on the voyage, they would have been responsible to that amount.

This is the extent of the authority which the law gives to the master, in a foreign port, and if he exceeds it, his acts are void. If, therefore, in this case, the master had pledged to the bottomry-lender, the personal responsibility of the owners, to the value of the ship and freight, and cargo also, the pledge, as respects the value of the cargo, would have been void, and without lawful authority, and the owners not responsible. Can he then, by pledging to the bottomry-lender the cargo, enlarge his authority in relation to the personal responsibility of the ship-owner, and indirectly bind him, not only for the value of the ship and freight, but for the value of the cargo also? The limitations upon the power of the master so carefully stated by the supreme court, are utterly nugatory, if by this circuitous mode, he is permitted to do what he cannot do directly; and by hypothecating the cargo, exercise a power over the fortunes of his owners to an unlimited extent. We think it cannot be done; and that the value of the ship and freight only were bound, so far as the ship-owners were concerned; and as no part of that fund has come to their hands, they are not personally responsible, either directly or indirectly, for the repairs at Pernambuco.

We are not aware of any decision in England or in this country, upon the precise point now before the court. But in the case of The Gratitudine, 3 C. Rob. Adm. 257, Lord Stowell strongly intimates an opinion that, in a case like this, the ship-owner would not be responsible to the owner of the cargo; and in The Packet [Case No. 10,654], it appears, from the language of the court, that Judge Story also doubted the liability of the ship-owner.

The justice and sound policy of the rule which restricts the power of the master over the property and fortune of his owner, to the value of the ship intrusted to his command and the freight she may earn, is proved by its deliberate adoption by every commercial nation in Europe; and we should be very unwilling to establish a contrary principle in this country, unless very clear and decisive authorities compelled us to the decision. For it would place the American ship-owner in a far worse condition than his European rival, and compel him to hazard his whole fortune, however large, upon every distant voyage made by one of his ships. And as the evil could be cured only by the legislation of the states, different rules would perhaps be established in different places, and the mischief to commerce increased by conflicting laws in the several states.

The principles stated by Lord Hardwicke, in the case of Boucher v. Lawson, in relation to the liability of the owner, although restricted to much narrower limits than those now contended for, appear to have surprised the commercial community of Great Britain, since they immediately petitioned for, and obtained an act of parliament limiting the responsibility of the owner, in cases like that of Boucher v. Lawson, to the value of the ship and freight. And when it appeared, from the decision of the court of king's bench in the subsequent case of Sutton v. Mitchell, 1 Term R. 18, that the former act of parliament did not cover all cases of the loss of cargo, the ship-owners immediately petitioned for, and procured the passage of an act extending the restriction to other cases; and finally obtained the law 53 Geo. III. c. 159, which, in every case of loss of cargo, without the fault of the owner, limits his liability to the value of the ship and freight. Abb. Shipp. (Story's Ed. 1829) 264–268. The history of these acts of parliament, shows that in the two decisions above mentioned, the principles adopted by the court carried the responsibility of the ship-owner, in England, farther than it had been supposed to extend in the commercial world; and the limitations procured immediately afterwards by act of parliament, show the apprehensions which these decisions excited, and the general sense of the trading community, that the liability should have been restricted to the value of the ship and freight. We are satisfied that, at this day, this is the general understanding of those who are engaged in commerce, and that the contracts are always made by both parties under that impression; and there can be no necessity or propriety in pushing the liability beyond the bounds prescribed by the general usages and understanding of the commercial world.

There is another view of this case, in which it appears to be evidently unjust and inequitable for the plaintiffs, to charge these defendants for the loss of the cargo. The master has the power to pledge the ship and freight only in cases of necessity, that is to say, where it is necessary for the interest of the owner; or there is reasonable ground to believe it to be for his interest; and the lender on bottomry is bound to show the existence of this necessity, otherwise, he is not entitled to recover, even against the ship and freight. Now, it never can be necessary for the interest of the owner of the ship to place upon her repairs, which cost more than double the amount of what she is worth after the repairs are made. There may be cases in which it may be for the interest of the owner of the cargo to do so; because the cargo may be of great value at the port of destination, and of little or no value at the port of necessity; it may be perishable in its nature; it may appear to have been impossible to procure another vessel in time to save it; and it may be the interest of the owner of the cargo to have repairs made upon the ship far beyond her value, in order

to enable her to transport his property to its place of destination. If there was any necessity which could have justified the enormous expenditure for repairs in this case, it must have been the necessities of the cargo, and not of the brig; for the repairs unavoidably sacrificed the vessel and freight, and nothing could be gained by them except for the cargo.

It is because it may sometimes be for the interest of the cargo to have the vessel repaired, that the power is given to the master to sell a part, or hypothecate the whole, if necessary, in order to raise funds for that purpose. But his power over the cargo is like his power over the ship in this respect; the lender must show that the necessity existed, otherwise he is not entitled to recover on his bond. Abb. Shipp. (Story's Ed. 1829) 129; 3 Kent, Comm. (1st Ed.) 133. Now in this case, although the cargo was not perishable, and although it does not appear that it could not have been transshipped at the same freight, and although the hypothecation has resulted most disastrously to the cargo as well as to the ship; yet, at Pernambuco, where the cargo must have been of very little value, and where very high calculations may have been formed of its value at Swansea, it may have been supposed that the interest of the owner of the cargo required that these extensive repairs should be made, in order to transport it to its port of destination.

If a discreet and prudent man, placed in the situation of the master, would have supposed so, then the hypothecation was lawful, and within the scope of his authority. Bad faith in this transaction is not imputed to him on either side; if he acted in good faith, and the interests of the cargo justified him in hypothecating the whole of it, there can be no good reason for charging the ship-owner with the unfortunate results of the contract made for the benefit of the owner of the cargo; but if, on the other hand, the interests of the cargo did not authorize the hypothecation, then the lender of the money obtained no lien upon it, since it was his duty to see that the necessity existed before he lent his money, and he was bound to prove its existence, if required to do so, to the satisfaction of the court, before he could enforce his lien. It appears from the evidence in this case, that the present plaintiffs stood by and saw the whole cargo sold, without appearing in the admiralty court to defend it, and without requiring from the lender any proof whatever of the necessity of the case. In either alternative, therefore, whether the necessity did or did not exist, it would be unreasonable and unjust to charge the ship-owner with the loss of the cargo arising from the hypothecation at Pernambuco; if justifiable, it was made for the benefit of the cargo, and at the sacrifice of the interests of the ship-owner; if not justifiable, it was lost by the negligence of the plaintiffs, to whom it was consigned, and who took no measures to protect it.

It is, perhaps, hardly necessary to remark particularly upon the opinion expressed by Mr. Benecke in his book on Average (page 253), that the ship-owner is personally liable for the value of the cargo in a case like the present. It is his inference from the various cases which have been cited in the present argument, and he refers to no case in which the point has been decided, nor even suggested that there is any established usage at Lloyd's upon this subject.

Upon the whole, we think that the master in this case had no right to pledge the ship-owner beyond the value of the ship and freight, and that the plaintiffs, therefore, are not entitled to recover.

NAYLOR (McDERMOTT v.). See Case No. 8,747.

NAYLOR (UNITED STATES v.). See Case No. 15,858.

Case No. 10,062.

NAZRO v. CRAGIN.

[3 Dill. 474.] [1]

Circuit Court, D. Iowa. June 1, 1874.

COURTS—FEDERAL JURISDICTION—ATTACHMENT—ACT JUNE 1, 1872—MOTIONS—ERROR.

1. The provision in section 11 of the judiciary act of 1789 [1 Stat. 78] that no civil suit shall be brought by original process in the federal court in any other district than that of which the defendant is an inhabitant, or in which he shall be found at the time of serving the writ, is not repealed by the bankrupt act, nor by section 6 of the act of June 1, 1872, in respect to the attachment of property. 17 Stat. 196.

[Cited in Anderson v. Shaffer, 10 Fed. 267; Boston Electric Co. v. Electric Gas-Lighting Co., 23 Fed. 839; Noyes v. Canada, 30 Fed. 666; Harland v. United Lines Tel. Co., 40 Fed. 311; Treadwell v. Seymour, 41 Fed. 581.]

2. Objection to the jurisdiction may be taken by motion, and is not waived by subsequently pleading to the merits.

[Cited in Abernathy v. Moore, 83 Mo. 69.]

3. Under the statute law of the state of Iowa, and the practice of the state courts therein, motions are parts of the record, and rulings thereon may be reviewed on error. Section 5 of the act of June 1, 1872, makes this practice applicable in the federal court on a writ of error to the district court, whose ruling on a motion to the jurisdiction may be reviewed.

[4. Cited in Howard v. American Dairy, etc., Co., Case No. 6,753, and cited in brief in Schollenberger v. 45 Foreign Ins. Cos., 5 Wkly. Notes Cas. 410, to the point that state legislation cannot confer jurisdiction upon the federal courts.]

[Alonzo] Cragin, as assignee in bankruptcy of Field & Field, bankrupts, brought an action at law in the district court of the United States for the district of Iowa (by which he was appointed such assignee), against John

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

Nazro, a citizen of Wisconsin, to recover an alleged claim against him. The petition asked the auxiliary process of attachment against the property of the defendant, and contained the necessary averments under the laws of the state for that purpose. An attachment bond was filed and a writ of attachment issued, which was levied upon property of the defendant, found within the district of Iowa. The defendant was not found within the district of Iowa, nor was he a resident or citizen thereof, and no summons was served upon him therein. But the defendant, by his counsel, made a special appearance in the district court and filed a motion therein to dismiss the suit and all proceedings for want of jurisdiction of the court over his person and property. The court overruled the motion, to which the defendant excepted. The defendant thereupon answered the petition, and, subsequently, there was a trial resulting in a judgment in favor of the assignee. The defendant brought the cause into this court by writ of error.

Thos. Updegraff, for plaintiff in errror.

Shiras, Van Duzee & Henderson, for assignee.

MILLER, Circuit Justice (orally). The eleventh section of the judiciary act contains the provision that "no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he may be found at the time of serving the writ."

The jurisdiction of the district court over the defendant, who was neither a citizen of Iowa, nor found therein, cannot therefore be maintained unless by some subsequent act of congress repealing the above restriction. It is urged that jurisdiction in such cases is conferred by the bankrupt act. Undoubtedly this act does, in certain cases, confer jurisdiction by reason of the subject-matter and irrespective of the citizenship of the parties. But I can discover nothing in the act which gives to the assignee in bankruptcy the power to sue in the federal courts a non-resident of the state upon whom no personal service within it can be had. The restriction in the judiciary act, mentioned above, is not repealed by the provisions of the bankrupt act.

It is next urged that the jurisdiction asserted by the district court is conferred by section 6 of the act of June 1, 1872 (17 Stat. 196). But in my judgment this is a mistaken notion of the design of this section. It does not repeal the limitation in the judiciary act. Prior to the legislation of 1872, just noticed, the federal courts had, by rule, generally adopted the state laws as respects attachments of property, but it was never supposed that jurisdiction could be exercised without personal service on the defendant, made within the district. The statute of 1872 adopts existing provisions of the state laws in this regard and gives the court power, by rule, to adopt provisions subsequently enacted by the states; but, in my opinion, it was not intended by congress to make the great change for which the assignee's counsel here contends. It would compel citizens of the Pacific coast to go to New York to defend their property which happened to be there and would give the great central cities vast power. I cannot but think that a change so radical would have been expressed by congress in unmistakable language. And this view is strengthened by the consideration that no publication is provided for by the section under consideration, while a subsequent section of the same act does provide for publication in respect to certain suits in equity.

The effect of this section in the act of 1872 is simply this: If the court has or can acquire jurisdiction over the defendant personally this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction.

Another question is this: Nazro appeared specially in the district court and by motion, instead of by plea, objected to the jurisdiction of the court. The objection was overruled. By the laws of the state and practice in the state court motions are part of the record. When the motion of the defendant to the jurisdiction was denied, he then answered and defended, and judgment went against him, to reverse which he brings this writ of error.

I am of opinion that, though a plea to the jurisdiction would have been more regular, yet, under section 5, of the act of June 1, 1872, the ruling of the district court on the motion is part of the record and may be reviewed here the same as if a plea to the jurisdiction had been overruled. I am also of opinion that the ruling on the motion to the jurisdiction was not waived by afterwards pleading to the merits, and that it is available to the defendant on error. Accordingly the judgment below must be reversed, and the district court directed to dismiss the proceedings. Judgment accordingly.

Case No. 10,063.

The NEAFFIE.

[1 Abb. U. S. 465.] [1]

Circuit Court, D. Louisiana. April, 1870.

TOWAGE—COMMON CARRIER LIABILITY—INJURY TO TOW—FAULT OR NEGLECT OF TUG.

1. The owners of a steam-tug or tow-boat, engaged in the business of towing vessels from point to point, but not receiving the vessels or the property on board of them into their care or custody otherwise than is involved in the mere

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

act of towage, are not liable as common carriers in respect of such employment.

[Cited in The M. J. Cummings, 18 Fed. 184.]

2. To charge them for an injury to the tow, such injury must be shown to have resulted from some neglect or fault in the management of the tug.

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

In admiralty.

N. H. Armstrong, for libelants.

Carleton Hunt, for claimants.

WOODS, Circuit Judge. The case was this: On May 28, 1866, the steam-tug Neaffie undertook to tow a flat or barge laden with hay from Jefferson City to the flat-boat wharf in the city of New Orleans—a distance of three or four miles. She made fast to the flat and towed her down the stream to said wharf, the master and crew of the flat remaining aboard of her. As she was about landing the flat, the latter collided with another flat made fast to the wharf. In a short time after the collision, the flat towed by the Neaffie sunk. The damage sustained by the sinking of the flat is agreed to be thirty-one hundred and fifty dollars.

The libelants charge that the sinking of the flat was in consequence of the collision, and that the collision was brought about by the carelessness of Cook, the master of the Neaffie; and in argument they allege that the Neaffie was a common carrier, and responsible for all damages to the flat not occasioned by the act of God or the public enemy.

The claimants answer, that when the Neaffie approached the flat for the purpose of towing down to the flat-boat wharf, they found her in a leaky condition, and refused to take her in tow except at the risk of her owners, to which the captain and part-owner of the flat assented. They deny any carelessness on the part of the master of the Neaffie, and deny that there was any collision whereby the flat was damaged; or that the sinking of the flat was the consequence of any damage received by her collision with the other flat lying at the wharf. They allege that the slight impingement of the one flat against the other was caused by a sudden eddy or boil in that part of the river.

In the view I have taken of this case, these are the only facts alleged on either side which it is necessary to recite. The naked fact that the flat of the libelants, while in tow of the Neaffie, did impinge upon the flat made fast to the wharf, and that in a very short time thereafter she sunk, raises a presumption of mismanagement and negligence on the part of the captain of the steam-tug, and fixes a liability for damages sustained upon her owners, unless contrary proof is adduced showing ordinary care and diligence. I have searched the testimony in this case in vain to find any act of carelessness or negligence on the part of the captain of the Neaffie. On the contrary, the proof shows, to state the result in the mildest form, reasonable care and diligence. No witness speaks of any act done or omitted showing want of skill or care on the part of the Neaffie.

Under this state of facts the Neaffie cannot be held liable for the damage suffered by the flat and cargo, unless she is made responsible as a common carrier. The business of the Neaffie, as the evidence shows, is to tow flats and other water craft from one point to another in and about the harbor of the city of New Orleans. The hire for her services varies according to the bargain made at the time the service is rendered.

A common carrier is often defined to be: "One who undertakes for hire to transport the goods of such as choose to employ him from point to point." This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is, "One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage."

Was the Neaffie a common carrier under either of these definitions? Chief Justice Marshall, in Boyce v. Anderson, 2 Pet. [27 U. S.] 150, says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further or applied to new cases." So unless the case of steam-tugs towing boats and their cargoes can be brought strictly within the definition of common carriers, I am not disposed to apply to them the great rigor of the law applicable to common carriers.

Can it be said that the tug-boats plying in the harbor of New Orleans undertake to transport the goods found on the water craft which they take in tow? It appears to me that it is the boat in which the goods are put that undertakes to transport them. The tug only furnishes the motive power. It is like the case of the owner of a wagon laden with merchandise hiring another to hitch his horses to the wagon to draw it from one point to another, the owner of the wagon riding in it, and having charge of the goods. In such a case, could it be claimed with any show of reason that the owner of the team was a common carrier? The reason of the law which imposes upon the common carrier such rigorous responsibility fails in such a case.

The tug-boats plying in New Orleans harbor do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boat in which it is laden. They neither employ the master and hands of the boat towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla.

The boat, goods and other property remain in charge and care of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the master or crew of the tow-boat, it can be hardly contended they would be answerable, and yet carriers would be answerable for such loss.

That tow-boats are not common carriers has been held in the following cases: Caton v. Rumney, 13 Wend. 387; Alexander v. Greene, 3 Hill, 9; Wells v. Steam Nav. Co., 2 Comst. [2 N. Y.] 204; Pennsylvania, D. & Md. Steam Nav. Co. v. Dandridge, 8 Gill & J. 248; Leonard v. Hendrickson, 18 Pa. St. 40.

In Vanderslice v. The Superior [Case No. 16,843], Mr. Justice Kane held a steam tow-boat liable as a common carrier; but when the case came before the circuit court, Mr. Justice Grier said he could not assent to the doctrine.

I am aware that a contrary doctrine has been applied by the supreme court of Louisiana to steam-tugs towing between the city of New Orleans and the mouth of the Mississippi river. These tow-boats are distinguishable from those plying in the harbor of New Orleans; but if it were otherwise, I think the weight of authority and reason is with those who hold tow-boats not to be common carriers.

Holding, then, that the Neaffie was not a common carrier, and that she was bound only for ordinary diligence and care, and that the testimony shows such diligence and care on the part of the master of the Neaffie, it follows that the libel must be dismissed at the costs of the libelant. The cross libel of claimants, not being supported by any proof, is also dismissed. Libels dismissed.

Case No. 10,064.

NEAFIE et al. v. CHEESEBROUGH.

[14 Blatchf. 313.] [1]

Circuit Court, E. D. New York. Sept. 11, 1877.

REFERENCE—CONCLUSIVENESS OF REPORT—JUDGMENT ENTERED—NEW TRIAL.

An order of reference, made on consent, in an action at law, provided that the cause be referred to H. to hear and determine all the issues thereof, and that the report of the referee have the same effect as a judgment of the court, and that, on filing such report with the clerk of the court, judgment be entered in conformity therewith, "the same as if the cause had been tried before the court." On the report, judgment was entered for the defendant, for costs. The plaintiff moved for a stay of proceedings, under section 987 of the Revised Statutes, with a view of applying to the court to grant a new trial: *Held*, that the court had no power to grant a new trial.

[Distinguished in Robinson v. Mutual Benefit Life Ins. Co., Case No. 11,961.]

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

[This was an action by Jacob G. Neafie and others against Charles A. Cheesebrough.]

Augustus C. Fransioli, for plaintiffs.

Frank E. Blackwell, for defendant.

BENEDICT, District Judge. This case comes before the court upon a motion for a stay of proceedings, after judgment entered. The case, which is an action at law, was referred by consent, and has been heard and determined by the referee. Upon the referee's report, judgment has been entered in favor of the defendant, for $155.80, costs. The plaintiffs desire to apply to the court to grant a new trial, and, for that purpose, now move for a stay of proceedings, under section 987 of the Revised Statutes. The defendant objects to the stay, upon the ground that the court has no power to grant a new trial after judgment entered upon the report of a referee, made upon such a consent as was given in this case.

The objection of the defendant appears to be well taken. The consent under which the reference was ordered, and to which the order of reference conforms, provides, that the cause be referred to Henry E. Howland, to hear and determine all the issues thereof, and that the report of the referee have the same effect as a judgment of the court. According to this consent and order, the decision of the referee, and not the decision of the judge, is to determine the judgment to be entered. That such a reference may be made has been expressly decided by the supreme court (Heckers v. Fowler, 2 Wall. [69 U. S.] 123); but I find no authority to grant a new trial after judgment has been duly entered upon the report of a referee authorized to hear and determine the cause.

It is supposed by the counsel for the plaintiffs that section 987 of the Revised Statutes confers upon the court the power to grant a new trial after judgment, in all cases when the trial is by the court, and he contends, that, inasmuch as, in this case, the consent and order of reference provide, that, on filing the report of the referee with the clerk of the court, judgment shall be entered in conformity therewith, "the same as if the cause had been tried before the court," therefore, the power to grant a new trial after judgment exists here, by virtue of section 987. But, this provision in the consent and order merely relates to the action of the clerk in entering judgment as of course, upon the referee's report, without application to the court. It does not change the character of the proceeding, nor make the trial other than a trial before a referee instead of the court. It cannot have the effect to bring the case within the scope of section 987, for, plainly, there has been neither a verdict nor a finding of the court upon the facts.

My conclusion being that the court has no power to grant a new trial, it follows that the stay asked for cannot be granted.

NEAFIE, The JACOB G. See Case No. 7,156.
NEAL, In re. See Case No. 1,406.
NEAL v. BECKWITH. See Case No. 1,406.

Case No. 10,065.

NEAL v. GREEN.

[1 McLean, 18.] [1]

Circuit Court, D. Tennessee. June Term, 1829.[2]

COURTS — FEDERAL PRACTICE — FORCE OF STATE DECISIONS—DIFFERENT CONSTRUCTION BY SUPREME COURT.

1. The courts of the United States adopt as a rule of decision, the settled construction of the statutes of the state, by its supreme court.

2. But where the supreme court of the United States have maturely adopted such construction, and the state court afterwards gives a different construction of the same statute, it is deemed more respectful to the supreme court of the Union, for the circuit court to hold their decision as binding, until the question shall be reviewed in that court.

3. The rule adopted, however, requires the courts of the United States to follow, in the construction of statutes, the supreme court of the state.

[This was an action in ejectment by Henry Neal against Asa Green for possession of certain real estate.]

Mr. Washington, for plaintiff.
Craighead & Yerger, for defendant.

OPINION OF THE COURT. The plaintiff has brought his action of ejectment to recover possession of a certain tract of 640 acres of land; and the defendant sets up the statute of limitations in bar of the action. The lessor of the plaintiff has shown a regular deduction of title from the patentee to himself; and the defendant exhibited a deed for the same land from Andrew Jackson to Dillon, and introduced evidence conducing to prove that persons claiming under and for Dillon, had held possession adverse to the plaintiff more than seven years before the commencement of the suit. To decide this case, a construction of the statute of limitations of 1815, of North Carolina, adopted by Tennessee, and one passed by Tennessee in 1797, must be given. The first statute provides "that no person or persons, or their heirs, which hereafter shall have any right or title to any lands, tenements, or hereditaments, shall thereunto enter or make claim, but within seven years thereafter his, her or their right or title shall descend or accrue; and, in default thereof, such person or persons so not entering or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made." And also that "all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all, and all manner of persons whatever, that the expectation of heirs may not in a short time leave much land unpossessed," &c. The act of 1797 provides that in order to settle the "true construction of the existing laws respecting seven years possession" "that in all cases wherever any person or persons shall have had seven years' peaceable possession of any land by virtue of a grant or deed of conveyance founded upon a grant, and no legal claim by suit in law shall be set up to said land within the above term, that then and in that case the person or persons so holding possession as aforesaid, shall be entitled to hold possession in preference to all other claimants," &c.

The question here is, whether as the defendant has failed to show that the deed under which he holds possession, is connected with a grant, he brings himself within the provisions of the statute. And the counsel for the plaintiff refers to the case of Patton v. Easton, 1 Wheat. [14 U. S.] 446, and the case of Powell v. Harman, 2 Pet. [27 U. S.] 340, as conclusive of the question. The supreme court in the first case say, "it has been decided that a possession of seven years is a bar only when held under a grant or a deed founded on a grant." The deed must be connected with the grant. This court concurs in that opinion. A deed cannot be "founded on a grant" which gives a title not derived in law or equity from that grant; and the words founded on a grant are too important to be discarded. The decision of the case referred to in 2 Pet. 340, is in accordance with this one; and we think both decisions carry out and give effect to the intention of the legislature. Indeed, the language of the act of 1797, would seem to admit of no other construction. The important words "founded upon a grant," being used in connection with the deed, would seem to require proof of the grant, as well as of the deed, and that they should be connected by intermediate conveyances. But it is insisted that since the decisions of the supreme court under this statute, the supreme court of Tennessee have by several adjudications, settled the construction of these statutes, that it is not necessary to show a grant or a title connected with a grant, by a person who claims the benefit of the statute. That the statute only requires the party who sets up the statute as a bar, to show a deed for the land, and that it has been granted. This appears now to be the settled construction of the statute, and the supreme court of the United States must adopt it, under their rule to follow the construction of a state statute which has been given by the supreme court of the state. And, although in this instance it may require of the supreme court of the Union, to give a different construction of these statutes from what they have given in the cases cited; they must adhere to the rule.

It is important that there should be but one rule of property in a state, and if this

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

[2] [Reversed in 6 Pet. (31 U. S.) 291.]

rule depends upon the construction of a statute of the state, as in the present case, it must be adhered to by the supreme court of the United States, under all the modifications which may be given to it by the supreme court of the state. But, nowithstanding this view, we think it would be more respectful for this court to consider themselves bound by the construction which has been given to those statutes by the supreme court of the United States, in order that the case may be brought before that tribunal for another adjudication. We, therefore, instruct the jury that according to the present state of decision in the supreme court of the United States we cannot charge that defendant's title is made good by the statute of limitations.

The jury found the defendant guilty of the trespass and ejectment in the declaration stated, and a judgment was entered on the verdict.

A writ of error was brought on this judgment, and it was reversed on the ground above suggested. 6 Pet. [31 U. S.] 291.

NEAL (RAILROAD CO. v.). See Case No. 11,534.

Case No. 10,066.

In re NEALE.

[3 N. B. R. 177 (Quarto, 43);[1] 1 Am. Law T. Rep. Bankr. 295.]

District Court, D. North Carolina. 1869.

BANKRUPTCY—REGISTRATION OF DEED OF ASSIGNMENT—CONSTITUTIONAL LAW.

1. Under the grant of power to frame "a uniform system of bankruptcy," congress has full authority to make such regulations in regard to the probate of deeds of assignment as it may deem best for carrying out the purposes of the law, without regard to the state laws regulating the registration of deeds.

2. Under the bankruptcy law of 1867 (section 14, cl. 61), a register of deeds in South Carolina must admit to probate a deed of assignment executed under the bankrupt law, upon a certificate of the clerk of the federal district court that the same is a copy of the assignment on file in his office, without requiring the same to be proved before a clerk of the superior court of the state, as required by the state laws.

[Cited in Taylor v. Irwin, 20 Fed. 617.]

By R. F. LEHMAN, Register:

I, R. F. Lehman, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said matter before me the following question arose pertinent to said proceedings, viz.: I had been notified by W. M. Pippin, the assignee of Charles E. Neale, bankrupt, that the probate judge of the county of Edgecombe refuses to admit to probate the assignment executed by me, under the 14th section of the United States bankrupt act [of 1867 (14 Stat. 522)], to him, as assignee, upon the ground that the register must appear before a judge of probate and acknowledge his signature. This the register declines to do, for the reason that in his opinion this proceding is unnecessary, and the state officer is bound to admit the deed to probate without it. Section 14, general clause 46, provides that the register shall (where there is no opposing interest), by an instrument under his hand, convey to the assignee all the estate, real and personal, of the bankrupt. General clause 61 provides that the assignee shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States, where a conveyance of lands owned by the bankrupt ought by law to be recorded. The assignment of bankrupt's effects is an official act, conveying property held by a judicial officer of the United States in trust to an assignee under authority of an act of congress. The mode of assignment is such as to make it a record of the court. It is not the record of a state court requiring to be exemplified, under the act of congress of May 26th, 1790, but of a United States court, which authenticates itself. In the case of Pepoon v. Jenkins, 2 Johns. Cas. 119, a record of a court of the United States was offered in the supreme court of New York, and upon issue joined upon a plea of nul tiel record was held sufficient, though it was merely certified by the clerk as a copy under the seal of the court. In this case the deed is under the hand of the register and the seal of the court. Independently of the common law on the subject, under G. O. 54, even a certified copy under the seal of the court is conclusive,—a portion of the original. The assignment then is a record of the United States district court, is conclusive evidence in the form in which it now stands of the transfer of the bankrupt's assets in all courts, and should be ordered to be registered by the probate judge.

The provisions of the Code of Civil Procedure in relation to the probate of deeds is clearly not intended to refer to official deeds of the officers of the courts. Nor, if it were so intended, is it conceived that the state could affect the operation of the bankrupt act. The registration of the assignment is clearly necessary to the proper working of the act. If the state could prescribe the nature of proof of its execution, it might make it so difficult as to practically be impossible. This is evident when it is considered that prior to the late amendments to the Code it would have been, if the view which is taken by the probate judge is correct, necessary for the register, in each case of an assignment which conveyed property in any county in the state, to go personally to that county and acknowledge the deed. I therefore cannot, as register, perform the superfluous act of acknowledging the deed. If the probate judge declines to admit the assignment to probate, his decision can be reviewed by a judge of the supreme court. It is therefore deemed unnecessary to intimate an opinion

[1] [Reprinted from 3 N. B. R. 177 (Quarto, 43), by permission.]

as to any remedy which may be had in the premises through the United States authorities, but the delay consequent upon a proceeding before the state courts might prevent the due registration of this deed within the six months. It is therefore conceived that an order might issue directly from the district judge to the probate judge of said county, commanding him to do what the law requires.

BROOKS, District Judge. The question presented by the certificate of Mr. Register Lehman in this case is whether the deed of assignment executed to the assignee by the register (there being no opposing interest), and the same duly certified by the clerk under the seal of the court, should be proved before a clerk of the superior court, and be by him certified, and ordered to be registered according to the provisions of the law of North Carolina in relation to deeds executed by private parties, before the same can be registered. I have examined carefully the reasons assigned by the register for the opinion expressed by him, and fully concur in both his reasoning and conclusion. I have no doubt but that congress of the United States has full power, in framing "a uniform system of bankruptcy," to adopt such provisions as it may think proper in regard to the probate of any deed or assignment that may become necessary in carrying out the purposes of the law. Much importance should be attached to that expression "uniform system through the United States." All of the states, I believe, have their bankrupt or insolvent laws; but these are not respected beyond the limits of the state passing such law, and the reason why they are not respected beyond the limits of the state passing them is that there is no uniformity in the system of the state bankrupt laws; many of them resembling each other in many respects, no two alike in every respect, hence no two with the same system. It could not properly be contended that congress, under the power expressly delegated by the constitution, could pass one system of bankruptcy laws to be in force in one state, and altogether another and a different system to be in force in another state. Indeed, if there were any essential differences, it would not conform to that important requirement. It would not be "a uniform system." The contrary might possibly be contended for if the power to pass a bankrupt law by congress was claimed as a constructive or implied right. But, when the power is expressly given, it excludes any implied power, and, when a particular system is prescribed, it effectually excludes any other system than the one provided. Then the only system of bankruptcy laws which congress has the power to pass is a uniform one, —one which requires the same acts and same duties from the officers appointed to execute the law in all the states, and producing the same general results in all the states, without regard to the important differences existing in the laws of the different states.

If, in preparing and passing the present system of bankrupt laws, congress has omited to make any provision in regard to executing and registering the conveyances or assignments required, I would readily hold that the state laws should be conformed to. If I am not altogether wrong in the views I have expressed, then the only question remaining to be considered is whether the bankruptcy act prescribes the forms to be observed in executing and preparing this instrument (the assignment) "to be recorded in every county or registry in the United States in which lands of the bankrupt are situate." I think the act already so provides. The object in requiring the assignment to be recorded is not to vest a title in the assignee, for he has title, though the assignment might never be recorded. The assignee may use it as evidence of his title in the courts, though the same may not have been registered. In this an assignment under the provisions of the bankruptcy act is essentially different from a deed or assignment (though absolute) made under the provisions of the laws of North Carolina. Under the latter, registration is necessary to the perfecting the title, though the deed be absolute. But the purpose in requiring the assignee to "cause the assignment to be recorded in every county or registry in the United States in which lands of the bankrupt are situate" is that every purchaser of land at an assignee's sale may have recourse to a certified copy from such registry, as a link in his claim of title in any suit he may bring for the possession, or in any suit in respect to the property which he, or his heirs, or others claiming under him, may desire to bring thereafter. Registration is necessary for the safety of such purchaser, for there is but one original assignment, which is filed in the district court clerk's office. It might be destroyed or lost, and often most inconvenient to have recourse to. Where this law is observed the loss of the original would work no damage, or work inconvenience to the purchaser or any other claiming under him, for they have recourse to a "certified copy" from the registry convenient, and which the act declares "shall be evidence thereof in all courts." It seems to me that any other conclusion would not be sustained by the language or the clear meaning of the act. In the 1st paragraph of the 14th section, after providing that the assignment shall be made by the judge or register, we find the following: "And thereupon by operation of law the title to all such property and estate, both real and personal, shall vest in the assignee." There is nothing preceding this language in regard to registration. Then what do we find subsequently in the same section to sustain the view that registration is not necessary to perfect the title of the assignee, and also that there is no other probate contemplated as necessary

than the attestation of the clerk and affixing his seal of office. That this means the clerk of the district court of the United States there can scarcely be room for doubt. After declaring that the assignee may sue for and recover the estate, prosecute and defend all suits in which the bankrupt may be a party, we find the following: "And a copy duly certified by the clerk of the court under the seal thereof of the assignment made by the judge or the register (as the case may be) to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt." And to show further that no other proof or probate of the assignment appears to have been made in this case is necessary, I refer to the language of that paragraph of the 14th section which relates directly to registering the assignment. It is as follows: "And shall within six months cause the assignment to him to be recorded in every registry of deeds," &c. If the law had contemplated proof as required by the state laws, is it not most likely the words proved and recorded would have been used?

My opinion is that such assignment does not require to be proved before a clerk of the superior court, or his certificate, to prepare it for registration, but that registers of deeds must record the same upon a certificate of the clerk of the district court that the same is a copy of the assignment on file in his office, with his seal affixed, upon demand that same shall be recorded, and a tender to him of the fees allowed him for such service by the laws of the state. Let this be certified to Mr. Register Lehman.

NEALE (BANK OF WASHINGTON v.). See Case No. 951.

Case No. 10,067.

NEALE v. CONINGHAM.

[1 Cranch, C. C. 76.] [1]

Circuit Court, District of Columbia. March Term, 1802.

WITNESS — INCRIMINATION — OBJECTION BEFORE BEING SWORN.

Witness who cannot testify in a cause without criminating himself shall not be sworn.

Trespass, for assault and battery, and false imprisonment.

Mr. Peacock, for plaintiff, produced Richard Spaulding, to prove that the plaintiff was arrested and confined in prison upon a ca. sa. issued by the defendant as a justice of the peace for Washington county, on the 28th of March, 1801, on a judgment rendered by Amariah Frost, a justice of the peace of Prince George's county, on the 24th of September, 1800. The witness objected to being sworn because he was the constable who served the ca. sa., and also the jailor who kept the plaintiff in confinement, and his testimony would criminate himself.

THE COURT refused to compel him to be sworn.

CRANCH, Circuit Judge, contrâ. It is not an objection to his being sworn, but is a good reason for his refusing to answer any question which may criminate himself.

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

Case No. 10,068.

NEALE v. HILL.

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

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

EVIDENCE — STAMP ACT — RECEIPT — NOTE FOR SECURITY OF MONEY.

A receipt for hogshead staves to be paid at a certain price is "a note for the security of money" within the stamp act of 1797 [1 Stat. 527].

Assumpsit for goods sold and delivered. Non assumpsit, and issue.

THE COURT, considering the following note as "a note for the security of money," refused to suffer it to go in evidence to the jury, because it was not stamped according to the act of 6th July, 1797, §§ 1, 13 (1 Stat. 527).

The note was in these words, viz.: "Alexandria, December 15, 1798. Received of Mr. Thomas Carberry six hundred and fifty cart white-oak hhd. staves, at the rate of twenty dollars per thousand, and eighteen hundred barrel staves, at ten dollars per thousand, the which I promise to pay the said Thomas Carberry, or order, in all the month of April next ensuing. Witness my hand, day and date above written. George Hill." Indorsed: "December 15th, 1798. Pay the within to Joseph Neale or order, and his receipt shall be good against Thomas Carberry."

Case No. 10,069.

NEALE et al. v. JANNEY.

[2 Cranch, C. C. 188.] [1]

Circuit Court, District of Columbia. Nov. Term, 1819.

BANKS AND BANKING — PRIVATE INSTITUTION — LIEN ON STOCK.

The private banking institution, known by the name of the Union Bank of Alexandria, had not, before it obtained its charter, any specific lien on the stock of its stockholders.

This was a special action upon the case, brought by the plaintiffs [Christopher Neale and others] as assignees of Gerrard Plummer, survivor of the firm of Jerome & Gerrard Plummer, against the defendant [John Janney], as president of the Union Bank of Alexandria, for not transferring to the plaintiff 600 shares of the stock of that bank, which J. and G. Plummer had assigned to him in trust to secure payment of 2,000 dollars loaned to them by the bank, the plaintiffs having tendered that sum in full to the de-

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

fendant as president of the bank, who refused to transfer the stock because the Plummers were indebted upon other notes discounted by the bank for their accommodation. The assignment to the defendant was made on the 31st of May, 1816. The note which was secured by it fell due on the 21st–24th January, 1817. Jerome Plummer died on the 31st of December, 1816. The assignment by Gerrard, the survivor, was made by a deed of trust duly executed, acknowledged, and recorded, dated the 8th of January, 1817. The tender of the 2,000 dollars by the plaintiffs to the defendant was on the 8th of February, 1817, before which day the other notes which had been discounted by the bank for the accommodation of the Plummers, to the amount of 5,500 dollars, had become payable and were unpaid. The charter was granted March 3d, 1817. By the 4th article of the association, it was declared that, "every stockholder may sell and transfer his stock in the said bank, or any part thereof, at his pleasure, not being less than one complete share or shares, the transfer being made in the bank books in the presence and with the approbation of the proprietor or his lawful attorney." The assignment to the plaintiffs was not made on the books of the bank, but was contained in a general deed of assignment of all the effects of the firm of Jerome & Gerrard Plummer. By the 11th section of the act of congress of the 3d of March, 1817 (3 Stat. 383), which incorporated the bank, it is enacted that the shares shall be transferable only on the books of the bank; but all debts actually due and payable to the bank (days of grace for payment being passed), by a stockholder requesting a transfer, must be satisfied before such transfer shall be made, until the president and directors shall direct to the contrary.

These facts being found by a special verdict, the case was argued by Mr. Taylor, for plaintiffs, and Mr. Swann, for defendant.

THE COURT at November term, 1820 (THRUSTON, Circuit Judge, absent), rendered judgment on the special verdict for the plaintiff, observing that the rights of all the parties were fixed before the charter, and that until the charter the bank had no general lien on the stock of individual stockholders.

NEALE (JONES v.). See Case No. 7,483.

NEALE (LEONARD v.). See Case No. 8,259.

Case No. 10,070.

NEALE v. MINIFIE.

[2 Cranch, C. C. 16.] [1]

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

FALSE IMPRISONMENT—JUSTICE OF PEACE—MALICE.

A justice of the peace is not liable in an action of false imprisonment under an illegal warrant issued by him, unless it be issued maliciously.

This was a motion for a new trial on the ground of misdirection of the jury, by the court, at the last term, in instructing the jury that it was not necessary for the plaintiff to prove malice, in an action against the defendant, a justice of the peace, for false imprisonment, the justice having committed the plaintiff for profane swearing, and making a disturbance in the market.

THE COURT (nem. con.) granted the new trial, being satisfied that a justice of the peace is not liable in an action for false imprisonment, for issuing an illegal warrant on which the plaintiff is imprisoned; unless it be done maliciously.

Case No. 10,071.

NEALE v. PEYTON.

[2 Cranch, C. C. 313.] [1]

Circuit Court, District of Columbia. May Term, 1822.

NOTES — INDORSEMENT — DEMAND ON MAKER — WHEN TO BE MADE—INSOLVENCY OF MAKER.

Demand of payment on the 5th of July, of a note due on the 1st–4th of July, is too late to charge the indorser, and the insolvency of the maker will not excuse the delay.

Assumpsit against the indorser of a promissory note. The note was put into the Bank of Potomac for collection, and fell due on the 1st–4th of July. The note was not given out, and no demand of payment was made on the maker of the note until the 5th of July. The maker was insolvent.

THE COURT (THRUSTON, Circuit Judge, absent,) said it was too late, and that the insolvency of the maker did not excuse the delay.

NEALE (QUEEN v.). See Case No. 11,504.

NEALE (UNITED STATES v.). See Case No. 15,859.

Case No. 10,072.

NEALE v. WALKER.

[1 Cranch, C. C. 57.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

PLEADING AT LAW—GENERAL ISSUE—STATUTE OF LIMITATIONS.

The defendant cannot avail himself of the statute of limitations upon the general issue.

Assumpsit for goods sold and delivered. Issue non assumpsit.

Mr. Simms, for defendant, contended that under the act of Virginia of 1793, § 9 (Rev. Code, p. 115), every article which appeared in the plaintiff's account to be charged more than one year before the action brought, ought to be rejected by the jury; upon which Mr. Taylor, for plaintiff, moved the court to instruct the jury that they were not to re-

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

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

gard the act of limitations, as it was not specially pleaded.

Mr. Simms, for defendant, contended that this act differs from common acts of limitation in that it was imperative to the jury. The seventh section enacts that all actions or suits founded upon any account for goods, wares, and merchandise, "sold and delivered, or for articles charged in any store account, shall be commenced and sued within one year next after the cause of such action or suit, or the delivery of such goods, &c. and not after." The ninth section declares, that "to prevent any doubt in the construction hereof, it is hereby declared, that the before mentioned limitation of one year, shall take place and be computed from the respective dates or times of delivery of the several articles entered or charged in any such account; and that all such articles as shall have been of more than one year's standing when the action or suit was commenced, shall be disallowed and rejected, and verdict shall be given, or judgment rendered for no more than the amount of such articles as appear to have been actually charged or delivered within one year next before the commencement of the suit as aforesaid."

But THE COURT decided that the time was not put in issue by the plea of non assumpsit; and the jury were only to try the issue joined, and so instructed the jury.

NEALE'S ADM'R (DUFFY v.). See Case No. 4,119.

Case No. 10,073.

In re NEBE.

[11 N. B. R. (1875) 289.] [1]

U. S. District Court, E. D. Michigan.

BANKRUPTCY—PROOF OF DEBT—HOW AUTHENTICATED—NOTARIAL SEAL—PROOF TAKEN BEFORE ATTORNEY FOR CREDITOR—COSTS—FEES TO NOTARIES.

1. A proof of debt taken before a notary public is not admissible unless authenticated by the official seal as well as the signature of the notary. It must appear from the impression of the seal, that it is the seal of the notary who employs it to authenticate his acts.

[Cited in Re Port Huron Dry Dock Co., Case No. 11,293. Disapproved in Re Phillips, Id. 11,098.]

2. Proofs of debt taken before the attorney of the creditor are not admissible.

3. No fees are taxable as costs in the bankruptcy proceedings and entitled to priority of payment, under section 28 [of the act of 1867 (14 Stat. 530)], to notaries for taking proofs of debt.

[In the matter of Henry Nebe, a bankrupt.]

The register certified that a deposition taken before W. M. Lillibridge, a notary public, was offered as a proof of debt due A. G. Ellair & Co. The form of the jurat is: "Subscribed and sworn before me this 26th day of October, A. D. 1874. W. M. Lillibridge, notary public, Wayne county, Michigan." Below the signature is an impression on the paper, in the usual form of an official seal, containing the words "Notary public, Wayne county, state of Michigan." It not appearing that this was the official seal of the notary, and it being conceded that it was used in common by him and other notaries; and it appearing also that the notary was the attorney of the creditor, the register declined to accept it as satisfactory, and therefore certified the questions arising upon it into court for determination by the district judge.

By HOVEY K. CLARKE, Register: The act amending the bankrupt act of June 22, 1874, § 20 [18 Stat. 186], authorizes notaries public to take proofs of debt against the estate of a bankrupt—"such proof to be certified by the notary, and attested by his signature and official seal." On this provision several questions of practice arise, which ought to receive an authoritative determination.

First. The statute requires the act of the notary to be authenticated by his signature and his official seal. There is nothing from which it can be inferred that one of these is of less importance than the other, and therefore an authentication by either would be imperfect without the other. But what is an "official seal"? A seal at common law was an impression upon wax. By statute in this state, and by statute or usage in many others, a scroll made with a pen will serve the purpose of a private seal. But this, so far as I know, has never been extended to corporate, or official seals. As regards these, it has required no little litigation to settle the question that an impression on wax is unnecessary; but all the cases hold that an impression on paper is indispensable. But an impression of what? Public seals—and a notary's seal is a public seal—are held to prove themselves. Is any stamp which a notary chooses to affix to his signature entitled to recognition as his official seal? Such a construction strikes me as a burlesque upon the provisions of the act of congress, which makes both signature and seal necessary to the authentication of the notary's act. And if as a public seal it proves itself, must it not show on its face what it is that it proves; not only that it is a seal, but that it is the seal of a notary public; and in order to show that it is the seal of the notary who employs it, that it must bear his name. If it be admitted that the seal in this case is the seal of a notary public, it is just as clearly the seal of every other of the notaries public, in number about one thousand, who hold office in the county of Wayne; and what then becomes of the provisions of the law which require the notary's act to be attested by "his official seal"? In the case of Gage v. Dubuque & P. R. Co., 11 Iowa, 314, the court holds "that unless the name of a notary public and the state in which he acts are engraved upon his seal so that an impression can be

[1] [Reprinted by permission.]

made therefrom, his seal would not be received as evidence." This was held to render invalid a seal where a part only of it was written and not impressed upon the paper. The court says in addition: "If a portion of the words necessary to be used in the body of the seal may be written, the whole may be." I do not see how this rule can be departed from, without introducing a laxity in practice which will defeat entirely the object contemplated by the statute, which requires a notary's act to be authenticated "by his official seal."

Second. Accompanying the proof of debt in this case, is a letter of attorney addressed by the creditors to the notary who took the deposition, authorizing him to represent them at all creditors' meetings. It thus appears that the creditor made his proof of debt before his own attorney. In many courts, how extensively I am not prepared to say, an affidavit taken before the attorney of the party will not be allowed to be read. Proofs of debt in bankruptcy are something more than mere affidavits; the law requires that such a proof must be "satisfactory" to the officer who takes it (section 22) as well as to the register who receives it. Section 3, Act July 27, 1868 [15 Stat. 228]. When it is remembered how large a proportion of clients swear to whatever they are advised by their attorneys is proper, and how general is the want of information by creditors as to what is necessary to be averred in a proof of debt, it will certainly, I think, be found unwise to allow creditors to prove their claims before their own attorneys. The fact that the power is given by the act to notaries without exception, is no valid reason why the courts should not prescribe such limitations as are obviously proper. A notary, who is a member of a partnership, would not be allowed to take the proof of a debt due to his firm sworn to by his partner; and there is really less objection to this, so far as an intelligent understanding of the act by the creditor and the officer is concerned, than there would be to a proof taken before the attorney of the party.

Third. There is still another question, which has become a practical one, relative to proofs of debts taken before notaries. General order 30 provides that fees paid by creditors in establishing their debts, are entitled to priority of payment under section 28 of the bankrupt act; and the question is, what sum shall be allowed to creditors for fees for taking proofs of debt by notaries. The fees of commissioners for this service are fixed by law; the fees of registers are fixed by law and general order 30. No fee is fixed either by law or the general orders for this service when rendered by a notary. The inference must be that no fee can be allowed to notaries unless some such general principle as this is applicable to the case, namely: that where an officer is authorized to perform a service, and no fee is specifically provided for his compensation, he may charge what he thinks the service worth, or what other officers are allowed to charge for a similar service. It is not to be denied that this view of the law finds many advocates among officers who are required to render service for which no specific compensation is provided; and it has, at least, a plausible show of justice in it. There are many services which a register, for instance, is required to render, and which are strictly clerical in their character—such as keeping dockets and filing papers—for which no fee has ever been allowed to him, with the single exception of filing proofs of debt, and the making of necessary copies of papers to be furnished to assignees, for which no fee has been allowed since the amendment of the general orders at the December term, 1871. To allow a compensation for these at the rate allowed to the clerk for similar services, on the ground that "congress never intended" that they should be performed gratuitously, would greatly increase, it is true, the income of registers; but it would do it at the expense of an abandonment of all definite rules for the taxation of these fees, and leave the compensation for a large class of services to be regulated entirely by the discretion of the officers rendering them. I cannot think that such a principle as this will find favor with the courts; and, therefore, that no fees can be allowed against a bankrupt's estate not expressly authorized by the bankrupt act, or the general orders of the supreme court.

LONGYEAR, District Judge. The foregoing conclusions of the register are approved.

Case No. 10,074.

In re NEBENZAHL et al.

[9 Ben. 243;[1] 17 N. B. R. 23.]

District Court, S. D. New York. Nov. 15, 1877.

BANKRUPTCY—COMPOSITION REFUSED BY CREDITOR—JUDGMENT IN STATE COURT—INJUNCTION TO STAY PROCEEDINGS.

1. N. was adjudged a bankrupt in February, 1875. He was sued for a debt in a state court, in December, 1875. A composition including said debt was confirmed in March, 1876. The creditor proved said debt in the composition proceedings. He claimed that the debt was created by fraud and was not affected by the composition proceedings. The composition was payable in three instalments, the last one in September, 1876. The cash payment, and the notes, under the composition, were tendered to said creditor and refused. On the application of N., the entire amount of the composition for said creditor, in money, was deposited in this court, January 2d, 1877. N. had never obtained from this court any order staying the proceedings in the suit. Judgment was entered in it in December, 1876. After January 2d, 1877, N. applied to the state court for leave to set up the composition as a defence, but the application was refused. N. then applied to this court to enjoin said creditor from interfering with the property of N. for the indebtedness on the judg-

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

ment: *Held*, that this court had no power to issue such injunction.

[Cited in Pupke v. Churchill, 91 Mo. 81, 3 S. W. 831.]

2. The practice of the court of bankruptcy in England, in such a case, considered.

[In the matter of Isaac Nebenzahl and Montague S. Marks, bankrupts.]

James Dunne, for bankrupts.

Thomas M. North, for creditor.

BLATCHFORD, District Judge. The bankrupts, after the lapse of the full time provided by the terms of a composition confirmed by this court in these proceedings, for it to be carried out, apply to this court to enjoin a creditor from prosecuting a suit against them in a state court, to recover a debt, the amount of which was set forth, with the name and address of such creditor, in the statement filed in the composition proceedings. The creditor claims that the debt was created by fraud, and is not affected by the composition proceedings. The adjudication of bankruptcy was in February, 1875. The suit in the state court was brought in December, 1875. The compensation was fifteen cents on the dollar, and was confirmed in March, 1876. The creditor proved his debt in the composition proceedings. The composition was payable in three equal instalments, the last one in September, 1876. A cash payment of one instalment, and two notes for the other two instalments, according to the resolution of composition, were tendered to the creditor and refused. On the 26th of December, 1876, this court, on the application of the bankrupts, made an order that they deposit with the clerk of this court the amount of the fifteen cents on the dollar, which would be the payment to such creditor according to the terms of the composition. This was due on the 2d of January, 1877. The bankrupts never obtained from this court any order staying proceedings in the suit in the state court. A trial of the suit in the state court was had by default, on the 11th of December, 1876, and judgment therein was entered against the bankrupts, on the 14th of December, 1876, for $1,343.99. Subsequently, and after the 2d of January, 1877, the bankrupts applied to the state court to set aside the judgment, and allow them to file a supplemental answer, setting up as a defence the proceedings in composition, and have a new trial, but the application was refused. Thereupon this application is made by the bankrupts to this court, for an injunction to restrain the creditor perpetually from molesting or interfering with the bankrupts or their property, for or on account of said indebtedness, or said judgment.

The principles properly applicable to a case in the situation of the present one were defined by this court in Re Hinsdale [Case No. 6,526]. Under those principles no injunction can be granted herein.

It is urged, that a different rule ought to be applied to this case, where the bankrupts put in their answer in the suit in the state court before the composition proceedings had assumed such a shape that the composition could be set up in the answer as a defence, and where they were obliged to apply for leave to put in a supplemental answer, setting up the composition and its fulfilment, from that which would be applied to a case where the bankrupt could avail himself of the composition proceedings in his original answer. But, in the present case, the suit was not brought until ten months after the adjudication of bankruptcy, and there was abundant time for the bankrupts to obtain, before putting in an answer in the suit, the injunction of this court staying the suit until the question of their discharge should be determined. Moreover, the composition proceedings were instituted in February, 1876, and the suit did not come up in the state court for trial until December, 1876, and there was abundant time, during those ten months, for the bankrupts to obtain from this court a stay of the suit because of the pendency of the composition proceedings.

The question of the power of this court to issue an injunction in such a case as the present one, under the clause of the composition statute which gives the court power, on motion made in a summary manner, to enforce the provisions of a composition, was discussed in Re Hinsdale [supra], and the conclusion arrived at was that no such power exists. The practice of the English court of bankruptcy is invoked. Section 126 of the English bankruptcy act of August 9, 1869, (32 & 33 Vict., c. 71), contains a like clause with our own statute, as to enforcing the provisions of a composition. But it is not under that clause that the English bankruptcy court enjoins suits after the time for fulfilling a composition has passed. It is under another provision of the English statute. Section 13 of the said act of August 9, 1869, provides, that the bankruptcy court "may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor, in respect of any debt provable in bankruptcy, or it may allow such proceedings, whether in progress at the commencement of the bankruptcy, or commenced during its continuance, to proceed upon such terms as the court may think just." Rule 260 of the English bankruptcy rules of 1870 contains the same provision. It is on these provisions that the power of the English bankruptcy court is founded, to enjoin suits in other courts, and not on the power given to it to "enforce" the provisions of a composition. See Ex parte Baum, 9 Ch. App. 673; Ex parte Lopez, 5 Ch. Div. 65. There is no like provision in our own statute. On the contrary, from the restriction imposed by section 5106 on the power of the bankruptcy court to enjoin suits to recover debts, name-

ly, that the stay is to continue until that court shall determine the question of discharge, the conclusion, by analogy, follows, that where there is a stay granted because of, and pending, a composition, it is to continue only until the time when the debtor shall have had a full opportunity to carry out the composition according to its terms, or until the court refuses to confirm it. Of course, after that time no injunction should be granted. In this case the bankrupts have had a full opportunity to carry out their composition, according to its terms, in respect to this creditor. If the state court will not allow them to file a supplemental answer, setting up the composition in defence, the result, if not due to their fault and laches, is a misfortune which this court cannot remedy. The state court was either right or wrong in its decision. If right, no wrong has been done. If wrong, relief must be sought in the way, if any, provided by the state laws. The application is refused.

Case No. 10,075.

The NEBRASKA.

[2 Ben. 500.] [1]

District Court, E. D. New York. July, 1868.

COLLISION—VESSEL LYING AT PIER.

Where a steamship was coming into pier 37, in the East river, in the harbor of New York, in tow of a tug, and, by the order of the pilot of the steamship, a movement of the tug was made which caused the steamship to swing against a schooner lying at the end of pier 39, so as to crush in a canal boat which lay between the schooner and the end of that pier, *held*, that it was the duty of the steamship to come in at pier 37 so as to avoid touching the vessels at pier 39, and that she was responsible for the damage.

[Cited in The Syracuse, 18 Fed. 829; Shields v. Mayor, etc., Id. 749.]

In admiralty.

Benedict & Benedict, for libellants.

Owen, Nash & Gray, for claimants.

BENEDICT, District Judge. These are two actions, which were tried together, brought by the owners of the canal-boat Sarah Ball, and the owners of certain cargo on board that boat, to recover the damages sustained by the respective libellants in a collision which occurred at pier No. 39, in this harbor, on the 20th day of November, 1867. There is little or no dispute as to the facts, which are as follows: The canal-boat lay at the end of pier No. 39, inside of a schooner, being there engaged in delivering her cargo of coal. The place was a proper place for her to lie; she was properly moored, and the evidence fails to show any fault on her part conducing to the accident which ensued. The steamer was bound to pier No. 37, in tow of a tug upon a hawser. When she was turning in the river, and as she was passing the pier at which the canal-boat and schooner lay, the tide being flood, an order was given by the pilot of the steamer to the tug, which had stopped her engine for a short time, to go ahead. Thereupon the tug started up, and by her action hauled the bow of the steamer somewhat into the river, thereby causing the steamer's stern to swing in shore, and thereby the steamer's starboard quarter, as she passed, came down upon the schooner with force enough to crush the canal-boat inside. The only question discussed by the claimant was, whether the tug should not be the party held liable, inasmuch as her action caused the steamer to swing in upon the vessels at the pier. But the evidence fails to show that the tug disobeyed any order given by the persons in charge of the steamer, under whose direction she was, while it does appear that, as the steamer was handled, she would, without the action of the tug, have touched the schooner, although it may be that she would in that case have done no damage. It was the duty of the steamer, having full control of herself and of the tug, to come into her pier, No. 37, in such a way as to avoid touching the vessels at pier No. 39. The evidence fails to show any excuse for not doing so; and it is evident that the master of the steamer did not consider the action of the tug to have been such as to excuse the steamer, from the fact which he himself states, that after the accident occurred, he went round to the schooner, inquired as to the damage done to her, and sent a man to repair it. This fact, together with the further circumstances that the answer does not allude to any fault or action of the tug as a cause of the collision, are decisive of the case. The decree must be for libellants, with an order of reference to ascertain the amount.

[NOTE. Upon the coming in of the commissioner's report, exceptions were filed to the amount of damages allowed the owners of the Sarah Ball. The exceptions were overruled. Case No. 10,076.]

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

Case No. 10,076.

The NEBRASKA.

[3 Ben. 261.] [1]

District Court, E. D. New York. May, 1869.

DAMAGES BY COLLISION—VESSEL SUNK AT PIER—COST OF RAISING—TOTAL LOSS.

Where a canal-boat, with a cargo of coal on board, lying at a pier in the harbor of New York, was struck by a steamship and sunk in thirty feet of water, and it was not possible to ascertain the amount of her injury as she lay, and her owner contracted to have her raised for $500, and she was raised and put upon ways, and then, on an examination and survey, it was found that she was not worth repairing, and she was sold at auction for $100: *Held*, that the owner of the canal-boat was entitled to recover as damages the value of the boat as a total loss, deducting the sum for which she was sold, and,

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in addition, the cost of raising the boat, and of putting her on the ways to be examined, after she was raised.

[Cited in The Mary Eveline, Case No. 9,211; The Havelah, 50 Fed. 334.]

[These were two libels against the steamship Nebraska, one by owner of canal boat Sarah Ball and the other by owner of cargo on board the same, to recover damages for a collision. At the first hearing of the case, the actions being tried together, a decree was rendered for the libellants. An order of reference was made as to the amount of damages. Case No. 10,075. The case is now heard upon exceptions to the commissioners' report as to the amount of damages allowed to the owners of the Sarah Ball.]

Benedict & Benedict, for libellant.

Owen, Nash & Gray, for claimants.

BENEDICT, District Judge. This case comes before the court upon exceptions to the commissioner's report of the amount of damages sustained by the libellant, by reason of the sinking of his canal boat, the "Sarah Ball," in the collision with the Nebraska.

The boat when sunk was lying at the end of a pier in the harbor of New York, and had on board a cargo of coal. Where the vessel sunk the water was about 30 feet deep, and it was not possible to ascertain the extent of her injuries as she lay upon the bottom, but it was manifestly possible to raise her. A contract was accordingly made with a wrecking company to raise her for $500, and she was thereupon raised and placed upon ways and examined. She was then found to be so much injured that the cost of repairing would exceed her value when repaired, whereupon she was sold at auction for $100.

The commissioner allowed the value of the vessel previous to the collision, (as a total loss,) less the proceeds of her sale, and in addition the expenses of raising her and placing her upon the ways.

To this report the only serious objection taken relates to the allowance of the expenses of raising the vessel, and placing her upon the ways, and it is insisted, on the part of the claimant, that the raising of the vessel was at the risk of the party incurring the expense, and was not chargeable against the wrong doer, in addition to the value of the vessel, it having turned out that the vessel was not worth raising. In support of this position, the case of the Metropolis, decided by Judge Betts and affirmed by Mr. Justice Nelson, and also by the supreme court, is relied on as an authority.

The law laid down in the case of the Metropolis [Banks v. The Metropolis, Case No. 962], I do not conceive to be applicable in the present case. In the case of the Metropolis, the vessel was sunk in the middle of the Sound, some sixteen miles wide, and there was no reasonable ground for supposing that efforts to raise her would be attended with success. Here the vessel was sunk at a pier, where it was known that she could be raised at an expense of $500; and when, until she was raised, it was impossible to ascertain whether it would be expedient to repair her or not. Under such circumstances, it seems to me that it was incumbent upon a prudent owner to have the vessel raised. The raising was a necessary proceeding to enable the libellant to determine his course as to her repairs, and to compute his loss, and he is entitled to be repaid the reasonable expense thereby incurred. Such was the ruling in the case of The Engineer, 1 Lush. 138.

Furthermore, this vessel was sunk at a pier where she was an obstruction to the harbor of New York. She could not lawfully be permitted to remain where she was, and, if not raised by the libellant, might be removed by the commissioners of pilots at the expense of the libellant. Laws N. Y. 1860, c. 522, § 1.

The libellant was, therefore, bound to raise her, and the expenses, to which he was put, became a part of the damages caused by the collision. The allowance of the expense of raising seems to me, therefore, to be correct. As to the expense of the ways, I am also of the opinion that it was a necessary expenditure, to enable the libellant to examine his vessel, in order to determine his course as to repairs, and it is, therefore, properly allowed.

The report must be confirmed.

Case No. 10,077.

NEBRASKA v. POLLOCK.

[This is a state case. See 23 Int. Rev. Rec. 297.]

Case No. 10,078.

The NED.

[1 Blatchf. Pr. Cas. 119.] [1]

District Court, S. D. New York. March, 1862.

PRIZE—ENEMY'S PROPERTY—ACT JULY 13, 1861—CONSTITUTIONALITY.

Part of vessel condemned, under the sixth section of the act of July 13, 1861 (12 Stat. 257), as belonging to a citizen of the state in insurrection. That act is constitutional.

In admiralty.

BETTS, District Judge. The libel of information charges that the collector of this port seized the schooner Ned, her tackle, &c., as forfeited to the United States under the provisions of the act of July 13, 1861, section 6, as belonging, in whole or in part, to citizens of the United States in a state of insurrection. The libel was filed September 7, 1861. An amended libel, detailing more specifically the grounds of forfeiture, and alleging the vessel

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

to be the property of Ely Murray, of Wilmington, North Carolina, was filed November 12, 1861.

Elzey S. Powell intervened, September 9, 1861, by sworn claim and answer, for himself, Ely Murray and others, to the original libel, avowing that the persons named and others were in possession of the vessel at the time of the attachment thereof, and that they alone are the true and bona fide owners of the schooner. No further answer was interposed to the amended libel specifically, but all the claimants named in the former claim, of the fifth of November, 1861, filed extended answers and pleas, embodying six specific exceptions, amounting to special demurrer, and also to a general issue to the libel. The after-proceedings in the suit before this court imply that the merits of the case are submitted for decision on the pleadings, with the addition of the exemplification of the register of the vessel offered in evidence by the district attorney. There is a technical incongruity between the language of the amended libel and the exceptions and demurrers, because, from the dates of their presentations to the court the defensive allegations seem to precede the presentation of the information demanding the forfeiture of the property. This was all well known to the counsel for both parties on the argument of the cause and the submission of the points in controversy to the consideration of the court.

Accepting the pleadings as taking effect in their due order, and that the libellants proceed for the forfeiture of the interest of Ely Murray, and remit all demands of condemnation against the interests of other part owners, it appears, from the pleadings and the certified copy of the registry found on board the vessel—

1. That at the time of her seizure she was in possession of Ely Murray and his co-claimants, as owners thereof.

2. It is alleged that she was owned in North Carolina, and that Murray was a resident of that state.

3. The information sets forth as facts all the particulars necessary to bring her within the provisions of the act of July 13, 1861.

4. The act itself, and the public acts of the government in relation to the existing Rebellion within the United States, afford judicial notice that the matter comes within the purview of that statute.

5. In the opinion of the court, the act, if valid in law, authorizes and calls for the condemnation and forfeiture of the interest of the rebel owners in the vessel, unless the statutory provisions are in violation of the constitution.

6. This court, in the case of Mary McRae, held this enactment to be within the legislative competency of congress, and enforced its provisions.

It is ordered that the exceptions to the suit be disallowed and overruled, and that the judgment be entered in favor of the libellants, forfeiting one-fourth part of the said vessel and her tackle to the United States.

The attorney of the United States having discontinued and remitted all claims in this suit for three-fourths of the value of the vessel and tackle, as belonging to loyal citizens of the United States, such amount of the proceeds is ordered to be restored to the claimants thereof.

Case No. 10,079.

NEEDERER v. BARBER.

[2 Betts, C. C. MS. 38.]

Circuit Court, S. D. New York. May 25, 1843.

BILLS AND NOTES — FOREIGN EXCHANGE — SUFFICIENCY OF PROTEST — NOTICE — ACCEPTANCE — STRIKING OUT SUBSEQUENT INDORSEMENTS.

[1. The protest of a foreign bill is sufficient if made in conformity to the law of the place where the dishonor occurred.]

[2. Where the drawer of a bill, after it is drawn, gives the drawee notice not to pay it, presentation for acceptance and payment is waived.]

[3. A payee or indorsee of a bill in possession has a right to strike out subsequent indorsements, and recover against the drawee upon the special count, or give such bill in evidence under the money counts.]

[This was an action by John Neederer against Andrew Barber on a foreign bill of exchange.]

BETTS, District Judge. The declaration is on a foreign bill of exchange, by the payee against the drawer. A verdict was taken for the plaintiff subject to the opinion of the court, on the questions of law arising upon the facts in evidence. The defendant, after the bill was drawn, gave orders to the drawees not to pay it, and it was protested for non-acceptance at Metz in France, by a huissier, in the presence of two witnesses. Two points were taken upon the sufficiency of the protest: (1) That it must be made by a notary public; (2) that to render the protest by a huissier sufficient the laws of France must be proved authorizing that officer to make the protest. The protest of foreign bills is sufficiently proved if made in conformity to the law of the place where the dishonor of the bill occurs. All the writers of authority on the subject concur in this general doctrine (Chit. Bills, Ed. 1833, pp. 362–490; Story, Bills, § 276, note 2), and by the laws of France the officer employed in this case was competent to make the protest (Code of Commerce, Art. 173), if the court can regard that law, without its being proved as a fact before them (3 Wend. 173). The court does not intend to intimate any opinion that the French law may not be received in evidence in commercial questions, as the English is by the books supplying that proof in their own courts. The question of the sufficiency of the protest does not become material in this case, because the drawer by his own act excused the payee from the necessity of pre-

senting for acceptance or payment. The law is clear that if the drawer has no funds in the hands of the drawee, the holder need not present the bill, and accordingly in such case a protest is unnecessary (1 D. S. E. 406–410; 2 D. S. E. 713; Chitty, Bills, 207; 2 Bearkl. 20; Read v. Wilkinson [Case No. 11,611]; Baker v. Gallagher [Id. 768]; Valk v. Simmons [Id. 16,815]; [Skellern v. May] 4 Cranch [8 U. S.] 141; 20 Johns. 146; 8 Pick. 83; 16 Mass. 116), unless the drawer had reasonable grounds to suppose the bill would be honored. A check on a bank, when the drawer has withdrawn his funds, need not be presented to found an action against him by the holder. 2 Nott & McC. 251; 1 Hill, R. 56; Story, Bills, § 75; Bailey, 192, 193. The want of funds may be shown by direct evidence or may be implied from the declarations or admissions of the party drawing the bill upon the ground of its being a waiver in law, or exonerating the holder from the necessity of presentment and notice. Smith, Merc. Law, 163; Bagley, Bills, 120; 2 Phil. Ev. 34, 37, 39. The fraud that is imputed to a party who draws a bill without funds to cover it becomes direct and positive when he interposes and forbids the drawee to honor it. A presentment to a correspondent under directions not to accept would be idle, and certainly required upon no higher considerations than a presentment, when the holder knew the drawer had no funds with which to discharge the bill. The principle clearly applies, and we are satisfied the verdict ought not to be disturbed for this cause.

A technical question has been raised as to the effect and operation of the full indorsements written on the bill, and it has been strenuously argued that the holder must make his title under such special indorsement in order to maintain his action. The rule applies to those only who must make title to the bill by means of the indorsements, and then, unless the first indorsement be blank, a holder cannot sustain an action without connecting himself with a special indorser. The cases establishing and explaining that rule are stated by Chitty, Kent, and Story. Chitty, Bills, 170; 3 Kent, Comm. 89; Story, Bills, § 201. The holder is always permitted to disembarrass himself of all indorsements subsequent to that conveying the title to him, whether general or special, by striking them off the bill (Story, § 107), and of all anterior ones though several intermediate him and a general indorsement (Ib.; 2 Starkie, Ev. 246; Bailey, 213). This he is prevented doing as to antecedent indorsements only because they are indispensable to communicate title to him. Bailey, 313–315; 4 Starkie, Ev. 246, 248. When the payee is holder, there is no reason why any after-indorsement should not be regarded as in blank in respect to him, for he does not recur to them for his title. He appears on the face of the bill a party in interest, and his possession of the bill gives him the same right in respect to all parties succeeding him that the first or second indorser would have in regard to those posterior to their indorsers. Story, Bills, §§ 207, 208. The subsequent indorsements may be regarded as made by him for the purpose of collection, or his own agents, no proof of interest in any indorser being needed. We therefore hold that the person in possession of the bill had a right to strike out subsequent indorsements, [Morris v. Foreman] 1 Dall. [1 U. S.] 193), and recover against the drawer upon the special count, or it may be given in evidence against him on the money counts (8 Johns. 79; 3 Johns. Cas. 5; 12 Mass. 172; 12 Johns. 90; 4 Pick. 421; 5 Wend. 491; 2 Phil. Ev. 38, 39). Order judgment on the verdict.

Case No. 10,080.

Ex parte NEEDHAM et al.

[1 Pet. C. C. 487.] [1]

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

INTERNATIONAL LAW—EXPEDITION AGAINST POWER AT PEACE WITH UNITED STATES—ARREST OF PARTICIPANTS—ACT OF 1794.

1. It is an offence against the act of congress, passed 1794 [1 Stat. 381], to concert an expedition from the United States to commit hostilities against a power at peace with the United States; and it is unimportant that such association originated beyond seas, if the expedition was carried on from hence.

2. It is unimportant, whether the persons engaged in such a purpose engage the whole vessel to themselves, or departed from the United States as passengers.

Habeas corpus. The case appeared shortly to be as follows: The petitioners, ten in number, being foreigners, enlisted or otherwise engaged in Holland to join the revolutionists in South America, and accordingly embarked for the United States with their military equipments, intending to obtain a passage from this country to South America. They arrived here under the command of Needham, who claimed or had in reality the title of colonel, and who exercised in Philadelphia, during the short stay they made here, the authority of commander, ordering them to appear at a certain place of rendezvous where they were drilled and exercised. A passage was taken for them on board the Ellen for the island of St. Thomas, and their baggage was put on board. The Ellen fell down to Gloucester Point to take in the balance of her cargo, consisting of arms and munitions of war, and destined from St. Thomas to some port in the Spanish American provinces, but before she left Gloucester Point she was stopped by admiralty process, and the prisoners were arrested and committed.

THE COURT was of opinion, that upon the ground of an expedition carried on from

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

the United States, with intent to commit hostilities against a power at peace with the United States, enough appeared to the court to justify the remanding of the prisoners. That it is unimportant, whether the association to join the revolutionists originated in the United States or beyond seas. The expedition or enterprise was still carried on from the United States, and it was immaterial whether a company of armed men, proceeding from this with such intentions, took the whole vessel to themselves, or merely departed hence as passengers. If a regiment of foreign soldiers, armed and equipped, should land in the United States and hire a vessel to transport them to South America, with intent to make war upon the Spanish king or his subjects, could it be contended, that this was not an expedition fitted out from the United States, within the clear expressions and meaning of the third section of the act of 1794? If such a case would come within the provisions of that law, it would seem difficult to distinguish it from the present. Prisoners remanded.

Case No. 10,081.

In re NEEDHAM.

[1 Lowell, 309;[1] 2 N. B. R. 387 (Quarto, 124); 2 Am. Law T. Rep. Bankr. 39; 16 Pittsb. Leg. J. 313.]

District Court, D. Massachusetts. Oct., 1869.

BANKRUPTCY—OMISSION OF CERTAIN CREDITORS IN SCHEDULE—DISCHARGE—WAIVER OF CREDITOR'S RIGHTS FOR BENEFIT OF GENERAL CREDITORS.

1. The omission from the bankrupt's schedule of the names of certain creditors with their consent expressed or implied, and for the reason that they did not intend to take dividends in competition with his trade creditors, will not bar the bankrupt's discharge on the objection of the other creditors who show no fraud or injury to their rights.

[Cited in Burpee v. Sparhawk, 108 Mass. 113; Bennett v. Goldthwait, 109 Mass. 495.]

2. Such an omission was wilful in a strict sense; but the oath to the schedule was not wilful false swearing, under [Act of 1867] section 29 [14 Stat. 531], because the bankrupt had reason to believe, and did believe, that these persons did not wish to be considered creditors of his estate. The right to be such creditors they could waive for the benefit of the general creditors.

[Objection was made to the bankrupt's discharge in this case, on the ground, among others, that he had omitted from the schedule the names of three of his creditors. Upon this point the bankrupt's testimony tended to show that he borrowed four thousand dollars of three of his friends to form the larger part of the capital of his business at Pittsburg; that they knew the purpose for which it was borrowed, and when the business turned out badly, did not expect to be paid in competition with his trade creditors, and have not been paid; that he did not put them on his schedule, because he expected to pay them if he ever became able to do so. The bankrupt supposed that his friends would not care to be notified of the proceedings, especially as there were no assets. He did not regard them like other creditors, and, perhaps, thought if their names were not on the schedule, that their debts would not be discharged. There was evidence that these friends understood that their debts were to be paid or not, as might be convenient.][2]

Hull & Childs, for general creditors.
J. H. Whitman, for bankrupt.

LOWELL, District Judge. The only objection now relied on to prevent the bankrupt's discharge is the omission from his schedule of the names of three of his creditors, who have not themselves made objection. The evidence tends to show that these creditors were friends from whom the bankrupt had borrowed the capital for his business, and that they did not expect to be paid in competition with his trade creditors, and have not been paid. No actual fraud or injury to creditors is shown or suggested. Although the omission may have been wilful in one sense, yet it would be unjust to say that the bankrupt's oath to schedule B. was wilful false swearing under section 29; because he had reason to believe and did believe that these persons did not wish to be considered creditors of his estate. It was a privilege they could waive, and their action tended to the advantage of the other creditors by increasing their dividends. The latter cannot object to it under these circumstances. Discharge granted.

Case No. 10,081a.

In re NEEDHAM.

[1 Chi. Leg. News, 171.]

District Court, E. D. Missouri. 1869.

BANKRUPTCY — TRUST DEED — SALE BY CREDITOR WITHOUT PERMISSION OF COURT.

1. A creditor of a bankrupt holding the security of a deed of trust in the nature of a mortgage with a power of sale, in a third party as trustee, must prove his debt as a creditor holding a security, and obtain the permission of the court to have the security sold. If he directed a sale without this permission, the court, upon application of the assignee, will set aside the sale.

2. If the trustee sell without the authority of the court, does any title pass to the purchaser?

Decided by TREAT, District Judge.

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

[2] [From 2 N. B. R. 387 (Quarto, 124).]

Case No. 10,082.

NEEDHAM v. WASHBURN et al.

[1 Ban. & A. 537; 4 Cliff. 254; 7 O. G. 649; Merw. Pat. Inv. 247.] [1]

Circuit Court, D. Massachusetts. Oct., 1874.

PATENTS — PATENTABLE INVENTION — CASTING WHEELS — PRIOR STATE OF ART — PRACTICE — RESPONDENT CORPORATION SUED AS COPARTNERSHIP—AMENDMENT.

1. Whether, in a suit brought against the respondents as copartners, but in which the proofs fail to show a partnership, but do show that the respondents, with others, were organized into a corporation, with the same name as the alleged copartnership, it would be competent for the court to enter a decree against the corporation, quaere.

[Cited in Brown v. Piper, 91 U. S. 43.]

2. In such case the court will not delay the hearing of the cause; since the defect, if it be one, may be cured by an amendment. Citing Goodyear v. Phelps [Case No. 5,581], and Poppenhusen v. Falke [Id. 11,279].

3. Prior to the complainant's patent for an improvement in casting car wheels, steel tires, previously heated to a required degree of heat, were placed in the mould in which the body of the wheel was to be cast, the flask immediately closed, and the molten iron poured into the mould through one or more openings or sprues in its centre, a suitable flux being employed to promote the welding of the two metals, which, when cool formed one solid mass. The evidence showed, that iron and steel had, from time immemorial, been welded, both with and without a flux: *Held*, that it was not a patentable invention, but merely the product of ordinary mechanical skill, in the casting of wheels in this method, to pour the molten iron through openings or sprues made just inside the inner edge of the steel tire instead of at the centre of the mould, for the purpose of preventing particles of foreign matter being carried by the flowing metal to the points of union of the two metals, and, thereby, preventing a perfect weld: *Held*, also, that the state of the art showing that iron and steel had long previously been welded both with and without the medium of a flux, and that mechanics skilled in the art differed in opinion as to the utility of any flux, it was not a patentable subject to cast car wheels in the manner described, but with the omission of a flux previously used.

[Cited in Snow v. Taylor, Case No. 13,148; Cone v. Morgan Envelope Co., Id. 3,096; Alcott v. Young, Id. 149.]

[This was a bill by Chandler Needham against Nathan Washburn and others to restrain the alleged infringement of letters patent No. 110,779, granted to the complainant January 3, 1871.]

J. B. Robb, for complainant.

A. K. P. Joy, for defendants.

CLIFFORD, Circuit Justice. Letters patent may be granted for the invention or discovery of any new and useful art, machine, manufacture or composition of matter, or of any new and useful improvement of the same, upon the conditions specified in the patent act. Unless the thing claimed as the invention is new and useful, the claim is wholly without merit, as that is the primary and indispensable condition annexed to the right to claim the protection which the patent act is intended to secure. Application in writing must be made to the commissioner, and the requirement is, that the applicant shall file in the patent office, a written description of the invention or discovery, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same. 16 Stat. 201. Patents granted by the commissioner, in pursuance of those conditions, afford a prima facie presumption, when introduced in evidence, that the patentee is the original and first inventor of what is therein described as his invention or discovery. Such a presumption, however, may be controlled by evidence of a prior knowledge or use by others in this country; or that the invention or discovery had been described in any printed publication, before his invention or discovery thereof, in this or any foreign country; or, that it had been in public use, or on sale, for more than two years prior to his application for a patent.

Damages are claimed by the complainant for an alleged infringement by the respondents of certain letters patent, granted to him, in which it is represented, that he is the original and first inventor of a certain new and useful improvement in casting car wheels, as more fully described in the specification of the letters patent. Process was served, and the four persons named as respondents in the bill of complaint appeared, and filed separate answers. They are described in the bill of complaint as copartners, under the name of the N. Washburn Steel Tire Works, and the charge is, that the respondents, without consent, and in violation of the complainant's exclusive rights, have made, sold, and used a large number of said patented car wheels, in infringement of the exclusive rights secured to the complainant by said letters patent. Appearance was entered by each of the respondents, and they severally set up the following defences: 1. That they are not, and never were, copartners doing business at Worcester, as alleged in the bill of complaint. 2. That the complainant is not the original and first inventor of the improvement. 3. That the alleged improvement was well known and in public use, by various persons, and at various places, before the alleged invention thereof by the complainant.

Proof to show that the respondents are copartners is entirely wanting, but, inasmuch as that defect, if it be one, may be removed by a proper amendment, the court is inclined to examine the merits of the controversy. Before doing so, however, it may be well to examine the proposition of the complainant,

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by William Henry Clifford, Esq.; and here compiled and reprinted by permission. Merw. Pat. Inv. 247, contains only a partial report.]

that he is entitled to a decree against the respondents, as individuals, even though he has utterly failed to prove that they are copartners as alleged. Partnership is certainly not proved. On the contrary, the respondents offer proof, tending to show, that they are a corporation duly established under the laws of the state in which their business is transacted; but the complainant denies that proposition, and insists that, as they were never duly incorporated, he may well maintain the present suit against them as individuals.

Besides the claim for damages, the complainant also prays for an account of gains and profits, and also for an injunction. Having sued the respondents as a partnership, it may be doubtful whether it would be competent for the court to enter a decree against the corporation, but as that defect, if it be one, may be cured by an amendment, the court will proceed to examine the merits of the controversy. Goodyear v. Phelps [Case No. 5,581]; Poppenhusen v. Falke [Id. 11,279].

Taken as a whole, the proofs in the case show, to the satisfaction of the court, that the persons sued as partners were, with others, organized as a corporation, in November, 1869, under the general statutes of the state, by the corporate name set forth in the pleadings, and it appears that all the corporators were made directors, and that the business of the corporation was conducted by the directors. Opposed to this, is the uncontradicted proof that no certificate, setting forth the corporate name and purpose of the association, was ever filed with the secretary of state; but the better opinion is, that the statutes of the state, in force at the time the organization was made, did not contain any such requirement, and, consequently, that the organization is not rendered illegal by that omission. Gen. St. 341. Such a requirement was enacted the next year, but this new provision is not retroactive. Supp. Gen. St. 806.

The principal defences upon the merits, are as follows: 1. That the alleged improvement is not new in the sense of the patent law, because the patentee was not the original and first inventor of it, and because the process was well known and in public use, long before the date of the supposed invention. 2. Because the respondents have never infringed the patent, as alleged. Both of these defences make it necessary to ascertain what the invention is, when the patent, which secures it is properly construed.

Enough may be learned from the description given by the patentee in the specification of the process, which he pursues to manufacture the patented car wheel, when weighed in connection with the claim of the patent, to furnish a satisfactory answer to the inquiry as to the true nature and scope of the alleged improvement. His first step, as pointed out in the specification, is to cast a suitable quantity of steel to form the tire of the wheel, into an annular ingot, about fifteen inches in diameter, with an opening at the center of its diameter, of four inches. He then hammers the ingot upon an anvil, by means of a steam hammer, by which its diameter is extended to eighteen inches; and he gives a description of the anvil which he uses, and of the manner of conducting the hammering. Forming-rolls are then employed, by which the ingot is enlarged to the proper size and shape, to form the tire of the wheel. Having formed the tire, he then places it in a heated furnace, and heats it to a bright cherry red, when it is taken from the furnace, and having removed every foreign substance from its surface, he places it within the mould in which the body of the car wheel is to be cast, said mould having previously been formed and prepared for the purpose. Care, it is said, should be taken, that the heated tire should be properly adjusted in the mould; and when that is accomplished, the direction is, that the flask shall be immediately closed, and the molten iron be poured into the mould, which as it comes in contact with the highly heated steel, fuses the surface of the latter, thereby forming a perfect union between the two, and as the metal cools, the body of the wheel and the tire are welded into one solid mass. Extended remarks upon that part of the described process is unnecessary, as nothing there described is embraced in the claim of the patent, and, if it had been, it would not have benefited the complainant, as every part of the process there described is substantially the same as that set forth in the patent granted to Zadoc Washburn, which was introduced in evidence, and is of prior date.

Two matters are then introduced into the specification of the patent in question, which, it is insisted, distinguish it from the invention of Zadoc Washburn, which, it is admitted, is the older of the two: 1. That the molten iron is introduced into the mould, through a series of openings at the rim of the wheel, just inside the tire, and that it flows from thence to the centre, carrying away from the inner surface of the steel tire all dirt and dust, if any, which might otherwise prevent the welding of the parts. 2. Nothing is expressly set forth, under the second head, as a matter pertaining to the described improvement, but the patentee points out what he represents as a defect in the process of the other patent, which is, that the cast iron, instead of lying still in the mould, and forming a perfect weld, is agitated and caused to bubble, by the gas generated by the molten iron as it comes in contact with the flux used in the process, whereby, as he states, the perfect and desired union of the iron and steel is prevented. Everything described in the patent to Zadoc Washburn, is disclaimed by him in express terms. What he claims is, the described method of introducing the molten cast iron into the mould, through a series of holes, directly upon the inner unfluxed surface of the cast-steel tire, by which a perfect union and weld of the metals are produced.

Car wheels, manufactured by first forming

a rim of cast steel, and then heating and placing it in a mould previously prepared for the purpose, and by pouring molten cast iron into the mould to complete the manufacture of the wheel, by the union or weld between the two into one solid mass, are certainly old. Nor is that proposition denied. Nothing, therefore, but a new and useful improvement in the method or process of such a manufacture can be regarded as the proper subject of a patent. Doubtless, it may be true, that the molten iron was formerly poured into the mould at the center of the mould, and, it may be, that it is better to construct the openings in the mould for the purpose—whether they are called by that name, or are called "sprues," or conduits—just inside the inner surface of the heated rim, when placed in the mould; but the court is not satisfied, from an examination of the product, or from any evidence in the case, that such a change, without more, even if new, which is not admitted, is the proper subject of a patent, as it is scarcely possible that it could have required any invention to make it. Changes of the kind are nothing more than common knowledge and experience would suggest, and every workman, whether skilled in the art or not, would know how to apply the suggestion. Nor can it make any difference that the patentee uses a series of such openings or holes in his method or process, as the proofs are full and satisfactory, that a series of holes had been used in making such castings at a much earlier period than the date of the complainant's invention, and on several occasions, as appears by the testimony of an unimpeached witness.

Suppose that is so, still, it is insisted by the complainant, that his method or process is new and useful, because he does not use flux in making the described weld, which, as he insists, distinguishes his method or process from the invention described in the Zadoc Washburn patent, and from all others known at the date of his invention. Much reason exists for holding, that the second feature of the claim is invalid, because not embraced in the description of the method or process used by the complainant, as required by the act of congress; but, inasmuch as the alleged invention consists, merely in omitting an ingredient, often employed in welding steel and iron, or two pieces of iron, the court is not inclined to rest the decision entirely upon that ground.

Nor is it at all necessary to do so, as the court, in view of the facts and circumstances of the case, is of the opinion, that it is matter of common knowledge, that iron, or iron and steel, may be successfully welded with or without the use of flux, and that such knowledge has existed among mechanics accustomed to work at the ordinary forge, for a very long period, whereof the memory of man runneth not to the contrary. Axes, scythes, hoes, and other farming utensils were formerly made on the common anvil; and it is believed, that mechanics, formerly engaged in manufacturing such articles, knew full well that flux was often omitted in effecting a weld of iron, or iron and steel. Horse shoes were made in the same manner, and many larger articles, such as ploughshares and mill cranks. Differences of opinion, it is known, have at times existed among mechanics of that class upon the subject, some maintaining that flux was useful, and even necessary, and others maintaining the opposite opinion, with equal earnestness and confidence. All of these suggestions, it is believed, are supported by common experience and knowledge, but it is not necessary to go out of the record to find convincing proof to the same effect. Even the complainant, in his deposition filed in the patent office, testified in his cross-examination, that he was aware that iron and steel had been so welded; and, when asked if he knew, as a matter of fact, that iron and steel had for a long time been welded with and without flux, stated that it was said to have been so welded for a long time. Support to that view is also derived from one of the respondents' witnesses, who says, that in making four or five car wheels, they used four sprue holes, and that some of them were made with flux, and some without; which statement is also confirmed by other witnesses.

Having come to the conclusion that the alleged infringement is not new or patentable, it is not necessary to examine the question of infringement. Bill of complaint dismissed, with costs.

Case No. 10,082a.

NEELY v. ROBINSON et al.

[Hempst. 9.] [1]

Circuit Court, D. Arkansas. Oct., 1821.

EXECUTORS AND ADMINISTRATORS—SUIT BY ATTORNEY IN FACT FOR BENEFIT OF ESTATE.

An attorney in fact of an executor or administrator cannot maintain suit in his own name for the benefit of the estate.

Appeal from the Arkansas circuit court.

[This was a suit by William Neeley against Robinson and others.]

Before SCOTT and SELDEN, JJ.

OPINION OF THE COURT. In this case it would be useless to give an opinion at length, as the law which governs it has been long and uniformly settled. We do not think that the attorney in fact of an executor or administrator can maintain an action for the benefit of the estate in his own name, in any instance, and therefore the demurrer, setting forth this ground to defeat the action, should have been sustained. Reversed.

NOTE. An agent cannot sue in his own name, where the legal interest is in his principal. Pigott v. Thompson, 3 Bos. & P. 147; Gunn v. Cantine, 10 Johns. 388; Devers v. Becknell, 1

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

Mo. 333; Brackney v. Shreve, Coxe [1 N. J. Law] 33; Toland v. Murray, 18 Johns. 24.

An action cannot be maintained in the name of a mere agent of a corporation. Gilmore v. Pope, 5 Mass. 491.

An agent of the United States cannot prosecute an action of assumpsit in his own name, where the interest is in the United States. White v. Bennett, 1 Mo. 102; Bainbridge v. Downie, 6 Mass. 253.

An agent who makes a contract in behalf of another cannot maintain an action thereon in his own name either at law or in equity. Whitehead v. Potter, 4 Ired. 257.

In general, a mere servant or agent with whom a contract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon. 1 Chit. Pl. 7; Bogart v. De Bussy, 6 Johns. 94; Jones v. Hart's Ex'rs, 1 Hen. & M. 470.

NEFF (BAYLOR v.). See Case No. 1,143.

NEFF (CRABTREE v.). See Case No. 3,315.

NEFF (HARPER v.). See Case No. 6,089.

Case No. 10,083.

NEFF v. PENNOYER.

[3 Sawy. 274; 15 Am. Law Reg. (N. S.) 367.] [1]

Circuit Court, D. Oregon. March 9, 1875.[2]

POWER OF A STATE OVER THE PROPERTY OF NON-RESIDENTS—PROOF OF SERVICE IN CASE OF PUBLICATION — JUDGMENT-ROLL NOT THE WHOLE RECORD—EVIDENCE NECESSARY TO AUTHORIZE ORDER FOR PUBLICATION—EVIDENCE OF CAUSE OF ACTION—A VERIFIED COMPLAINT AN AFFIDAVIT—DILIGENCE TO ASCERTAIN THE PLACE OF RESIDENCE OF NON-RESIDENT DEFENDANT—PROOF OF PUBLICATION OF THE SUMMONS—AVERMENT OF SERVICE IN JUDGMENT ENTRY—PRESUMPTION IN FAVOR OF JURISDICTION.

1. A state has the power to subject the property of non-residents, within its territorial limits, to the satisfaction of the claims of her citizens against such non-residents by any mode of procedure which it may deem proper and convenient under the circumstances, and therefore may, for such purpose authorize a judgment to be given against such non-resident prior to seizure of such property, and with or without notice of the proceeding.

[Cited in Hannibal & St. J. R. Co. v. Husen, 95 U. S. 471; Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 702.]

[Cited in Marsh v. Steele, 9 Neb. 99, 1 N. W. 869.]

2. The proof of service required by section 269 of the Oregon Code to be placed in the judgment-roll includes in the case of service by publication, the affidavit and order for publication as well as the affidavit of the printer to the fact of publication.

[Cited in Gray v. Larrimore, Case No. 5,721.]

[See Hahn v. Kelly, 34 Cal. 391.]

3. The judgment-roll required by said section 269 is not the exclusive record of the case, but only a collection of papers and entries selected from the record for convenience and economy and sufficient in the opinion of the legislature to show the judgment of the court and its jurisdiction to give it; but the record is a history of all the acts and proceedings in the action from its initiation to final judgment which includes all the papers filed in the case, and upon which the court acted in any step of the proceedings, and this record is of the same verity as the judgment-roll which is made up from it.

[See Hahn v. Kelly, 34 Cal. 391.]

4. In case of service by publication the record must show that there was evidence presented to the court or judge who made the order for publication by affidavit, sufficient to prove the ultimate facts which bring the case within sections 55 and 56 of the Oregon Code, allowing such service; and it is not enough that the affidavit repeats the mere language of the statute, it must contain facts and circumstances sufficient to prove these ultimate facts; but when a judgment is attacked collaterally it is sufficient if the evidence contained in the affidavits tends to prove such facts.

5. An averment in an affidavit for an order for publication, "that plaintiff has a just cause of action against defendant for a money demand on account," is a mere assertion of the fact of the existence of such cause of action—the opinion of the affiant to that effect, but is no evidence of it, and is therefore insufficient to authorize such order.

6. A verified complaint as to the facts stated therein, is an affidavit, and when it appears from the record that such a complaint, containing evidence of a cause of action against the defendant, was on file at the time of allowing an order for publication, the court will presume that such complaint was used as evidence therefor.

[Cited in U. S. v. Griswold, Case No. 15,266; McDonald v. Cooper, 32 Fed. 751.]

7. Where an order allowing service of a summons by publication, under sections 55 and 56 of the Oregon Code omits to direct that a copy of the complaint and summons be mailed to the defendant, addressed to his place of residence, it must appear from the affidavit that the plaintiff had used reasonable diligence to ascertain such place of residence and that it is unknown to him.

8. Section 69 of the Oregon Code, having provided that in case of publication of the summons "the proof of service" shall be by "the affidavit of the printer or his foreman or his principal clerk," an affidavit to such a publication by one styling himself therein "editor," is not within the statute and therefore no evidence of the facts contained in it.

9. An averment of due publication of a summons in a judgment entry which appears from the whole record to be untrue or is not affirmatively supported by the facts contained in such record, is a nullity and may be disregarded.

[Cited in Gager v. Henry, Case No. 5,192; McDonald v. Cooper, 32 Fed. 748.]

[Cited in De Corvet v. Dolan (Wash.) 35 Pac. 1072.]

10. The common law presumption in favor of the jurisdiction and regularity of the proceedings of courts of record or general jurisdiction had its origin in the fact that at common law no judgment could be given against a defendant until he had appeared in the action, but no such presumption does or ought to apply in cases where the defendant is a non-resident and there was no appearance and only constructive service of the summons by publication.

[See Hahn v. Kelly, 34 Cal. 391.]

[This was an action in the nature of ejectment by Marcus Neff against Sylvester Pennoyer.]

John W. Whalley, M. W. Fechheimer, and W. W. Page, for plaintiff.

H. Y. Thompson and George H. Durham, for defendant.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 15 Am. Law Reg. (N. S.) 367, contains only a partial report.]

[2] [Affirmed in 95 U. S. 714.]

DEADY, District Judge. This action is brought to recover the possession of a half section of land situate in Multnomah county, the same being donation claim 57. It is alleged in the complaint that the plaintiff is a citizen of California, and the owner, and entitled to the possession of the premises which are worth $15,000; and that the defendant is a citizen of Oregon and wrongfully withholds the possession of the premises from the plaintiff.

The answer of the defendant tacitly admits the citizenship of the parties and the value of the premises as alleged in the complaint, but denies the ownership of the plaintiff and his right to the possession of the premises, and sets up a title thereto in himself. The defense of title in the defendant is controverted by the reply. By consent of parties the cause was tried by the court without the intervention of a jury, on September 24 and 25, 1874, and afterwards submitted on briefs.

On the trial the plaintiff proved that a patent to the premises was issued to him by the United States on March 19, 1866, as a settler under the donation act of September 27, 1850, and rested his case.

Thereupon the defendant offered in evidence duly certified copies of the complaint, summons, order for publication of summons, affidavit of service by publication, and judgment in the action of J. H. Mitchell v. Marcus Neff [unreported], in the circuit court of the county of Multnomah, wherein judgment was given against the defendant therein on February 19, 1866, for the sum of $294.98; to the introduction of which papers the plaintiff objected, because: (1) Said judgment is in personam, and appears to have been given without the appearance of the defendant in the action, or personal service of the summons upon him, and while he was a non-resident of the state, and is therefore void. (2) Said judgment is not in rem, and therefore constitutes no basis of title in the defendant. (3) Said copies of complaint, etc., do not show jurisdiction to give the judgment alleged, either in rem or personam; and (4) it appears from said papers that no proof of service, by publication, was ever made, the affidavit thereof being made by the "editor" of the Pacific Christian Advocate, and not by "the printer or his foreman, or his principal clerk." The court admitted the evidence, subject to the objections.

The defendant then offered in evidence a certified copy of an execution issued upon said judgment on July 9, 1866, and the returns thereon, from which it appears that the premises in question were sold upon said execution to satisfy said judgment on August 7, 1866, to J. H. Mitchell for the sum of $341.60, to the introduction of which papers the plaintiff objected, because the judgment in Mitchell v. Neff being given without jurisdiction, the execution was void, and, further, that the notice of sale upon said execution and attached to the return, was no part of either, and therefore should not be admitted. The court admitted the evidence, subject to the objections.

The defendant then offered in evidence three papers purporting to be deeds to the premises to the defendant, the first being signed by Jacob Stitzel, sheriff of Multnomah county, by his deputy, C. B. Upton, on January 14, 1867; the second by said Stitzel, ex-sheriff of said county, on July 24, 1874, and the third by E. J. Jeffery, sheriff of said county, on July 21, 1874. To the introduction of which papers the plaintiff objected, because as to the first one: 1. It was not made to the purchaser at the sheriff's sale. 2. It is not sealed, witnessed or properly acknowledged as a deed. To the second one: 1. There being no valid judgment proved, the instrument is not a link in the chain of title. 2. It was not made to the purchaser at the sheriff's sale; and as to the third one, for the same reasons as in the case of the second one, with the additional one: That it was not executed by the officer making the sale. The court admitted the evidence subject to the objection.

The defendant then offered in evidence an assignment by J. H. Mitchell to the defendant of the certificate of purchase of the premises, dated August 10, 1866, to the introduction of which the plaintiff objected, because: (1) There being no valid judgment, assignment is not evidence of title in the defendant. (2) If there were a valid judgment to support the sale to Mitchell, the assignment would pass a mere equity to the defendant, to enforce a conveyance from the former after he had received one from the sheriff, and therefore it is not evidence of title in the defendant. The court admitted the evidence, subject to the objections.

The defendant having rested, the plaintiff offered in evidence a duly certified copy of the judgment-roll in Mitchell v. Neff, which contained not only the complaint, summons, and other parts of the record of that case already introduced by the defendant, but also a copy of the affidavit of the plaintiff therein, upon which the order for publication was made; to the introduction of which the defendant objected because said affidavit was not properly a part of the judgment-roll. The court admitted the evidence subject to the objections.

Upon this evidence, the right of the plaintiff to recover is admitted, unless by virtue of the sale of the premises upon the judgment in Mitchell v. Neff, and the subsequent assignments of the certificate of purchase and the conveyances to the defendant, the legal title passed from the plaintiff to him.

Admitting that the proceedings in Mitchell v. Neff were duly taken according to the statute of the state in the case of non-resident debtors, what was the effect or force of the judgment as against the person of the defendant or his property? It is admitted on all hands that such a judgment

is not binding in personam. Story, Confl. Law, § 539; D'Arcy v. Ketchun, 11 How. [52 U. S.] 174; Galpin v. Page, 18 Wall. [85 U. S.] 367. And this rule is expressly declared in the Oregon Code of Civil Procedure (section 506), as follows: "No natural person is subject to the jurisdiction of a court of this state, unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached." Neither is it claimed by the defendant that this judgment had any other or greater effect than to enable the plaintiff therein to subject this property to the payment of the debt owed him by Neff.

But the plaintiff maintains that the court, in Mitchell v. Neff could not acquire jurisdiction to reach the property of a non-resident, or subject it to the payment of his debts, owed in this state, except by the actual seizure of such property contemporaneous with the commencement of the proceeding or before the rendition of the judgment therein.

In support of this position, the case of Galpin v. Page [Case No. 5,206], decided by Mr. Justice Field, in the circuit court for the district of California, on August 31, 1874, is cited. In this case the learned judge, after showing that "the tribunals of one state have no jurisdiction, and can have none, over persons and property without its territorial limits," proceeds as follows: "But over property and persons within those limits the authority of the state is supreme, except as restrained by the federal constitution. When, therefore, property thus situated is held by parties resident without the state, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the state over the property would be defeated if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the states, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. * * * A pure personal judgment, not used as a means of reaching property at the time in the state, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the state, not having been personally served within its limits, and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the state as to the liability of a party over whose personal property they have no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the state is brought under the control of the court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the state."

But I see nothing in this language or the rule as there laid down, which supports or gives countenance to the position of the plaintiff, unless it be in the statement that the statute giving the right to proceed by publication against non-residents of the state is valid only when restricted "to cases where, in connection with the process against the person, property in the state is brought under the control of the court, and subjected to its judgment."

Now, the property was "brought under the control of the court, and subjected to its judgment" in Mitchell v. Neff, if at all, by the execution which issued upon the judgment. This process against the property of Neff was issued to enforce the judgment given in pursuance of the process against his person. The one was the inception and the other the completion of the proceeding, and so they were connected together as the links in a chain. Certainly, the process against the property could issue in connection with the process against the person without being exactly simultaneous with it. They were related parts of the same proceeding.

Besides, this judgment, though personal in form, was procured, intended and used simply as a means of reaching the property of Neff then within the state, and according to the rule in Galpin v. Page, supra, is so far valid and binding. But the power of the state over the property within its limits, of non-residents, being supreme, and it being admitted on all hands that the state may subject such property "to such disposition by their tribunals as may be necessary to protect the rights of its own citizens," in my judgment, the mode of exercising this power is a matter for the state to determine. In the exercise of this power it may require that the proceedings be strictly in rem and commenced by the seizure of the property, or it may, as provided in this state, upon the proper preliminary showing, permit a suit to be maintained against the non-resident by name—nominally—for the purpose of enabling the plaintiff therein to first judicially establish his right or claim against such non-resident, and then authorize the seizure and disposition of the property so as to satisfy the same. In either case, the result is the same; while the latter mode of proceeding has this to commend it over the former, that it does not permit the seizure or interference with the property of the non-resident until the right or claim of the citizen in or to it is satisfactorily established.

Nor does it appear to me that the state is bound in any case to provide for giving no-

tice to the absent party by publication of the summons or otherwise. That matter pertains to the mode of proceeding over which the state has absolute control. The notice usually given is merely constructive, and in a large number, if not in a majority of cases, gives no information to the absent party. Of course it is the duty of the state to deal justly and considerately with non-residents who have property within her jurisdiction, and therefore it should provide as far as practicable that no proceeding should be taken in her courts to affect such property, without notice to the owner. It being shown that the state has the power to subject the property of non-residents to the payment of debts owing to her citizens by such a proceeding as may by law be provided, including one in which such property is not seized prior to judgment, but thereafter, and then only for the purpose of satisfying said judgment, it remains to be considered whether the judgment in Mitchell v. Neff was given by a court having jurisdiction to do so according to the laws of the state.

The plaintiff maintains that the court acted without jurisdiction, because it appears from the record: (1) That the order of publication was made without evidence that Mitchell had "a cause of action against" Neff; or (2) that any diligence had been used to ascertain his "place of residence." (3) That the service of the summons was not proved as by statute provided.

In consideration of these objections two preliminary questions arise which must first be disposed of, namely: What constitutes a judgment-roll, and it is the only part of the record of the court which may be inspected upon an objection to its jurisdiction? As to what constitutes a judgment-roll in this state there has been no decision by the supreme court of the state, and therefore this court must construe the statute on the subject for itself. The Code of Civil Procedure (section 269) provides that "the clerk shall prepare and file in his office the judgment-roll," "if the complaint has not been answered by any defendant" by attaching "together in the order of their filing, issuing and entry, the complaint, summons and proof of service, and a copy of the entry of judgment." The law of this state at the date of the proceedings in Mitchell v. Neff, provided that whenever personal service cannot be made upon the defendant, and "after due diligence he cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, and in like manner it appears that a cause of action exists against the defendant," "such court or judge may grant an order" allowing constructive service to be made in the case, by publication of the summons, "among other cases, when the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action." Code Civ. Proc. § 55.

In the case of Mitchell v. Neff, there was an order granted by the judge allowing service of the summons to be made by publication, under this section. What then constitutes the proof of such constructive service, and is, therefore, a necessary part of the judgment-roll? The question is not altogether free from difficulty, principally because section 69 of the Code, in prescribing what "proof of the service of the summons" shall be, provides, that if served by the sheriff, his certificate thereof; if served by any other person, his affidavit thereof, and "in case of publication, the affidavit of the printer or his foreman or his principal clerk, showing the same."

On behalf of the defendant it is maintained that section 69 limits the effect and scope of the phrase "proof of service," as used in section 269, to the affidavit of the printer touching the mere fact of publication of the summons in the newspaper. But because the effect of the phrase is so limited in section 69 —the printer's relation to and knowledge of the subject beginning and ending with the fact of such publication—it does not follow that the legislature intended it should be so understood and applied when used elsewhere in the Code, particularly when the natural signification of the words and the plain import of the context, as in section 269, require that it should be construed to include other facts than this one.

The judgment-roll of the Code is a mere collection of papers and copies of entries in the case, sufficient, at least, to show a prima facie case of jurisdiction in the court and the exercise thereof until a final determination of the controversy, so far as the particular proceeding is concerned. As its name implies, it is the roll or record of the final determination or judgment, and not of the entire proceedings in the case. Among other things, the proof of service is directed to be placed in such roll, because, without it, it would not appear therefrom that the court had jurisdiction to give the judgment. But how does the mere affidavit of the printer, as to the publication of the summons, show a service of the summons? It cannot appear from such affidavit that any court or judge ever ordered publication of the summons, or, if so, in that particular paper or for that length of time. Such an affidavit may be made and filed in a cause and placed in the roll without any order for publication having been made, or, if there was one, without the publication proved by it being in any essential in accordance with it.

"The proof of service" in a judgment-roll, must, according to the natural signification of the words, and the obvious purpose of section 269, include not only the fact of delivery or publication of the summons, but the authority to do so. In the case of service by a sheriff, his certificate of delivery to the defendant would not be sufficient proof of service, unless it contained evidence of his

authority—that is, was done in his official character; and so when the service purports to be by publication, it is not proven—shown, established—until the authority to publish is proven as well as the publication itself.

This proof—proof of service of the summons—the Code directs to be placed in the judgment-roll as part of it. What constitutes such proof depends upon the circumstances of the case. Where the service is by publication, it must include not only proof of the fact of publication in a newspaper, but the authority therefor. Nothing short of the order of the court allowing the publication will suffice for this purpose; and unless such order state that the facts necessary to give jurisdiction appeared by affidavit, it should include the affidavit also. Admitting that an order for publication containing the statements suggested would be prima facie sufficient, yet the full and complete proof of the service should include the affidavit upon which the order was made.

The only authority cited, which differs from this conclusion, is Hahn v. Kelly, 34 Cal. 304, in which it was held that neither the affidavit for the order for publication nor the order itself were a part of the judgment-roll, and that the only proof of service of the summons which it need contain is the affidavit of the printer to the fact of publication. The court admitted that "the proof of service by publication" should include the affidavit and order of publication, because "in point of law they constitute a part of the mode" of such service; and this itself is sufficient reason why the statute should not have been so construed as to exclude them. In the same court the previous cases of Braly v. Seaman, 30 Cal. 610, and Forbes v. Hyde, 31 Cal. 342, were considered and decided upon the theory that the affidavit and order for publication were a necessary part of the proof of the service and therefore a constituent of the judgment-roll. "Counsel eminent for learning and ability," who argued these important cases, "assumed and therefore conceded that they were a part of the judgment-roll;" and there can be no doubt that the rule first announced in Hahn v. Kelly was a wide departure from what had been understood and assumed by the bench and bar of that state to be the true construction of this statute.

In Galpin v. Page, supra, Mr. Justice Field held that the proof of service must include the affidavit and order for publication. In considering the question he says: "Now it is evident that the language of the statute in the first title mentioned, declaring what shall be proof of service of the summons, must be limited to the action of the persons making the service of publication, of which the sections immediately preceding in the same title speak; as if the language were as follows: 'Proof of the service of a summons by the sheriff or other person, or by a publisher of a newspaper, as above provided, shall be as follows.' The obvious meaning intended is, that the proof of service which the parties performing the particular duty prescribed must furnish, shall be the certificate or affidavit designated. It does not mean that such certificate or affidavit shall be all that is required on the subject of service, but only all that is required of those particular persons. Any other construction would lead to this absurd result, that an affidavit can be used to establish conclusively, a fact to which it makes no reference. Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. The publication to be of any avail, must be in a paper designated and for the period prescribed by the order of the court or judge. The terms of such order must therefore be connected with the affidavit, or the proof will amount to nothing. The affidavit, by itself, is only a portion of the proof, a solitary link in the chain required. The printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit. When therefore the record of the judgment comes to be made up, it must necessarily include the order of the court, or it will disclose no proof of service. And when the statute requires the clerk to attach with other papers the proof of service, it means not merely the affidavit which the publisher may furnish as part of such proof, but the order also, without which the affidavit establishes nothing. It is giving to the provision, declaring the proof which the officer or person making personal service or the printer publishing the summons shall furnish of their acts, the effect of a declaration that no other proof of the service was necessary, that error in our judgment was committed in Hahn v. Kelly. That the ruling in that case left the judgment-roll a defective and imperfect record, seems to have been felt by the court, for it says: 'In our judgment, it would have added to the completeness of the record to have made proof of service by publication, include also the affidavit of the party, and the order of the court directing the publication to be made, for, in point of law, they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it.' For the reasons we have stated, we do not admit that the statute sanctions any such defective record; but, on the contrary, we are clear, that properly construed, it requires full proof of the jurisdictional facts to be incorporated into the judgment-roll."

I am not advised what has been the practice in this state in this matter. In the case under consideration the roll does not contain the order for publication, but does contain the affidavit therefor. But the order having been put in evidence by the defendant may be considered, so far as he is concerned, a part of the roll. The roll itself is otherwise

made up in utter disregard of the statute, the papers and entries comprising it, being attached together pell mell, without any reference to the order of their issuing, filing or entry; while some of them are motions for orders and judgments and the like, which are out of place.

The ruling in Galpin v. Page, supra, being made by a justice of the supreme court of the United States, is of more direct authority in this court, than that in Hahn v. Kelly, while the reasons for it, to my mind, far outweigh those given in support of the ruling in the latter case. In my judgment there is scarcely a doubt that the judgment-roll, to show "the proof of service," must contain not only the proof of publication of the summons, but also the authority for such publication. But the affidavit and order for publication may be inspected by this court for the purpose of ascertaining whether the court in Mitchell v. Neff had jurisdiction or not, upon another ground. The judgment-roll is not the whole of the record in Mitchell v. Neff. The record of the case comprises "a history of all the acts and proceedings in the action from its initiation to final judgment." Galpin v. Page, supra. A part of this record or history is at least all the papers filed in the case, and upon which the court appears to have acted in any step of the proceedings. So are the entries and files containing the acts and doings of the court in the case. And these are all verities in the same sense, and in the same degree, as the portion of them which by statute constitute the judgment-roll. These are all elements of "the record at common law, which imported absolute verity," and the definition of a record contained in section 719 of the Code of Civil Procedure, is to the same effect: "A judicial record, is the record, official entry or files of the proceedings in a court of justice, or the official acts of a judicial officer, in an action, suit or proceeding."

There is nothing in section 269 prescribing how the judgment-roll shall be made up, which expressly or by implication makes it the record of the case or that imparts to it any more or greater verity, than the rest of the record. As has been already remarked, the judgment-roll is not the whole record of the case, but only a collection of such of the papers and entries as in the opinion of the legislature were necessary or sufficient to show a prima facie case of jurisdiction in the court to pronounce the judgment. The remaining portion of the record which is often voluminous, is omitted from this roll on grounds of convenience and economy. For the same reason, I suppose, the roll is made up in part by attaching the original papers together instead of copying them upon parchment, as was once the case, or in a book, as is still the case in some states, and in this in particular cases. See section 270, Code Civ. Proc. There is really no ground for assuming that the legislature, in providing for this brief judgment-roll, intended to thereby exclude the rest of the papers and entries of the case from the record, and to take from them the force and effect as evidence to which they were otherwise entitled. In the very nature of things, there is just as much reason and convenience in attributing absolute verity to an order for the publication of a summons as to the ex parte judgment given in pursuance of it, in the same case and by the same court or judge; and it is not to be assumed, in the absence of express provisions to that effect, that the legislature would make such an illogical and absurd distinction.

In considering, then, the objections made to the judgment in Mitchell v. Neff, the court will inspect the affidavit and order for publication, as well as the rest of the record, upon the double ground that they are properly a part of the judgment-roll, and also a part of the general record of the case, and therefore, in either case, of equal verity with any part of such roll. If, then, it shall appear from the record in the case that the court in Mitchell v. Neff, never acquired jurisdiction to give the judgment it did, the sale of the premises and subsequent proceedings were void, and the plaintiff must recover. This conclusion would follow upon general principles, and is within the rule expressly declared in section 731 of the Code of Civil Procedure, as follows: "Any judicial record may be impeached, and the presumption arising therefrom overcome, by evidence of a want of jurisdiction in the court or judicial officer * * * in respect to the proceedings."

To proceed, then, with the consideration of the objections: Was the order for publication of the summons made without evidence that Mitchell had "a cause of action" against Neff?

The affidavit of Mitchell upon which this order was made is dated November 13, 1865, and after the title of the cause reads as follows: "I, J. H. Mitchell, plaintiff, being first duly sworn, say the defendant, Marcus Neff, is a non-resident of this state; that he resides somewhere in the state of California, at what place affiant knows not, and he cannot be found in this state. The plaintiff has a just cause of action against defendant for a money demand on account. That this court has jurisdiction of such action. That the defendant has property in this county and state."

The order was granted in open court, on the same date as the affidavit, and reads as follows: "Now at this day comes the plaintiff in his proper person and by his attorneys Mitchell and Dolph, and files affidavit of plaintiff and motion for an order of publication of summons as follows: 'Now comes the plaintiff by his attorneys and upon the affidavit of plaintiff herewith filed moves the court for an order of publication of summons against defendant, as required by law—he being a non-resident;'—and it appearing to

the satisfaction of the court that the defendant cannot after due diligence be found in this state and that he is a non-resident thereof; that his place of residence is unknown to plaintiff, and cannot with reasonable diligence be ascertained by him; and that plaintiff has a cause of action against the defendant; and that defendant has property in this county and state, it is ordered and adjudged by the court that service of the summons in this action be made by publication for six weeks successively in the Pacific Christian Advocate, a weekly newspaper published in Multnomah county, Oregon, and this action is continued for such service."

The judgment in Mitchell v. Neff being now attacked or questioned collaterally, not on appeal, if there is any evidence in the affidavit tending to prove or establish the ultimate fact upon which jurisdiction to grant the order depends—the existence of a cause of action against the defendant—it is sufficient to sustain the judgment. But if there is no evidence of such fact, the court acted without authority and the judgment is void. I find the rule upon this subject laid down very fully and clearly by Mr. Justice Sawyer, in Forbes v. Hyde, 31 Cal. 348, as follows: "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence but he has jurisdiction to act upon it, and his action is simply erroneous. His order would in such case be reversed on appeal. But as there was jurisdiction to act, until reversed, or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid. Such a judgment could not be collaterally attacked. If, however, there is a total want of evidence on any point necessary to be determined, upon which the law requires the mind of the judge to be satisfied as a prerequisite for granting an order of publication, then there is nothing upon which he is authorized to act; the evidence which is the very basis of his jurisdiction and upon which it depends, is wanting, and his action is without authority. His action is not merely erroneous, for there was nothing to call into exercise the judicial mind—there is no jurisdiction to act at all, and the proceeding is void."

There is nothing in the affidavit of Mitchell which tends to show that he had "a cause of action" against Neff. True, he asserts therein that he has a cause of action, but this is not the statement of a fact tending to prove such a proposition, but a general assertion or expression of opinion that the proposition is true. But it is the province of the court to determine that question, upon the facts to be stated in the affidavit. A general statement that the plaintiff has a cause of action against the defendant is not sufficient. It does not make the matter appear to the court. The facts necessary to show that a cause of action exists must be stated. Concerning the material circumstances of time, place and amount, this affidavit is wholly silent, and whether this supposed cause of action arose upon an indebtedness of one mill for "a small measure of moonshine" or a million of dollars for as many miles of land, is left to conjecture. In Forbes v. Hyde, 31 Cal. 354, Mr. Justice Sawyer quotes, with approval, the following ruling upon this subject from Ricketson v. Richardson, 26 Cal. 153: "An affidavit which merely repeats the language or substance of the statute is insufficient. * * * The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the court or judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge, from the probatory facts stated in the affidavit, before the order for publication can be legally entered."

Of course, in stating that the affidavit contains no evidence of the existence of a cause of action against Neff, I consider the sense of the language of that instrument: "Plaintiff has a just cause of action against defendant for a money demand on account"—as in no degree affected by the words which I have italicised. The expression—"a money demand on account"—is, so far as my knowledge goes, sui generis in the literature of the law. What it means is not obvious, and counsel have not been able to enlighten the court upon the subject. If it means anything, it is an allegation that the affiant has a demand against the defendant "for money on account," which at least is a mere obscure

amplification of what was already said in the averment that he had a cause of action against him.

So far, then, as the affidavit is concerned, it containing no evidence that the plaintiff had a cause of action against the defendant, the court acted without authority in making the order for publication and the same together with the judgment following it, is simply void.

But it is suggested that it appears from the verified complaint on file in Mitchell v. Neff, when this order for publication was allowed, that a cause of action existed in favor of Mitchell and against Neff. The complaint states, that the plaintiff is an attorney, "and as such, has been practicing in Portland, Oregon, for over five years last past. That between January 1, 1862, and May 15, 1863, plaintiff, at defendant's special instance and request, rendered professional services for defendant, as such attorney, which services were reasonably worth the sum of $209 in legal tender notes; that said amount is long since due and unpaid, except $6.50 paid thereon by defendant, January 24, 1863, wherefore," etc.

While it is questionable whether even the complaint states facts sufficient to prove the existence of a cause of action, and therefore to justify the granting of an order for publication, if the question arose upon an appeal, it doubtless contains some evidence tending to establish that conclusion, and, therefore, is sufficient, when the question arises, as in this case, where the judgment is attacked collaterally.

In Forbes v. Hyde, 31 Cal. 355, the complaint which was not necessarily verified, was not in the record. The court was asked to presume that it was verified, and contained evidence tending to show the existence of a cause of action, and that the court in allowing the order for publication may have acted upon it as well as the insufficient affidavit. But it declined to do so, saying: That "it affirmatively appears by the recitals in the order itself that the order was based upon the affidavits of Green and Brooks."

In Mitchell v. Neff the complaint is in the record, and appears to be verified. It is therefore, as to the facts contained in it and relative to this inquiry, substantially an affidavit. The motion for the order for publication, which is recited therein, asks that it be made "upon the affidavit of plaintiff herewith filed," but the order itself does not state that it was made exclusively upon the affidavit. It states: That "it appearing to the satisfaction of the court," etc., without stating how or why. In a case like this there is no presumption that there was any evidence before the court allowing the order other than appears by the record. But it appears from such record that the complaint was on file in the case when the order for publication was allowed, and was therefore before the court, and might have been used by it in allowing the order as evidence that a cause of action existed against Neff. In U. S. v. Walsh [Case No. 16,635], I held that the complaint in an action for a penalty was an affidavit and sufficient for the allowance of a writ of arrest under section 107 of the Code of Civil Procedure. The point is not free from doubt, but my mind inclines to the conclusion that this court ought to presume, if necessary, that the court in Mitchell v. Neff acted upon the evidence contained in the complaint, as well as the affidavit in allowing the order, and therefore I conclude, that so far as this objection is concerned, the judgment is valid.

The second objection to the judgment is, that it does not appear from the record that any diligence was used by Mitchell to ascertain Neff's place of residence. The fact upon which the objection is based is admitted by counsel for defendant, but they insist that it is not necessary that the affidavit upon which the order of publication was allowed, should contain the evidence of such diligence; that the fact might be proved by oral testimony. The order merely states that it appears to the satisfaction of the court that the place of residence of Neff "is unknown to plaintiff, and cannot, with reasonable diligence, be ascertained by him." Upon what evidence this conclusion was reached by the court does not appear, except in the recital that the motion was made upon the affidavit of the plaintiff.

Sections 55 and 56 of the Code regulate the allowance of service of summons by publication, and ought to be taken and construed together. The latter provides that "in case of publication the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him."

The fact of diligence can only be shown by affidavit, and this must appear by the record. Cook v. Farran, 11 Abb. Prac. 40; 13 How. Prac. 43; Hallett v. Righters, 13 How. Prac. 43; Titus v. Relyea, 16 How. Prac. 373; Hyatt v. Wagenright, 18 How. Prac. 248.

The exposition of section 798 of the Code of Civil Procedure, by defendant's counsel to show that an affidavit could not have been used to prove "diligence" upon the application for the order is unsound. On the contrary, such section expressly provides that an affidavit may be used on a motion. Indeed, I do not understand that the evidence of a witness can be heard on a motion otherwise than by affidavit. The application for the order for publication of the summons was a motion, and any evidence used in support of it should have been by affidavit, and doubtless such was the case. Besides, sections 55

and 56 taken together, by necessary implication, require that the proof of residence and diligence shall be by affidavit. In construing the corresponding sections in the California Code, the court in Ricketson v. Richardson, 26 Cal. 152, said: "Sections 30 and 31 treat of the same general subject, and they must be read together for the purpose of ascertaining what the affidavit and order should contain in order to satisfy the law and make the service complete. It must appear from the affidavit that the person upon whom service is to be made either resides out of the state or has departed from the state * * *; and also whether his residence is known, and if known, it should be stated. * * * The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and if known, the residence must be stated. It is true that this is not required in terms in the thirtieth section, which is more especially devoted to the affidavit; but, as we have already said, the whole statute on the subject of service by publication is to be read together, and section 31 requires that where the residence is known the order shall direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. In granting the order, the court or judge acts judicially and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant. There is no other way of bringing the fact of residence to the judicial knowledge of the court or judge. That the fact of residence should appear in the affidavit is therefore necessarily implied from the whole tenor and scope of the statute. * * * Where this kind of service is sought the proceedings should be carefully scrutinized and strict compliance with every condition of the law exacted; otherwise its provisions may lead to gross abuse, and the rights of person and property made to depend upon the elastic consciences of interested parties, rather than the enlightened judgment of a court or judge."

The evidence of diligence used to ascertain the residence of the defendant, when it is alleged to be unknown to the party making the application, must appear in the affidavit for the same reason that "the fact of residence" should, if known to such party. The one is the equivalent of the other. Either the place of residence of the defendant must be shown, or it must appear that it is unknown to the party and what diligence he has used to ascertain it. They are in the same category, and the law which requires one to be shown by affidavit equally applies to the other. It was not intended that the law should be a means of spoiling non-residents, and therefore it provides that the defendant shall have personal notice of the proceeding if possible, so that he may take proper measures to protect his rights. The provision requiring a copy of the summons and complaint to be mailed to the address of the defendant is a wise and just one, and well calculated to prevent its abuse. Little chance has a non-resident to be informed of the proceedings against him by the mere publication of the summons, often, as in this case, in a weekly newspaper of denominational circulation within the state, and practically none without it.

The court having omitted to make the order directing a copy of the summons and complaint to be deposited in the post-office, addressed to the defendant at his place of residence, upon the mere allegation in the affidavit, that such place of residence was "somewhere in California," then unknown to the affiant, and without any evidence that the plaintiff had ever used any diligence to ascertain such place of residence, or even that he was not conveniently and intentionally ignorant of the fact, the order allowing service by publication, and the service and judgment following it are necessarily void and of no effect.

The third objection to the judgment is also well founded. There was no legal proof of the service of the summons by publication, and therefore the court had no jurisdiction to give the judgment. As has been stated, section 69 of the Code of Civil Procedure requires that the service of the summons shall be proved, in case of publication by the "affidavit of the printer or his foreman or his principal clerk." As appears from the affidavit to the publication it was made by Henry C. Benson, the "editor" of the paper. The statute is imperative and admits of no proof of service but the affidavit of the printer or his foreman or his principal clerk. The reason is obvious. The persons described are the only ones who, as a rule, are likely to have personal knowledge of the fact, by virtue of their relation to the subject. It may be in some cases that the editor has such knowledge also. So it may have been in Mitchell v. Neff, but if it were so it should have been stated. But as a rule the contrary is probably true. One of the elementary rules of evidence is that a fact shall be proven by the best evidence of which, in its nature, it is susceptible. For very cogent reasons this rule ought to be rigidly applied to the proof of jurisdictional facts where the proceeding is ex parte. An editor does not know by virtue of his employment as such, that a summons has been published in all the numbers of the paper he edits, put in circulation during a certain period of time. But the printer may be reasonably presumed to. Therefore the editor's affidavit is not the best evidence of the matter. True he may inform himself concerning it, and so may any one having no relation whatever to the paper. But speaking from information derived at second-hand in this way, the witness is liable to be mistaken or imposed upon.

For these very sufficient reasons, as it appears to me, the legislature has required that

the service by publication shall be proven by the best evidence of which the case is susceptible—the affidavit of the printer, his foreman or principal clerk. This being so, no court is authorized for any reason to assume that the affidavit of an editor or other person, not the printer of a paper, is legal evidence of a publication therein.

But counsel for defendant maintain that due service of the summons appears from the entry of judgment which states "that the defendant had notice of the pendency of the action by publication of the summons for six successive weeks in the Pacific Christian Advocate."

What is meant by the averment "that the defendant had notice of the pendency of the action" is not clear. The averment is without the statute which does not provide that the defendant shall have notice of the pendency of the action by publication, but that constructive service of the summons may be made upon him by that means. Whether he thereby acquires actual notice of the proceeding, the court cannot know and therefore cannot find. The averment should be that the defendant was duly served with the summons by publication of the same in the Advocate, etc. But assuming that this averment is formally sufficient, it does not appear to be true in point of fact. The record not only fails to support it, but actually contradicts it. So far as the record discloses the fact there was no evidence before the court that the defendant had any notice of the pendency of the action by a publication of the summons. The affidavit of the editor of the Advocate was not competent evidence of the fact, and none other appears to have been before the court.

And, finally, it is insisted by counsel for defendant that the court in Mitchell v. Neff was a court of general jurisdiction, and therefore the law presumes its proceedings were regular and in its power, unless the contrary affirmatively appears from the record.

Admitting for the moment that this rule applies in cases of this kind, it is a sufficient answer to say that the contrary does appear here from the record. If the record of a court is silent as to a jurisdictional fact for the purpose of upholding the judgment, it will be presumed that the fact was duly made to appear by the court; but when it appears from the record, that such fact was made to appear by a certain means, it will not be presumed that it was also made to appear otherwise or differently. Here the record shows that the proof of service was made by the affidavit of the editor, and there is no room to presume that it was otherwise or differently made. The record is not silent on the subject. It speaks for itself, and there is no reason or necessity for resorting to presumption. Moreover, in this class of cases, it is not sufficient that an averment of due service of the summons in the judgment-entry should be not in conflict with the facts contained in the record—it must be affirmatively supported by them. If such an averment could be successfully substituted for the proof of the fact which the statute requires, it is reasonable to suppose that the proof would generally be dispensed with. The averment is a nullity.

But I am satisfied, upon both reason and authority, that the rule in regard to presumptions in favor of the regularity of proceedings in courts of general jurisdiction, does not and ought not to apply in cases where there is no appearance or actual service of the summons, and the defendant is a non-resident of the state. This presumption is a rule of the common law. It had its origin and is only applicable to a procedure in which judgment could not be given against a defendant, unless he was not only personally summoned, but was arrested or appeared in the action. If he did not appear, his goods and the profits of his lands might be distrained ad infinitum to compel an appearance; or if he absconded, he might be outlawed, but no judgment could be given against him in the action until he appeared and was heard. 3 Bl. Comm. 280 et seq. See Hess v. Cole, 3 Zab. [23 N. J. Law] 116.

The court being without jurisdiction to proceed in the action until both parties were before it, and each had an opportunity to allege what he might for himself and against his adversary, it might well be presumed that its judgment was regularly and duly given, unless the contrary affirmatively appeared by the record. Such is still the rule in regard to courts of general jurisdiction when proceeding substantially according to the course of the common law.

But the proceeding in Mitchell v. Neff, so far as the acquiring of jurisdiction is concerned, was in fact and theory ex parte. The record was made by the plaintiff without the knowledge or interference of the defendant. He was not present to question the jurisdiction of the court, or point out wherein the facts stated or shown by the plaintiff were insufficient to authorize its action. The action of the court in the premises in such cases is only formal. Technically it gives the judgment, but substantially the proceeding and record are taken, conducted and made up by the plaintiff upon his own judgment. No presumption ought to be allowed in favor of the jurisdiction in such cases. Every fact necessary to sustain the jurisdiction, must appear from the record or the judgment is void. As was said by Mr. Justice Field, speaking for the court in Galpin v. Page, 18 Wall. [85 U. S.] 368: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he

never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

In Galpin v. Page, in the circuit court, supra, it was held, citing the same case in 18 Wall. [85 U. S. 367] that "the presumptions which the law implies in support of the judgment of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits of the courts, persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common law." And again: "When the judgment of such a court" (of general jurisdiction in civil cases) "is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained; and such jurisdiction cannot ordinarily be assailed except on writ of error or appeal, or by some other direct proceeding. But when the judgment of such a court relates to a matter not falling within the general scope of its powers, and the authority of the court can only be exercised in a prescribed manner not according to the course of the common law; or the judgment is against a party without the territorial limits of the court, who was not served within those limits, and did not appear to the action, no such presumption of jurisdiction can rise. The judgment, being as to its subject-matter or persons, out of its ordinary jurisdiction, authority for its rendition must appear upon the face of its record. In other words, there is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. This doctrine is an obvious deduction from principle, and is sustained by adjudged cases almost without number in the highest courts of the several states, and in the supreme court of the United States. There is running all through the reports the emphatic declaration of the common law courts, that a special authority, conferred even upon a court of general jurisdiction, which is exercised in a mode different from the course of the common law, must be strictly pursued, and the record must disclose the jurisdiction of the court. On this subject the cases speak a uniform language, with scarcely a dissenting voice."

But I do not understand that a mode of proceedings is "different from the course of the common law," in the sense in which that phrase is here used, because there may be a difference in mere non-essentials or incidents which change with the manners and circumstances of a people and their ideas of utility and convenience. As, for instance, whether a pleading is verified or not, or a denial is special or general, or a defendant shall answer without or after an imparlance, or an issue shall be made by the complaint and answer, or by an indefinite series of pleadings or altercations if necessary, or there shall be many forms of action or but one, or a judgment in ejectment shall be a bar to another action or not, does not in this sense make the mode of proceeding differ from the course of the common law. But as has been shown, the corner-stone of a proceeding at common law was that no judgment could be given against a defendant unless he appeared in the action. Out of this important fact grew the reasonable presumption that the record was absolutely true and the court had jurisdiction to give the judgment. But the law ceases with the reason of it. There is no reason for such a presumption when the proceeding takes place in the absence of the defendant upon a mere constructive service of process upon him. In such case the record must show affirmatively every fact necessary to give the court jurisdiction, and as to such facts it may be even contradicted, when attacked collaterally in the tribunal of another forum. Thompson v. Whitman, 18 Wall. [85 U. S.] 468. This court and the one that gave the judgment in Mitchell v. Neff are tribunals of different sovereignties exercising a distinct and independent jurisdiction, though within the same territorial limits. The judgment of the state court is only entitled to the same faith and credit in this court as it is in the courts of another state. Galpin v. Page, supra.

I cannot better conclude this opinion than by quoting and adopting the language of Mr. Justice Sawyer in a similar case (Forbes v. Hyde, 31 Cal. 355): "We are not insensible to the fact that this decision may affect many judgments obtained upon service by publication of summons in years past, and for that reason we have bestowed upon the question the attention which its great importance demands. We know that there is probably no state in which there have been, and where there is likely to be, so many occasions for procuring service by publication as in California. But while this is true, it is doubtless equally true, that there is no state in which so many have waited and are still waiting for their adversaries to depart in order that suit may be brought and judgment obtained against them on publication without actual notice. It may be important to the interests of those who suppose they have acquired rights under this class of judgments that they should be upheld. But it is equally important that the interests of parties, who have been only constructively

served with process, and who, in many instances, have had no actual notice till they have been condemned unheard, should be protected. If a judgment is void for want of jurisdiction, all those who have acquired interests under it have done so in full view of the condition of the record; while, on the other hand, a defendant is liable to have an unjust judgment rendered against him without any knowledge of the pendency of the action till it is too late to protect himself. An appeal is no adequate remedy when a party has no notice, for the time to appeal is very brief, and may expire before actual notice is obtained. In the language of the court in Smith v. Rice, 11 Mass. 512, 'the very grievance complained of is that the party had no notice of the pending of the cause and of course no opportunity to appeal.' "

There must be judgment for the plaintiff and findings of fact and law will be prepared in accordance with this opinion.

[NOTE. This judgment was affirmed upon error in the supreme court, Mr. Justice Field delivering the opinion, and Mr. Justice Hunt dissenting. 95 U. S. 714. This cause was again heard in the circuit court upon appeal by defendant from the clerk's taxation of costs. Case No. 10,084. The plaintiff brought an action against the defendant for unlawful cutting of timber and other waste upon the same tract of land. The defendant filed a counterclaim setting up taxes paid and improvements. The case was heard upon plaintiff's motion to strike out counterclaim. Case No. 10,085.]

Case No. 10,084.

NEFF v. PENNOYER.

[3 Sawy. 335;[1] 7 Chi. Leg. News, 276.]

Circuit Court, D. Oregon. April 26, 1875.

EXPENSES OF PRINTING BRIEF.

Section 918 of the Revised Statutes gives to the circuit court power to regulate the practice therein, "as may be necessary or convenient for the advancement of justice and the prevention of delay in proceedings," provided such regulation is not inconsistent with any law of the United States or rule of the supreme court: *Held*, that under this authority the court might by general rule or special order in a particular case require parties to a cause submitted to it for decision to file printed briefs, and might tax the reasonable expense of printing the brief of the prevailing party against the losing party, as a necessary disbursement.

[Cited in The Alice Tainter, Case No. 196; Simpson v. One Hundred and Ten Sticks of Hewn Timber, 7 Fed. 246; Gird v. California Oil Co., 60 Fed. 1,011.]

Appeal from taxation of costs by clerk.

John W. Whalley, for plaintiff.

H. Y. Thompson, for defendant.

DEADY, District Judge. The plaintiff in this action having obtained judgment [Case No. 10,083], filed a statement of costs and disbursements, as provided in section 546 of the Oregon Code of Civil Procedure, amounting to $86.47. The defendant objected to the item of $45 "for printing brief under the direction of the court." The clerk allowed the charge and the defendant appealed to the court. See section 547 of said Code.

In Ethridge v. Jackson [Case No. 4,541], this court held that by force of section 34 of the judiciary act [1 Stat. 92], now section 721 of the Revised Statutes, the law of the state regulating the allowance of costs and disbursements in civil actions at law was applicable to such actions in this court, unless where otherwise provided by congress.

Upon the argument of the appeal it was assumed by counsel that the allowance or rejection of the charge turned upon the construction of section 543 of the Oregon Code of Civil Procedure, which provides, that: "A party entitled to costs shall also be allowed for all necessary disbursements including the fees of officers and witnesses," etc. But this is a mistake. Section 984 of the Revised Statutes (section 20 of the act of 1853; 10 Stat. 161) prescribes what items of disbursement shall be taxed in favor of the prevailing party as follows: "The bill of fees of the clerk, marshal and attorney and the amount paid printers and witnesses * * * in cases where by law costs are recoverable in favor of the prevailing party shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party."

The Revised Statutes (section 853) prescribe a printer's fee "for publishing any notice or order required by law or the lawful order of any court * * * in any newspaper," but do not provide any compensation for printing briefs.

But section 918 gives the court power to regulate practice therein, "as may be necessary and convenient for the advancement of justice and the prevention of delay in proceedings," provided such regulation is not inconsistent with any law of the United States or rule of the supreme court. The order in this case requiring the parties to file printed briefs was an order regulating the practice in the same, within the purview of this section. The printing and filing of such briefs was deemed "necessary and convenient" for a right understanding of the case, and therefore "the advancement of justice" therein. The supreme court of this state has, by rule 28 (2 Or. 15), required printed briefs to be filed in all cases heard in that court, and it is the practice therein, to tax the costs of such briefs in favor of the prevailing party as a "necessary disbursement," by reason of such rule.

The sum paid the printer by plaintiff for printing his brief is tacitly admitted to be a reasonable one. No objection is made to it on that ground. If the expense was incurred under a lawful order of this court, it is a necessary disbursement and ought to be taxed against the defendants.

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

The question turns, I think, upon whether the court had power under section 918, supra, to require the plaintiff to incur the expense of printing his brief. If it had, it seems to follow as a matter of course that it can provide that such expense be taxed against the defendant as a proper and necessary disbursement in the case.

Now as to the power of the court to require the printing of the brief, there is hardly room for doubt. The order is not inconsistent with any act of congress or rule of the supreme court. It is such an one as all courts of record, in the exercise of the power inherent in them to regulate the practice before them, are accustomed to make. It rests upon the same ground as the power of the supreme court of the state to make rule 28, supra, as well as rule 24, authorizing the clerk to tax against the losing party, as part of his costs, the sum of three dollars as a compensation for recording the opinion of the court. The taxation of the clerk is affirmed, with costs.

Case No. 10,085.

NEFF v. PENNOYER.

[3 Sawy. 495.] [1]

Circuit Court, D. Oregon. Oct. 11, 1875.

CUTTING TIMBER—TREBLE DAMAGES—DEFENSE TO CLAIM FOR TREBLE DAMAGES—IRRELEVANT ALLEGATION — COUNTER-CLAIM — TAXES PAID BY PARTY IN POSSESSION — DAMAGES FOR WITHHOLDING POSSESSION AND DEFENSE THERETO—IMPROVEMENTS.

1. In an action for cutting or carrying away timber from the land of another to entitle the plaintiff to recover treble damages, judgment therefor must be demanded in the complaint, so that the defendant may be apprised of the claim, and the facts stated in the complaint must bring the case within the statute. Civ. Code Or. § 385.

2. The defense to a claim for treble damages in such an action must be pleaded, and it may be either: (1) That the trespass was casual or involuntary; (2) or that, at the time of the commission thereof, the defendant had probable cause to believe that the premises were his own, or those of the person under whom he acted; (3) or that the timber was taken from uninclosed woodland for the purpose of repairing a highway or bridge. Civ. Code Or. § 336.

3. An allegation which merely contains facts tending to prove either of said defenses is irrelevant and will be stricken out on motion.

4. A counter-claim is substantially a cross-action and should contain nothing but the facts necessary to constitute it; and if any other defense is inserted therein it may be stricken out.

5. In an action for damages for withholding the possession of real property, if the defendant held under color of title in good faith adversely to the claim of the plaintiff, taxes paid by him upon the property during such withholding are a proper subject of counter-claim.

6. In action to recover damages for wrongfully withholding the possession of real property, the plaintiff may allege and recover for any particular waste or injury committed by the defendant thereon during his possession, or he may omit all claim other than that arising from such waste or injury, but he cannot by so doing preclude the defendant from showing that the alleged waste or injury was committed while he was in the possession of the premises, claiming title thereto, in good faith, adversely to the plaintiff, and thereby prevent him from making any defense to which he may be entitled under these facts.

7. To enable a defendant to maintain a counter-claim for the value of improvements made upon the premises of another, it must appear therefrom that the improvements are affixed to the freehold and still existing, and that they better the condition of the property for the ordinary purposes for which it is used; and that they were made while the defendant, or those under whom he claims, were in possession under color of title, in good faith, adversely to the claim of the plaintiff. Civ. Code Or. § 318.

[Cited in Wythe v. Myers, Case No. 18,119.]

8. A counter-claim not containing these allegations, but only a statement of facts tending to prove them, will be stricken out as irrelevant.

[Cited in Wythe v. Myers, Case No. 18,119.]

[This was an action of Marcus Neff against Sylvester Pennoyer.] Motion to strike out counter-claim.

M. W. Fechheimer, for the motion.
H. Y. Thompson, contra.

DEADY, District Judge. This action is brought by the plaintiff as a citizen of California, against the defendant, a citizen of the state of Oregon, for wrongfully entering the plaintiff's close—a tract of land situated in Multnomah county, Oregon—on May 10, 1869, and on divers other days and times between that day and March 9, 1875, and then and there cutting and carrying away the trees and timber therefrom, and converting the same to his own use, and for then and there pulling down and destroying a certain log dwelling-house thereon; and also for removing and destroying a certain fence inclosing an orchard growing thereon, whereby stock and cattle entered upon said orchard and destroyed the same, to the damage of the plaintiff $4,600.

The answer of the defendant consists of a denial of the material allegations of the complaint, except the one concerning his own citizenship, and a counter-claim styled "a further and separate answer," in which it is alleged that the defendant entered into the peaceable possession of the premises on January 14, 1867, as a purchaser at a sale made upon an execution, issued out of the circuit court for the county and state aforesaid, upon a judgment wherein J. H. Mitchell was plaintiff and the plaintiff herein defendant, and that he occupied them in good faith as such purchaser until 1875, when he was evicted therefrom upon a judgment of this court [Case No. 10,083]; that during such occupation he paid $121.55 of taxes duly levied upon said premises and erected thereon a board cabin which still remains, at a cost of $35; that he removed certain fallen and standing timber from said premises for the pur-

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pose of clearing a portion of them for pasture, and that said clearing was a benefit to the premises, and worth the sum of $600.

The plaintiff moves to strike out four separate parts of the counter-claim, which taken together constitute the whole of it, as being irrelevant and redundant. The first allegation asked to be stricken out is the one concerning the circumstances under which the defendant entered and occupied the premises. On the argument it was assumed that this allegation was inserted in the counter-claim to show that the trespass complained of is not within section 385 of the Oregon Civil Code, which provides, that in case of trespass by cutting or carrying away "any tree, timber or shrub on the land of another * * * without lawful authority, * * * if the judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor as the case may be." Counsel for the plaintiff disclaims the right to recover treble damages in this action, the demand in the complaint being for single damages only.

To entitle the plaintiff to recover treble damages, judgment therefor must be demanded in the complaint, so that the defendant may be apprised of the claim, and the facts stated must bring the case within the statute. Newcomb v. Butterfield, 8 Johns. 345; Chipman v. Emeric, 5 Cal. 239; Mooers v. Allen, 2 Wend. 247.

The case made by the complaint being for single damages the allegation in question is so far irrelevant and ought to go out. But if it had been otherwise the allegation would be irrelevant. Where an action is brought for cutting timber, on the land of another, without authority, the defense against a claim for treble damages must be pleaded, and it may be either: (1) That the trespass was casual or involuntary; (2) or that, at the time of the commission thereof, the defendant had probable cause to believe the premises were his own or those of the person under whom he acted; (3) or that the timber was taken from uninclosed woodland for the purpose of repairing a highway or bridge. Civ. Code Or. § 336.

The second one of the defenses appears to have been in the mind of the pleader when this allegation was drawn, but instead of alleging directly that at the time of cutting the timber the defendant had probable cause to believe the premises were his own, the circumstances of the purchase and entry are detailed, from which it may be inferred that he had such cause so to believe. This is pleading the evidence—the probative facts instead of the ultimate ones. Therefore, as a pleading it is irrelevant. Besides, this allegation considered as a defense to a claim for treble damages, is improperly inserted in a counter-claim. It should have been pleaded separately. This counter-claim for taxes paid and improvements made upon the premises is in no way dependent upon the plaintiff's claim for treble damages or the defendant's defense to it. A counter-claim is substantially a cross-action and should not contain anything but the facts necessary to constitute it. If the defendant has any other defense to the action, either absolutely or as to the demand therein for treble damages, he must plead it separately.

As to the payment of taxes by one who holds the premises under color of title in good faith, adversely to the claim of another, I think, it is a proper subject of counter-claim in an action by the true owner for damages for withholding the possession of the premises. It is a cause of action arising out of the transaction set forth in the complaint—the occupation of the premises by the defendant. As was said in this court in Stark v. Starr [Case No. 13,307]: "The expenditure was not made voluntarily by the defendant, but in obedience to the law and for the benefit of the property, and consequently its owner. It is the duty of a party in possession of property, claiming title or interest therein to pay all lawful taxes and charges imposed thereon by public authority. If he neglect to do this, and purchase the property at a sale for these taxes, he acquires no right thereby, because his conduct is deemed fraudulent as against the true owner. As it turns out, these taxes were paid by the defendant for the benefit of the plaintiff. If the former had not paid them the latter must, or allowed the property to have been sold as delinquent. Therefore in estimating the damages to which the plaintiff is entitled for being kept out of possession, the amount of the assessment must be deducted from the gross rents, and the remainder is the true profits or damages." Bright v. Boyd [Case No. 1,875]. It is true that the plaintiff in this action has not sued for mesne profits or damages for withholding the premises eo nomine, but for certain trespasses alleged to have been committed thereon by the defendant. But if the fact is, as stated in this counter-claim, that the plaintiff was at the time in the occupation of the premises as a purchaser in good faith at a sale upon an execution against the property of the plaintiff, then this is substantially an action to recover damages for withholding the possession of the premises, in which the plaintiff may also recover for any particular waste or injury committed by the defendant thereon during his occupation. 1 Chit. Pl. 225.

In such action the plaintiff may omit all claim for damages other than those arising from the alleged waste or injury to the premises, but he cannot by so doing preclude the defendant from showing that such waste or injury was committed while he was in possession of the premises claiming the title thereto, in good faith, adversely to the plaintiff, and thereby prevent him from making any defense to which he may be entitled under these facts.

To enable the defendant to maintain a

counter-claim for the value of improvements made upon the premises it must appear therefrom that the improvements are permanent—affixed to the freehold and still existing—and that they ameliorate or better the condition of the property for the ordinary purposes for which it is owned and used (Stark v. Starr, supra); and that they were made while the defendant or those under whom he claims were in possession under color of title in good faith, adversely to the claim of the plaintiff.

Here, the allegation in the counter-claim, as to the circumstances under which the defendant entered and held possession of the premises as has been stated, contains facts tending to show that the defendant occupied under color of title in good faith, adversely to the plaintiff, but the proper mode of pleading is to allege such facts directly and not other ones tending to prove them.

From the facts stated concerning the alleged improvements it appears that the clearing of the portion of the land for pasture was and is a benefit to the premises, but it does not appear that the cabin is any benefit to the property or what its present value is.

The motion to strike out is allowed as a whole.

NEID (UNITED STATES v.). See Case No. 15,860.

Case No. 10,086.

NEIDLINGER et al. v. INSURANCE CO. OF NORTH AMERICA.

[10 Ben. 254.] [1]

District Court, E. D. New York. Jan., 1879.[2]

MARINE INSURANCE—DAMAGE BY ACTUAL CONTACT OF SEA WATER—DAMPNESS OF A SHIP'S HOLD.

1. The shipper of a cargo of barley, in sacks, from San Francisco to New York, insured it against perils of the seas. The policy contained a memorandum clause by which grain was to be "free from average unless general," also "free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils," also "subject to 20 per cent particular average." The ship met with heavy weather on the voyage and put into Rio, leaking, where, part of her cargo having been discharged, she was repaired and then, having been reloaded, she completed the voyage to New York. On the discharge of the cargo, a portion of the sacks were found to have been wet with sea water, and the barley in them damaged thereby, but the damage on that part of the cargo did not equal 20 per cent of the property insured. But it was found that the malting quality of the rest of the cargo had been destroyed, as it was claimed, by dampness of the hold, arising from the leak, and such damage amounting to more than 20 per cent, a libel was filed against the underwriters to recover the whole loss: *Held*, that, assuming that the damage to the sacks of barley, which were not reached by the sea water, was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas, such damage was not caused by actual contact of sea water with the articles damaged, within the meaning of the policy; and that the insurance company was not liable on the policy.

2. The cases of Woodruff v. Commercial Mut. Ins. Co. (2 Hilt. 130), and Cory v. Boylston Fire & Marine Ins. Co., 107 Mass. 143, commented on.

[This was a libel by Adam Neidlinger and others against the Insurance Company of North America.]

W. W. Goodrich, for libellants.

C. A. Hand, for respondents.

BENEDICT, District Judge. In October, 1876, the libellants obtained from the defendant, by open policy and certificates, insurance to the amount of $17,600 upon 21,068 43/48 bushels of barley from San Francisco to New York on the ship Blue Jacket. The policy was in the usual American form against perils of the seas. By the memorandum clause grain of all kinds was warranted by the assured "free from average unless general," and also "free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." The memorandum was qualified by the certificates, which contained the words, "Subject to 20 per cent particular average."

The barley was shipped in sacks, and the bills of lading issued therefor described the property as so many sacks of barley. There was other barley in the ship—also shipped in sacks—and there was some pig lead, wool, rags, borax and other cargo. The barley was stowed in tiers, the lower tier resting upon a grain ceiling over the pig lead, old sails being spread for dunnage between the ceiling and the ground tier of barley. During the voyage and while the ship was in the South Atlantic, she sprung a leak through a peril of the seas, and thereby sea water was taken into the hold, which came in actual contact with those sacks of barley composing the lower tiers, and with some in the wings. In consequence of the leak, the vessel bore up for Rio, where she arrived on the 15th day of January, having experienced heavy weather and having at times had from 22 to 24 inches of water in her hold. Upon arrival in Rio all the cargo except the barley composing the lower tier and some in the after end of the ship was taken out. The ship was then docked and repaired. The barley and other cargo taken out was then restowed in the ship, and on the 18th day of March the ship sailed for New York, where she arrived without further disaster on the 11th day of May. Upon discharging the cargo in New York, certain of the libellants' bags, especially those

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

[2] [Affirmed by circuit court, 11 Fed. 514.]

composing the lower tier, showed marks of sea water, and were caked and badly damaged by actual contact with sea water.

The evidence will not permit the conclusion that of the libellants' bags a greater number than 5,360 were in actual contact with sea water. Indeed, it is quite evident that the number of bags so damaged was less than 5,360. The rest of the barley was bright in color, and to all external appearance merchantable. But by testing samples it was discovered that the malting quality of the barley had been destroyed, and in consequence it was unsaleable as merchantable barley fit for malting. Accordingly all was sold at auction, when it brought a price far less than the market price of barley fit for malting.

This action was then brought by the owners of the barley against the underwriters, to recover for the loss upon the barley insured by them, as ascertained by the auction sale.

In regard to the 5,360 sacks above mentioned, it may, for the purposes of this case, be considered to have been proven that the damage was caused by actual contact of sea water with those sacks. In regard to the damage to the remainder, it may, for the purposes of this case, be considered to have been shown to have been caused by dampness in the ship's hold. The most favorable view for the libellants is to consider the evidence as warranting the inference that the sea water which leaked into the ship prior to her arrival at Rio, by creating a damp atmosphere in the hold caused germination to commence in the barley, which being thereafter checked by heat, left the barley dry, bright, and to all appearances sound, but incapable of further germination.

It is conceded that the loss on the 5,360 sacks is not sufficient to charge the underwriters—that loss not amounting to 20 per cent of the property insured. But if to the loss on the 5,360 sacks there be added the loss on the remainder, arising from the destruction of the malting capacity, then the amount of loss is sufficient to warrant a recovery upon the policy. The question to be determined, therefore, is, whether the underwriter is liable upon the policy for damage to sacks of barley that were never reached by the sea water, assuming it to have been shown that such damage was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas. Was such damage caused by actual contact of sea water with the articles damaged, within the meaning of the warranty in the policy contained? If so, the libellants are entitled to recover; otherwise, not.

The question thus presented does not appear to have been passed on in the national courts of the United States. It has, however, been considered in the state courts, and the cases there adjudged deserve respectful attention. It will conduce to the understanding of those cases to notice the circumstances under which the warranty in question came to be inserted in policies of insurance, and then to examine in chronological order the adjudications made in regard to the effect produced by the provisions.

In the year 1851 a question arose in the English courts in regard to the liability of an underwriter in a case where hides and tobacco had been shipped together, and the tobacco was injured in flavor by a fetid odor arising from the hides, which had been wet by sea water shipped during the voyage by peril of the seas. The policy contained no limitation of the underwriter's liability other than that contained in the ordinary memoranda, and the plaintiff recovered, upon the ground that the natural and almost inevitable cause of the flavor communicated to the tobacco was the access of sea water to the hides by a peril of the sea. Under such a policy it is not necessary, said Martin, B., "that sea water should be in absolute contact with the injured article." Montoya v. London Assur. Co., 6 Exch. 459.

In the same year the case of Baker v. Manufacturers' Ins. Co., 12 Gray, 603, came before the supreme court of Massachusetts when the liability of the underwriter was asserted in respect to damage to delicate French goods arising from an extraordinary formation of steam and gases occasioned by an extraordinary access of sea water to the hold, caused by perils of the seas.

In consequence of these decisions—as it has been supposed, and as the language of the warranty indicates—the warranty under consideration was thereafter inserted in policies, whereby the property insured is "warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged occasioned by sea perils."

In 1858 the effect of this warranty came to be considered by the court of common pleas in the city of New York, in the case of Woodruff v. Commercial Mut. Ins. Co., 2 Hilt. 130, and upon that case the libellants in this action place their chief reliance. The action was upon a policy similar to the one here sued on, to recover for damage to wheat loaded in sacks. The evidence disclosed three kinds of injury. Some of the sacks were damaged by sea water leaking upon them; other sacks were damaged by dampness arising from the sacks that had been in actual contact with sea water; and there was damage caused by effluvia that arose from hides forming part of the cargo which had been wet by sea water through a peril of the sea. The judgment of the court was that the underwriters were not liable for the damage caused by the effluvia from the hides, but were liable for the other damage.

The ground upon which the court based the distinction drawn between the damage caused by effluvia and that caused by dampness, is

to be found in the opinion delivered by Brady, J., where it is said: "If sea water be communicated by absorption, or makes its way upon any other principle of natural philosophy from the articles wet to any part of the same article, the actual contact contemplated by the policy is created." The same idea is conveyed by the language used in the opinion delivered by Judge Ingraham, when, in concurring with Judge Brady, he says: "The dampness referred to in the warranty is dampness to the article when it has come in contact with sea water."

From these expressions it may be inferred that no damage was considered by the court of common pleas to be chargeable to the underwriter, except such as appeared to have been caused by sea water that had been communicated from one bag to another by absorption, or upon some other principle of natural philosophy; and it seems difficult to understand how the court reached its result upon any other ground.

It is not stated in the opinions that the shipment, constituted as it was, of various sacks of wheat, was considered to be a single article; and unless the decision was that the sea water had passed to all the sacks allowed for in the judgment, it would seem that the sacks damaged by effluvia would have been placed in the same category with those damaged by the vapor of the water,—the effluvia, as well as the vapor, being the natural result of the sea water in the ship. If this be the ground of the distinction that was there made between the damp sacks and those damaged by effluvia only, the case affords little support to the libellants here, for in this case the question is in regard to bags of grain to which sea water was never communicated by absorption or otherwise.

But however the case of Woodruff v. Commercial Mut. Ins. Co. may be understood, its weight as authority in favor of the libellants is more than counterbalanced by the decision of the supreme court of Massachusetts in the subsequent case of Cory v. Boylston Fire & Marine Ins. Co., decided in 1871, and reported in 107 Mass. 146; also in 9 Am. Rep. 14. This was a case upon a policy of insurance similar to that issued to libellants. The loss sought to be recovered arose from damage to champagne wine packed in cases and valued by the case. The ruling was that under such a warranty "it is not enough to bring a case within this clause that perils of the sea should be the efficient and, within the rule laid down in the previous decisions, the proximate cause by which the sea water was shipped which more or less directly operates upon and injures the goods; or that sea water should come in contact with part of the cargo; but it must come into actual contact with the articles for the damage to which the underwriters are sought to be charged."

The result of this ruling was that the underwriter was absolved from liability upon a state of facts curiously resembling, as the court remarks, those in the former case of Baker v. Manufacturers' Ins. Co., where the same tribunal had held the underwriters liable. The difference in result arose simply from the insertion of the warranty under consideration here. The case is directly in point and it is adverse to the claim of these libellants.

I have not overlooked the suggestion made in behalf of the libellants that a distinction between that case and this arises from the fact that there the wine was valued by the case in the policy, while here the policy is open. But this is a distinction without a difference. Inserting in the policy a valuation of the articles by the case does not change the nature of the contract. It is still a policy in gross upon a shipment consisting of different articles (Hernandez v. Sun Mut. Ins. Co. [Case No. 6,415]); and so far as the question under consideration is involved the two policies are alike.

The conclusion reached by the supreme court of Massachusetts commends itself to my judgment. It is certainly in harmony with the letter of the warranty, and as I think with the spirit and intention of the parties; and no arguments have been here presented sufficient to lead me to a different conclusion.

It has been said that the vapor arising from sea water is sea water within the meaning of the warranty. But the difference between a case where damage arises from sea water carried by absorption or capillary attraction, and one where the damage is caused by the vapor evolved from sea water, is palpable. The risk is different in the two cases, not only in degree but in character, because the vapor of water is communicated under different circumstances and in obedience to different laws from those that control the movements of water.

Nor can the position be maintained that the barley shipped by the libellants is to be deemed for the purpose of the insurance to be a single article, and, as in Woodruff v. Commercial Mut. Ins. Co., the insurer be held liable upon the ground that all the damage arose from sea water having been communicated by absorption or having made its way upon some other principle of natural philosophy from one part of the article to another part of the same article. For, however the fact may have appeared in Woodruff v. Commercial Mut. Ins. Co., in this case the evidence forbids the conclusion that sea water was ever communicated to any sacks except the 5,360 sacks that displayed marks of the contact of sea water. It is, therefore, impossible upon the evidence in this case to hold that the disputed damage was occasioned by the actual contact of sea water with a part of the article insured. Nor can a shipment of grain in bags be deemed to consist of a single article.

In a case of insurance upon hides before the supreme court of the United States (Bias

v. Chesapeake Ins. Co., 7 Cranch [11 U. S.] 416) the insurance was described as an "insurance in gross on a cargo consisting of a distinct number of articles." If such be the character of an insurance upon hides, certainly an insurance upon grain in sacks cannot be said to consist of a single article.

But it is said, if this be an insurance of many different articles in gross the different kernels of grain constitute the articles of which it is composed, and inasmuch as it would be absurd to suppose an intention by the warranty to compel the insurer to show actual contact of sea water with each kernel of grain, it must have been the intention to treat the barley as consisting of a single article when applying the provision of the warranty. If this were the intention no advantage would result to the libellants, for, as before stated, the damage in dispute did not result from the contact of sea water, but from the contact of vapor. Besides, policies of insurance are commercial contracts, to be construed and applied in view of the methods pursued by the merchants in their dealings with each other, and among merchants no notice is taken of the possibility that some of the kernels in a sack of grain that is wet may escape contact with the water; but in the absence of evidence to the contrary they act upon the assumption—sufficiently accurate for all practical purposes—that when sea water comes in contact with a sack of grain it will by absorption be brought in contact with all the grain in the sack. And in such case they would, when ascertaining the part damaged, treat each sack as constituting a single article. The more reasonable supposition, therefore, is, that it was the intention of the parties to this contract that in applying the warranty each sack of grain should be deemed a distinct article. So understood, the warranty will read: "This grain is warranted free from damage or injury from dampness, unless such dampness be caused by actual contact of sea water with the damp sack." If the policy had contained a warranty so worded it would scarcely have been claimed that the insurer was liable for any damage outside of the 5,360 bags which showed marks of the actual contact of sea water.

My conclusion, therefore, is that the libellants have failed to show that a loss equal to 20 per cent of the value insured was occasioned by any peril insured against, and their libel must, therefore, be dismissed, with costs.

[The libelants took an appeal to the circuit court. The decree above was affirmed. 11 Fed. 514.]

[See Case No. 1,569.]

Case No. 10,087.

The NEIL COCHRAN.

[The case reported under above title in Browne, Adm. 162, is the same as Case No. 7,996.]

Case No. 10,088.

NEIL v. ABBOTT.

[2 Cranch, C. C. 193.] [1]

District Court, District of Columbia. Jan. 20, 1820.

LIMITATIONS OF ACTIONS — OFFER OF COMPROMISE—EFFECT.

The offer of terms of compromise is not sufficient to take the case out of the statute of limitations.

[See Ash v. Hayman, Case No. 572; Bank of Columbia v. Sweeny, Id. 882.]

To take the case out of the statute of limitations, the plaintiff offered evidence of the acknowledgments of the defendant's intestate, Campbell, when offering a compromise, viz. that Campbell acknowledged the debt to be due by Campbell and Matlock, and offered to pay one-half, although he said he was discharged by the insolvent law of Missouri, if the plaintiff would give him time.

Mr. Key, for defendant, objected to this evidence, and cited Baird v. Rice, 1 Call, 26.

Mr. Marbury, contra, cited 3 Esp. 113.

THE COURT (THRUSTON, Circuit Judge, contra) decided that the acknowledgment, under those circumstances, could not be given in evidence. Verdict for the defendant.

NEIL (McKINNEY v.). See Case No. 8,865.

NEIL (PECK v.). See Cases Nos. 10,892 and 10,893.

Cas No. 10,089.

In re NEILL.

[8 Blatchf. 156; 13 Int. Rev. Rec. 29; 5 Am. Law Rev. 566; 4 Am. Law Rep. U. S. Cts. 153.] [2]

District Court, S. D. New York. Jan. 27, 1871.

ARMY AND NAVY—POWER TO DISCHARGE—ACTS OF FEBRUARY 24 AND JULY 4, 1864—SECRETARY OF WAR—STATE COURTS—HABEAS CORPUS—RETURN.

1. Under section 20 of the act of February 24, 1864 (13 Stat. 10), and section 5 of the act of July 4, 1864 (13 Stat. 380), the power of discharging from service in the army of the United States minors under the age of eighteen years, is taken away from the courts and is confided wholly to the secretary of war; and the whole power of discharge is thereby given to the secretary of war in regard to minors, whatever their ages when they enlisted or when they apply for discharge.

2. A state court, judge or officer is without jurisdiction to release a soldier, on habeas corpus, when is appears, prima facie, that he is held to service in the army by an officer acting under the authority of the United States and claiming to hold him as an enlisted soldier.

[Cited in McConologue's Case, 107 Mass. 159.]

3. In return to such writ, such officer is not bound to produce the body of the soldier.

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

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 5 Am. Law Rev. 566, contains only a partial report.]

4. Under the statute of New York (2 Rev. St. 566, § 32), a return to a writ of habeas corpus issued by a state judge, need not be verified by oath, when such return is made by an officer of the army of the United States.

5. Where such officer, for not producing the body of the soldier, and for not making a sworn return to the writ, was imprisoned for contempt, by the state court, this court, on a writ of habeas corpus, discharged him from imprisonment. Such power of discharge exists under section 7 of the act of March 2, 1833 (4 Stat. 634), and section 1 of the act of February 5, 1867 (14 Stat. 385).

[Cited in U. S. ex rel. Bull v. McClay, Case No. 15,660; Re Bull, Id. 2,119; State v. Bolton, 11 Fed. 218; Re Neagle, 39 Fed. 851; Cunningham v. Neagle, 135 U. S. 74, 10 Sup. Ct. 672.]

[In the matter of Thomas H. Neill.]

Noah Davis, Dist. Att'y, and Asa B. Gardner, for the United States and the relator.

Aaron J. Vanderpoel, for the state sheriff.

BLATCHFORD, District Judge. On the 4th of January, 1871, a petition was presented to the Honorable John H. McCunn, a judge of the superior court of the city of New York, by one John Casey. The petition set forth, that the said Casey "is at present restrained of his liberty at Fort Columbus, a military depot, in the port of New York; that said John Casey is a minor and under the age of twenty-one years;" and that "the cause or pretence of such imprisonment and restraint, according to the best knowledge and belief of your petitioner, is, that said John Casey, while such minor as aforesaid, enlisted in the United States army, at the city of New York, on or about the 23d day of December, 1870, without the knowledge or consent of his parents, who are both living." The petition prayed, that a writ of habeas corpus might issue, directed "to the officer in command of said Fort Columbus, in said port of New York, commanding him to produce the body of said John Casey." The judge to whom the petition was presented, acting as an officer authorized to perform the duties of a justice of the supreme court at chambers (2 Rev. St. 564, § 23, subdiv. 2), granted a writ of habeas corpus, on the 4th of January, 1871, directed to "the officer in command of Fort Columbus, a military depot in the port of New York, General Neill," commanding him to produce the body of John Casey, together with the time and cause of his imprisonment and detention, before the said judge, in the said superior court, on the 9th of January, 1871. The writ was issued and duly served.

The time for making return to the writ was extended by the attorney for Casey until the 11th of January, 1871. On that day, General Neill made to the judge who issued the writ a written return, signed by him, but not verified by his oath, in the following words: "Head-Quarters, Principal Depot General Recruiting Service, Fort Columbus, New York Harbor, January 11th, 1871. To the Honorable John H. McCunn, Judge of the Superior Court of the City of New York: Sir. I have the honor to make return to the within writ of habeas corpus, issued in the case of John Casey, a private soldier in the service of the United States, that the said John Casey is a regular enlisted soldier, and held to service in the army of the United States, by virtue of said enlistment; that the said John Casey was regularly enlisted into the service of the United States, according to the laws governing the recruiting service for enlisting recruits, by his signing the proper statement or declaration required for recruits to take, and that the paper here annexed, marked 'A,' is one of the duplicate enlistment papers in the case of the said John Casey; that the oath was regularly administered by an officer authorized to administer oaths, and that the recruit was regularly examined by the surgeon appointed for that purpose; that, under the decisions of the judge advocate general of the army, it is not my duty to produce the body of said John Casey in court; that such declination and denial of the jurisdiction of your honor is a matter of official duty, and not from any disrespect or contempt of your honorable court. Your attention is respectfully invited to the enclosed extract from the Digest of Opinions of the Judge Advocate General of the Army, (published by authority,) and points of law, which constitute the precedents on which this return is based. I am, sir, very respectfully, your obedient servant. Thos. H. Neill, Lt.-Col. 6th U. S. Cavalry, and Bvt.-Brigadier General U. S. A., Commanding Depot."

Annexed to the return were what purported to be copies of the enlistment papers referred to in the return. Among them was an oath of enlistment and allegiance, signed by Casey, and subscribed and sworn to by him, December 23d, 1870, before "F. E. Camp, Captain U. S. Army, Recruiting Officer." This oath was in the following words: "State of New York, Town of New York, ss: I, John Casey, born in Brooklyn, in the state of New York, and by occupation a plumber, do hereby acknowledge to have voluntarily enlisted, this twenty-third day of December, 1870, as a soldier in the army of the United States of America, for the period of five years, unless sooner discharged by proper authority, and do also agree to accept from the United States such bounty, pay, rations and clothing as are or may be established by law. And I do solemnly swear, that I am twenty-one years and eleven months of age, and know of no impedient to my serving honestly and faithfully as a soldier for five years, under this enlistment contract with the United States. And I, John Casey, do also solemnly swear, that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whomsoever, and that I will observe and obey the orders of the president of the United States, and the orders of the offi-

cers appointed over me according to the rules and articles of war." Another of the enlistment papers was a certificate signed by Captain Camp, certifying, on honor, that he had carefully examined Casey, agreeably to the general regulations of the army, and that, in his opinion, he was free from all bodily defects and mental infirmity which would in any way disqualify him from performing the duties of a soldier. Another of the enlistment papers was a certificate signed by Captain Camp, certifying, on honor, that he had minutely inspected Casey previously to his enlistment, that he was entirely sober when enlisted, that, to the best of his, Camp's, judgment and belief, Casey was of lawful age, and that he, Camp, had accepted and enlisted him into the service of the United States, under such contract of enlistment, as duly qualified to perform the duties of an able bodied soldier, and, in doing so, had strictly observed the regulations governing the recruiting service. He also certified a description of Casey's person. Another of the enlistment papers was a declaration, signed by Casey, in the presence of a subscribing witness, and dated December 23d, 1870, in the words following: "I, John Casey, desiring to enlist in the army of the United States, for the term of five years, do declare, that I have neither wife nor child, that I have never been discharged from the United States service on account of disability, or by sentence of a court martial, or by order before the expiration of the term of enlistment, and that I am of the legal age to enlist of my own accord, and believe myself to be physically qualified to perform the duties of an able-bodied soldier." Another of the enlistment papers was a paper containing the details of the examination of Casey as to his physical condition. The extract and points of law referred to in the return were annexed thereto in print. The body of Casey was not produced with the return.

On the 12th of January, 1871, Judge McCunn issued, under his hand and seal, a warrant, in the name of the people of the state of New York, directed to the sheriff of the city and county of New York, and in the words following: "It appearing satisfactorily to me, on oath, that Thomas H. Neill, the officer in command at Fort Columbus, in the port of New York, to whom a writ of habeas corpus was directed and delivered, commanding him to bring before me John Casey, in the said writ named, has refused to obey the said writ, according to the command thereof, in not producing the said John Casey before me, and also by not making a full and explicit return to said writ, within the time limited by law, and no sufficient excuse having been shown for such refusal, these are, therefore, to authorize and command you, in the name of the people of the state of New York, forthwith to arrest the said Thomas H. Neill, and to bring him immediately before me, at part one of the superior court of the city of New York, in the said county of New York." Under such warrant, the said sheriff, on the 17th of January, 1871, arrested General Neill, and took him into custody.

At this stage of the proceedings, a petition was presented to me by General Neill, praying that a writ of habeas corpus might be issued to the said sheriff, to inquire into the cause of his imprisonment. A copy of the warrant of attachment was annexed to the petition, and the petition set forth the causes of the issuing of the warrant, in substance, as they are above stated, namely, the issuing of such writ of habeas corpus by Judge McCunn, and the making of such return to it. The petition averred, that the ground for the issuing of the attachment was, that General Neill had not produced Casey before Judge McCunn, on the writ of habeas corpus. The petition also stated, that General Neill had submitted to the service of the process of attachment by the sheriff, at his post of Fort Columbus, relying on this court for relief under the statutes of the United States, and from a belief that, with such remedy, it did not befit him to resist by force such process of attachment; that his action in the premises had been in accordance with the orders of the secretary of war; that the issuing of the attachment was coram non judice; and that he was, under it, restrained of his liberty, for acts done or omitted to be done by him in pursuance of a law of, and under color of the rightful authority of, the United States, he being lieutenant-colonel of the Sixth United States cavalry, and a brevet brigadier-general in the United States army, and commandant of the post of Fort Columbus, a military site of the United States. This petition was acccompanied by an affidavit of the military officer who presented to Judge McCunn the return of General Neill, showing its presentation, and that the judge refused to receive it because Casey was not produced.

On this petition and affidavit, I issued, on the 17th of January, 1871, a writ of habeas corpus to the said sheriff, commanding him to produce General Neill forthwith before this court, together with the time and cause of his imprisonment and detention. The writ was served on the sheriff, and he produced General Neill before this court, and made return, that he held him in custody by virtue of said warrant of attachment, of which a copy was annexed to his return.

This return was traversed by the United States, by its attorney, and by General Neill, as relator, in person, by a traverse averring, that, "while it is true that said sheriff has arrested the said relator by virtue of the said writ of attachment annexed to said return, and holds him in custody thereunder, yet the said arrest and detention are unlawful and in violation of the constitution and laws of the United States, for that the several facts and allegations in the petition of the said relator, in respect to the proceedings before the

said, the Hon. John H. McCunn, and in respect to the return to the writ issued by him, and the several facts stated in said return, are, in all things, true, in substance and matter of fact, as alleged and set forth in said petition, and they pray leave to refer to said petition and said return, with the same force and effect as though embodied herein." The sheriff put in a reply to this traverse, denying the same and averring that, "if the same is true, it is not sufficient, and this respondent ought not, by reason of any matter therein contained, to be prevented from executing the attachment held by him."

On the issues thus raised oral testimony was taken before me, which disclosed the state of facts above set forth, and the further fact, that, on the presentation of the return to Judge McCunn, the counsel for Casey objected to it, on the ground that it was not verified by oath, and also that the body of Casey was not produced, and that the judge thereupon refused to receive the return as sufficient, adding that he would receive no return until Casey was produced.

In the case of In re Riley [Case No. 11,834], in September, 1867, it was decided by me, in the district court for this district, following two prior decisions of the same court, made by Judge Betts, that, by virtue of the provisions of the twentieth section of the act of February 24, 1864 (13 Stat. 10), and of the fifth section of the act of July 4, 1864 (13 Stat. 380), the power of discharging from service in the army of the United States minors under the age of eighteen years, (the enlistment of minors above the age of eighteen years, without the consent of their parents or guardians, being lawful,) was taken away from the courts, and was confided wholly to the secretary of war; and that the whole power of discharge was thereby given to the secretary of war in regard to minors, whatever their ages when they enlisted or when they applied for discharge. The general term of the supreme court of New York for this district, in January, 1867, in the case of In re O'Connor, 48 Barb. 258, decided that congress had power to pass an act prohibiting the state judges from interfering with enlistments in the army; that it had done so by the two acts of 1864 and the act of February 13, 1862 (12 Stat. 339); and that the provision made by the acts of 1864 for a discharge by the secretary of war, on certain terms and conditions, of minors enlisted in the army, must be held to forbid other modes of obtaining discharges, and to be an assumption of exclusive jurisdiction, in cases of the kind, by the federal government. This decision was made on a return which was in all essential particulars like the return made to Judge McCunn in the case of Casey, and stated that the officer (General Butterfield) denied the jurisdiction of the state court, and refused to produce the body of the soldier. Such decision of the supreme court has not been overruled by any superior authority, and was binding upon Judge McCunn, who, in issuing the writ of habeas corpus which he issued, acted, as before stated, under the statute of New York, solely as a justice of the supreme court at chambers. The decision does not show that the return made by General Butterfield was verified by oath, and it is understood that it was not. The decision was concurred in by Justices Ingraham and Clerke, and dissented from by Mr. Justice Leonard. But, in July, 1867, the case of James Stokes, Jr., like that of Casey in all its features, came before Judge Leonard, and he dismissed the writ of habeas corpus on the return. The same course was taken by Judge Loew, of the New York common pleas, in the case of Thomas Somers, in December, 1869, and by Mr. Justice Barnard, of the New York supreme court, in the same month, in the case of Herman Hattenhorst. These three cases were subsequent to the decision in the case of O'Connor, and so was the decision in Rielly's Case, 2 Abb. Prac. (N. S.) 334, made in March, 1867, by Judge Daly, of the New York common pleas, in which case, which was one like that of Casey, he held that, on the return, the writ must be discharged. The same course had been taken by Mr. Justice Barnard, in October, 1866, in the case of David Clarke, and, in November, 1866, in the case of Isaac Kent. I have before me the original papers in the cases of Stokes, Somers, Hattenhorst, Clarke, and Kent, with the signatures upon them of the several judges referred to, discharging the writs on the returns. In all of them, as well as in the case of Rielly, the officer to whom the writ was directed stated, in his return, that he denied the jurisdiction of the state court, and refused to produce the body of the soldier, and the return was, in substance, the same as that in the case of Casey. In all of them, except that of Rielly, the original papers show that the return of the officer was not verified by oath. I have not before me the original papers in the case of Rielly, but the report of the case does not show that the return was verified by oath, and it is understood that it was not.

These decisions were all made on the ground that the state court, judge or officer is utterly without jurisdiction to release the soldier on habeas corpus, when it appears, prima facie, that he is held to service in the army by an officer acting under the authority of the United States and claiming to hold him as an enlisted soldier; and that the inquiry whether he is an enlisted soldier, or whether he could be lawfully enlisted, is one of which the state tribunal, from that moment, ceases to have jurisdiction. In the case of Casey, not only did this appear from the return made by General Neill, but it also appeared from the petition presented to Judge McCunn for the allowance of the writ. The petition alleged that Casey "was restrained of his liberty at Fort Columbus, a militiary depot, in the port of New York," and that the cause of his re-

straint was, that he "enlisted in the United States army, at the city of New York, on or about the 23d day of December, 1870," and prayed for a writ to be issued, "directed to the officer in command of said Fort Columbus, in said port of New York." The only allegation in the petition as to any illegality or irregularity in his enlistment was, that he enlisted while a minor, under the age of twenty-one years, without the knowledge or consent of his parents, who were both living. The petition itself, therefore, showed, on its face, that Casey was held to service in the army, by an officer acting under the authority of the United States, and claiming to hold him as an enlisted soldier, and, therefore, showed that Judge McCunn had no jurisdiction to issue the writ. But if, under the statute of New York, it was imperative on the judge to issue the writ, his want of jurisdiction in the case appeared clearly from the return.

It was not necessary that the return should be verified by oath. I must regard the decisions made in the cases I have referred to, where the returns made by the military officers were none of them verified by oath, as authoritative that the oath was not necessary. The statute of New York (2 Rev. St. 566, § 32) provides that, except where the person making the return "shall be a sworn public officer, and shall make his return in an official capacity, it shall be verified by his oath." General Neill was a sworn public officer, within the meaning of this provision, and he made his return in his official capacity. The writ issued by Judge McCunn was addressed to "the officer in command of Fort Columbus, a military depot, in the port of New York, General Neill." The return is headed: "Headquarters Principal Depot, General Recruiting Service, Fort Columbus, New York Harbor," and General Neill's signature to the return is: "Thos. H. Neill, Lt. Col. 6th U. S. Cavalry, and Bvt. Brigadier General U. S. A., Commanding Depot." The writ, based on the petition, treated him as an officer, and as an officer of the United States army, and as a public officer, and as an officer in command of the military depot where Casey was restrained of his liberty, and as the officer who, in his official capacity as such commandant, was restraining Casey of his liberty, and it called upon him to make his return in such official capacity, and he did so. He is an officer of the United States, and a public officer, appointed by the president by and with the advice and consent of the senate, under article 2, section 2, subdivision 2, of the constitution of the United States. He is, also, an executive officer of the United States, under the second article of such constitution, and, as such, required, by article 6, section 3, of such constitution, to take an oath or affirmation to support such constitution. The form of such oath or affirmation is prescribed by section 1 of the act of June 1, 1789 (1 Stat. 23), and by section 4 of the same act, all officers thereafter to be appointed under the authority of the United States are required, before they act in their respective offices, to take the same oath of office. Furthermore, by the eighteenth section of the act of January 11, 1812 (2 Stat. 673), every officer is required to take and subscribe an oath or affirmation that he will bear true faith and allegiance to the United States, and that he will serve them honestly and faithfully against their enemies and opposers whomsoever, and that he will observe and obey the orders of the president of the United States, and the orders of the officers appointed over him, according to the rules and articles of war. Being found acting as such public officer, and being treated as such by the writ issued to him, he must, in such collateral proceeding, be regarded as having taken the required oaths and become a sworn public officer.

In either event, therefore, whether General Neill was or was not required to make a return to the writ, he was not required to make a sworn return. If there was no jurisdiction to issue the writ, no return at all was necessary. If a return was required, he was, by the statute, exempted, as a sworn public officer, from verifying it by oath.

Nor was he bound to produce the body of Casey. It was held by the supreme court of the United States, in the case of Ableman v. Booth, 21 How. [62 U. S.] 506, 523, that, where a state court or judge is without jurisdiction to release on habeas corpus, in a given case, a person held in custody under the authority of the United States, it is the duty of the officer who so holds such person in custody not to take such person, or suffer him to be taken, before the state court or judge, on the habeas corpus, and, also, his duty, if the state court or judge attempts to control him in any respect in his custody of such person, to resist such attempt by force. That case is also an authority to the point, that there was no power in the state judge to issue the writ of habeas corpus in the case of Casey, on the facts set forth in the petition for the writ.

As the state judge had no jurisdiction to proceed in the case of Casey, certainly after the return made by General Neill, and no jurisdiction to require the body of Casey to be produced, or to require any other or further return to the writ, he was without jurisdiction to issue the warrant of attachment against General Neill, which states, on its face, that it is issued solely because General Neill did not produce the body of Casey, and did not make any other return to the writ of habeas corpus than the return which he is shown to have made.

The next question is, whether the court has power, on the writ of habeas corpus issued to the sheriff, to release General Neill from the custody in which he is so held, under the warrant of attachment thus issued without jurisdiction. The seventh section of the act of March 2, 1833 (4 Stat. 634), provides, that "either of the justices of the supreme

court or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus, in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof, anything in any act of congress to the contrary notwithstanding; and, if any person or persons to whom such writ of habeas corpus may be directed, shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding six months, or by either, according to the nature and aggravation of the case." The first section of the act of February 5, 1867 (14 Stat. 385), provides, "that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus, in all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States." The section then goes on to provide as to the application for the writ, its award, its form, the return to it, the joining of issue, the hearing, the penalties for not obeying it, and appeals from the final decision upon it, and concludes as follows: "And, pending such proceedings on appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty, in any state court, or by or under the authority of any state, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void."

By the terms of the warrant of attachment, General Neill is in custody for not producing the body of Casey before the state judge, and for not making any other return than the one he made to the state writ of habeas corpus. Whether the retaining of the body of Casey and the making no different return to the writ be regarded as acts done by General Neill, or omissions by him to do acts, he acted, in retaining the body of Casey, and in refusing to produce him before the state judge, and in denying the jurisdiction of the state judge, and in not making any other return than the one he did make, in pursuance of his duty as an officer of the army of the United States, who, under the laws of the United States, was charged with the custody of Casey, as an enlisted soldier of the army, and was bound to maintain such custody as against the unlawful interference of a state judge. He acted, therefore, "in pursuance of a law of the United States," within the meaning of the seventh section of the act of 1833; and he is restrained of his liberty in violation of a law of the United States, within the meaning of the first section of the act of 1867. This court is, therefore, bound to discharge him from the custody in which he is held by virtue of the warrant of attachment.

The same conclusion I have arrived at was reached by the district judge of the United States for the district of Kentucky, in the case of In re Farrand [Case No. 4,678], in December, 1867. In that case, a state court issued a writ of habeas corpus to an officer of the army of the United States, to produce one Johnson. The officer made a return stating that the man was a duly enlisted soldier in the army of the United States, and annexing copies of his enlistment papers, in substance the same as in the case of Casey, and denying the jurisdiction of the court, and declining to obey the writ. The state court, nevertheless, proceeded and made an order directing that the soldier be discharged. The officer refused to obey such order and continued to hold the soldier by virtue of his enlistment. The state court then proceeded against the officer by process of contempt, and he was taken into custody under such process, and, while in confinement, a writ of habeas corpus was issued by the district judge of the United States for the district of Kentucky, on his application, to the state marshal who had him in custody under such process. The district judge, on these facts, discharged the officer from the custody of the state marshal, holding that the proceedings in the state tribunal were without jurisdiction, and that the federal judge had power to discharge the officer from the state custody. A similar power of discharge was exercised by the federal court in the cases of Ex parte Robinson [Id. 11,935]; Ex parte Jenkins [Id. 7,259]; and Ex parte Sifford [Id. 12,848]. The relator is discharged.

Case No. 10,090.

In re NEILSON.

[7 N. B. R. 505.] [1]

District Court, E. D. Michigan.

PRACTICE IN BANKRUPTCY—MOTION TO SET ASIDE DEFAULT—WHEN TOO LATE.

A bankrupt moved to set aside his default for not appearing on the return day of the order to show cause why he should not be declared a bankrupt, on the ground that the debt of the petitioning creditor was not provable, as it was based wholly upon the sale of intoxicating liquors and therefore void. *Held*, that the motion

[1] [Reprinted by permission.]

comes too late and without any excuse being offered or pretended for the delay; that the defense when made by the debtor himself founded as it is in a violation of the law, is not to be favored by the courts.

[Cited in Re Meade, Case No. 9,370.]

Motion by the bankrupt [J. Neilson] to set aside his default for not appearing to the order to show cause why he should not be declared a bankrupt, and the adjudication thereon on the grounds: 1. For want of service of the order, and, 2. That the debt of the petitioning creditor is not provable.

Mr. Brownson (Van Dyke & B.), for the motion.

H. M. Duffield (D. B. & H. M. D.), opposed.

LONGYEAR, District Judge. The first ground of motion is abandoned and the motion is left to rest entirely on the second. The ground of motion is based upon the following statement in Neilson's affidavit: "That he has a good and substantial defense to the said petition, the claim therein mentioned being wholly based upon the sale of intoxicating liquors, and therefore void." This defense, when made by the debtor himself, founded as it is in a violation of the law by himself, is not one to be favored by the courts, especially when it is considered that except in a few isolated instances the law is practically a dead letter upon the statute book. And hence, while this court holds itself bound to enforce that law in all cases which are brought within its letter, it will insist in all cases that the facts must be laid before it fully and particularly, in order that the court may see that the case comes within the law. All debts or claims founded upon the sale of intoxicating liquors are not void by the statute. Hence, the statement of the simple fact that the claim is founded upon a sale of intoxicating liquors is not sufficient. The facts of the sale must be stated in order that the court may see that the case comes within the statute. This is not done, and hence the affidavit is entirely and fatally defective.

But there is another full and complete answer to this motion, and that is the delay in making it, without any excuse being offered or even pretended therefor. Adjudication passed on the 6th of November, 1872. Neilson had legal personal notice of that fact on the 8th. On the 9th he furnished the messenger the list of his creditors, as required by the act. On the 12th the case was duly referred to the register, and it is not until the 19th that this motion is made. Under these circumstances the motion comes too late, and could in no case be entertained without the most ample and satisfactory excuse for the delay, and especially so in view of the character of the defense proposed to be made as indicated in Neilson's affidavit. The motion is denied.

Case No. 10,091.

NEILSON v. GARZA.

[2 Woods, 287.] [1]

Circuit Court, E. D. Texas. March Term, 1876.

CONSTITUTIONAL LAW—STATE INSPECTION LAWS—CHARGES—REGULATION OF COMMERCE—REVISION BY CONGRESS.

1. The right to make inspection laws is not granted to congress, but is reserved to the states; nevertheless, it is subject to the paramount right of congress to regulate commerce with foreign nations and among the several states.

2. If any state, as a means of executing its inspection laws, imposes any duty or impost on imports or exports, such duty or impost is void if it exceeds what is absolutely necessary for executing such inspection laws.

3. As the article of the constitution of the United States which prescribes the limit within which inspection charges shall be kept, goes on to provide that "all such laws shall be subject to the revision and control of congress," congress is the proper authority to decide whether a charge or duty is or is not excessive.

[Cited in Turner v. Maryland, 107 U. S. 55, 2 Sup. Ct. 59; Patapsco Guano Co. v. Board of Agriculture, 52 Fed. 694.]

4. Therefore if a law passed by a state is really an inspection law, it must stand until congress sees fit to alter it, even though the fee allowed by it is in effect an impost or duty on imports or exports.

5. The scope of inspection laws is very large and is not confined to articles of domestic produce or manufacture, but applies also to articles imported and to those intended for domestic use.

6. The act of the legislature of Texas, approved October 14, 1871 [Gen. Laws 1871, p. 112], and the further act, approved March 23, 1874 [Laws 1874, p. 33], entitled "for the encouragement of stock-raising and the protection of stock-raisers," are inspection laws and are constitutional.

[This was a bill brought by Henry Neilson against Mariana Trevino Garza, state inpector of hides for Cameron county, Tex., for the purpose of testing the constitutionality of the Texas inspection laws.] Heard upon pleadings and evidence for final decree.

Stephen Powers and Nestor Maxan, for complainant, cited Gibbons v. Ogden, 9 Wheat. [22 U. S.] 203; Brown v. Maryland, 12 Wheat. [25 U. S.] 419; Story, Const. §§ 1004, 1017, 1024; Clintsman v. Northrop, 8 Cow. 46; Hancock v. Sturges, 13 Johns. 331; Ferris v. Ccles, 3 Caines, 212; Shoemaker v. Lansing, 17 Wend. 327.

J. R. Cox, for defendant.

BRADLEY, Circuit Justice. The complainant in this case resides in Matamoras, Mexico, and is largely engaged in the business of importing hides from that city to Brownsville, in Texas, and sending the same thence via the port of Brazos Santiago, in Texas, to New York.

The defendant is inspector of hides and animals for Cameron county, Texas, at Brownsville, appointed and acting under an

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

act of the legislature of Texas, approved October 14, 1871, and a further act, approved March 23, 1874, entitled for "the encouragement of stock raising and the protection of stock raisers." By virtue of his said office, the defendant claims and exercises the right to inspect the hides imported as aforesaid by the complainant, and to exact and receive and does exact and receive therefor, in accordance with said law, fees at the rate of from six to ten cents per hide, according to the number inspected.

The complainant contends that this exaction is in reality an impost or duty on the imporation or exportation of said hides, and that it is contrary to those clauses of the constitution of the United States which declare that congress shall have power "to regulate commerce with foreign nations and among the several states;" and that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." It is not pretended that congress has granted any consent in the case; and the complainant insists that congress, in making the importation of hides free from duty, has regulated the subject, and no state regulation can have any force or effect, but all such regulations are void.

If the state law of Texas, which is complained of, is really an inspection law, it is valid and binding unless it interferes with the power of congress to regulate commerce, and if it does thus interfere, it may still be valid and binding until revised and altered by congress. The right to make inspection laws is not granted to congress, but is reserved to the states; but it is subject to the paramount right of congress to regulate commerce with foreign nations, and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. How the question, whether a duty is excessive or not, is to be decided, may be doubtful. As that question is passed upon by the state legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, in another case. As the article of the constitution which prescribes the limit goes on to provide that "all such laws shall be subject to the revision and control of congress," it seems to me that congress is the proper tribunal to decide the question, whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until congress shall see fit to alter it.

Then we are brought back to the question whether the law is really an inspection law. If it is, we can not interfere with it on account of supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods. The complainant contends that it is not an inspection law; that inspection laws only apply legitimately to the domestic products of the country, intended for exportation; and that no inspection is actually required in this particular case, but a mere examination to see if the hides are marked, and who imported them, etc., duties which belong to the entry of goods, and not their inspection.

No doubt the primary and most usual object of inspection is to prepare goods for exporation in order to preserve the credit of our exports in foreign markets. Chief Justice Marshall, in Gibbons v. Ogden, says: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or it may be, for domestice use." 9 Wheat. [22 U. S.] 203; Story, Const. § 1017. But in Brown v. Maryland, he adds, speaking of the time when inspection takes place: "Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land." 12 Wheat. [25 U. S.] 419; Story, Const. § 1017. So that, according to Chief Justice Marshall, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation. All housekeepers who are consumers of flour know what a protection it is to be able to rely on the inspection mark for a fine or superior article. Bouvier defines inspection as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict. verb. "Inspection." The removal or destruction of unsound articles is undoubtedly, says Chief Justice Marshall, an exercise of that power. Brown v. Maryland, supra; Story, Const. § 1024. "The object of the inspection laws," says Justice Sutherland, "is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets." Clintsman v. Northrop, 8 Cow. 46. It thus appears that the scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exporation, but applies to articles

imported, and to those intended for domestic use as well.

An examination of some of the actual inspection laws of the different states shows that this is the fact: Thus, in Alabama, the city authorities of Mobile are authorized to appoint inspectors, and to adopt regulations (to be approved by the governor) for the inspection of staves, tobacco, pitch, tar, turpentine, rosin, fish, flour and oil, within the limits of the city. Many of these articles must be articles of import. In Massachusetts, fish intended for exportation are to be inspected, whether inspected previously in another state or not. Pearson v. Purkett, 15 Pick. 264. In Kentucky, under the inspection laws of that state, imported salt cannot be sold in the state until it has been inspected, and three cents inspection fees are chargeable for each barrel inspected. The inspection laws of North Carolina are very full, and, amongst other things, provisions and forage imported from out of the state, such as beef, pork, fish, flour, butter in firkins, cheese in boxes, hay or fodder, bacon in hogsheads, etc., must be inspected before they can be sold, on pain of $100 penalty, and a scale of inspection fees is fixed by law. It is true the constitutionality of these laws has not been tested, but they show what range inspection laws have taken, and what is generally regarded as within their scope.

Now, the law in question is a general law of the state of Texas; it purports to be an inspection law, to encourage stock raising and to protect stock raisers; it makes each county of the state, except certain counties named, an inspector's district, for the inspection of hides and animals; and creates the office of inspector, to be elected by the voters of the county; it requires of him a bond and oath of office; it requires him to keep a book of records of his inspections; it requires him to examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment; and all animals driven or sold in his district for slaughter to packeries or butcheries; it directs the method of inspecting, branding and recording animals and hides; it requires him to prevent the sale or removal out of the county of hides or animals upon which the brands can not be ascertained, unless identified by proof, etc.; it gives him power to seize and condemn unbranded animals or hides. Various other regulations are imposed in the act. By the sixteenth section, it is provided that any person may ship from any part of the state any hides or animals imported into the state from Mexico, and shall not be required to have the same inspected: provided, he has first obtained the certificate of the inspector or deputy inspector of the county into which the same were imported, certifying the date of the importation thereof, the name of the importer and of the owner, and of the person in charge of the same, the name of the place where the same were imported, together with the number of hides and animals so imported, and a description of their marks and brands (if any there be) by which the same may be identified. By the 17th section, it is declared that inspectors shall be allowed to charge and collect the same fees for the services which they are authorized to perform by the terms of section 16 as are allowed in other cases thereafter provided. The fees referred to are those allowed for inspection, which are, as before stated, from six to ten cents per hide, according to the number inspected.

Now, it is contended that the examination and certificate required by the 16th section, in order to be allowed to export out of the state hides imported from Mexico, is not an inspection, but is expressly denominated otherwise. "Shall not be required to have the same inspected," are the words, it is true. But the thing which is required, though not such an inspection as is usual and customary in other cases, is, nevertheless, an actual inspection. The exporter must obtain the certificate of the inspector, or his deputy, of the county into which the hides were imported, certifying (note what things are to be certified) the date of the importation, the name of the importer and of the owner, and of the person in charge, name of the place where imported, number of hides and animals imported, and description of their marks and brands, if any there be, by which they can be identified. What is this but inspection? The object is to subject the hides or animals to the examination of the official inspector, that he may note everything about them, serving to their identification, ownership, etc.

I do not say that such an inspection as this is necessary or expedient; but it is inspection; and at such a place as Brownsville, it may, for aught I know, be a necessary police regulation to prevent frauds and clandestine removal and exportation of property belonging to the people of Texas. The fee or duty exacted may be excessive; but if so, congress can regulate that. Our only concern with the case is to know whether the acts required by the state law, and performed by the defendant on and about the hides, are fairly characterized as inspection or not. If they are, that ends the case here. We think the law is an inspection law; that the part of it in question is not foreign to that character; and that the acts of the defendant for which the fees exacted by him were charged were fairly performed under said inspection law; and that the fees are valid charges, until they shall be altered by congress.

The bill is therefore dismissed with costs.

Case No. 10,092.

NEILSON et al. v. The LAURA.

[2 Sawy. 242.] [1]

District Court, D. California. Sept. 12, 1872.

SICK SEAMAN ENTITLED TO WHOLE WAGES WHEN NO FRAUD—MASTER'S AUTHORITY TO INCREASE WAGES.

1. When a seaman was unable to perform duty during a part of the voyage, by reason of sickness, *held*, that he was entitled to his whole wages, notwithstanding that the sickness may have begun before he signed the articles, but after he had entered on the service.

[Cited in Longstreet v. The R. R. Springer, 4 Fed. 672; The W. L. White, 25 Fed. 504.]

2. It is no objection to his claim that the sickness may have had its origin in some previous injury or infection, not occasioned by his own fault, provided he has acted in good faith, and without fraudulent misrepresentation or concealment.

3. Although the master's authority in general extends to all matters connected with the hiring of the crew, he cannot, after the contract is made, at his mere will, bind the owners to the payment of increased wages, unless some consideration be given for the advance, or in the exercise of a reasonable discretion, he had the right to suppose he would thereby promote the interests of the adventure; and especially is this the case where the master has not been selected by the owners, but appointed by a consul at a foreign port.

[In admiralty. This was a libel by Jens Neilson and Buckhardt for wages.]

T. B. Mildram, for libellants.

H. C. & C. R. Greathouse, for claimants.

HOFFMAN, District Judge. The libellant [Jens] Neilson sues for wages due him as seaman on a voyage in the above vessel, from this port to the Cocos Islands, Punta Arenas, and other Central American ports, and back to San Francisco. His claim is contested on the ground that, owing to physical disability, he failed to render the service contracted for; and that his wages should be reduced to a compensation for the service actually rendered:

The facts appear to be as follows:

On the 18th January, 1872, Neilson, with some others of the crew, went on board the Laura to serve as seamen on the contemplated voyage of the brig to the Cocos Islands, in search of the hidden treasure. The departure of the vessel having been delayed by causes not specially detailed, the men were informed by the master that they would be allowed, during the detention of the vessel, wages at the rate of one dollar per day. The libellant states that he was hired at the rate of thirty dollars per month; but the difference is immaterial, as the men were paid in full up to the time when they signed the articles, and no claim is made for wages earned prior to that date. The articles were signed the nineteenth of February; the vessel sailed on the twenty-sixth of February.

Some time after coming on board, Neilson appears to have hurt his leg while in the performance of his duty. This occurred before the signing of the articles, and it was known to the master and the crew. The injury did not prevent Neilson, so far as appears, from doing his duty, and it seems to have been regarded as slight, and unlikely to produce serious results. Neilson states that he showed his leg to the master, and expressed doubts as to the propriety of his going to sea. The master told him that it would soon get well, and that he didn't wish him to leave.

Some eight or ten days after leaving port, Neilson again hurt his leg while doing some duty aloft. The sore on his leg was examined by the doctor on board, and found to be an ulcer of an aggravated kind. It proved, on treatment, to be obstinate and intractable, and Neilson's leg remained in consequence, during the whole voyage, in a condition which prevented the full performance of his duty. The master estimates roughly that he did able seaman's duty about one third of the time. At other times he worked about the deck, or did no duty whatever.

From its persistency and resistance to treatment, as well as from its appearance, the doctor supposed the ulcer to have been venereal. He states, however, that it was not caused by syphilitic disease, and I understand him to mean that an otherwise trivial injury was aggravated and made obstinate by some ancient venereal taint, which he supposed to have existed in the patient's constitution. Some evidence was offered, tending to show that Neilson admitted that he had hurt his leg while "sky-larking on shore." This Neilson denies. I do not consider the inquiry important, for if the leg was hurt prior to his coming on board, the injury must have been very slight, as he performed his duty during the whole time the vessel lay in port, from the eighteenth of January until the twenty-sixth of February, and for ten days or two weeks thereafter after the vessel had put to sea.

The question thus presented is: Did the disability of the seaman occur while in the service of the vessel, and not through his own fault or misconduct?

The general principle that the seaman is not only entitled to his wages during any sickness or disability occurring to him while in the service, without fault or misconduct on his own part, but also to be cured at the ship's expense, is not disputed. But it is contended that in this case the injury was sustained before the commencement of the voyage, and before, by the signing of articles, he entered into the service of the ship.

In Ex parte Giddings [Case No. 5,404], Mr. Justice Story rejected the claim of a mariner to a share of the prizes of a privateer (which he put on the same footing as a claim for wages), where the disability occurred after the signing of articles, but be-

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

fore the cruise was actually begun. In that case, it appeared that the seaman was discharged at the home port of the vessel with his own consent.

But the same learned judge, in Reed v. Canfield [Case No. 11,641], held that the right to be cured at the ship's expense extends to "all sickness and injuries sustained in the service, and while the party constitutes one of her crew, whether they occur at a home or in a foreign port, at the commencement or at the termination of the voyage. The voyage of the ship must, so far as the seamen are concerned, be deemed to commence when they are to perform service on board, and to terminate when they are discharged from further service."

The fact that the articles have not been signed is immaterial, if the seamen have been engaged for the voyage, and are on board the vessel in the performance of their duty. The articles are required for the protection of the seaman, but his rights are not impaired, or his relations to the vessel affected to his disadvantage by an entire omission to enter into the formal engagement required by law.

If the circumstances of the case required it, I should have little hesitation in deciding that, where a seaman engaged for a voyage sustains an injury while in the service of the ship, but before she sails, and before the articles are signed and without any fraud or concealment on his part he is retained in the service, and performs the voyage, he is entitled to his wages, notwithstanding that he proves unable to discharge his duty, either in whole or in part.

If the injury be such as obviously to disable him for the performance of his duty, he may be discharged, especially with his own consent, as was the case in Ex parte Giddings [supra]. He would then be entitled to compensation for the services already rendered, and probably to be cured at the ship's expense.

But in the case at bar, I think it clear that the disability must be considered to have occurred during the voyage. The original injury, whether Neilson received it after he came on board the vessel or before, must have been slight, for he continued to do duty for some weeks afterwards, and was permitted to ship without objection. He unquestionably sustained a further injury after the voyage commenced, and his subsequent disability was the result of the original hurt, aggravated by the injury received on board, and perhaps by the exposure and other unfavorable conditions incident to his situation. I do not understand the rule to require that the sickness of the seaman should have originated during the voyage; it is only necessary that it occur during the voyage, without fault or misconduct on his part. Were it otherwise, he would be deprived, in great measure, of its benefit.

If, for example, he have a cut on his hand at the time of shipment, and erysipelas supervenes during the voyage, and he is unable to do duty, the sickness that incapacitated him would be deemed to have occurred during the voyage. So, if he have a cold, which is succeeded during the voyage by some pulmonary disease, the disease which disables him would clearly be the pulmonary affection, and not the cold in which it had its origin. So, if after the commencement of the voyage, he fall sick of small-pox or other infectious disorder, his claim to wages, and to be cured at the ship's expense, could hardly be resisted on the ground that the infection was received before he shipped, and that the seeds of the disease were lurking in his system when he entered into the service. The rule should receive a liberal as well as rational construction. It would be infinite to explore the remote causes of disease, or to attempt to assign to each of the various causes which have concurred in producing the result its precise effect. If the seaman, without fraud or concealment, and believing himself able to perform his duty, enters upon the service, his subsequent illness, whether it be due to the development into serious disease of some slight injury, previously received, or ailment previously contracted, whether the unfavorable symptoms be caused by the exposure and hardships of the service, or are to be ascribed to some vice in the patient's constitution, or whether it be the natural and inevitable effect of some previous infection; in none of these cases would the rights of the seaman, under the just, as well as humane rule so universally adopted in all the maritime codes, be impaired.

I think Neilson is entitled to the full amount of his wages, without deduction.

With regard to Buckhardt, there is more room for doubt. His claim is founded on an alleged agreement by the master to pay him $30 in lieu of the nominal sum which by the articles he was to receive.

If it appeared that in consideration of additional services, the master had in the reasonable exercise of his discretion, promoted him, and promised the wages of the station to which he was advanced, there would be no objection to his claim. The master's authority, in general, extends to all matters connected with the employment and hiring of the crew.

But after the contract with the seaman has been made, the master cannot capriciously, and at his mere will, bind the owners to the payment of increased wages, unless it appear that some consideration was rendered for the advance, or that, in the exercise of a fair discretion, he was justified in supposing he would thereby promote the interests of the adventure. In this case, the master, by whom the promise is alleged to have been made, was not the master to whom the owners had entrusted the vessel. He became such by the appointment of the

consul at a foreign port. It would even seem that, at the time he agreed to give the additional wages, he had not been formally appointed. The services rendered by the man were in no respect different from, or more valuable than, those he had previously performed, and for which he shipped. No entry of the agreement was made in the articles; and the claim rests on an alleged oral promise of the master to the man.

The master alleges that he hired the man in place of the steward who had left, and that the cook refused to stay unless a new steward was employed. Of the thirty dollars per month additional wages allowed to Buckhardt, ten dollars were to be given to the cook. It is a little singular, if this were the case, that the cook has made no demand for the ten dollars per month which he was to receive.

So far as I can gather from the testimony, the services of a steward seem to have been unnecessary. Five out of the eight passengers had left the vessel, and the testimony shows that after his employment as steward, Buckhardt performed the same duty as he had previously discharged as waiter.

There are some other circumstances indistinctly disclosed by the testimony, which lead me to doubt whether the master, in promising to Buckhardt the additional compensation, was acting in the exercise of a reasonable discretion, and with exclusive regard to the interest of the service. If not, he exceeded his authority, and went beyond the limits of his agency. He had no right to indulge in favoritism or even generosity at the expense of the owners of the vessel.

On the whole, I am of opinion that Buckhardt's claim should be rejected, except for the amount of wages as stipulated in the articles.

NEILSON, The (MESSENA v.). See Case No. 9,493a.

NEILSON, The JOHN. See Case No. 4,241.

Case No. 10,093.

The NELLIE.

[7 Ben. 497.] [1]

District Court, S. D. New York. Dec., 1874.

COLLISION AT PIER IN EAST RIVER—CONTRIBUTORY NEGLIGENCE.

A tug, coming up the East river, with an elevator in tow, sought to swing the elevator into the proper position to enter a slip, and in so doing allowed it to touch the stern of a barge moored at the end of the pier and projecting. The tug had full knowledge of the position of the barge: *Held*, that the tug was responsible for the damages to the barge, and the position of the latter was not contributory negligence, it not being shown that she was not rightfully where she was.

[Cited in The Canima, 17 Fed. 272; Shields v. Mayor, 18 Fed. 749; The Nettie, 35 Fed. 615; Pope v. Seckworth, 47 Fed. 832.]

In admiralty.

William J. Haskett, for libellant.

Samuel G. Courtney, for claimant.

BLATCHFORD, District Judge. The libellant, as owner of the barge Hudson River, brings this suit against the steamtug Nellie, to recover for the damages sustained by him through a collision, wherein the barge was injured, on the 5th of May, 1873. The barge was lying at the outer end of pier 45, East river, with her stern down, taking in cargo. The tug, with an elevator lashed to her starboard side, came up the river and rounded to, for the purpose of going into the slip next below pier 45, and then proceeded to enter such slip, the tide being flood, and intentionally brought the side of the elevator in contact with the barge, for the purpose of swinging the elevator around with the tide, so that it might be shoved bow forward into the slip. The libel alleges, that the tide swung the tug and the elevator around under the stern of the barge, and that the rudder post and a pintle of the barge were broken.

The answer sets up, as faults in the barge, causing or contributing to the collision, that the barge was improperly berthed at an exposed and dangerous place at the end of the pier; that her stern projected beyond the side of the pier and into the space where the tug and the elevator had a right of way; that the barge was so improperly trimmed, that her rudder and its appurtenances were lifted above the water line, and exposed to danger, and deprived of the protection of the fantail of the barge; and that the barge was not provided with fenders over her stern.

It is satisfactorily established by the evidence, that the elevator, moved by the tug, struck the rudder of the barge and did the damage complained of. If the tug and the elevator were to enter the slip on a strong flood tide, it was, undoubtedly, necessary for them to manoeuvre as they did. But the barge was in full view. If she was down by the head, and her stern was raised, her condition and position were plainly visible. The tug assumed the risk of entering the slip without injuring the barge. If the barge was exposed, by being at the end of the pier and by having her stern projecting into the water space of the slip, such exposure made it incumbent on the tug to exercise the greater caution. The barge was helpless. It is not shown that she was not rightfully where she was. The tug had no such right of way as conferred upon her the right to injure the barge, without being responsible for such injury. It is shown that the barge had in position all customary fenders.

There must be a decree for the libellant, with a reference to a commissioner to ascertain the damages.

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

Case No. 10,094.

The NELLIE.

[8 Ben. 261.] [1]

District Court, E. D. New York. Nov., 1875.

TUG-BOAT AND TOW—CONTRACT—DAMAGE FROM ICE.

A contract was made on behalf of a tub-boat to tow a canal-boat from the foot of Fourteenth street, East river, to One Hundred and Thirty-First street North river, and there leave her in a safe and suitable place for the discharge of her cargo. Under this contract the tug-boat towed the canal-boat to the foot of One Hundred and Thirty-First street, North river, where she was placed at the north side of a pier. This was then a safe place, but it was one where on the change of the tide the boat might be injured by ice. Demand was made of the captain of the tug-boat that he should place the canal-boat on the lower side of the pier, but this was not done and the canal-boat moved up to the bulkhead and began to discharge her cargo. About four hours after, on the change of the tide, ice was brought down upon the canal-boat and crushed her. The owners of the canal-boat and of her cargo filed libels to recover for the damage: *Held*, that no breach of the contract on the part of the tug-boat had been shown and that the libels must be dismissed.

In admiralty.

BENEDICT, District Judge. These two actions which have been tried together, are brought, one by the owner of the canal-boat Waddy, and the other by the owner of her cargo, to recover damages for breach of a towage contract.

The allegation of the libellant, William Nelson, Jr., the owner of the cargo, is, that a contract was entered into whereby the tug-boat "Nellie" was to tow the canal-boat "Waddy" from the foot of Fourteenth street, East river, to 131st street, North river, and there leave her in a safe and suitable place for the discharge of the cargo with which she was laden.

The breach averred is, that the canal-boat was not left in a safe and suitable place, but in the tide-way about 100 feet from the end of the pier, at the foot of 131st street and in an improper and unsafe place, where there was great danger of her being injured or carried away by the tide and floating ice. In the libel of Whipple, the owner of the boat, the averments are somewhat different, but in substance the same. The damages claimed are those resulting from injuries sustained by the canal-boat and her cargo by reason of her having been crushed by ice on the same day, while she lay at the bulkhead on the northerly side of the pier at the foot of 131st street—a place to which it is said she was compelled to go by reason of having being left by the tug in the tide-way.

A careful examination of the libel shows that the contract thus set forth is not, as seems to have been supposed, a contract to take the boat to the lower side of the pier at 131st street, but simply to tow her to 131st street, North river, or to Manhattanville, and there leave her in a safe and suitable place for the discharge of her cargo. Assuming, then, the contract to be that set forth in the libel, my opinion is, that the tug-boat is not responsible for the injuries sustained by the canal-boat from ice, which, it is shown, came down upon her some few hours after she had been left by the tug moored at the pier.

The evidence shows, beyond dispute, that the canal-boat was not left in the tide-way about 100 feet from the end of the pier, as averred in the libels, but that she was placed alongside the upper side of the pier, at a place where she was at once to be made fast, and where she could at once proceed to discharge her cargo.

It is true, demand was made at the time that the boat should be placed at the lower side of the pier, and it is also true that the upper side of the pier was a place where injury might result, if, upon a change of tide, ice should come down the river. But the contract set forth raised no obligation to leave the canal-boat at the lower side of the pier.

The contract set forth was performed when the boat was left at the foot of 131st street, fast to the pier, at a place then safe and suitable for the discharge of her cargo.

A breach of such contract is not made out by showing that some four hours after the termination of the service, and at a different time of tide, the place where the boat was left became dangerous because of ice which then came down the river.

The libels must, therefore, be dismissed and with costs.

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

Case No. 10,095.

The NELLIE.

[Blatchf. Pr. Cas. 553] [1]

District Court, S. D. New York. Oct. 14, 1863.

PRIZE—VIOLATION OF BLOCKADE—ADDITIONAL PROOF.

In this case, no witnesses having been sent in with the vessel, and no reason being furnished for not producing them, and the commander of the capturing vessel being examined by order of the court, but not furnishing any proof of any violation of the blockade, or that the captured property was enemy property, the court ordered the case to stand over for further proof as to the criminality of the vessel, and in order that the absence of all evidence from on board of her might be accounted for, and allowed six months time for that purpose.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured at sea, about 25 miles northeast from Port Royal, South Carolina, March 29, 1863, by a United States ship-of-war. The vessel was, by due valuation and course of procedure, taken for the use of the United States at the time, and the cargo was

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

sent to this port for adjudication. Due service and return of the warrant of attachment and of the monition were made; and, no one intervening in defence of the action, judgment of condemnation and forfeiture was regularly entered, by default, against the vessel and cargo.

In the absence of other witnesses in the case, John J. Almy was, by order of the court, examined in preparatorio in the cause. He testifies that he was present at the capture of the Nellie at sea; that she had no papers on board; that she was captured because she was found at sea without papers; that her master acknowledged that he had run the blockade out of Charleston with her, and was bound to Nassau; that the capture was made by the United States ship-of-war under command of the witness; that the vessel carried about 75 bales of cotton; and that her master said he came out of Charleston and was going to Nassau, and knew all about the war. No witnesses were sent in with the captured vessel, nor is any reason furnished for not producing them. No doubt the officer making seizure of a vessel at sea is a competent witness to prove the act of capture, and also circumstances, accompanying the capture, which afford reasonable cause for believing the culpability of the property arrested. No proof is furnished by Captain Almy that the vessel in fact evaded the blockade of Charleston, or that the person who made the declarations testified to has been really master of the Nellie, or that the Nellie or her lading were enemy property. The unseaworthiness of the prize vessel and her appropriation to the use of the United States are, prima facie, adequately authenticated if the prize is shown to have been enemy property at the time or to have violated the blockade.

The case must stand over for further proof as to the criminality of the vessel seized, and in order that the absence of all evidence from on board of her may be accounted for; and it is ordered by the court that the United States be allowed the period of six months from the entry of this decree to produce proof to that end.

Case No. 10,096.

The NELLIE.

[2 Lowell, 494.] [1]

District Court, D. Massachusetts. Oct. 1876.

COLLISION — DAMAGES RESULTING FROM SUBSEQUENT NECESSARY ACTS OF MASTER — VALUE OF BOAT STOLEN.

1. If the master of a vessel injured by collision through the fault of the other party conducts himself with reasonable skill and diligence after the collision, the damages occurring from a necessary act, such as beaching his ship, will be chargeable to the wrong-doer. Such damages were allowed, though the master was informed that a better place for beaching his vessel was to be found.

[Cited in Cornwall v. New York, 38 Fed. 711.]

2. The value of a boat stolen from the master of the injured vessel was disallowed, there being no necessary or probable connection proved between the collision and the theft.

In admiralty.

J. C. Dodge & F. Dodge, for libellants.

F. Goodwin, for claimants.

LOWELL, District Judge. The claimant contends that the master of the Hulloneon, after the collision had occurred, was negligent and unskilful in beaching his vessel where he did, and again in making the contract which he made for raising her. On the second point the claimants are almost estopped, because they were twice applied to, and asked to make the contract or to give their advice about it, and refused. To be sure, they were not bound to advise, and therefore they are not technically estopped; but they were fully notified and warned; and if they thought at that time that it would be so much better to contract by the day than by the job, they would have run very little risk by saying so. After it has turned out that one mode might probably have been better than the other, it is easy to suppose that this was clear from the beginning; but, if it really was so, why was the light withheld?

The first point is similar in the principle which must govern its decision. As to both points, the following cases are cited: The Linda, Swab. 309; The Flying Fish, Brown. & L. 436; and to these may be added The Catherine, 17 How. [58 U. S.] 170. These cases decide that the vessel which is responsible for the collision is not bound to make good damages which do not fairly and necessarily result from the wrongful act; and that, if the master or owners have been guilty of rash or even negligent conduct, by which the damages are largely increased, the court is to ascertain, by the best means in its power, what the damage was or would have been if the subsequent conduct of the injured party had been prudent and skilful. The editors of Browning and Lushington's Reports, in a note to The Flying Fish, suggest that perhaps even this damage ought to be divided between the parties, on the ground that it was partly caused by the collision. But those learned persons, I fear, may be suspected of a design to cast ridicule upon the rule itself, which they afterwards say is an embarrassment in practice. At all events, no court has ever decided that the damages caused by A.'s negligence were partly due to an antecedent negligence of B.

The evidence in this case falls very far short of that given in the two English cases; and, though The Catherine [supra], is rather briefly reported, it would seem that it resembled them. If so, they were all clear cases of a reckless negligence, almost amounting to the wilful loss of a vessel, which might

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

easily have been, and in the American case actually was, saved and repaired at a comparatively trifling expense; and this was not only obvious at the time, but, in the two cases which are fully reported, was pointed out to the master, and he was urged to save his ship. Here the evidence is that some one advised the master to beach the vessl a few rods higher up the shore than he did, and told him that it was a better place for the purpose. This is a very different state of things from those on which the above-cited cases were decided. I agree with the assessor that there is no such evidence of negligence as should throw upon the Hulloneon the loss, if any, which was incurred by the vessel being beached where the master thought best to put her.

The first objection taken by the libellant illustrates somewhat this matter of remote damage. The assessor has disallowed the value of a boat which was stolen, not from the vessel, but from a wharf in Boston, on the night after the collision. Granting that damages might be recovered for all direct losses, even if one of them should be a plundering which no means within the reach of the injured party could prevent, yet the theft of a boat hours afterwards, at a different place, has no such natural or necessary connection with the collision as to be one of its legal consequences. Indeed, I do not know, and no one can say, that it had any connection whatever with that event. The boat was stolen from a place where boats are often left, and where this master might have left it if he had had occasion, though his vessel were safely riding at anchor in the stream.

Decree for libellants for $1,084.25 and interest from the date of the libel, and costs.

NELLIE, The CORA. See Case No. 3,217.

Case No. 10,097.

The NELLIE D.

[5 Blatchf. 245; [1] 2 Int. Rev. Rec. 62.]

Circuit Court, S. D. New York. Aug. 22, 1865.

COLLISION—RIGHT OF WAY—VESSELS SAILING IN SAME DIRECTION.

Where two sailing vessels are beating in the same direction, the hindmost vessel is bound to know that the leading vessel must come about on running out her course, and to know the time and place when and where the manoeuvre must take place, and to take proper measures to permit the movement without coming into dangerous proximity.

[Cited in The Charlotte Raab, Case No. 2,622; The Clytie, Id. 2,913.]

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

This was a libel in rem, filed in the district court, by the owners of the schooner Sea Bird, against the schooner Nellie D., to recover damages for a collision which occurred between the two vessels, on the morning of the 21st of November, 1860, while they were beating up through the entrance into the lower bay of New York at Sandy Hook. The wind was northwest, or west by north, and a five or six knot breeze. Both vessels were on the starboard tack, going toward Sandy Hook beach. The Sea Bird was leading, and slightly to the windward, and tacked about, and, on her larboard tack eastward, passed the Nellie D., which vessel, after going some thirty or forty yards, also tacked about, passing the other vessel on her tack eastward. The Sea Bird, after running out her course as far as it was prudent to go, came about, and while her sails were filling on the starboard tack, and before she got under way, the two vessels came in contact, their larboard bows together, doing considerable damage to each.

Charles Donohue, for libellant.

William J. Haskett, for claimants.

NELSON, Circuit Justice. I have looked with some care into the pleadings and proofs, with a view to ascertain whether either or both of the vessels committed any fault in navigation, and, as both were sufferers, whether or not the case could be fairly disposed of, on the hypothesis that neither was in fault. But, after the most careful scrutiny, I feel bound to say that I can see no fault in the navigation of the Sea Bird. On the contrary, she ran out her tack, and came about, according to usage and safe seamanship, and could have done nothing more to avoid the disaster. The Nellie D., following her, on the tack eastward, was bound to know that the leading vessel was obliged to come about on running out her course, and about the time and place the manoeuvre must necessarily take place, and should have taken the proper measure to permit the movement without coming into dangerous proximity. This was clearly in her power, and she should have exercised it early enough to avoid coming together.

It is urged that the Nellie D. was to the windward, and that the Sea Bird was in fault in coming about with the two vessels in that relative position. But the answer is, that the Sea Bird had no choice in the manoeuvre adopted. If she had not tacked she would have gone upon the shoals. Besides, I do not agree that the Nellie D. was to the windward. On the contrary, the weight of proof is otherwise; and, indeed, it would be difficult to account for the collision of the two larboard bows at all, on this hypothesis. The decree below is affirmed.

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

Case No. 10,098.

The NELLIE HUSTED.

[9 Ben. 42.] [1]

District Court, E. D. New York. Feb. 1877.

PILOTAGE—EVIDENCE—BURDEN OF PROOF.

In an action for pilotage, where the right of action is claimed to be derived from a statute of the state of New York, and to have arisen by reason of a tender of service and a refusal to take any pilot, the libellant must show a tender of service and that no pilot was employed. Slight circumstances will however be sufficient to warrant the inference that no pilot was employed. Such inference may be drawn from the fact that when the libellant presented his bill, the master of the ship said it was all right, no evidence being offered to show that a pilot was employed.

In admiralty.

Barney, Butler & Parsons, for libellant.
Benedict & Benedict, for claimant.

BENEDICT, District Judge. This is an action to recover pilotage, based upon a tender and refusal of services at such a distance from Sandy Hook light house that it could not be seen from the deck in fair weather. The answer avers that subsequent to the libellant's tender of services a pilot was taken and paid, but no evidence is produced in support of the averment. A tender and refusal is proved by the libellant and that he was the first pilot teudering his services. The question supposed by the defendant to be presented for determination is whether under the law of this state as now construed by the court of appeals in the last case upon the subject Gillespie v. Zittloson, 60 N. Y. 449, and by the circuit court of this circuit in the case of The Nevada [unreported],[2] following the court of appeals (Hunt, J., Aug. 16, 1876, MSS.), a recovery for a pilotage can be had upon proving a tender of services and a refusal thereof, without proving in addition the negative fact that no pilot was taken. Upon this question I incline to the opinion that although prior to the construction lately put upon the statute of the state by the highest court of the state a tender of services was considered sufficient to raise "an implied promise to pay the amount specified in the statute," according to the present understanding of the statute a tender of services and a failure to take a pilot must appear in order to raise such an implied promise. But it does not follow that in this case the libel must be dismissed. As this view of the law casts upon the libellant the burden of showing a negative, justice requires that it be held that slight circumstances are sufficient to warrant the inference that no pilot was taken. In the present case the defendant has taken upon himself to aver that a pilot was taken, but he offers no proof whatever in support of his averment, while the libellant has proved without objection taken, that after the vessel arrived, he made out his bill and presented it to the master of the vessel, who not only made no objection to it, but said it was all right. This admission of the master by implication admits that no pilot was taken, for, if a pilot had been taken, the bill was not right. In the absence of any evidence for the defendant, when proof from him was easy, the admission of the master should be deemed sufficient to warrant the inference that in fact no pilot was taken. If this inference be incorrect, it can be shown to be so by further testimony, on application to this court, or on appeal. I deem it proper to add that the law stated is intended to be confined to a case where as in this instance the liability is claimed to be derived from the state.

There being no dispute as to the tonnage of the vessel, there must accordingly be a decree in favor of the libellant for the amount claimed with interest and costs.

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

[2] [See Case No. 10,130.]

Case No. 10,099.

NELLIS et al. v. McLANAHAN et al.

[6 Fish. Pat. Cas. 286.] [1]

Circuit Court, W. D. Pennsylvania. Feb., 1873.

PATENTS—SUIT FOR INFRINGEMENT OF SEVERAL PATENTS—MULTIFARIOUSNESS.

Where suit is brought for the infringement of several patents for different improvements, not necessarily embodied in the construction and operation of any one machine, the bill must contain an explicit averment that the infringing machines contain all the improvements embraced in the several patents, or it will be bad for multifariousness.

[Cited in Horman Patent Manuf'g Co. v. Brooklyn City R. Co., Case No. 6,703; Gamewell Fire-Alarm Tel. Co. v. Chillicothe, 7 Fed. 355; Hayes v. Dayton, 8 Fed. 704; Pope Manuf'g Co. v. Marqua, 15 Fed. 400; Barney v. Peck, 16 Fed. 413; Griffith v. Segar, 29 Fed. 707.]

Demurrer to bill in equity [by Aaron J. Nellis and John Crawford against A. King McLanahan, William Stone, and William Bailey].

Suit brought upon the following letters patent:

1. Letters patent [No. 44,129] for "improvement in hay-elevators," granted to Edward Walker, September 6, 1864, and reissued December 18, 1866 [No. 2,429].

2. Letters patent [No. 46,027] for "improvement in hay-elevators," granted Seymour Rogers, January 24, 1865, and reissued May 29, 1866 [No. 2,260].

3. Letters patent [No. 53,345] for "improvement in horse hay-rakes," granted Seymour Rogers, March 20, 1866.

The charging part of the bill was as follows:

"And your orators further show unto your honors, as they are informed and believe, that the said defendants herein named, well knowing all the facts hereinbefore set forth,

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

are now constructing and using, and vending to others to be used, hay-forks, of the kind and description known in the trade as 'harpoon hay-forks,' in some parts thereof substantially the same in construction and operation as in the said several letters patent mentioned, the exclusive right and privilege to make and use which, and vend the same to others to be used, is thus by law vested in your orators.

"And so it is, may it please your honors, that the said defendants, as your orators are informed and believe, without the license of your orators, against their will and in violation of their rights, have made and used, and intend to continue still to make and use the said improvements, within the Western district of Pennsylvania, and refuse to pay to your orators any of the profits which they have made by such unlawful manufacture and use, or to desist from the further infringement of said recited letters patent; all of which acts and doings are in violation of the exclusive rights and privileges so as aforesaid vested in your orators, under and by virtue of said recited several letters patent and assignments, and are contrary to equity and good conscience, and tend to the manifest injury of your orators in the presents."

Then followed special interrogatories as to each of the patents in suit. These were similar in character, and the following will serve as a specimen of all:

"Whether the said defendants, or either, and which of them, have at any time, and when, and during what period of time, made, used, and sold any, and how many, horse hay-forks, or harpoon hay-forks, constructed, in whole or in part, upon the principles and in the manner described in said reissue letters patent, No. ——, granted to said Edward L. Walker, as aforesaid. Describe minutely and in detail their construction and operation."

To this bill the defendants filed a special demurrer, and, for cause, showed, that it appears by the said bill that the same is exhibited against those defendants for three several and distinct matters and causes, to wit, for alleged infringements of three several and distinct letters patent in said bill set forth, which three several letters patent are of different dates, and for separate and distinct alleged improvements, one of said letters patent being for an alleged improvement in hay-elevators, patented to one Edward L. Walker; another of said letters patent being for an alleged improvement in hay-elevators, patented to one Seymour Rogers, and the other being for an alleged improvement in horse hay-forks, patented to one Seymour Rogers, which several alleged improvements, it appears by the said bill, are not necessarily connected together in practical operation or use, nor common to any one hay-fork, or horse hay-fork, or harpoon horse hay-fork, made by these defendants; so that said complainants, by their single bill of complaint aforesaid, charge the infringement of each of said letters patent, and thereby seek to compel these defendants to unite these separate and distinct subject-matters, wholly unconnected with and entirely independent of each other, and calling for three several, separate, and distinct defenses, depending severally upon distinct and different proofs, so as to complicate and embarrass these defendants in their answer to said bill of complaint, by reason whereof said bill of complaint is altogether multifarious.

Bruce & Negley, for complainants.
G. H. Christy, for defendants.

McKENNAN, Circuit Judge. The defendants have demurred to the bill in this case on the ground of multifariousness. The bill sets up three distinct patents, viz.: A reissue to Edward L. Walker for an improvement in hay-elevators, dated December 18, 1866; a reissue to Seymour Rogers for an improvement in hay-elevators, dated May 29, 1866; and an original patent to Seymour Rogers, for an improvement in horse hay-forks, dated March 26, 1866,—the title to all of which is vested in the complainants by various assignments. These improvements are not necessarily embodied in the construction and operation of any one hay-fork, and unless they are identified by the frame of the bill the defendants cannot be subjected to the embarrassment of confounding defenses, which may be severally applicable to each patent. The bill charges that the defendants are now constructing and using, and vending to others to be used, hay-forks of the kind and description known in the trade as "harpoon horse hay-forks," in some parts thereof substantially the same as in the said several letters patent mentioned. There is no explicit averment here that forks, made and sold by the defendants contain all the improvements embraced in the complainants' patents, and the interrogatories clearly indicate that a discovery is sought touching only the several infringements of each patent. The bill, therefore, does not show any reason why the joining of multifarious causes of complaint should be allowed, and the demurrer must be sustained.

[For another case involving this patent, see Nellis v. Pennock Manuf'g Co., 13 Fed. 451.]

Case No. 10,100.

In re NELSON.

[9 Ben. 238; [1] 16 N. B. R. 312.]

District Court, D. Vermont. Oct. 1877.

LIEN OF EXECUTION CREDITOR — ASSIGNEE AS SHERIFF.

Where an assignee in bankruptcy had possession of goods of the bankrupt at the time of

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

the bankruptcy, as sheriff, under a writ of attachment, and various executions obtained by creditors before the filing of the petition, and as assignee had converted the property into money, and the execution creditors were not parties to the bankruptcy proceedings, but agreed in writing that the facts stated in the petition were true, and that the court might make such order as to the disposition of the funds as may be according to law: *Held*, that the bankruptcy proceedings did not enlarge the judgment liens nor change their place, by the dissolving of the attachment and the vesting the property in the assignee, but left them covering all the property in the hands of the officer not covered by the attachment lien.

[In the matter of M. J. Nelson, a bankrupt.]

Prout & Walker, for assignee.

E. J. Ormsbee, for execution creditors.

WHEELER, District Judge. This proceeding has been commenced by a petition of the assignee, setting forth that at the commencement of the proceedings in bankruptcy, he, as deputy sheriff, had custody of the goods of the bankrupt by virtue, first, of an attachment on an original writ in favor of Keyes & Co., in a suit in their favor against the bankrupt then and at the same time of the petition still pending; second, of other subsequent attachments and executions in suits in favor of other plaintiffs against the bankrupt, in which they had respectively recovered judgment, and placed execution in his hands in season to change the property, and praying for a determination of the rights of the parties in respect to the property at the time of the commencement of the proceedings, and of their rights now in respect to the sum of three hundred and eleven dollars and one cent, into which, as assignee, he has converted the property and still holds in lieu of the property. None of these execution creditors appear to be parties to the bankruptcy proceedings, nor are they claiming in any manner under them, but are claiming in hostility to them, and for that reason this petition could not be maintained against them as an adversary proceeding.

In order to maintain a proceeding in invitum to have the rights of parties so interested adjudicated upon, it would be necessary to proceed by regular writ at law or in equity, according to the nature of the case and the relief sought. But in this case the execution creditors have come in and agreed in writing that the facts stated in the petition are true, and that "the court may upon said petition make such order and decision as to the disposition of the fund" as may be according to law. In section 5011, Rev. St. U. S., it is provided that in any proceedings within the jurisdiction of the court "the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent state any question in a special case for the opinion of the court, and the judgment of the court shall be final, unless it is agreed and stated in the special case that either party may appeal if in such case an appeal is allowed," etc. In this special case the parties have submitted to the jurisdiction and stated questions in the case, and so the questions submitted are regularly before the court.

At the commencement of the bankruptcy proceedings the goods were the general property of the bankrupt, subject to a first lien by the attachment of Keyes & Co., and to a second and subsequent lien, by virtue of the executions of the attaching creditors. By force of the provisions of section 5044, Rev. St. U. S., the title to the property vested in the assignee, and the attachment of Keyes & Co., having been made within the prescribed time, was dissolved. The liens in favor of the judgment creditors were valid and perfect, the executions having been delivered to the officer within thirty days, according to the provisions of the Vermont statutes (Gen. St. 303, § 94), and he having the actual possession of the property. These judgment liens were not at all affected by the bankruptcy proceedings. Thus far there is no difficulty or real difference between the claims of the counsel of the respective parties. The real question is as to how and where the judgment lien stood when the attachment lien was dissolved, and the property subject to the judgment liens was vested in the assignee. The petitioning creditors and assignee, in behalf of the bankrupt estate, claim that the attachment lien was equal in amount to the ad damnum in the writ, which is four hundred dollars, and, as that was greater than the amount of the property, covered the whole property and left no room for the judgment liens, and that its dissolution created no room for them. The judgment creditors claim that the dissolution of the attachment made room for their liens, and that, as their liens were subject to the attachment only, as soon as that was dissolved their liens took its place and covered the whole. But neither of these claims is thought to be well founded to the full extent. Keyes & Co. had a valid lien by attachment which could not as to damages exceed four hundred dollars, for that was the extent of their claim at that time, although the court where the suit was pending might, if within its jurisdiction, raise the ad damnum so as to permit them to recover more. The ad damnum would not limit the recovery for costs at all, and that recovery might make the whole much beyond four hundred dollars, and extend the lien as far, unless it was limited by the direction in the writ as to the value of the property to be attached, which might be beyond the ad damnum, if the authority issuing it saw fit to make it so.

It is not stated in the special case what the amount directed to be attached was. But whatever it may have been the attachment lien would not be measured by it, but would only be limited by it. The measure of their lien was the amount of their debt or claim sued for and their lawful costs of the suit to that time.

To the extent of that attachment lien the judgment liens were restricted, and as far as that covered the property they did not. The same thing that dissolved the attachment vested the property in the assignee subject to the executions. There was no space of time after the attachment was gone and before the property was vested in which the judgment lien could move, or be moved up to take its place.

The bankruptcy proceedings did not enlarge the judgment liens nor change their place, but left them exactly as and where they were before. Before, they covered all of the property in the custody of the officer not covered by the attachment lien. After, they covered all the same property in the hands of the assignee, not covered by the right, which before was the attachment lien, and was then vested in him. This leaves to the judgment creditors exactly their rights and gives to the other creditors exactly theirs. These conclusions are in accordance with the opinions of Dyer, J., upon similar questions in Eastern district of Wisconsin. In re Steele [Case No. 13,345]. The judgment liens stand valid in the order of their attachments. The amount of the demand of Keyes & Co., and costs to the time of adjudication, does not appear.

The cause is referred to the register having charge of the case to ascertain the amount of the demand of Keyes & Co., with costs to the time of the commencement of bankruptcy proceedings, and when that amount is ascertained the assignee is to hold so much of the sum of three hundred and eleven dollars and one cent as is equal to it for the estate of the bankrupt and to pay over the balance to the execution creditors, so far as the same will go, in the order of their attachments, in satisfaction of their judgments.

NELSON v. BAILEY. See Case No. 2,635.

Case No. 10,101.

NELSON v. BARKER et al.

[3 McLean, 379.] [1]

Circuit Court, D. Illinois. June Term, 1844.

PLEADING — AMENDMENTS — WHEN MADE — MISNOMER.

1. By the common law amendments were permitted, if there was any thing to amend by.
[Cited in brief in Turner v. Christy, 50 Mo. 146.]

2. Anciently all amendments were required to be made at the term when the error occurred.
[Cited in Re Wight, 134 U. S. 146, 10 Sup. Ct. 490.]

3. But now they may be made, at any time before judgment, and, in some cases, afterwards.
[Cited in Tufts v. Tufts, Case No. 14,233; Re Wight, 134 U. S. 146, 10 Sup. Ct. 489.]

4. A misnomer may be amended after plea in abatement.

5. The plea gives the matter, by which to amend. But under the act allowing amendments, the declaration may be amended.

[This was an action by Nelson against Barker and Stewart.]

Mr. Hall, for plaintiff.

Mr. Peters, for defendants.

OPINION OF THE COURT. This was an action of assumpsit to which the defendants filed a plea of misnomer. And the plaintiff moved for leave to amend the writ and declaration. This was objected to on the ground that there was nothing to amend by. At common law the court could give leave to amend only where there was something to amend by. And anciently amendments were required to be made at the term at which the error occurred; but now an amendment may be made at any time before judgment, and, in some cases, after judgment.

In the case of Randolph v. Barret, 16 Pet. [41 U. S.] 141, the court held where suit was brought against the defendant as administrator, on a plea in abatement being filed, alleging that he was executor and not administrator; that the circuit court had power to allow the writ and declaration to be amended. And they say, "In this case the defendant admitted by his plea that he was the person liable to the suit of the plaintiff; but averred that he was executor and not administrator." "And when the plea was filed it became part of the record, and furnished matter by which the pleadings might be amended." And the court remark, "express authority is given by the 32d section of the judiciary act of 1789 [1 Stat. 91], to the courts of the United States, to permit either of the parties, at any time, to amend any defect in the process or pleadings, upon such conditions as the court shall, in their discretion, and by their rules prescribe." "This amendment is, therefore, not only authorised by the ordinary rules of amendment, but by the statute also."

The case of a misnomer is, in principle, similar to that above cited, as the plea in both cases gives the true name or designation. On the general ground from the above authority, the amendment may be permitted under the act of congress. Leave to amend.

Case No. 10,101a.

NELSON v. BELL et al.

[18 Betts, D. C. MS. 107; Betts, Scr. Bk. 202.]

District Court, S. D. New York. April 2, 1851.

ADMIRALTY PRACTICE—MOTIONS TO VACATE PROCEEDINGS FOR IRREGULARITIES.

[1. A party seeking to set aside the proceedings against him (including an attachment of his property and an arrest of his person) for irregularities in the papers must embody all his

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

objections in one application, and will not be allowed to split them up, and embody in a subsequent motion additional grounds presumptively known to him at the time of the first application.]

[2. A second application to vacate the proceedings cannot be sustained on the ground that the libel was not verified by oath, and that no jurat is annexed thereto, for it will be presumed that these facts were known to counsel, or would have been known to him on the exercise of reasonable diligence at the time of making the first motion.]

[3. Where a motion is made to set aside the proceedings for want of verification of the libel, the fact being that the name of the clerk is not subscribed to the jurat, it may be shown in opposition to the motion by the testimony of the clerk that the oath was in fact regularly administered before the libel was filed.]

[This was a libel by Samuel C. Nelson against Thomas Bell and others. Heard on motion to set aside the proceedings, including an attachment of defendant's property, and an arrest of his person, because of irregularities in the papers. A similar motion was previously made and denied. Case No. 1,257.]

BETTS, District Judge. Notice dated February 5, 1851, was given by the proctor of Bell, one of the respondents, to the proctors of the libellant, of a motion to be made on the 11th of the same month to vacate, set aside and annul the proceedings upon the libel in this cause, and also the order of January 13, 1851, endorsed thereon, to hold the defendant to bail. The notice then proceeds to state five different grounds upon which the motion will be supported: First. That rule 23 of the supreme court has not been complied with. Second. That no affidavit or other proof was produced to the judge making the order to support it. Third. That the libel is not verified by oath or affirmation of the libellant or any person in his behalf. Fourth. That no evidence was given the judge of the verification of the libel by oath. Fifth. That no proof was given the judge that Bell could not be arrested before a mandate was obtained for the attachment of his property. The motion was brought to hearing during the March term. An objection was taken preliminarily by the counsel for the libellant that the essential matters embraced in this notice had been brought before the court in January term, on an application similar in purport to the present, and when all the facts of the present motion were also in possession of the defendant and his proctor, and that it is not now competent for him to divide his application, and ask relief upon grounds then known to him and directly connected with the subject-matter brought before the court. The former application by the same proctor dated January 17, 1851, is upon notice that he will move that the defendant Bell be discharged from arrest in the cause, and that the attachment against his property be dissolved, founded upon the affidavit of Bell and the supreme court rules in admiralty, and upon the libel and order to hold to bail thereon. That motion was made and argued the 22d of January, and after consideration was decided by the court on the 27th against the defendant. [Case No. 1,257.]

No new particular is presented in this case respecting the regularity of the proceedings by the libellant, other than that the proctor for the defendant makes affidavit that he has examined the files of the court, and made inquiries as to the proceedings in this cause, and has discovered that the libel is not verified by oath, and that no jurat is annexed thereto or filed therewith. He does not state when the discovery was made, and as it was a patent fact at the time the former notice was given and motion made, the presumption is it was then known to him, or would have been on the exercise of reasonable diligence.

The rule rests alike upon reason and authority that a party seeking to set aside proceedings against him for any supposed irregularity or want of equity must embody all his objections in his application. He will not be permitted to split them into parcels, and try the effect and sufficiency of one motion thereon after another; and he is bound to be prepared with all those which he could by reasonable diligence procure, as well as those then known to him, or apparent upon the papers. Desmond v. Wolf [1 Code Rep. 49].

If there was a vital deficiency in the libel or its verification, that must be matter open to the notice of the party, on the slightest inquiry, and after hearing the defendant once fully upon the objection that there was no sufficient authority to justify the process issued in the cause, and adjudging the point against him, a court will hardly admit a new application to effect the same end, founded upon a denial that the evidence on which the court acted was not regularly authenticated.

The objection in respect to the verification of the libel is merely technical and formal. The name of the clerk taking the oath is not subscribed to the jurat, but he swears the oath was regularly administered by him to the libellant before he filed the libel, and he so informed the counsel for the defendant before this motion was made. If a motion had been made upon the affidavit, the objection might be taken that it was not verified. Jackson v. Stiles, 3 Caines, 128. But when the motion is aggressive, founded upon the circumstance that no signature is attached to the jurat, it may be repelled by proof that the affidavit was duly sworn to. The supreme court say, the officer's name, but not the date, may be omitted in a jurat. Chase v. Edwards, 2 Wend. 283. Attaching the name of the officer to the jurat does not constitute a verification by oath. It is only evidence that the oath was administered, and I cannot perceive there would be any legal objection to convict a party of perjury in an affidavit sworn before a proper officer, although no jurat is attached to it, provided the officer could, without the jurat, give satisfactory proof that the oath was duly administered.

Upon both grounds this objection must fail to affect the proceedings, and all the other points respecting the regularity of the warrant of attachment were considered and disposed of on the former motion. This motion must accordingly be denied, with costs.

NELSON (BELL v.). See Case No. 1,257.

Case No. 10,102.

NELSON v. BOWEN.

[Nowhere reported; opinion not now accessible.]

Case No. 10,103.

NELSON v. CARMAN.

[5 Blatch. 511; [1] 6 Int. Rev. Rec. 181.]

Circuit Court, E. D. New York. Nov. 12, 1867.

TAXES ILLEGALLY ASSESSED—ACTION FOR MONEY HAD AND RECEIVED.

An action for money had and received is maintainable against a collector of internal revenue, for duties or taxes erroneously or illegally assessed and collected, when the payment has been made under protest, and with notice of an intention to bring a suit to test the validity of the claim.

[Cited in Greer v. Ferguson, 56 Ark. 324, 19 S. W. 967.]

This was an action [by William Nelson] against [George T. Carman] an internal revenue collector, to recover back an income tax alleged to have been illegally imposed upon the plaintiff. The cause was tried before the court without a jury, and, the testimony being closed, the district attorney raised the objection, that the action would not lie against the collector, inasmuch as it appeared that the tax in question had been decided by the assessor, as well as by the commissioner, upon appeal, to be due, and had been inserted in the assessment list as due and payable by the plaintiff, and had been collected in pursuance of the assessment list and paid into the treasury.

BENEDICT, District Judge. The question raised by the district attorney, in this case, has been passed upon by the supreme court, in the case of City of Philadelphia v. Collector, 5 Wall. [72 U. S.] 720, and it must now be considered as settled, that an action for money had and received is maintainable against a collector, for duties or taxes erroneously or illegally assessed and collected, when, as in the present case, the payment has been made under protest, and with notice of an intention to bring a suit to test the validity of the claim. The objection is, therefore, overruled, and the case must proceed upon the merits.

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

NELSON (CROPPER v.). See Case No. 3,417.

Case No. 10,104.

NELSON et al. v. CUTTER et al.

[3 McLean, 326; [1] 1 West. Law J. 359.]

Circuit Court, D. Ohio. April 10, 1844.

ARREST — AFFIDAVIT TO HOLD TO BAIL — SUFFICIENCY—STATEMENT OF NECESSARY FACTS—OPINION OR BELIEF—HABEAS CORPUS.

1. An affidavit to hold to bail must be positive as to the indebtment.

2. The opinion or belief of the affiant is insufficient.

3. On a habeas corpus the court will inquire whether the capias was rightfully issued.

[Cited in Blake's Case, 106 Mass. 504; Ex parte Rollins, 80 Va. 318.]

4. And this involves the sufficiency of the affidavit.

[Cited in Spice v. Steinruck, 14 Ohio St. 221.]

[5. Cited in Ex parte Davis, 17 Neb. 442, 23 N. W. 364, to the point that, where the affidavit upon which the arrest is based states facts, the legal tendency of which is to make out a case in all its parts, although the proof may be slight, and not entirely satisfactory, the arrest will be valid until set aside by a direct proceeding for that purpose.]

[T. Walker and W. M. Corry, for defendants [Cutter & Tyrrell], claimed a discharge on habeas corpus, on two grounds: First, because the affidavit did not state that the deponent was the authorized agent of plaintiffs [Nelson & Graydon]; and, secondly, because the affidavit was not positive, but only as to deponent's opinion, information, and belief.

[C. Fox and Howard, for plaintiffs, insisted that the court, on habeas corpus, could not go behind the capias, and try the sufficiency of the affidavit. But if this could be done, the present affidavit was sufficient.

[Judge McLEAN held otherwise, and ordered the defendants to be discharged, because the affidavit was not positive. He considered the agency sufficiently set forth.] [2]

Fox & Howard, for plaintiffs.

Walker & Carey, for defendants.

McLEAN, Circuit Justice. The defendants were arrested on a capias ad respondendum, founded upon the following affidavit: "The United States of America, District of Ohio. I, William A. Woodward, of the city and state of New York, being duly affirmed, depose and say, that Nelson & Graydon are merchants, residing in the city and state of New York, and that I am informed and verily believe, that the said Amos Cutter and Jacob Tyrrell, partners, trading and doing business under the firm of Cutter & Tyrrell, are citizens of the city of Cincinnati, in the state of Ohio, and that the said Cutter & Tyrrell are justly indebted to the said Nelson & Graydon, in

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

[2] [From 1 West. Law J. 359.]

the sum of eleven hundred and twenty-five dollars and four cents, by virtue of a promissory note described in the foregoing precipe, exclusive of all offsets; which said promissory note was given for goods and merchandise, sold by the said Nelson & Graydon to the said Cutter & Tyrrell; and I do further depose and say, that I verily believe said Cutter & Tyrrell are about to convert their property into money for the purpose of placing it beyond the reach of their creditors; that they have property and rights in action, which they fraudulently conceal; and that they have disposed of, and are about to dispose of their property, with intent to defraud their creditors. And I do further depose and say, that my opinion is founded upon statements and information given to me by the said Cutter & Tyrrell, themselves, and on examination of their books and accounts, and information of individuals residing in the neighborhood of the said Cutter & Tyrrell: and I do further depose and say, that I am acting in this matter as the agent of the said Nelson & Graydon." Signed, "W. A. Woodward," which affidavit is duly certified.

The counsel move for the discharge of the defendants on two grounds: 1. Because the facts are stated by the affiant, from his information and belief. 2. Because he does not state that he was the authorised agent of the plaintiffs.

On the part of the plaintiffs it is insisted, that on the habeas corpus the court cannot go behind the capias and inquire into the sufficiency of the affidavit. If this were a regular term, it would only be necessary to bring the sufficiency of the affidavit before the court, to move for the discharge of the defendants. But, in vacation, the defendants are brought up on the present writ, to enable me to inquire into the cause of their detention. The writ on which the arrest was made is produced by the gaoler, but that writ, unsupported by an affidavit, did not authorise the arrest. Indeed it cannot legally be issued without an affidavit. The affidavit, therefore, is so connected with the writ, as to constitute an essential part of it. Separate it from the writ, and the defendants must be discharged. The personal liberty of the defendants is concerned, and in such a case a presumption does not arise against that liberty.

By the third section of the act of this state, to abolish imprisonment for debt it is provided, that if any creditor, his authorised agent or attorney, shall make oath or affirmation in writing, &c. that there is a debt or demand justly due to such creditor, of one hundred dollars or upwards, specifying, as nearly as may be, the nature and amount thereof, and establishing one or more of the following particulars: 1. That the defendant is about to remove his property out of the jurisdiction of the court, with intent to defraud his creditors: or, 2. That he is about to convert his property into money for the purpose of placing it beyond the reach of his creditors, &c. &c. This affidavit was not intended to be a mere formal matter. The debt must be positively stated to be justly due. Not that it is due in the opinion or belief of the witness from an examination of the account or the written instrument on which the action is founded. If something more than this evidence of indebtment were not required, a capias would have been given without an affidavit. Under an Indiana statute, containing similar provisions to the above, the supreme court held, "in actions on contract, the affidavit, whether made by the plaintiff himself, or by a third person, must show that there is, at the time of suing out the writ, an existing debt actually due, for which an arrest may be lawfully made. It must be positive as to the sum due, and not as the deponent believes, nor as appears by an account stated," &c. Lewis v. Brackenridge, 1 Blackf. 112. A similar decision was made by the circuit court in the district of Illinois. Wright v. Cogswell [Case No. 18,074]. The agency of the affiant is sufficiently shown. The defendants are discharged.

NELSON (DALTON v.). See Case No. 3,549.

NELSON (DOLTON v.). See Case No. 3,976.

Case No. 10,105.

NELSON et al. v. FOSTER et al.

[5 Biss. 44.] [1]

Circuit Court, D. Wisconsin. Sept. Term, 1857.

ABATEMENT—ANOTHER ACTION PENDING—STATE COURTS—SUIT IN STATE COURT.

1. Certificate of counsel that, in his opinion, the plea is well founded, need not accompany a plea of abatement in the federal court.

2. The federal court will take cognizance of the constitution and laws of the state on the subject of her courts, and ascertain which are courts of general jurisdiction.

3. A plea of another action pending, in the usual form that the former suit was at the time of the commencement of this suit, and still is pending, is sufficient without alleging that the former suit was not discontinued before the plea was filed.

4. The pendency of a suit in a state court is a good plea in abatement in the federal court.

[This was an action by John G. Nelson and others against Charles S. Foster and others.]

MILLER, District Judge. This is an action of assumpsit upon book account for goods sold and delivered, commenced by writ of attachment. The defendants pleaded in abatement that a suit for the same debt was brought by these plaintiffs against the defendants in the circuit court for Green county in this state, before this suit was commenced; and that the said former suit was, at the time of commencing this suit, and still is,

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

pending in said circuit court. An affidavit of one Francis Emerson is annexed to the plea.

To this plea the plaintiffs demurred, and they set forth for causes of demurrer: 1. That the plea was not accompanied with a certificate of counsel that in his opinion the plea is well founded. 2. That the former suit is in a court of inferior jurisdiction, and the said plea does not aver that the said court had jurisdiction of the parties or the subject matter. 3. That the plea does not allege that the former suit was not discontinued before the plea in abatement was filed. 4. That a suit pending in a court of this state is not the subject of a plea in abatement in this court.

By the rule of court, demurrers or special pleas shall be accompanied with a certificate of the attorney or counsellor that, in his opinion, the demurrer or plea is well founded, otherwise the demurrer or plea may be treated as a nullity. The plea in this case was not so signed, but it has not been the practice to require a plea in abatement to be so signed. The affidavit required to the plea has been considered all that was necessary. When the objection was raised at the argument, the attorney for the defendant was allowed to annex the certificate. This was not a proper manner of making the objection; it should have been done by a motion to strike off the plea as a nullity.

The courts of the United States take judicial cognizance of the constitution and laws of the state on the subject of her courts, and we know that a circuit court for a county is a court of general jurisdiction.

The third point is, that the plea does not allege that the former suit was not discontinued before the plea in abatement was filed. The plea is in the usual form, that the former suit was, at the time of commencing this suit, and still is, pending. This is sufficient. We cannot look out of the record to see how the fact is in regard to the former suit. The plea states that the suit is still pending, which is conceded by the demurrer, and by this we are bound.

The objection that a suit pending in a court of the state is not the subject of a plea in abatement in this court is not tenable. By the eleventh section of the act to establish the judicial courts of the United States (1 Stat. 78) it is provided that the circuit courts shall have original cognisance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. It is too well settled by the courts of the United States to require citation of authority that in all cases when courts have concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively, and has exclusive jurisdiction. In this case, there were two attachments of the defendant's property, and two writs served on them, and two suits pending against them at the same time. If such a proceeding were sanctioned, it would lead to great oppression, and would be a reproach to the administration of justice. A party has his choice of jurisdictions, but he cannot claim both at the same time. This court has always adhered to the rule not to entertain jurisdiction of a case when we are informed by a plea in abatement that a prior suit in law or equity for the same subject matter, between the same parties, is pending in a court of the state; and such, I have no doubt, is the rule in every court in the United States. Earl v. Raymond [Case No. 4,243]. This court is not a foreign court to the courts of this state. Williams v. Wilkes, 14 Pa. St. 228. The writ will be quashed.

NOTE. This plea cannot be sustained unless the suits be of the same character, and the plaintiff be the same in both. Certain Logs of Mahogany [Case No. 2,559]; Davis v. Hunt, 2 Bailey, 412. Bancroft v. Eastman, 2 Gilman, 259, was a case where two actions had been commenced by same plaintiff for same cause of action. *Held*, defendant, in second action, must aver pendency of first suit at time of filing his plea in abatement. McConnell v. Stettinius, 2 Gilman, 707. A owed B, for which debt he gave his note in liquidation. B transfers to C., who sues on it, pending which B sues A. on the original debt. *Held*, the first a good abatement to second suit if properly pleaded. Branigan v. Rose, 3 Gilman, 123. The ground of pleas in abatement (regarding two or more suits) is said to be the abhorrence of law to multiplicity of suits; and that where a party has a complete remedy by an action commenced, another is abatable. But if the remedy of an action commenced is partial or ineffectual, another suit is proper; as where a proceeding in rem (foreign attachment) is pending, that is not cause for plea in abatement to second suit in personam. Hart v. Granger, 1 Conn. 154. In a petition in chancery by A and B against C, praying a contract for the purchase of Ohio lands to be delivered up and canceled as C had not broken it, C pleaded in abatement a bill in chancery brought by him and then pending in Ohio against A and B, praying damages for its breach or other equitable relief, *held*, good plea in abatement.

It was here contended that the plea of another suit was only applicable where the defendant had been harrassed with two suits for the same cause, and not where defendant has first sued on the contract and afterwards plaintiff has also sued, but the court said, "But as a general principle, if the determination of the first suit commenced will determine the whole controversy, the first is pleadable in abatement of the last; at any rate it is so if the suits be not in the same court. I know not, indeed, that it would make any difference at law if they were both in the same court. It rather strikes me that in chancery, as the court could easily try them both together and settle at once all the controversies between the parties, the suits would stand on the ground of bill and cross-bill," and then goes on to say the first to sue should have the benefit of priority, &c.

In Evans v. Lingle, 55 Ill. 455, an appeal from a justice of the peace was dismissed; appellant filed a bill in chancery to re-instate the appeal pending which appellee sued appellant and his surety on the appeal bond. They plead the chancery suit in abatement. *Held*, not good, there being no injunction to restrain the suit at law. The pendency of a suit in a court of general jurisdiction in another state, in which property sufficient to satisfy the demand has been attached, is a good bar. Lawrence v. Remington [Case No. 8,141], April, 1874. The

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

Case No. 10,106.

NELSON et al. v. The GOLIAH.

[Hoff. Op. 481; 2 Am. Law Rev. 772, note.]

District Court, D. California. March 10, 1868.

NEGLIGENT TOWAGE — LIABILITY OF TUG FOR INJURY TO TOW—COLLISION WITH ANCHORED VESSEL—EXCESSIVE SPEED—LENGTH OF HAWSER.

[1. A steamer engaged in towing is responsible to the tow for at least the same degree of care and diligence as she is bound to exercise to avoid injuring other vessels; and hence, where the tow is injured by being brought into collision with another vessel, the question of the tug's liability is to be determined by the same rules applicable in ordinary cases of collision.]

[2. The use of the terms "ordinary negligence," "gross negligence," etc., are of doubtful utility for the purpose of defining liabilities of different classes of bailees, and often tend to create difficulties and embarrassments in practice; and the question, what constitutes actionable negligence depends, after all, upon the circumstances of the particular case.]

[3. Any violation of the general rules of navigation in respect to the course to be pursued by vessels approaching each other or in respect to lookouts, the display of lights, etc., will ordinarily render the vessel guilty of it liable for the consequences; and, when required by the circumstances, "great caution" and the "utmost vigilance" will be exacted, and "ordinary care" is not sufficient.]

[4. The law exacts the extremest diligence and the highest degree of caution on the part of vessels, especially steamers, navigating frequented waters, where there is danger of collision; nor will it be any excuse that the collision could not have been prevented at the moment it occurred, if measures of precaution have been neglected which would have rendered the accident less probable.]

[5. The rule that, in case of collision between a vessel under way and one at anchor, the burden is upon the moving vessel to show that she was not in fault, applies in its full extent to the case of a tow seeking to recover against her tug damages occasioned by being brought into collision with an anchored vessel, in the course of the towage.]

[6. A tug *held* in fault, and responsible to the owners of her tow, for collision with an anchored vessel, in that she attempted to run through anchored shipping on a hazy night, with her tow upon a hawser of 50 fathoms, and at a speed of from 7 to 8 miles an hour, when she might have avoided the shipping by taking a different route.]

This was a libel by Charles Nelson and others against the steamtug Goliah for damages sustained in a collision alleged to be caused by negligent towing.

Milton Andros, for libelants.

T. R. Wise, for claimants.

HOFFMAN, District Judge. On the 2d of January the steamtug Goliah was employed by the master of the schooner Eclipse to tow the latter vessel (then at the entrance of the harbor) to a place of mooring. The libel avers that by reason of the negligent and unskilful manner in which this service was performed the schooner was brought into collision with the steamer Ajax, and sustained damage, for which this action is brought. It is not contended by the advocate of the libelants that steamtugs or tow boats, while engaged in their ordinary business, are to be held to the rigid accountability of common carriers. It is urged, however, on the part of the claimants, that they are liable for gross negligence only, and two cases from the New York Reports are cited in support of this position. But neither of these cases will be found on examination to sustain the rule contended for. In Alexander v. Greene, 7 Hill, 533, the decision turned upon the effect to be given to a permit or special contract by which the risks of the transportation were assumed by the tow. The supreme court (per Mr. Justice Bronson) held that by this agreement the tug was exonerated from all liability, even for gross negligence. The court of errors reversed this decision. All the judges except one were of opinion that, notwithstanding the permit, the owners of the steamboat were responsible for injuries caused by the want of ordinary skill and care on the part of their agents. A majority even held that they were liable as common carriers; and Mr. Justice Bronson himself admitted that in the absence of an express agreement the law would make them answerable for the want of ordinary care and skill on the part of their servants. In Wells v. Steam Navigation Company, 4 Seld. [8 N. Y.] 375, the same question arose, and was decided on the authority of the previous case in 7 Hill. The case turned upon the construction of the special contract; and the court expressly declares that "under an ordinary contract to perform the service the defendants would be bound to bestow ordinary care and diligence, and would be liable for any injuries occasioned by the want thereof." Page 379.

Judge Story, in his work on Bailments (section 496), states the owners of steamboats employed in towing are not liable as common carriers, but are responsible only for ordinary diligence and care in the undertaking. To the same effect is Ang. Carr. §§ 668–686. In truth, the only question discussed in the cases is not whether tow boats are liable for gross negligence, but whether they are not subject to the full liability of common carriers. In Louisiana they are so considered. Smith v. Pierce, 1 La. 353; Adams v. New Orleans Steam Towboat Co., 11 La. 46. They were also held to be common carriers by Mr. Justice Kane, in Vanderslice v. The Superior [Case No. 16,843]. The decision of the district court in this case was overruled by Mr. Justice Grier in the circuit court. But it is in none of the text-books intimated that the owners of tow boats, who have made the ordinary contract for the performance of the service, are not liable, like bailees for hire,

for the want of the reasonable care and diligence required by the nature of their undertaking, the business they are engaged in, and the circumstances of the particular case. It would be a singular anomaly in the law if the owners of steamtugs, who are confessedly liable for injuries done by their want of skill and diligence to the vessels of strangers with whom they have made no contract, should be held to a less degree of responsibility to the owners of the vessel in tow for the negligent and unskillful performance of a service which they have been paid for undertaking. Whatever difference of opinion may have heretofore existed as to the precise relations between the owners of the tug and those of the tow, whether those of principal and agent, or of master and servant, it is now settled by the supreme court of the United States that the tug is responsible for damages caused to other vessels by want of skill and diligence on the part of her master and crew. And this, though the vessel in tow may, by coming in contact with the other, have been the immediate cause of the damage. Where both vessels are exclusively under the control, direction, and management of the master and crew of the tow, the owners of the tug would not be liable, for the injury could in no sense be said to be caused by the negligence and unskillfulness of themselves or their agents. Where those in charge of the vessels respectively jointly participate in their control and management, both will be liable if the damage was caused by the fault of both, or either, if it arose from his fault alone. Sturgis v. Bowyer, 24 How. [65 U. S.] 110; Cushing v. The John Fraser, 21 How. [62 U. S.] 184; Sproul v. Hemmingway, 14 Pick. 1; The New York v. Rea, 18 How. [59 U. S.] 223; The Express [Case No. 4,596]; The Carolus [Id. 2,424]; The R. B. Forbes [Id. 11,598].

These principles, so agreeable to justice and common sense, must be considered as authoritatively established; and assuming, as we must, that the liability of the tug to the vessel in tow for injuries occasioned by her negligence is at least coextensive with her liability to stranger vessels for injuries similarly caused, the inquiry in this case becomes in no respect distinguishable from the ordinary inquiry in collision cases,—by whose fault did the accident occur? We are thus relieved of the necessity of considering whether the tug has performed the service with ordinary or with slight diligence, or whether she has been guilty of gross or of "ordinary negligence," whatever this last expression may mean. In truth, these terms, borrowed from the civil law, and common in the text-books and judicial opinions, appear to have but doubtful utility for the purposes of defining liabilities of different classes of bailees.

The question in all cases is: Has there been such negligence as will render the party guilty of it responsible? Whether such negligence has occurred will depend on the relations of the parties (e. g. whether a bailment be gratuitous or for pay), the nature of the service, and all the other circumstances of the case. In Wilson v. Brett, 11 Mees. & W. 113, Rolfe, B., observes that "he could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." In Wyld v. Pickford, 8 Mees. & W. 460, Parke, B., says: "That a carrier, under certain circumstances, has in many cases been held responsible for gross negligence; but in some of them that term has been defined in such a way as to mean 'ordinary negligence'—that is, the want of such care as a prudent man would take of his own property." The use of the expression "ordinary negligence" to signify the want of ordinary diligence seems not particularly happy; nor does it afford any certain or precise measure of the degree of diligence to be exacted in any class of cases, since that must depend, as before observed, upon all the circumstances of each particular case. The degree of diligence required of a bailee is usually said to depend upon the question whether the bailment was gratuitous or for compensation, and whether for his or the bailor's exclusive benefit. But that this distinction affords no certain test of what shall be deemed "negligence" is shown by the case of Wilson v. Brett already cited. In that case a person known to be skilled in the management of horses was held liable for failing to exercise such skill as he possessed, although the injury occurred while he was riding a horse gratuitously, at the owner's request, to show him for sale. So, too, in the case of The New World v. King, 16 How. [57 U. S.] 469, it was held that a passenger carried gratuitously has the same right of redress as other passengers for injuries caused by the negligence of the carrier. The court, it is true, abstains from declaring that the obligations of a carrier to a gratuitous passenger are "precisely the same in all respects" as to other passengers, but it holds that, even in regard to the former, he is held to the "greatest possible care and diligence." The court further expresses, in very forcible language, its doubt whether the terms "slight," "ordinary," and "gross," used to describe different degrees of negligence, can be usefully applied in practice, and it remarks "that judges have recently expressed their disapprobation of these attempts to fix the degree of diligence by legal definitions, and have complained of the impracticability of applying them." It is added "that some of the ablest commentators on the Roman law, and on the Civil Code of France, have wholly repudiated the theory of three degrees of diligence as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties." If a mechanic or professional man undertake a service, he could hardly excuse himself for the want of that skill and diligence which he holds him-

self out as possessing, on the ground that he was not to be paid for his services. Nor would a bank, which has received gratuitously a special deposit from a customer, be excused by that fact from the duty of taking the same care of it as of its own funds. But perhaps the most striking illustration of the uselessness of the test supposed to be afforded by the gratuitous or non-gratuitous character of the service is furnished by the admitted rule in collision cases. In these cases the parties have no relations to each other growing out of contract, express or implied. Their only relations arise from the reciprocal duty of so using one's own as not to injure another. But the inquiry in these cases is, was the libelled vessel in fault? If so, or if, in other words, she has been guilty of negligence, she is responsible. What constitutes negligence in a particular case depends upon its circumstances. Any violation of the general rules of navigation in respect to the course to be pursued by vessels approaching each other, or in respect to look-outs, the display of lights, etc., etc., will ordinarily render the vessel guilty of it liable for its consequences; where required by the circumstances, "great caution" and the "utmost vigilance" will be exacted; "ordinary care" is not sufficient. Culbertson v. The Southern Belle, 18 How. [59 U. S.] 585; The Scioto [Case No. 12,508]; Rogers v. The St. Charles, 10 How. [60 U. S.] 108; Ward v. The Fashion [Case No. 17,154]; Ang. Carr. § 650. And yet the obligation of the rule, "Sic utere tuo ut non alienum laedas," would generally be stated to be the duty of exercising reasonable and ordinary care in the use of one's own to avoid injury to another. But under special circumstances extraordinary care is only reasonable diligence, the want of which creates the liability. Thus the duty of exercising ordinary care and diligence becomes, in effect, the duty of exercising extraordinary care and "great caution"; and this apparent paradox illustrates the difficulty of attempting to define in advance, by qualifying epithets, what shall constitute that negligence in any particular case for which the guilty party would be responsible.

With respect to the caution and vigilance to be observed by vessels entering a harbor or navigating waters where other vessels are likely to be encountered, the rules established by the decisions are very explicit. "When a steamer is about to enter a harbor, great caution is required. There being no usages to an open way, the vigilance is thrown upon the entering vessel. Ordinary care under such circumstances will not excuse a steamer for a wrong done." Culbertson v. The Southern Belle, 18 How. [59 U. S.] 587. "If they (propellers) take other craft in tow, those in charge of them ought to augment their vigilance in proportion to the embarrassments they have to encounter." New York & B. Transportation Co. v. Philadelphia & Savannah Steam Nav. Co., 22 How. [63 U. S.] 472. "It may be safely stated as another general rule admitting perhaps of no exception, that a vessel entering a harbor in the night time is put on her utmost vigilance. * * * When there is reason to expect that the harbor may be crowded with vessels the utmost vigilance is required." The Scioto [supra]. "Inasmuch as the schooner was in a place much frequented as a harbor, in stormy weather, and of which the steamer was chargeable with knowledge, it was the duty of the steamer to slacken her speed on such a night, if not to have avoided the place altogether." Rogers v. The St. Charles, 19 How. [60 U. S.] 108. "If a vessel chooses to avail herself of a particular mode of going down the river at a particular time, which renders it difficult to escape collision, if a collision does take place she must bear the consequences of a contingency to which she has exposed herself." The Hope, 2 W. Rob. Adm. 8. "Nothing is better settled in the admiralty than that in dark and foggy nights measures of strict precaution are expected on the part of a master of a vessel in order to avoid chances of collision. However important it may be that voyages should be completed in the most speedy manner, such speed must be combined with safety to other vessels." Ang. Carr. § 648, and cases cited. In The Iron Duke, 9 Jur. 476, it was held that although the vessel injured carried no lights, properly so termed, "the steamer in going at full speed on such a night, in such a locality, and with only one man on the lookout, was improperly navigated, and therefore responsible for the whole damage." "Steam vessels, under such circumstances, are not justified by the English court of admiralty in going at the rate of ten knots an hour." Ang. Carr. § 650.

From these authorities it is manifest that the law exacts the extremest diligence and the highest degree of caution on the part of vessels, especially steamers, navigating frequented waters, where there is danger of collision; nor will it be any excuse that the collision could not have been prevented at the moment it occurred, if measures of precaution, which would have rendered the accident less probable, have been neglected. Ang. Carr. § 650. There can be no doubt that these rules apply with full force to a steamer engaged in towing. The tow has a right to expect of the tug at least as high a degree of diligence to prevent injuries to her, and to safely perform the service, as the steamer is bound to exercise in regard to other vessels. I proceed then to consider whether in this case the steamtug has been guilty of such negligence as will render her liable for the consequences of the collision, applying to the inquiry the same rules as would govern a similar inquiry if the collision had occurred between the tug and a stranger vessel. The tug appears to have taken hold of the schooner about 2 o'clock p. m., and about five miles outside the Heads. The tide was then ebb—but not long after, and probably when the vessels

were not far from Fort Point, the flood set in. About 7 o'clock the collision occurred. The schooner was thrown with great violence against the steamer Ajax, then at anchor in the harbor, striking the stern of the latter with her starboard side. If the Ajax had been struck by the tug, there can be no doubt that the latter would have been prima facie liable. "It may be assumed," says Mr. Justice Ware (The Scioto [supra]), "as a general rule, that when a collision takes place between a vessel under sail and one not under sail, the prima facie presumption is that the fault is imputable to the vessel in motion. [Smith v. Coudry] 1 How. [42 U. S.] 29. * * * Undoubtedly the rule must admit exceptions. But the first presumption will place the blame on her, because she has the power of changing her course, and a vessel at anchor is stationary. The vessel under sail must therefore clear herself from the imputation by showing that every practicable effort was made to avoid the collision." The same presumption must arise where the vessel in motion causes the craft she has in tow, and whose movements she controls, to collide with another vessel; nor is the case altered by the circumstance that the principal injury happens to fall upon the tow, and that it is she that is seeking compensation.

The claimants allege that soon after passing Meigg's wharf the master of the tug discovered a bark lying on his course; that the tug proceeded "slowly and cautiously" on her course, but went further into the stream to avoid the bark; that a fog, or haze, had settled on the water, and soon after she came "quite suddenly" upon a schooner without lights; that to avoid her the helm was put to port and the tug made a gentle sheer; that the schooner, in order to follow the tug, also put her helm to port, but did not meet her helm at the proper time; that as soon as the master of the tug discovered that the schooner was passing across his stern, and was going in a straight line, and head on to the Ajax, he ordered the helm of the tow hard a-starboard; that the schooner did not obey her helm readily, and that in consequence thereof she failed to clear the Ajax, and the collision occurred. It is further alleged that the schooner was loaded by the head; that she was short-handed, and her crew weak and worn down; that she was hogged, and steered badly, and that her master did not inform the tug of her condition. The answer also states that "against the ebb tide she steered well, but that in the slack water she steered wildly, sheering badly from side to side, but that it was then dark, and the master of the tug could not see how well or badly the schooner steered and he thought she had changed her man at the wheel." It is denied by the libelants that the schooner's helm was put to port to avoid a vessel without lights, or that she took any sheer whatever; and it is claimed that she was steered with the utmost care and attention, keeping a vigilant watch on the movements of the tug; that the vessel obeyed her helm, and her crew were abundantly able to perform every duty required of them.

The libelants charge that the tug was guilty of negligence in attempting to run through the shipping on a dark night with a vessel in tow by a line of fifty fathoms in length, and at a high and unsafe rate of speed. They also charge negligence on the part of the tug in not sooner taking measures to avoid the Ajax, and in not ordering the tow to starboard her helm until she herself had passed the bows of the Ajax, and was out of danger, while the tow was in a position that rendered the collision unavoidable. It is not easy to arrive at any accurate estimate of the speed of the vessels. The witnesses, of course, vary in their opinions; but from all that can be collected, it would seem to have been from seven to eight miles an hour. Whether this would be an unsafe rate of speed would depend upon the darkness of the night, the length of the hawser, the probability of meeting vessels, and all the circumstances of the case. If the night was as dark as is stated by Captain Neal, and even as may be inferred from the allegations of the answer, both the speed of the tug and the length of the tow line were too great. Captain Neal testifies that "it was very thick; you could hardly see a vessel more than a ship's length." The answer alleges that "it was then dark, and the master of the tug could not see how well or how badly the schooner steered." Captain Wilson, of the tug St. Thomas, states that he "should not consider it safe to run with the flood tide seven or eight miles an hour." Other witnesses express a contrary opinion, and Capt. Harrison ventures to say that "the greater the speed, the safer it is, up to the limit of speed which a tug can reach." In the case of The Rose, 2 W. Rob. Adm. 1, it was held that steamers are not justified in going at the rate of 10 miles an hour, on a dark night, and where other vessels are likely to be met. That the speed of the tug was greater than prudence justified would seem clear from the fact that she passed quite rapidly the tug Look Out, commanded by Capt. Neal, and also towing a vessel into the harbor. Capt. Neal testifies that she was going twice as fast as his own vessel. But the danger from her high rate of speed was greatly enhanced by the length of her tow line, especially if the night was as dark as appears from the answer. If the darkness or fog was so thick that the master of the tug could not see whether the tow steered well or ill, it may be inferred that the tow was at too great a distance to see the movements of the tug, and follow them by shifting her own helm. Both Capts. Neal and Wilson testify that it is unsafe to come up with a long hawser when the night is thick.

Capt. Smith states that he generally tows with a short hawser, 15 or 20 fathoms in length, until he gets below the shipping, and the significant fact appears in this case, and it is not disputed, that Capt. Neal, when he got near the shipping, did back down and shorten his hawser, thus proving by his conduct the sincerity of his opinion that it was a proper measure of precaution. If it were such, the neglect of it will render the tug liable for the consequences.

It may be urged, however, that the preponderance of testimony shows that the night was not so dark as to prevent the movements of the tug being seen from the tow, and that therefore the hawser was not too long. I am inclined to believe (though the answer seems to admit the contrary) that there was no difficulty in seeing the tug's lights from the tow, although the very close proximity of the schooner without lights at the moment she is said to have been discovered would seem to indicate that the night was far from clear. But I see no mode of reconciling with that "extreme caution" and that "utmost care" which the law exacts, the fact that the tug at so high a rate of speed, and with so long a hawser, took her course through, instead of inside or outside of, the shipping. On the inside was a fair way, 500 yards in width, established by harbor regulations; on the outside were the broad waters of the bay, where all danger would have been avoided. Capt. Neal, with his tow, passed outside of the shipping, and he observes, "There is no necessity to run through the shipping; it is dangerous, especially on a flood tide." That the tug in fact passed through the shipping cannot, I think, be doubted. It is not denied that several vessels were passed by the tug so near as barely to avoid them. Mr. Crabtree, first mate of the schooner, says that he passed within twenty, forty, and sixty yards respectively of three vessels. Espegreen, the schooner's helmsman, testifies that he crossed the bows of two other vessels, their jib-booms not more than five or six fathoms off; and Capt. Dresser, master of the schooner, says that after coming near a square-rigged vessel which they passed, he felt apprehensive of a collision. The schooner, without lights, is said to have been anchored somewhat to the outside of the Ajax, and about one-fourth of a mile below her. The master of the tug states that he passed to the inside of this schooner, and not more than fifty feet from her, and then endeavored to pass outside of the Ajax, which he succeeded in doing, clearing her by about forty yards, which the tow was unable to do.

It is evident, therefore, that the course of the tug was directed through the shipping, and under circumstances which required that her speed should be slackened and her hawser shortened, or else, in the language of the court in [Rogers v. St. Charles] 19 How. [60 U. S.] 108, "that the place should have been avoided altogether." The conjecture, for it is nothing more, of the master of the tug, that the tow ported her helm to avoid the schooner without lights, and thus got a sheer to starboard, which she was unable to overcome, is wholly unsupported by the testimony. Both the captain of the schooner and her helmsman deny that her helm was ported, or that she took a sheer to starboard. In fact, those on board the tug failed to see the schooner without lights in the position assigned to her by claimants' witnesses.

The allegations of the answer that the schooner's crew were worn down by labor and privation, that she was hogged, that she was not in trim, that she leaked, etc., seem either unsustained by the proofs or the facts testified to, are immaterial. That the schooner had been out of meat for about a week, and of bread for a few days, is clearly proven. She was also leaky, and perhaps a little out of trim. But when she was taken in tow by the tug she had no need of the services of her crew, except those of a competent helmsman and a vigilant lookout. The master appears to have been at much pains to have his vessel well steered. The helmsman was relieved about half an hour before the collision, because "he did not steer to the captain's satisfaction," and the wheel was taken by the master himself, who soon after resigned it to the second mate, who seems to have been thoroughly competent and attentive. The master then stationed himself as a lookout on the forward part of the deck-load, and maintained this position until the collision. He testifies that he observed the tug had put her helm to starboard, and was on the point of making the corresponding change in his own helm when the order to do so was given by the tug. This statement is corroborated by the testimony of Capt. Pierce, a passenger on the tug, who states that her helm was starboarded some two minutes before the order to do the like was given to the tow. Both the master and the mates testify that they were in full possession of their health and strength, and that they had heard no complaints from, and seen no sign of inability to work, in the crew. The leaky condition of the schooner, her being out of trim, or hogged, etc., are only important as tending to show that she did not steer well, and that she may have taken the sheer supposed by the claimants. But the master, the helmsman, and the mate deny most positively that she took any sheer whatever. If these witnesses are worthy of credit, their testimony as to what occurred on board their own vessel is more reliable than the suppositions of those on board the tug. The Neptune [Case No. 10,120]. The testimony establishes, I think, very clearly, that the schooner steered as well as is usual in vessels of her class. The captain, the first mate, the second mate, and Morse, all testify that she steered well. Some of the other seamen state that she steered badly in heavy

weather, but they generally admit that she steered well enough "if her helm was given to her quick, and she was close watched." Captain Pierce, a witness not certainly ill-disposed to the claimants, testifies that he remarked, when coming up to the Heads, that the schooner steered very well. Captain Cameron, her former owner, testifies that her qualities in that respect were rather remarkable—"she was a little hogged, but it made no difference in her steering." Captain Shelly, a pilot who came up in the tug as far as Meiggs' wharf, says: "I paid no particular attention to the steering of the schooner. If she had steered badly I should have noticed it." It is manifest from this testimony that the theory of the claimants that the schooner took a sheer which her helmsman was unable to meet, can derive no support from the defects of the schooner in regard to her steering qualities.

It seems to me not difficult to discover from the allegations of the answer and the admitted facts of the case to whom the fault of the collision should be attributed. The answer admits that the tug came upon the schooner without lights "quite suddenly." She passed her within forty or fifty feet. The Ajax was then nearly dead ahead, and, as claimants aver, one-fourth of a mile distant. The tug having passed inside the schooner, attempted to go on the outside of the Ajax, and for this purpose put her helm to starboard. But she did not communicate the corresponding order to the tow until two minutes afterward, nor until she had herself passed the Ajax's bows. Notwithstanding her own early change in her helm, she passed the Ajax within 200 feet, or, as the captain admits, within forty or fifty yards. The order to the tow was promptly obeyed, but it was too late to avoid the accident. The tow could not then have been much further from the Ajax than the length of the tow line, and this with a flood tide setting her directly upon her. Under favorable circumstances the course taken by the tug in and out among vessels, passing within forty or fifty feet of one and within 200 feet of another, would be attended with danger. But to take this course voluntarily, when she could have assured her own safety and that of her tow by passing either on the outside or the inside of all the shipping, and this on a night admitted to be somewhat hazy, at a considerable rate of speed, and with a tow line some forty-five or fifty fathoms in length, certainly betrays, as the result proved, a want of that "extreme vigilance" and utmost care which the law exacted under the circumstances. I am therefore of opinion that the tug was in fault, and should be held responsible for the damages.

NOTE. In the original opinion at page 483, lines 47–50 from top, the language is: "Culbertson v. The Southern Belle, 18 How. [59 U. S.] 585; The Scioto [Case No. 12,508]; Rogers v. The St. Charles, 19 How. [60 U. S.] 108; Ward v. The Fashion [Case No. 17,154]; Ang. Carr. § 650." This is erroneous, and should be corrected so as to read: "Culbertson v. The Southern Belle, 18 How. [59 U. S.] 585; The Scioto [supra]; Rogers v. The St. Charles, 19 How. [60 U. S.] 108; Newberry's R. 32 [Ward v. The Fashion, supra]; Ang. Carr. § 650."

Case No. 10,107.

NELSON v. HALL et al.

[1 McLean, 518.] [1]

Circuit Court, D. Ohio. July Term, 1839.

BOUNDARIES — EVIDENCE — PUBLIC REPUTATION — STATEMENTS OF INDIVIDUALS—CORNERS —COURSES AND DISTANCES.

1. What an individual may have said, as to a certain corner or line, is not evidence.

2. Public reputation may prove boundaries, but it must be the reputation in the neighborhood, and not what A or B may have said.

3. Where the original corners and lines are established, they must control courses and distances. But courses and distances called for must govern where there are no established objects to control them.

[Cited in Hanson v. Township of Red Rock (S. D.) 57 N. W. 14; Yocum v. Haskins, 81 Iowa, 441, 46 N. W. 1067.]

Mr. Fox, for plaintiff.

Williams & Ewing, for defendants.

OPINION OF THE COURT. This is a case of disputed boundaries. The lessor of the plaintiff claims by certain lines and corners, and the defendants with the exception of the beginning corner, claim by different lines and corners, and the jury are to determine from the evidence, which are the original boundaries of the lessor of the plaintiff's land. The original survey of Nelson, and other original surveys connected with it, have been given in evidence, and many witnesses have been examined, and blocks cut from trees marked as corners, and from others marked as line trees, showing the annular growths, have been examined by experienced surveyors and others, in the presence of the jury. There are some leading principles which the court will state to the jury, and which will govern them in making up their verdict. As you have heard from the bench, reputation is admissible evidence to prove boundaries. But what an individual may have said respecting certain lines or corners, does not constitute public reputation, and is, therefore, inadmissible to prove a corner or lines. The reputation must be general in the neighborhood. The surveys made subsequently to Nelson's and calling for it, are received as conducing to prove the reputation of the boundaries of such survey. The beginning corner is claimed in common by both parties, and also the first line, except the point where it is to terminate. But there is no agreement in regard to any of the other lines and corners.

The jury will first endeavor to ascertain

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

from the evidence, the original corners of Nelson's survey; and if they shall be able to do this satisfactorily, they will have little difficulty in tracing or running the lines connected with the corners. And this is the general rule as to corners and lines. If the original marked trees, or objects called for shall be proved, the jury will be governed by them, though they may vary materially from the courses and distances called for. The entry and survey of Nelson are prior in date to the entry and survey under which the defendants claim; and, of course, the subsequent entry and survey are controlled, even at law, so far as the survey is concerned, by the prior survey and patent.

But, if the corners claimed by the lessor of the plaintiff, and which are disputed, are not established by the evidence, the jury will locate the lessor of the plaintiff's claim, by beginning at the corner admitted, and running the courses and distances called for. And so, if a part of the disputed corners are established by the proof, in the opinion of the jury, and they can find no lines to control, the boundary must be established by running the courses and distances called for, so as to include the established points. But, no other deviation from the courses and distances called for, can be made, unless controlled by objects called for in the original survey.

With these general principles the jury will take the case, and after looking into the mass of the evidence, will apply the rule stated.

The jury found the lines of Nelson, as originally run established, except one, and they closed the survey by running the courses called for, so as to connect the two courses. Judgment, &c.

NELSON (HAUPTMAN v.). See Case No. 6,225.

Case No. 10,108.

NELSON v. The HERCULES.

[4 Law, Rep. 22.]

District Court, D. Massachusetts. March, 1841.

JOINDER OF SEAMEN IN SUITS FOR WAGES.

Libel by a seaman for wages on board the ship Hercules. The act of congress of 1790, c. 56, § 6, provides that in suits by seamen for wages, all the seamen (having cause of complaint of the like kind against the same vessel) shall be joined as complainants. In this case, the libellant was the only one of the crew in port, and brought his suit alone.

Mr. Bolles, for respondents, moved the court to add the names of the rest of the crew to the libel, that they might be concluded by the decree, and offered evidence to show that they had the same cause of action, in all respects, with the libellant. This would answer the object of the statute, which was to save the expense and trouble of several suits.

R. H. Dana, Jr., for libellant, contended that the statute applied only to cases where suits were actually commenced, and that absent parties could not be prevented from showing that their cause of action was different, and should not be concluded as to their claims by a trial upon evidence different from that which they might be able to produce.

DAVIS, Judge. The court has no power to make parties to the libel. The statute only requires the consolidating of several suits, when actually brought upon what is evidently the same cause of action.

NELSON (HERRING v.). See Case No. 6,424.

NELSON (LATHROP v.). See Case No. 8,111.

Case No. 10,109.

NELSON v. McMANN et al.

[16 Blatchf. 139; 4 Ban. & A. 203; 16 O. G. 761.] [1]

Circuit Court, S. D. New York. April 2, 1879.

PATENTS—SUIT BY LICENSEE FOR INFRINGEMENT—JOINDER OF OWNER OF LEGAL TITLE—WHAT IS LICENSE.

1. A mere licensee under a patent cannot sue, in equity, for the infringement of his rights under the patent, without joining with him, as plaintiff, the owner of the legal title, and such owner is, in such case, a proper party.

[Cited in Gordon v. Anthony, Case No. 5,605; Wilson v. Chickering, 14 Fed. 918; Bogart v. Hinds, 25 Fed. 485; Cottle v. Krementz, Id. 495; Blair v. Lippincott Glass Co., 52 Fed. 227.]

2. What constitutes a mere license, defined. The instrument under which the plaintiff in this case claimed his rights, *held* to be only a license.

Stephen D. Law and A. B. Malcomson, Jr., for plaintiff.

Thomas William Clarke and William T. Graff, for defendants.

BLATCHFORD, Circuit Judge. The bill in this case is founded on reissued letters patent of the United States, granted to Nathaniel Jenkins, August 3d, 1869, for an "elastic packing for joints and valves exposed to destructive fluids." The original patent was granted to Jenkins, May 8th, 1866. The specification of the reissued patent describes the new packing as "an elastic packing, of indestructible properties, to a valve, joint or aperture through which a destructive fluid is to pass, such as steam of any kind, hot water, kerosene or other coal oil, hot or cold." The bill alleges, that Jenkins, by an instrument in writing, dated February 1st, 1870, assigned and conveyed to the plaintiff "the exclusive right and license, within the states

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here republished by permission.]

of New York and New Jersey, to use said elastic packing in the manufacture of any and all manner of valves, cocks and other articles in which said elastic packing could or should be used, and sell for use in said territory and elsewhere in the United States, such valves, cocks, &c., so manufactured." It also alleges, that, under such rights, the plaintiff made and sold "valves, cocks and other articles containing said elastic packing." It also alleges, as an infringement, that the defendants did, in New York and New Jersey, "use and vend to others to be used the aforesaid invention and discovery, and did cause the same to be done, and did make, use, and vend to others to be used, valves, cocks and other articles employing and containing said improved elastic packing."

To this bill the defendants interpose a plea, which sets forth, "that the said Charles Nelson is not, and never has been, the assignee of the said letters patent in said bill set forth, or of any territorial grant under the same, in manner and form as set forth in said bill, and that the said letters patent are now the exclusive property of Thomas William Clarke of Boston, in the county of Suffolk, and state of Massachusetts, under the following claim of title: The said Nathaniel Jenkins died, on or about the twentieth day of May, 1872, leaving a will duly probated in said county of Suffolk, in the probate court thereof, whereof Charles F. Jenkins, Alfred W. Chandler and John Hassam were executors, and came into full possession of said letters patent. The said Charles Jenkins, Alfred W. Chandler and John Hassam, executors as aforesaid, on the —— day of ——, 1874, duly assigned said letters patent to Alfred B. Jenkins, under power contained in said will, and thereby conferred upon them. The said Alfred B. Jenkins, on the fifth day of November, 1874, duly assigned the same to said Thomas William Clarke. * * * Wherefore defendants say, that the title to said letters patent is not in the said Charles Nelson, for the states of New York and New Jersey." The plaintiff takes issue on this plea, by a replication.

Proofs have been taken by both parties, and the case has been brought to a hearing thereon. The real question tried and argued has been, whether the plaintiff has a right to maintain this suit in his own name alone, as it is now brought. The bill does not aver that the plaintiff is or has been the assignee of the patent or of any territorial grant under the same. Therefore, the plea, in denying that, denies what is not averred in the bill. The allegation of the bill as to the right and license conveyed to the plaintiff by Jenkins, by the instrument of February 1st, 1870, is not otherwise denied by the plea. The parties have, however, treated the pleadings and proofs as raising the question, whether the plaintiff has such a title to, or under, the patent as authorizes him to bring this suit in his own name alone; and that is the question which will be considered.

On the 1st of February, 1870, Jenkins owned two other patents which had been granted to him, besides the reissued patent of 1869. That reissue will be called the 1869 patent. The 1869 patent was for a packing composed of refractory earth and vulcanized rubber. Of the other two patents, one, granted October 15th, 1867, was for a packing for joints and valves composed of pulverized mica and vulcanized rubber, or one composed of pulverized wood charcoal and vulcanized rubber. The other patent was granted October 6th, 1868, and was for an "improvement in steam globe valves," of that class in which an elastic or semi-elastic packing could be employed, the packing being in an annular chamber in the valve head. Premising this, the instrument of 1870 was made. It contains these provisions: "Whereas said Jenkins is the proprietor of certain inventions in the construction of stop valves, cocks, &c., and in packing or discs for stop valves, cocks and other purposes; and whereas the said Jenkins has entered into an arrangement with said Nelson to license him to manufacture stop valves, cocks, &c., under his patent dated October 6th, 1868, and also other valves, cocks, &c., of a suitable pattern to employ his said patent packing or discs, and said Nelson does agree to pay to said Jenkins certain royalties on the valves, cocks, &c., so made by him, and to conduct the manufacture and sale of said valves, cocks, &c., in a manner that will insure the best results to the parties herein named: Now, therefore, said Jenkins does hereby authorize, empower and license the said Nelson to manufacture and sell valves, cocks, &c., of any and every kind, name and description, for any and every purpose, according to his said letters patent, dated October 6th, 1868, and does also authorize and empower said Nelson to make any and every other valves, cocks, &c., not constructed according to said letters patent, which can be suitably arranged for employing the Jenkins patent packing or discs, without making the said Jenkins liable for any infringements of letters patent on valves, cocks, &c., taken out by any other party or parties; and said Jenkins does hereby covenant and agree to and with said Nelson, that he will sell and promptly supply all his orders for the patent packing or discs, such as are to be used in the construction of the valves, cocks, &c., so made by him or for him, at a discount of twenty (20) per cent. from the latest list of prices of such packing or discs, advertised or circulated by him, a copy of which said list is hereunto annexed, in order to show the prices at this date;" (here follows the list of prices of packing or discs;) "and the said Jenkins does also covenant and agree, to and with the said Nelson, that he will not hereafter grant any authority or license to any person or persons to manufacture, within the

states of New York and New Jersey, any valves, cocks, or any article in which shall be used the Jenkins patent packing or discs, but that said Nelson shall have the exclusive right to manufacture, within the states of New York and New Jersey, any valves, cocks, or any other article, under said letters patent, dated October 6th, 1868, or renewed patents, or patents for improvements thereon; and said Nelson agrees to pay a royalty for any article he may manufacture, not within specified, in which the said packing is used, the royalty to be fixed upon when such article, not specified, is manufactured; and said Nelson shall have the right to sell in any of the United States, valves, cocks, or any other article, manufactured under said letters patent, or renewed patents, or patents for improvements thereon; and, for and in consideration of the same, the said Nelson does hereby agree with the said Jenkins, his executors, administrators, and the assigns of said Jenkins, of said patents for valves and packing, that he will make the business of manufacturing and selling the Jenkins patent compression valves and gauge cocks a specialty, that he will endeavor to introduce them into use in preference to any other valve or gauge cocks, and recommend them as a superior article, and that he will manufacture them of good material, and equal in weight and workmanship to those heretofore manufactured by him; and said Nelson also agrees to thoroughly advertise said valves and cocks, so to be made by him or for him, and bring them thoroughly to the attention of persons using and employing valves and cocks, and that he will purchase all the packings or discs required for such valves and gauge cocks, from said Jenkins or his legal representatives, or those owning said patents, at the aforesaid rates, viz., at a discount of twenty (20) per cent. from the latest list prices, and that he will pay to said Jenkins, his executors, administrators, or those owning said patent of October 6th, 1868, a royalty at the following rates, for each and every valve made and sold;" (here follows a tariff of royalty on each valve, according to its inches of opening, and on every gauge cock sold) "and said Nelson does hereby agree to stamp, or have stamped, each and every valve made by him, or for him, under said letters patent, as follows: 'Patented, Oct. 6th, 1868—May 8th, 1866, reissued Aug. 3d, 1869—Oct. 15th, 1867;' and said Nelson further agrees to account, at the end of each and every month, for the valves and cocks, or any other article sold by him, or for him, since the last account rendered, specifying the sizes, and the number of each size, and articles sold, and to pay to said Jenkins, his executors, administrators or assigns of his said letters patent, the sum of money due under this agreement, and according to such account, forthwith; and it is mutually understood and agreed, that the said Nelson may sell, transfer, or convey this right or license to any member or members of his firm, now or hereafter engaged in the carrying on of business with him, and that, in case of the death of said Nelson, this license or right shall descend to the survivor or survivors, or the administrators of the deceased, who shall possess all the rights and privileges guaranteed to said Nelson by this agreement, and such administrators may sell such right or license to any parties in the said firm, but neither the said Nelson, nor the administrators of said Nelson, nor any member or members of his firm, shall have any right to assign this right or license to any others than those now engaged, or those who may hereafter be engaged, in business with said Nelson, without first obtaining a written consent of said Jenkins, his executors, administrators, or assigns of his said letters patent; and said Jenkins further agrees, that this agreement shall subsist for the term of said letters patent, and that it shall be binding on the lawful possessors of the said letters patent for said packing, dated May 8th, 1866, reissued August 3d, 1869, and dated October 15th, 1867; and the said Nelson agrees that this agreement shall subsist during the term of said letters patent, and shall be binding on him, his executors, administrators and assigns."

The scope and meaning of the provisions of this agreement are very plain. Jenkins had a patent for valves and two patents for packing. The valves were such as could employ the patented packing. The patented packing could also be used in other valves, not covered by the 1868 patent. Jenkins desired to retain in his own hands the manufacture of the packing, and to sell it. He desired to create a market for it. He could do so by promoting the manufacture and sale of valves made according to his 1868 patent, which would require the patented packing, and of other valves which would require it. By licensing the manufacture of valves to be made according to his 1868 patent, he could derive a royalty on each valve, and at the same time obtain a profit on the manufacture and sale by himself of the packing to be used in such valve. He would also be able thus to ensure that the packing should be a satisfactory article. He, therefore, licenses Nelson to make and sell valves under the 1868 patent, and other valves which could employ the packing of the 1867 and 1869 patents, without making him (Jenkins) liable for infringing any patents for such other valves. He agrees to sell to Nelson, for use in such valves, packing made under the 1867 and 1869 patents, at specified prices. He agrees not to license any one to make in New York and New Jersey any article in which the packing of the patents of 1867 or 1869 shall be used. He agrees that Nelson shall have the exclusive right to make in New York and New Jersey any article under the 1868 patent. Nelson agrees to pay a specified royalty on every valve made and

sold according to the patent of 1868, and a specified royalty on every gauge-cock sold according to that patent, and on every other article he should make, not specified, in which such packing should be used, a royalty to be thereafter fixed. Nelson is to have the right to sell anywhere in the United States any article he may make under the 1868 patent. He agrees to purchase from Jenkins all the packing required for such valves and gauge-cocks, at the prices specified. He agrees to stamp every valve made by him or for him under the 1868 patent, with the dates of all three of the patents. He agrees to account to Jenkins every month for all articles sold by him under the agreement, and to pay forthwith the money due under the agreement and according to the account. He is authorized to transfer the license to those then engaged, or who might thereafter be engaged, with him in business, but he is forbidden to transfer it to any one else without the written consent of Jenkins. The agreement is to continue during the term of the 1868 patent and is to bind the owners of the patents of 1867 and 1869.

The instrument calls itself a license. It is not necessary in this case to construe its provisions as a license under the patent of 1868, for the suit is not brought on that patent, nor is it proper to do so, as between the present owners of that patent and Nelson, as the former are not parties to this suit. It is plainly a license to some extent to make and sell articles under the patent of 1868. As to the patents of 1867 and 1869, Jenkins owning those patents, and being engaged in making packing under them, agrees to sell such packing to Nelson at specified prices, with a view to having Nelson use it in articles to be made under the 1868 patent and in other articles fitted for it. But, the moment it was bought by Nelson it passed out from under the monopoly of the patents of 1867 and 1869, and it required no license to enable Nelson then to use it for any purpose for which it could be used. The fact of sale carried with it a license to use and a license to sell again. The instrument conveys to Nelson no right to make packing under either of the packing patents. The royalty to be paid is to be paid solely under the patent of 1868 and for a license under it. There is no royalty to be paid under either of the packing patents. The packing is to be bought from Jenkins as an article of merchandise, at a specified price, and Nelson agrees to buy from Jenkins all the packing he, Nelson, is to use. The valves made according to the patent of 1868 are to be stamped with the dates of all three of the patents, because the valves are made by Nelson under the patent of 1868, and the packing in them is made by Jenkins under the packing patents. Whether the instrument gives to Nelson, as against the owners of the packing patents, an exclusive right to use the patented packing in New York and New Jersey, is a question not necessary or proper to be decided in this case. At most, the instrument is, as to the patent sued on, a mere license.

It was provided by section 11 of the act of July 4, 1836 (5 Stat. 121), which was the statute in force when the 1868 and 1869 patents were granted, and when the instrument of February 1st, 1870, was made, that "every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing, which assignment and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout any specified part or portion of the United States, shall be recorded in the patent office within three months from the execution thereof." The 14th section of the same act provided, that an action at law for damages for infringement might be brought "in the name or names of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States." The seventeenth section of the same act gave original cognizance "as well in equity as at law" to all the circuit courts of the United States, of "all actions, suits, controversies, and cases" arising under any patent law, and gave power to such courts, "upon bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity," to prevent infringements. Under these provisions it was always held, that no mere licensee could bring a suit for infringement, either at law or in equity, in his own name alone. In Gayler v. Wilder, 10 How. [51 U. S.] 477, 494, it is said, that while, by the fourteenth section of the act of 1836, the patentee may assign his exclusive right within and throughout a specified part of the United States, and the assignee may, upon such an assignment, sue in his own name, for an infringement of his rights, yet, in order to enable him to sue, the assignment must convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself as well as others; and that any assignment short of this is a mere license. That was a suit at law. Wilder, the assignee of the whole of the patent, had granted to one Herring the exclusive right to make and vend the patented article, a safe, in the city and county of New York, for a royalty of a cent a pound on each pound the safe might weigh. But Wilder reserved the right to set up a manufactory for making the safes in the state of New York, not within fifty miles of the city, and to sell them in the state of New York, paying to Herring a cent a pound on each safe so sold within the state. The supreme court held that the agreement was "not an assignment of an undivided interest in the whole patent, nor the assignment of an ex-

clusive right to the entire monopoly in the state or city of New York;" that it, was, therefore, "to be regarded as a license only," and did not, under the statute, enable Herring to maintain an action for infringement; that Wilder continued to be the legal owner of the patent; and that the suit was properly brought in the name of Wilder. The same view was held by Mr. Justice Nelson and Judge Ingersoll, in the circuit court of the United States for the district of Connecticut, in Potter v. Holland [Case No. 11,329]. If, within the foregoing principles, the plaintiff in this suit is only a licensee, he cannot sue in equity without joining with him as plaintiff the owner of the legal title (Curt. Pat., 3d Ed., § 403); and such owner is, in such case, a proper party. Woodworth v. Wilson, 4 How. [45 U. S.] 712. A suit at law is, in such case, properly brought in the name of such owner, in behalf of the licensee. Goodyear v. McBurney [Case No. 5,574]; Goodyear v. Bishop [Id. 5,558]. These principles are recognized in Littlefield v. Perry, 21 Wall. [88 U. S.] 205, 219, 223, and there is nothing in that case which favors the right of the plaintiff in this case to sue alone. The court in that case say: "A mere licensee cannot sue strangers who infringe. In such case redress is obtained through, or in the name of the patentee or his assignee."

The thirty-sixth section of the act of July 8, 1870 (16 Stat. 203), provides, that "every patent or any interest therein shall be assignable in law, by an instrument in writing; and the patentee, or his assigns or legal representatives, may, in like manner, grant and convey an exclusive right, under his patent, to the whole or any specified part of the United States." This provision is not different from that found in section 11 of the act of 1836, and is now embodied in section 4898 of the Revised Statutes. The "exclusive right," under a patent, to a specified part of the United States, means an exclusive right to do everything under the patent, in such specified part, which the patentee could do, and is the same thing as the "exclusive right," under the patent, "to make and use, and to grant to others to make and use, the thing patented, within and throughout" such specified part. Section 55 of the act of 1870 contains the same provisions, in substance, which are above cited from section 17 of the act of 1836, and they are now embodied in sections 629, 711, and 4921 of the Revised Statutes. Section 59 of the act of 1870 provides, that an action at law for damages for infringement may be brought "in the name of the party interested, either as patentee, assignee or grantee." This means such a grantee as is referred to in section 36 of the act of 1870, and no other grantee than such as is spoken of in section 14 of the act of 1836. The provision above cited from section 59 of the act of 1870 is now embodied in section 4919 of the Revised Statutes. There is no ground for saying that the scope of the act of 1870 is greater than that of the act of 1836.

Applying the foregoing interpretation of the law to the provisions of the instrument under which the plaintiff claims the right to bring this suit in his own name alone, it is entirely clear that he has no such right, because he has not the title to the patent for any part of New York or New Jersey, which is the defence set up in the plea. Even if the agreement between Jenkins and Nelson gave to Nelson such an exclusive right and license to use the packing of the reissue of 1869 as is alleged in the bill, the plaintiff would have no right to maintain this suit in his own name alone. The plea is allowed and the bill is dismissed, with costs.

[For other cases involving this patent, see note to Jenkins v. Johnson, Case No. 7,271.]

Case No. 10,110.

NELSON et al. v. MADISON.

[3 Biss. 244; [1] 4 Chi. Leg. News, 297.]

Circuit Court, W. D. Wisconsin. June Term, 1872.

DEDICATION BY PLATTING—PLAT RECORDED IN WRONG COUNTY—PLAT MUST BE BY OWNER—EVIDENCE OF DEDICATION BY PRESCRIPTION.

1. The owner of land, or his authorized agent, can plat and lay out a town so as to pass to the public the perpetual use of portions of the land for streets and public grounds, and when such plat is made out, acknowledged and recorded in conformity with the statute, it operates as a sufficient conveyance of the streets and public grounds to the public use.

2. A plat made out and recorded in a different county from where the land is situate does not operate as a dedication.

3. The plat must be made by the person who owns the land at the time it is made, or his authorized agent, and in order to divest the title of the proprietor, the formalities prescribed in the statute are essential.

4. Deeds referring to a plat, but given before the grantor acquired title, do not bind him as an act of dedication.

[Cited in Boerner v. McKillip (Kan. Sup.) 35 Pac. 8.]

5. But an unequivocal recognition of the map after purchase would operate as an affirmance of the original intention of dedication and give it full force and effect.

6. Though dedication may be established by user for a period of twenty years, such user, in order to constitute a dedication by prescription, must have been adverse under some real or pretended claim or right, and exclusive. In the absence of proof to the contrary, the presumption is that the user was permissive.

7. Various decisions of the supreme courts of Wisconsin and of the United States cited and commented on, this court following the latter.

8. Circumstances constituting a dedication—effect of user and acquiescence.

[9. Cited in Reid v. Board of Education of Edina, 73 Mo. 297, to the point that counties have no power to purchase or hold land unless it is given to them by statute.]

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

In equity. This was a bill filed by the complainants, claiming to be owners in fee of certain real estate in the city of Madison, to restrain the city from taking possession of or using them. The facts appear in the opinion.

Gregory & Pinney and S. U. Pinney, for complainants.

J. C. Ford and H. S. Orton, for defendant.

HOPKINS, District Judge. The bill in this case is filed to restrain the defendant from proceeding forcibly to remove a fence erected around a piece of ground situated in the city of Madison, and claimed by the complainants as lots one, two, three and four, block 272. It is alleged in the bill that the complainants placed such fence around the lots to enclose them, and that the defendant has ordered its police officers to remove it. The complainants charge that they own the lots in fee, and ask a perpetual injunction to restrain the defendant from intermeddling with the said fence or the possession of the lots.

The defendant in its answer denies that the premises claimed belong to the complainants, but on the contrary sets up and maintains that they have been dedicated to the public use as a landing or "square," for the use of the public, and that as such they are under the control of the city authorities, and admits that it has directed its officers to remove the fence in case the complainants do not do it after five days' notice. The answer further alleges that the common council of the city, on the 5th day of November, 1870, declared the premises in question to be a public square by the name of "Mendota Public Square." It also alleges that the proprietors and owners of this property more than thirty years before the commencement of this suit, duly granted and dedicated the same to the public for their use as a public landing, street, or public way to and on to Lake Mendota, and that it had been used as such for that period by the public, without objection or hindrance from the complainants or others up to the time the complainants erected the fence around it in December, 1870.

It also states that in 1836 the proprietor of the land embraced within the city of Madison laid out and platted it into lots, streets and squares, and duly acknowledged and recorded such plat in the proper county, and that afterwards it was duly recorded in Dane county, in volume 2 of deeds, page 338, and that on that map or plat this property is designated as a "public landing," and defendant insists that it was thereby granted and dedicated to the public for such use.

The bill alleges that for more than twenty years last past the city has assessed and taxed it as private property, and that the complainants and those under whom they claim, have paid the taxes on such lots, and special assessments for sidewalks, which is admitted in the defendant's answer.

The only questions that require much examination are those relating to the validity and effect of the plats, and if they should be found invalid as grants, then as to whether the defendants have shown a dedication or title by prescription. This I say because I think the evidence abundant to show title in the complainants, unless it is avoided by the plats, dedication, or user.

Three plats of the city have been given in evidence. One made by James D. Doty, individually, acknowledged on the 27th day of October, 1836, and recorded in Iowa county on the 5th May, 1837. Upon this, property on Lake Mendota, now known and described as blocks 260, 261 and 262, and portions of the lots in question, are marked "Public Landing." The residue of these lots are a part of what is called on the plat the "Canal Reservation." It is claimed that this shows that the intention of the proprietor was to reserve certain portions of land on the margin of the lake on each side of the proposed canal for a "public landing." If this were all there was upon that question, I should concur with the defendant's counsel; but the case presents other and different questions. The land platted was not in Iowa county, where the plat was recorded, but was in the county of Milwaukee, so that it was not recorded in the county required by the statute. At the same time another plat was made by J. D. Doty, "as agent, trustee and attorney of the Four Lake Company," which was acknowledged by him as such attorney on the 2d day of January, 1837, and recorded in Milwaukee county on the 17th day of January, 1837. Both of these plats appear to have been prepared by John V. Suydam, as surveyor, whose certificate on each bears date on the 27th October, 1836. On this map the property now known as blocks 260, 261 and 262, is not platted or subdivided into lots or blocks, nor designated as a "public landing." The property in question is left the same way, except that part included in the "canal reservation," which is the same as on the other plat. The surveyor's certificate on each is the same, and in neither is this property or any of this property on the lake not subdivided, mentioned as a "public landing" or "square," nor is it particularly described, nor are the dimensions, courses, or boundaries given. In these respects both plats are essentially defective and do not comply with the statute under which they were made (section 2, Act Mich. April 12, 1827, p. 531; Laws Mich. 1833). And as they are not executed, acknowledged and recorded in accordance with the requirements of the statute, they are not valid or operative as grants of the portions designated as streets and public squares.

The complainants further object to their validity on the ground that neither Doty nor "the trustees of the Four Lake Company" owned the land at the time the plat was made and acknowledged. It cannot require the citation of authority to show that no person other than the owner or his authorized agent

can plat and lay out a town so as to pass to the public the perpetual use of portions of the land for streets and public grounds; and as the evidence shows that neither Doty, individually, nor "the trustees of the Four Lake Company," for whom he claimed to act as attorney in making one of the maps, owned this land when they were made, they are, on that ground, ineffectual to pass the title to these lots, or any portion of the land, as public grounds. When a town plat is made, acknowledged and recorded in conformity with the statute, it operates, according to the express declaration of the act authorizing it, as "a sufficient conveyance of the streets and public grounds to the public use." But in order to devest the title of the proprietors, the formalities prescribed by the statute are essential. Gardiner v. Tisdale, 2 Wis. 153; People v. Beaubien, 2 Doug. 256.

The counsel for the defendant claim that as Doty, in 1841, after making the plats, acquired the title to all this property, such subsequent purchase operated, under the doctrine of inurement, to affirm the plat and make good all grants and dedications therein contained. Lee v. Lake, 14 Mich. 12. But I do not think that doctrine applies to the case. That only applies to sales with warranty. In such cases, an after-acquired title is held to inure to the benefit of a purchaser to prevent circuity of action. But I think an unequivocal recognition of the map after the subsequent purchase would operate as an affirmance, as will be more fully considered hereafter. Cincinnati v. White's Lessee, 6 Pet. [31 U. S.] 431.

Another map was made by M. M. Strong, as attorney for Kintzing Pritchette, on the 10th day of October, 1839, which on the same day was acknowledged and recorded in Dane county. On this map, all this property that is marked on the Doty map as a "public landing" (except the lots in controversy) was laid off into blocks as numbers 260, 261 and 262. This property in controversy is not laid off into blocks or designated at all, except by a blank space, but more than three-fourths of what was called in Doty's plat a "public landing," is laid off into blocks, and it was soon thereafter built upon, and has been occupied as private property ever since.

The defendant does not claim to make title to the property as a public square or landing under that plat, for it is not designated as such thereon. The mere omission to divide portions of the property within the limits of a town into lots or blocks, does not operate ipso facto as a grant or dedication of such parts. But it is unnecessary to continue the further consideration of these plats as legal instruments to pass the title, for the counsel of the defendant, on the hearing, did not contend with much confidence that they were executed in compliance with the requirements of the statute, so as to operate as conveyances. But he maintained that they, and particularly the Doty plat first mentioned, constituted very strong, if not conclusive evidence, of a dedication by the proprietor to the public for the use and purpose designated.

But it seems to me that one of the grounds upon which I have held the plats to be inoperative as grants, applies equally to this claim. I have held that as the person laying it out did not own it, he could not legally plat it, and it would seem to follow as a logical conclusion, that if he did not own it he could not dedicate it, for a party cannot give away what he does not own, any more than he can sell it. Bushnell v. Scott, 21 Wis. 451. In the decision of this case, the intention of Mr. Doty, as manifested by the plats, must be laid out of view, unless it shall be found that after he acquired the title in March, 1841, he, by some act, clearly recognized the plat. If he did, I think it would operate against him and those claiming under him as an estoppel in pais; and if he recognized it in such a way, I think it should be held also to be an affirmance of his original intention of dedication as shown by the map; it should be held to be equivalent to a re-execution and acknowledgment of it and give to it its full force and effect, so far as dedicating to the public the right to use the streets and public grounds.

The defendant, for the purpose of showing such recognition, gave in evidence several deeds executed by him, in which he refers to his individual plat as the plat according to which he sells. But I do not find that any deed of that kind was given after he acquired the title. They do not bind him, therefore, any more than the plat itself, so that the case must be determined upon the question of dedication arising by prescription, user, and a peaceful and willing acquiescence by the owners in such use for such a length of time as to presume a grant. Upon this question there is some apparent conflict in the testimony; but I think when carefully examined, such conflict will be found to exist more in the different meaning of the terms used by the witnesses than in any difference in the facts they meant to relate. The defendant's witnesses state that they always understood it to be a "public landing," and that it had been so used up to the time of the building of the fence, since the town was first settled; while the witnesses on the other side say that it has been so used, but they never understood that the city or any one else claimed the right to use it in that way. The defendant's witnesses probably understood it to be such, because it was called the "Landing," while the plaintiff's witnesses did not understand that it was so claimed simply because it was called such. There is no evidence of the exercise of any authority over it on the part of the public authorities. Governor Farwell, who owned it from February, 1847, up to 1859, and Richardson and Van Slyke, who have since acted as the agents of the complainants, testify that they never heard it claimed as public property until

about the time it was enclosed by the fence. I think, therefore, that no formal claim of right had ever been made to it on the part of defendant, or any claim sufficient to require a denial of it by the owners, or any action on their part to prevent its being so used in order to protect their interest. It is clearly proven that it had been traveled over ad libitum by persons going to the lake, and that the fire companies of the city had used it on their parade days. This property had remained open and unimproved, although the complainants had granted permission to Manning, Briggs and Hudson to pile wood upon it, and to use it in that way for their private purposes for some portion of the time during the last ten or twelve years. The old pier or steamboat landing built in 1837, spoken of by some of the witnesses, was not opposite this property, but was, according to the testimony, opposite the old mill on block 262, and the pier built more recently is at the end of East Canal street, and not on any of this property. This is a narrow strip between East and West Canal streets; a part of it was, I should infer, reserved or intended to be by the original proprietors of the town, for a canal to connect Lake Mendota and Monona, to be used by them either as a raceway for mills, or for navigation, as the wants and necessities of the country should demand. Long before the place was much settled, I think the idea of using the lakes for purposes of navigation was abandoned, for in 1839 the space originally left as a landing, or for some other purpose, was platted for private uses, as appears by the Pritchette plat hereinbefore mentioned, and only the piece lying between East and West Canal streets, a part of which was designated as the canal reservation, was left, which may still have been considered as valuable for purposes of a water power.

This change of purpose seems to have been generally acquiesced in by both the public and public authorities, for there is no evidence of any objection ever having been made to it, and all of that part then platted has been occupied for a great many years with mills, factories, and dwelling-houses.

The fact that more than three-fourths of the land originally designated as a "landing," has been devoted to private uses, and used as such a great many years, without objection on the part of the city or any one, negatives the idea that it was understood originally that this property was in fact dedicated or intended to be dedicated to public use. For if Doty dedicated any, he dedicated the whole marked on his map, and we have no right to limit or restrict his intention to dedicate only this piece in controversy. It must be borne in mind that at the time of that platting, the town in that vicinity was covered with timber and small bush, and that Gorham street in front of these lots, which is now one of the principal residence streets in the city, was not cut out, as Governor Farwell in his testimony, says, until 1849, when he says he had it cut out and cleared off. Before that he says the travel was not confined to the streets in that part of the town, but wound around in places most available, without reference to the line of the streets, and as he first improved the property in that vicinity, I think his testimony as to its condition at that time and previously, entitled to the most weight of any given in this case. To hold that there had been any such use as the law contemplates as the foundation of a title by prescription, is attaching altogether too much consequence to the irregular travel and trifling use of it by the public before that time. I do not think such a use for any length of time of land in its natural state would devest the owner of his title to it, or any part of it. James Richardson testifies that in 1849 he was employed by Governor Farwell, who then owned this property, to survey and lay it out into lots and blocks, which he did, numbering the lots 1, 2, 3, and 4, block 272; that since that time it has always been claimed as private property, first by Farwell, and since by the Nelsons, and it has since been designated on the maps of the city generally in use, as "Block 272," and he swears that as the agent of the Nelsons, in 1860 and 1861, he permitted it to be occupied by Mr. Briggs, and after that by Manning and Hudson, for piling wood. No objection was made by the city to such use, nor was any claim made that it was public property. The case shows that ever since it was platted by Richardson for Farwell it has been assessed and taxed as private property, and that these claimants, Farwell and Nelsons, have paid the taxes assessed on it; that in 1866 the city passed an ordinance requiring the owners to build a sidewalk across it on Gorham street, which the owners or claimants built in pursuance thereof. These facts establish beyond controversy to my mind that the city in its corporate capacity has never claimed to occupy this property adversely to the owners up to about the time of the commencement of this suit, when they passed the ordinance declaring it a public square, as heretofore stated. Do these facts authorize the court to find that defendant had acquired a right to it by prescription as it claims? I do not think they are sufficient. Dedication may be presumed and established by user for a period of twenty years. But I think such user, in order to constitute a prescription or dedication by prescription from acquiescence in such user, must have been adverse under some real or pretended claim or right, and it must have been exclusive. In the absence of proof to the contrary, I think the presumption is that the user was permissive and not adverse.

This was so laid down by the supreme court of this state in State v. Joyce, 19 Wis. 91; but in the case of Hanson v. Taylor, 23 Wis. 547, a majority of the court overruled that case and held that the use in the ab-

sence of proof to the contrary must be presumed adverse. Chief Justice Dixon dissented, and filed an able and exhaustive opinion, in which he collates and reviews the leading authorities on the question, which I think triumphantly sustain his conclusions.

This case was relied upon by defendant as sustaining the doctrine that its right by prescription might be established by the mere user by the public, without any claim on the part of the city authorities, and without showing it to have been adverse in fact, claiming that it must be presumed to have been adverse. I cannot yield my assent to the rule laid down by the majority of the court in that case, and as it is in conflict with the decisions of the United States supreme court. Irwin v. Dixion, 9 How. [50 U. S.] 10; City of Boston v. Lecraw, 17 How. [58 U. S.] 426. And as it relates to a common law question, and is not under the authority of Yates v. Milwaukee, 10 Wall. [77 U. S.] 497, binding upon the federal courts, I shall follow the decisions of the United States supreme court as controlling in this case.

In the case of City of Boston v. Lecraw, 17 How. [58 U. S.] 426, the court, in speaking of a right of way attempted to be established by dedication or prescription, say: "Till he reclaimed his land the public needed no grant or dedication by him, in order to their enjoyment of the right of navigation over it. The owner was not bound to exercise his right within a given time or forfeit it. A man cannot lose the title to his lands by leaving them in their natural state without improvement, or forfeit them by non-user. See Batz v. Ihrie, 1 Rawle, 218." In this case as in that, the land has remained in its natural state, and if the use of it under such circumstances, in the manner detailed by the witnesses, constitutes a prescriptive right to it on behalf of the city, then the complainants will have lost the title to it "by leaving it in its natural state," and it will be "forfeited" by reason of the "non-user," which the court, in the opinion above cited, hold cannot be done.

The payment of taxes on vacant or unseated lands, the supreme court of New Hampshire have decided to be an act of ownership. Little v. Downing, 37 N. H. 355; Farrar v. Fessenden, 39 N. H. 268; Carr v. Dodge, 40 N. H. 403; Hodgdon v. Shannon, 44 N. H. 572.

In Kirk v. Smith, 9 Wheat. [22 U. S.] 288, Chief Justice Marshall, in commenting upon the operation of the statute of limitations, and the character of the possession of real estate, in order to make it available as the foundation of a right acquired under such statutes, says: "One of the rules which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is that possession to give title must be adverse. The word is not indeed to be found in the statutes, but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title. Several cases have been decided in this court in which the principle seems to have been considered as generally acknowledged, and in the state of Pennsylvania, particularly, it has been expressly recognized. To allow a different construction would be to make the statute of limitations a statute for the encouragement of fraud; a statute to enable one man to steal the title of another, by professing to hold under it. No laws admit of such a construction." This expresses the rule in very clear and energetic language; but I think none too much so, when considered in reference to lands in their natural state.

In Irwin v. Dixion, supra, the property had been taxed as in this case, and the owner had paid the taxes as in this case, and that fact is mentioned by the court as a circumstance repelling the idea of dedication or prescription. The court further says, "In order to have a use or occupation accomplish this (prescription), it must have been adverse to the owner. 3 Kent, Comm. 444. It must have also been an exclusive use by the public. It must also have been acquiesced in by the owner, and not contested or denied." This case does not come up to these requirements or to any one of them, but, on the contrary, the evidence clearly establishes that it has been claimed as private property by the owner since 1849, when it was laid out as private property, that it has been taxed by the city as private property ever since that time, and that for a portion of the time it has been occupied by parties under the owners for private purposes.

These acts are inconsistent with the idea of a dedication, either express or by implication. They show, to my satisfaction, that the use of this property by the public was not adverse in its character within the meaning of the law, and was not acquiesced in by the owners in such a manner as to bring it within either the doctrine of dedication or prescription. I therefore find that the defendant has no right, title or claim to said property or the possession thereof, and that they have no right to remove the fence erected around the same by the complainants, and direct that a decree be entered according to the prayer of the bill, with costs to be taxed. The complainants' solicitor will prepare a decree according to this opinion, and present it to the judge to be settled according to the usual practice.

For a full citation of the authorities on the question of dedication, consult U. S. v. Illinois Cent. R. Co. [Case No. 15,437].

Case No. 10,111.

NELSON v. MOON et al.

[3 McLean, 319.] [1]

Circuit Court, D. Ohio. Dec. Term, 1843.

PRACTICE IN CHANCERY—WAIVER OF PROCESS BY APPEARANCE—GUARDIAN AD LITEM—NOTICE TO INFANT—RECORD AS EVIDENCE—PARTITION IN TWO COUNTIES—DECREE—PATENT FOR LAND COVERED BY PARAMOUNT TITLE.

1. Parties in chancery, or at law, may waive process and appear.

2. Regularly a notice should be served on infants, where the court appoints a guardian ad litem, and for this defect a judgment or decree may be reversed by a superior court.

[Cited in O'Hara v. MacConnell, 93 U. S. 152.]

[Cited in McAnear v. Epperson, 54 Tex. 220.]

3. But this objection cannot be taken collaterally.

4. When a record is used as evidence, presumptions are always favorable.

[Cited in Horner v. Doe ex dem. State Bank of Indiana, 1 Ind. 133; Horner v. Doe, Id. 11.]

5. The court of common pleas had power to take jurisdiction of a bill for partition in two counties.

6. But, to affect purchasers, the decree must be recorded in the county where the land lies.

7. Where a tract of land is lost in whole or part, the patent may be cancelled, under the act of congress.

8. The act under which this is done is remedial in its character, and just.

9. It is exerted only on the application of those who have lost land by a paramount title.

10. A patent for land covered by a paramount title does not vest the fee in the patentee.

At law.

Mr. Thompson, for plaintiff.

Mr. Foot, for defendants.

OPINION OF THE COURT. The facts in this case being admitted, it is submitted to the court without the intervention of a jury. The defendants pleaded the general issue, and under the rule of court have specified by metes and bounds the various tracts of land which they claim, and of which they have possession. A patent issued to Breckenridge for the land in controversy, and other tracts, the fifteenth of February, eighteen hundred and three, in all amounting to seventeen hundred and sixty-six and two-thirds acres. Robert Campbell was the owner of the warrants on which the locations were made by Breckenridge in his own name, and for which he was entitled to a moiety of the land. In 1833, Campbell filed his bill in the court of common pleas for Brown county, against the heirs of Breckenridge, setting up the contract of location, and praying a conveyance of a moiety of the land, and partition. Answers were filed, and a decree for a title and partition was made. In 1831, the patent to Breckenridge was surrendered, and a new patent issued to the heirs of Breckenridge and Robert Campbell, for thirteen hundred and thirty-five and two-thirds acres—to Robert Campbell, in proportion of five hundred and thirty-eight to the whole tract. Prior to the issuing of the new patent, Campbell had conveyed to the defendants all his interest in the land, except one hundred and seventy acres, which he subsequently conveyed to St. Clair. By these conveyances the plaintiff contends, the defendants have acquired possession of more land than Campbell was entitled to, and this is the ground of controversy. Several questions on the foregoing facts have been raised and discussed.

The plaintiff contends, the proceedings before the court of common pleas of Brown county were void, for the following reasons: 1. There was no service of process on the parties. 2. The answers are not sworn to. 3. The land of which partition was made was situated in Brown and Clinton counties, over which the common pleas of either could exercise no jurisdiction.

As to the service of process. George C. Light was appointed guardian ad litem to two of the defendants, who were minors; and Mr. Collins, of counsel for the defendants, filed all the answers. Defendants in chancery, as well as at law, may waive process and appear; and this having been done in good faith, they are as much in court, and as much bound by its proceeding, as if they had been regularly served with process. But it is said that infants cannot waive process. The two infant defendants appeared by guardians ad litem, and it is objected that this was done without a notice having been served on the infants. If it be admitted, that for this defect in the proceeding the supreme court would have reversed the decree, yet it does not follow that the decree, when collaterally used, can be treated as a nullity. There was an appearance by a guardian specially appointed by the court to defend the suit, and the presumption will be in favor of the proceeding and not against it, when used as evidence. A judgment or a decree may be treated as a nullity, if it appear from the record that there was neither a service of process nor a waiver of it. But in the present case there was an appearance according to the forms of law, and that gave jurisdiction to the court. The objection, at most, is to an irregularity, which might be ground of reversal, but does not show a want of jurisdiction in the court. And this must be made clearly to appear, before the decree can be treated as a nullity.

The answers were not sworn to, but they were treated as sworn answers by the complainant in that suit, and an objection cannot now be made on that ground. Had an exception been filed to the answers for this cause, they would have been set aside; but no exception being taken, it was waived, and the decree can in no sense be affected by this

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

omission. No doubt the pleadings were made up by consent.

A part of the land was situated in Brown county, where the bill was filed; and this gave jurisdiction over the land in Clinton county. If the decree of partition were not recorded in Clinton, within the time limited by the statute, the rights of a purchaser were not affected by it. But, as between the parties to the decree, it was valid under the statute. Was the first patent cancelled? This is the great question in the case.

The act of the 13th of May, 1800 [2 Stat. 80], provides: "That in every case of interfering claims, under military warrants, to lands within the Virginia military tract, when either party to such claims shall lose or be evicted from the land, every such party shall have a right, and hereby is authorised, to withdraw his, her or their warrant, respectively, to the amount of such loss or eviction, and to enter, survey and patent the same, on any vacant land within the bounds aforesaid, and in the same manner as other warrants may be entered, surveyed and patented." The surveyor of the district certified, that four hundred and thirty-one acres of the land patented to Breckenridge were lost by a prior entry. That of the land decreed to Campbell, one hundred and eighty-one acres were lost. This certificate bore date the 1st of December, 1830. The original patent was returned to the land office, on which the following indorsement was made: "Cancelled, 431 acres of land lost by a prior claim, as patented on the new survey, No. 3045, will be issued for 1335⅔ acres. The parties, R. Campbell, and the heirs of Breckenridge, claim scrip for the 431 acres lost by prior survey. December, 1831." And lines of the pen were drawn across the patent. The commissioner of the general land office states, "that where a tract of land, which had been patented, was lost in whole or in part, it was the practice of the land office to cancel the patent," as was done in this case. It is objected, that the law does not authorise the cancellation of the patent. It does not in terms, but such is the practice of the department, and it would seem to be a reasonable and proper practice, and one which, if not required by the words of the act, is fully justified by its substance and spirit. This, it is contended, would vest in the treasury department a very dangerous power. How is the power a dangerous one? It is treated as a power exercised against the rights of the original patentee. But such is not the character of the act. It is remedial, and only operates in cases where the person in interest makes special application for relief. Having lost his claim by a paramount title, in whole or in part, he obtains other lands from the government. The government might have withheld this relief. For a person who holds a Virginia land warrant, is bound to select vacant land, and if, through negligence, or want of knowledge, he locates his warrant on lands previously appropriated it is his own fault, and the government, strictly, is not bound to relieve him. But he is relieved by the above act, and it is just, and the act is fraught with no danger to the citizen. But it is said by the patent the fee passes out of the government to the patentee, and that this cannot be divested except by judicial decision. But the fact assumed here as to the fee is not true, and never can be true in an equitable sense. It is in fact only in cases where the patent does not convey the title, as the face of it purports to do, that relief under the act is desired. For it is only where the title, in whole or in part, is inoperative, that relief can be asked. And is it not strange that this should be considered a dangerous power? As the evidence on which the government acts under this law, and the mode by which the power is exercised, seems to be within the executive power to determine, it is not competent for the judiciary to prescribe the forms in which any executive power shall be exercised. It may determine whether such a power has been legally exercised. The action of the executive in the case must be considered prima facie, if not conclusive. If there has been fraud to the injury of third parties, it may be shown, and the proceeding may be held void. But there is no pretence of fraud. The cancellation of the patent must be held to have been for the benefit, as it was at the instance, of the parties interested.

From this view of the case, the lessor of the plaintiff, under the patent, has a legal right of recovery. Whether the defendant may not set up an equitable right under the partition, is not now before us.

NELSON (MOORE v.). See Case No. 9,771.

Case No. 10,112.

NELSON v. NATIONAL STEAMSHIP CO.

[7 Ben. 340.] [1]

District Court, E. D. New York. May, 1874.

BILL OF LADING—DAMAGE TO CARGO—BREAKAGE—NEGLIGENCE—EVIDENCE.

1. Casks of plumbago were brought in different ships of a line, under bills of lading which exempted the ship from damages resulting from leakage, or breakage, or from stowage, however such damage might be caused. On some of the bills of lading were memoranda, that the casks were loose when shipped. The consignees brought suit against the owner of the vessels to recover for plumbago lost out of the casks, as they claimed by reason of injury to the casks from careless handling: *Held*, that the exemption in the bills of lading was not sufficient to exempt the owners from loss arising from their negligence.

[Cited in The Montana, 17 Fed. 379.]

2. In the cases where the memoranda that the casks were loose were on the bills of lad-

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

ing, the presumption would be that any loss which occurred arose from such loose condition of the casks.

[This was a libel by Horatio Nelson against the National Steamship Company to recover damages for injury to goods shipped.]

Beebe, Wilcox & Hobbs, for libellants.
John Chetwood, for respondents.

BENEDICT, District Judge. This action is brought to recover damages of the National Steamship Company, for loss and injury to certain shipments of plumbago. It is founded upon seven different bills of lading, issued on seven different voyages, made by five different steamers all owned by the defendants.

Owing to the lapse of time and the number of shipments, there is much confusion in the evidence, and it is with difficulty that the facts appertaining to each shipment can be ascertained. It is clear, however, that in every one of the shipments casks of plumbago came out in bad order, and that there was not only a loss of part of the contents, but an injury to the remainder from the admixture of dirt, which occurred in shoveling up from the wharf plumbago which had escaped from the casks.

One of the grounds of defense is that the loss was caused by the fact that the casks were rotten and unable to retain their contents, and parts of staves are produced in court which are clearly unsound. These staves were taken from two casks in one of the shipments. With this exception the evidence as to a bad condition of the casks is general in its character, and insufficient to account for the bad order in which the merchandise arrived. On the other hand, there is evidence equally positive that the casks were good, and the claim is that the loss arose not from insufficiency of the casks but from the breaking of the staves caused by bad stowage.

None of the bills of lading contain any reference to a rotten or weak condition of the casks. The burden of showing that the loss arose from the rotten condition of the staves is therefore upon the defendants, and the general evidence produced to that effect does not enable me to charge this loss to a bad condition of the casks, except in the one instance where it is positively proved that two casks in the shipment were rotten. The main ground of defense is that the bills of lading relieve the defendants from liability for loss or damage arising from leakage or breakage, or resulting from stowage, however such damage may be caused. This exception in the bills of lading is not sufficient to exempt the defendants from loss arising from their negligence. The evidence discloses negligence in the stowage of the shipment by the Denmark, of May 2d (No. 1). A neglect of proper care of this merchandise while on the deck before delivery also appears. Damage from neglect in the stowage of the shipment by the Helvetia, of June 2d (No. 2), is also shown, as well as careless handling of the merchandise in landing, whereby some of the casks were broken and contents lost, together with injury to portions of it by admixture of dirt, &c., &c., while on the ship or on the wharf. The loss on these two shipments is therefore chargeable to the defendants.

The bill of lading, shipment by the Erin (No. 3), contains a memorandum that the casks were loose when shipped, and the presumption that such loss as appears from these casks, of such an article as plumbago, arose from the loose condition of the casks is sufficient to overcome any evidence in the case tending to show the loss to have resulted from bad stowage.

As to shipment by the Denmark (No. 4), it is not claimed that there was bad stowage, and no evidence of other neglect. As to shipment by the Queen (No. 5), the bill of lading contains a memorandum that the casks were loose when shipped, and there can be no recovery for the reasons above stated in respect to No. 3. As to shipment by the Queen (No. 6), it is not claimed that there was any bad stowage, and no evidence of other neglect. In shipment No. 7 were the two casks proved to be rotten, and the deficiency claimed should, upon the evidence, be charged to the bad condition of the casks.

My conclusion, therefore, is that the libellants are limited in their recovery to the loss they have sustained upon the two shipments first above mentioned (No. 1 and No. 2). Any loss of quantity or of value by the admixture of foreign matter upon these two shipments they are entitled to a decree for. A reference will be had to ascertain the amount of the damage in accordance with this opinion.

Case No. 10,113.

NELSON v. PHOENIX CHEMICAL WORKS.

[7 Ben. 37.] [1]

District Court, E. D. New York. Oct., 1873.

WHARFINGER—DAMAGE TO VESSEL BY GROUNDING AT A WHARF.

1. It is the duty of a shipmaster, before placing his vessel in a berth, to ascertain whether the depth of water in the dock is sufficient for the draught of his vessel.

[Cited in Crossan v. Wood, 44 Fed. 95.]

2. A wharfinger is not bound to maintain a depth of water in the berth at his wharf, sufficient for all vessels at all tides.

[Cited in The Francesca T., Case No. 5,030.]

3. It is the duty of a wharfinger to give information as to inequalities in the surface of the bottom, when that is material to the safety of a vessel about to moor at his wharf.

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

4. A direction by a wharfinger, who is consignee of cargo on board of a vessel, to the master of the vessel, to put his vessel in a certain berth, is not equivalent to a notification that the water is deep enough at all times to float the vessel.

This was a libel by [Christopher Nelson] the owner of the Gen. Lyon, to recover damages for an injury received by her, by grounding while lying in a berth at a dock owned by the respondents. The vessel had brought a cargo consigned to the respondents, who directed the berth at which they wished her to discharge.

Wilcox & Hobbs, for libellant.
G. W. Hoxie, for respondents.

BENEDICT, District Judge. No recovery can be had in this action, except upon proof of negligence on the part of the wharfinger, resulting in damage to the libellant's vessel, while moored at the defendants' wharf. The evidence shows no negligence in the construction of the wharf. As to the condition of the bottom, in the berth to be occupied by vessels when fast to the pier, the evidence is not sufficient to warrant the conclusion that it was not made as level as could be reasonably demanded, and as any obligation on the part of the wharfinger required.

Some variation in the depth of water in the berth is proved, but there is no evidence of the presence of any stones, or any obstructions on the bottom, or that the bottom was such that a sound boat would be liable to be injured by resting upon it at low tide. The water in the berth was not deep enough at low tide to float the libellant's vessel, but this fact is not sufficient to render the wharfinger liable for injury sustained by the vessel when grounded at low tide.

The proposition asserted in behalf of the libellant, that, in the absence of notice to the contrary, every vessel, even of the size of the Great Eastern, has the right to assume that the water in the dock at a public wharf is of sufficient depth to float her at all tides, cannot be sustained. A wharfinger is not bound to maintain a depth of water in the berth at his wharf sufficient for all vessels at all tides.

The proposition, that it is the duty of a wharfinger to give information as to inequalities in the surface of the bottom, when that is material to the safety of a vessel about to moor at his wharf,—Sawyer v. Oakman [Case No. 12,402],—is entirely consistent with the other proposition, that it is the duty of the shipmaster, before placing his vessel in the berth, to ascertain whether the depth of water in the dock is sufficient for the draught of his vessel.

The present is a case of no inequality in the surface of the bottom, but where the injuries to the boat arose simply because of insufficient water in the berth to float the vessel at low tide. But it is insisted that inasmuch as the evidence shows that the wharfinger, who was the consignee of the cargo on board this vessel, directed the master to place his vessel in the berth she took, without informing him that the dock was not deep enough to float the vessel at low tide, this was equivalent to an express notification that the water was deep enough at all times to float the libellant's vessel. To this I cannot agree. Some vessels can safely be permitted to take the ground at a wharf at low tide, and it is a common thing for some vessels to do this; but other vessels are not sufficiently strong to permit such a course; and whether the libellant's vessel could safely do it or not could be known only to the master. The master knew the condition of his vessel and her draught. He had also full means of ascertaining the depth of water in the berth, and was bound to ascertain it. He was bound to know whether she would be compelled, and if so able safely, to take the ground at low water.

The damage he subsequently sustained arose either from a failure to inform himself as to the depth of water, or a failure of judgment as to the strength of his vessel. I either case the fault is his, and not that of the wharfinger. The libel must be dismissed, with costs.

NELSON (REED v.). See Case No. 11,648.

NELSON (ROBERTS v.). See Case No. 11,907.

Case No. 10,114.

NELSON v. ROBINSON.

[Hempst. 464.] [1]

Circuit Court, D. Arkansas. July, 1846.

PRACTICE IN EQUITY — DISSOLUTION OF INJUNCTION ON COMING IN OF ANSWER — DENIAL ON INFORMATION AND BELIEF — DISCRETION OF COURT.

1. Where there is equity on the face of a bill, an injunction will not be dissolved on the coming in of the answer, unless there is a positive denial of all the material facts from which that equity arises, based on the personal knowledge of the defendant.

2. A denial on information and belief is not sufficient for that purpose.

[Cited in Farmer v. Calvert Lithographing Co., Case No. 4,651.]

3. It is in the sound discretion of the court to continue an injunction even after answer, where the nature and circumstances of a case require it, and where justice will be attained by that course.

Bill in equity.

S. H. Hempstead, for complainant.
Daniel Ringo and F. W. Trapnall, for defendant.

JOHNSON, District Judge. This is a motion to dissolve an injunction; and on looking into the case, it appears that some of the specific material and positive allegations in the bill upon which the injunction may well

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

be sustained, are only denied on information and belief, and not on the personal knowledge of the defendant. Where there is equity on the face of the bill, the rule is well settled that an injunction will not be dissolved on the coming in of the answer, unless there is a positive denial of all the material facts which form that equity, and such denial, too, must be based on the personal knowledge of the defendant; and a denial on information and belief is not sufficient. Roberts v. Anderson, 2 Johns. Ch. 202; Apthorpe v. Comstock, Hopk. Ch. 143; Ward v. Van Bokkelen, 1 Paige, 100. And the plain reason of this rule is, that a denial on information cannot be equal in weight with a statement made from personal knowledge; for a defendant may have derived his information from one no better informed than himself on the subject. Id. 160; Id. 426. Although it is doubtless a general rule that an injunction obtained on filing the bill will be dissolved on the coming in of the answer denying all the equity of the bill (2 Madd. Ch. 238; 8 Ves. 35; 9 Ves. 355; 19 Ves. 144; 1 Johns. Ch. 211; Id. 444), yet it is equally well established as an exception to it, that it is in the sound discretion of the court to continue an injunction where the nature and circumstances of a case require it, and where justice will be attained by that course (2 Johns. Ch. 202; 3 P. Wms. 255; 2 Brown, Ch. 88; 3 Brown, Ch. 463; 16 Ves. 49; 19 Ves. 149; 2 Madd. Ch. 366; 1 Newl. Ch. Prac. 227). It does not follow, then, as a necessary consequence, that an injunction will be dissolved on the coming in of the answer; and at all events, to produce that result, the answer must have the requisites above alluded to, and which this, in my opinion, does not possess. Poor v. Carlton [Case No. 11,272]. Motion denied.

April, 1853.—This cause came on for final hearing before DANIEL, Associate Justice of the Supreme Court, holding the circuit court. RINGO, District Judge, having been of counsel, did not sit.

S. H. Hempstead, for complainant.

In January or February, 1837, Charles T. Nelson, the complainant, purchased from Theodoric A. Bennett the north-west quarter section three, the south-west quarter of the north-east quarter of section three, in township fourteen, south of range twenty-five west; also the south-west quarter of section thirty-four in township thirteen, south of range twenty-five west, containing altogether 361 $^{57}/_{100}$ acres, at $5 per acre. There was no written contract between the parties, but Bennett was to make Nelson a title, which of course means one in fee-simple; and Nelson gave his obligation for the purchase-money. Nelson took possession of the lands and made valuable and lasting improvements, worth, according to the proof, $1,200 or $1,500, and upon a rescission of the contract, is willing to lose, so the parties can be placed in statu quo without injury to any one, except that Nelson must be loser. Bennett, the vendor, died in August, 1837, without having made title, the purchase-money remaining unpaid, and Henry M. Robinson administered on the estate. Bennett left a widow, who afterwards married Joel J. Robinson, and she is still alive. Bennett left two children, namely, Lucy Ann, who is still alive, and a child born after his death, which child died in minority; and according to our law, the mother inherited from the child. Lucy Ann, the living child, never had a guardian. Henry M. Robinson, the administrator of Bennett, became insolvent and removed from the state without closing the administrationship, and it is not yet closed. The obligation that was given by Nelson for the purchase-money appears to have been split up into small sums, within the jurisdiction of a justice of the peace, and judgments to have been confessed on these sums. And these judgments were afterwards consolidated by Winslow Robinson, and a note given to him by Nelson and others, on which judgment was obtained, and the collection of it enjoined by this court, on the principal ground that no title could be obtained from Bennett or his representatives. The answer of Winslow Robinson sets up, by way of avoidance, that Nelson, the complainant, was to take title through Norlove Nelson, and was not to obtain any from Bennett at all; that this was the contract between the parties. This is new matter, and it will not be controverted that the defendant must prove it. This he has not done, according to our understanding of the case; and the proof is, that he was to obtain title from Bennett and not that Bennett was to substitute some other person in his place.

The rule of law we take to be clear, that where a person contracts with another for real estate, and the understanding is, that A., the vendor, is make a title, the vendee cannot be required to take a title from B., because that would be to make a new contract. Yeates v. Pryor, 6 Eng. [Ark.] 76. In the case of Taylor v. Porter, 1 Dana, 422, it was said by the court that the vendee had a right to insist on the title he contracted for, and that the vendor could not substitute another person in his place as the maker of the title. And the reason is plain; if he could do that, he might offer one less solvent and able to remunerate the vendor, should the title fail. 6 Eng. [Ark.] 76. It is not an answer to say that the title offered by B. is unexceptionable, and as good or better than a title which A. could make. My contract is to take title from A., and not from B.; and I have a right to stand on my contract. The patents that are produced here we repudiate; we say there was no contract with Norlove Nelson, and we were not to take title through him, because, putting every thing else aside, it is proven that he was a minor, and could not make a binding contract, except for necessaries. He died in minority. The transfers

made by him to Charles T. Nelson, on which these patents purport to have issued, were void. The transfers could be of no possible benefit to him; in fact they were prejudicial to him, and hence void, not voidable merely, but absolutely void. [Tucker v. Moreland] 10 Pet. [35 U. S.] 70. We do not deny that an infant may be a trustee; but here no trust has been shown, nor any thing equivalent to it. These transfers must be treated as void. There is no proof that the patents ever came to the possession of Charles T. Nelson, or that he ever saw them. This controversy cannot be settled in this court, and the appropriate remedy is to enjoin this judgment perpetually, and let the parties resort to the state courts, where Mrs. Robinson, formerly the wife of Bennett, and Lucy Ann, her child, and the heirs of Norlove Nelson can be made parties, and justice done between them. These persons, on account of citizenship, cannot litigate their rights in this court, for there would be no jurisdiction. There are equitable rights and interests behind these patents vested in others; and Charles T. Nelson could only get an apparent title, with a vast ocean of litigation beyond it. A specific performance against a purchaser should not, it is said, be enforced, unless the title to the estate is free from suspicion. 2 Sugd. Vend. 110.

The inclination of the court is to favor the vendee, and it will always see that he has a good title. Where there is doubt, where there is suspicion, where the court sees that there are difficulties or equities beyond the legal title, a specific performance will not be decreed. In substance, this involves the specific performance of a contract. But the judgment ought to be perpetually enjoined, on the ground that Winslow Robinson has no such interest in this debt as will authorize him to control or collect it. The money belongs to the estate of Theodoric A. Bennett, and this suit would be no protection to Nelson against a claim brought by the heirs of Bennett for it. If he pays it, it is at his peril, and he is liable to pay it again to that estate. According to the showing made by Winslow Robinson, in his answer, this money, or a part of it, will be misapplied; as a part of it is to discharge a private debt of Henry M. Robinson, the administrator of Bennett, to Hendley and Robinson. Surely a court of equity will not stand by and allow such a proceeding, nor remove the restraint by which a party will be enabled to do it. It is no answer to say that we have no concern in this, or in the application of the fund. We have the deepest concern; because, if we ought to pay the purchase-money to any one, it is to the estate of Bennett, and not to Winslow Robinson, who is not connected with that estate in any way, and can make us no title.

F. W. Trapnall, for defendant.

THE COURT, on the whole case, considered that the injunction should be dissolved, the defendant remitted to his remedy at law, and the bill dismissed at the costs of the complainant, but gave no written opinion. Decreed accordingly.

NELSON (SHUFFLETON v.). See Case No. 12,822.

Case No. 10,115.

NELSON et al. v. The THOMAS SPARKS. DENNY v. SAME. CHAMBERLAIN v. SAME.

[18 How. Prac. 20.]

Circuit Court, S. D. New York. Sept., 1859.

COLLISION—STEAM AND TOW.

Where it appeared that the master of a propeller in attempting to pass on the larboard side of a tow-boat, with barges attached, after the tow had taken a sheer to the larboard on the conjecture that the tow would break her sheer in time to allow of sufficient room in the channel for the propeller to pass on that side, and a collision ensued, by which the outside barge on the larboard side was sunk: *Held*, that before the master of the propeller could rightfully or prudently act upon such conjecture, if he desired to persist in the course he had adopted in passing the tow, he should have stopped his vessel until he had ascertained the result of the sheer.

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

[These were separate libels by Edward D. Nelson and others, Henry Denny and Enoch Chamberlain, against the propeller Thomas Sparks, to recover damages sustained by the Eagle in a collision between the two vessels. From a decree of the district court in favor of libellants (case unreported), respondent appeals.]

Stoughton & Leveridge, for appellant.
Van Santvoord & Nelson, for libellants.

NELSON, Circuit Justice. The libels were filed in these cases by the owners of the barge Eagle and the owners of her cargo, against the Thomas Sparks, to recover damages for a collision occurring between the two vessels in the Raritan river, New Jersey, on the 22d of August, 1854. The Eagle was in tow of the New Boston, which was descending the river against the tide, with four barges or boats on each side of her, two abreast, and each having another towed astern. The Eagle was the forward outside barge on the larboard side, and was fastened by a hawser at her stem and stern to the barge next inside of her. The Thomas Sparks was descending the river astern of the New Boston and her tow, and in attempting to pass her on the larboard side, struck the Eagle and sunk her. The channel was some two hundred and fifty feet wide at the place of collision, and both vessels were approaching a very abrupt turn in the river towards the north; that is, towards the left in descending. There were mud-flats on each side of the channel. As the New Boston was

approaching this turn, being in about the middle of the channel, she suddenly took a lurch or sheer toward the left or larboard side, without having changed her helm, but from the effect of the head-tide acting upon the tow, which brought her obliquely across the channel, and brought the Eagle, she being the outside barge, and heavily laden, somewhat upon the flats, the draft upon which had the effect to produce a strain on her hawser at the bow, and broke the bolt of the cleet with which it was fastened to the inside boat; and from the advance of the tug swung the head of the Eagle thus broken loose, round at right angles to the line of the other boats, and thus closed up the passage on the larboard side; and in this position she was struck by the Thomas Sparks, while in the act of attempting to pass on that side of the channel. No fault is attributable to the New Boston, or to any of the barges or boats in her tow. And the only question in the case is whether the collision occurred without any fault on the part of the Thomas Sparks. The defence set up by the master is, that if the Eagle had not broken loose from her connection with the tow, and swung across the channel, the collision would not have occurred, as there was room enough for his vessel to pass clear of the tow; and that, when the accident happened to the Eagle, his vessel was so near that no manoeuvre or movement could prevent the blow.

The master was a witness for the respondent. He states that his vessel was about a quarter of a mile astern of the tow, when he made up his mind to pass it on the larboard. As he neared it, the tow sheered across the river toward the larboard side, rather out of the channel. "I calculated," he observes, "it would break the sheer, and still give us room to go on the larboard side. The tow came quartering to the larboard. We had not commenced turning the bend in the river. As we neared the tow, I saw it kept its sheer, and I then slowed my boat, and finally stopped her, and the other boat continued under way. As we stopped our boat, I let her go along until our bow lapped on to the stern of the tow, and I then discovered that the barge was swung out, and I rang to go back, and we backed her." At another place in his testimony the master states that the reason he did not go to the starboard was because he thought the tow would break her sheer, and he thought she would break it because he thought it would keep the channel. No witness on the part of the respondent varies this account of the collision as given by the master.

We are satisfied, upon a very careful examination of the evidence, and especially of that of the master, that if, when he discovered the sheer of the New Boston, he had ported his helm his vessel could have passed the tow on the starboard side without any difficulty; and that it was his persistence in his first determination to pass to the larboard, after the sheer, that occasioned the disaster. There was abundance of room in the channel to have passed to the starboard. But assuming that the Thomas Sparks was too near to have made this manoeuvre at the time of the sheer, then it was the duty of the master to have immediately stopped and backed his boat. Instead of doing so, he admits, as he stopped, he let her go along until his bow lapped on the stern of the tow, before he rung the bell to back her. The excuse given for persisting in passing to the larboard, after the sheer of the New Boston, is that he thought she would break it. But before he could rightfully or prudently act upon this conjecture, if he desired to persist in the course he had adopted in passing the tow, he should have stopped his vessel until he had ascertained the result of the sheer.

Without pursuing the examination of the case further, we are satisfied the decrees of the court below was right, and should be affirmed.

Case No. 10,116.

NELSON et al. v. UNITED STATES.

[Pet. C. C. 235.] [1]

Circuit Court, D. Pennsylvania. April Term, 1816.

NON-IMPORTATION LAWS—CONDEMNATION OF VESSEL—SUSPICIOUS CIRCUMSTANCES—EVIDENCE—LETTERS ROGATORY—INTERROGATORIES ACCOMPANYING COMMISSION—JUDGMENT AGAINST SURETIES AFTER AFFIRMANCE OF DECREE OF CONDEMNATION.

1. Condemnation of a vessel, and part of her cargo, for a breach of the non-importation laws,

2. However positive evidence may be, its effects will be done away, by suspicious circumstances.

[Cited in The John Griffin, Case No. 7,348.]

3. The circuit court will issue letters rogatory, for the purpose of obtaining testimony, when the government of the place where the evidence is to be obtained, will not permit a commission to be executed.

Form of letters rogatory (note).

4. If all the interrogatories which accompany a commission, are substantially, although not formally answered, it is sufficient; and this principle applies as well to evidence obtained under letters rogatory, as to answers under a commission.

5. After affirmance of the sentence of condemnation of the district court, for a breach of the revenue or non-importation laws, the court will, forthwith, on motion, give judgment against the claimant and his sureties, on the bond given upon the delivery of the cargo to him, at the appraised value.

[Cited in The Wanata v. Avery, 95 U. S. 616; U. S. v. Ames, 99 U. S. 41.]

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

This was an appeal from the district court of Pennsylvania, where a pro forma decree, upon an information filed by the district attorney, had been entered in favour of the

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

United States. The information was founded upon a breach of the non-importation law, for importing into the United States, from the Havanna, a cargo of rum, sugar, coffee, molasses and copper; the growth, produce or manufacture of a British colony. The copper, molasses and sugar, were claimed by Joseph E. Tatem as his property; the rum, was claimed by Abbott, for himself and Nelson, the master and owner of the vessel; and the vessel called the Perseverance, was claimed by Nelson.

Ingersoll & Peters, for claimants.

C. J. Ingersoll, Dist. Atty., for the United States.

WASHINGTON, Circuit Justice. As there is no claim interposed for the coffee, the sentence of the district court, must of course be affirmed. As to the copper, molasses and sugar, claimed by Joseph E. Tatem, his ownership in the same, is made out by all the ordinary documentary proof, and there is not the slightest evidence in the cause, to induce a suspicion that these articles were the growth or manufacture of Great Britain or of any of her colonies or her possessions. The decree, therefore, as to these articles, must be reversed. The only question, which was seriously contested at the bar, related to the ninety-seven hogsheads of rum, claimed by Abbott, for himself and Nelson. For the United States it was insisted, that this article was manufactured in one of the British West India islands, and on the other it is asserted to be of Spanish origin. To establish the fact, on the one side, and on the other, a number of witnesses have been examined; all or most of whom, professed themselves to be well acquainted with the flavour and strength of rum made in the British islands. The number of witnesses was nearly equally divided, one-half pronouncing the rum to be of British origin, the other half declaring a different opinion; and the latter have relied for their support, not only upon the flavour, but upon the strength of the spirits, and upon the quality and make of the casks containing the same. In aid of the testimony given in favour of the claim, we have the depositions of sundry witnesses, taken at the Havanna, under letters rogatory awarded by this court.[2] These witnesses swear most positively; that the ninety-seven hogsheads of rum, shipped on board the Perseverance, were manufactured at the Havanna, by Solere, one of the witnesses, and sold to Medina, another of the witnesses; and by him sold to Nelson and delivered on board the Perseverance. To these depositions, objections have been made, the chief of which is, that all the interrogatories were not answered. To this it has been answered, that they are all substantially though not formally answered. If this be the case, this court have decided in former cases, that it is sufficient, even where the depositions were taken under commissions, and consequently by persons appointed by and acting under the authority of this court. The reason for dispensing with a strict performance of the duty imposed upon those who take the depositions applies, a fortiori, in a case where a foreign government refuses to suffer a commission to be executed within its jurisdiction, and deputes persons, appointed by itself, to take the depositions. This being the policy of the Spanish government, this court, instead of sending a commission in the present case, was induced to send letters rogatory, which have been executed by persons appointed by the governor of Cuba. In such a case, where the business is taken out of the hands of persons appointed by the court, the ends of justice seem to require a departure, in some degree, from the ordinary rules of evidence. To what extent this departure should go, has never yet been decided in this court, and it is not necessary at present to lay down the limitation; because I am satisfied, that if the cause rested solely upon the testimony of the witnesses examined to prove the origin of the rum; the weight of evidence, to which there can be no exception, is in favour of the point, contended for by the claimant, that it was not manufactured in a British island. But if the evidence to establish this point were much stronger than it is, the case is crowded with circumstances of suspicion, too violent to be overcome. In the first place, there was not on board of this vessel at the time of seizure, any of the ordinary muniments of property, either in Abbott, in Nelson, or any other person. There was no invoice, bill of lading, bill of

[2] A commission, in the usual form, had been issued out of the district court to Havanna, but the authorities there prevented its execution. Any attempt to take testimony under it, was deemed an interference with the rights of the judicial tribunals there. Letters rogatory, according to the form and practice of the civil law, were issued, and the testimony was obtained. The following is a copy of the letters rogatory: United States. District of Pennsylvania. Sct. The President of the United States, to Any Judge or Tribunal, Having Jurisdiction of Civil Causes at Havanna, Greeting: Whereas a certain suit is pending before us in which John D. Nelson, Henry Abbott and Joseph E. Tatem, are the claimants of the schooner Perseverance and cargo, and the United States of America are the defendants; and it has been suggested to us, that there are witnesses, residing within your jurisdiction, without whose testimony, justice cannot completely be done between the said parties. We therefore request you, that in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses, as shall be named or pointed out to you by the said parties, or either of them, to appear before you, or some competent person, by you for that purpose to be appointed and authorised, at a precise time and place by you to be fixed, and there to answer on their oaths and affirmations, to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed up together with these presents. And we shall be ready and willing to do the same for you in a similar case when required. Witness, &c.

parcels, accounts, or paper of any kind; nor has any attempt been made to account for the absence of these documents. It was contended, that the title of Nelson to the rum, was proved by the evidence of Solere and Medina; and that his possession is sufficient to establish his title. Still, however, this does not account for the want of the ordinary documentary proof of property; and consequently does not relieve the case, from the suspicion which this circumstance fixes upon it. If the transaction was fair and legal; if the rum was really manufactured in a Spanish island; what reason can be assigned, for the absence of those papers, which never fail to accompany a legal importation? Besides, the rum is claimed by Abbott, for himself and Nelson, although Nelson himself was in court, and filed a claim for the vessel. Independent of the objection to the claim itself, for this reason, the manner in which it is made, furnishes an additional ground of suspicion against the fairness of the transaction. As to Abbott, he has not produced the slightest evidence of ownership; and Nelson has no other evidence, than that which has been before noticed. Second. Another strong circumstance of suspicion, is the false destination of the vessel, and the consignment of the cargo. The manifest, which was delivered by the master to the custom house officer, states that the destination was to Cadiz, and that the vessel put into this port in distress, for the purpose of repairs. It also states, that the rum was consigned to Abbott of Cadiz. But Abbott resided in Philadelphia; and if, as is now contended, upon the total want of evidence, to prove property in Abbott, Nelson is the owner, what reason can be assigned, for making the consignment to any other than himself? Third. From the time this vessel entered the Delaware Bay, the entries in the log book ceased; and to account for this extraordinary omission, a very extraordinary and absurd reason, is assigned by the mate, viz. that the weather was so cold, as to prevent him from writing. It would have been less a ground of suspicion, if no reason had been assigned, than to offer one, so obviously untrue and ridiculous. Upon the whole, I am clearly of opinion, that the rum and the vessel are liable to forfeiture.

The decree of the district court was affirmed, as to the vessel, rum and coffee; and reversed as to the rest of the cargo.

After the decision was made, in the preceding case, the district attorney moved the court, to enter up judgment on the bond, which had been given by the claimant of the rum, and his security, upon the order of the district court, to deliver the same to the claimants. He referred to 2 [Bior. & D.] 65 [1 Stat. 85]; 3 [Bior. & D.] 221 [1 Stat. 695]; Acts 1789 and 1799,—which he contended, could only apply to the district court, so far as it required the lapse of twenty days, before the judgment is to be rendered. The Alligator [Case No. 248]; McLellan v. U. S. [Id. 8,895]; H. Black. 164.

On the other side, it was contended; that The Alligator [supra], was against the motion; and that, upon the construction of the 89th section of the act of 1799, this court cannot give judgment on the bond, except in open court, and after twenty days, from the day when the sentence of condemnation passed. Besides, it was contended, that the sureties have a real defence to make in this case; the substance of which is, that after the rum was delivered to the claimant, he gave his sureties a lien on it, to induce them to join him on the bond. That the rum was, afterwards taken in execution by the marshal, to satisfy a judgment obtained by the United States, for duties due to them, the amount whereof was satisfied by the sureties; which they claim, as a set off against their bond, the marshal having intimated an opinion, that such a set off would be allowed.

WASHINGTON, Circuit Justice. This defence, could, by no means, avail the sureties, even if the marshal had made the most express promise, that the money paid by them, should be credited against their bond; because that officer has no power to bind the United States, by any promise which he may make. If the fact be, that Nelson pledged the rum to his sureties, to secure them against their undertaking for him, and, if in consequence thereof, they might have contested the right of the United States to levy an execution on it; still, as they voluntarily permitted the execution to be levied on it, and paid the money, they cannot now complain, and off set the money so paid. As to the main question, the 89th section of the act. of 1799, seems to consider the bond, which is directed to be given by the claimant, for the appraised value of the property, in nature of a stipulation, according to the ordinary course of the admiralty; or else, it would hardly have directed judgment to be entered on it, without further delay, after the expiration of the twenty days. But the delay was clearly intended to be confined to the district court, where without further delay, the judgment might be rendered. It is totally inapplicable to the circuit court; because, the whole design of the provision would be defeated, if that court were bound to wait twenty days, after the sentence of condemnation, before judgment could be entered on the bond. I entirely concur in the decision of the court, in the case of The Alligator [Case No. 248]; and shall in conformity with it, direct judgment to be entered on the bond given in this case.

NELSON (UNITED STATES v.). See Cases Nos. 15,861–15,864.

Case No. 10,117.

NELSON et al. v. WOODRUFF et al.

WOODRUFF et al. v. NELSON et al.

[16 Leg. Int. 325; 4 Wkly. Law Gaz. 188; 41 Hunt, Mer. Mag. 710.]

Circuit Court, D. New York. Oct. 4, 1859.[1]

SHIPPING—DAMAGE TO CARGO BY WEATHER.

[A shipper of lard in the summer months takes the risk of damage occasioned by the excessively hot weather, unless some neglect or fault can be charged upon the vessel, contributing to the loss.]

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

[These were cross actions by William Nelson, Edmund S. Dennis, Sherbourne Sears, Francis Burritt, and Aaron Cohen against John O. Woodruff and Robert M. Henning, survivors of James E. Woodruff, and John O. Woodruff and Robert M. Henning against William Nelson, Edmund S. Dennis, Sherbourne Sears, Francis Burritt, and Aaron Cohen. The district court entered a decree in favor of Nelson and others in the first action, and dismissed the libel in the cross action (case unreported), and an appeal was then taken to this court.]

NELSON, Circuit Justice. The libel was filed in the first case by the libelant to recover freight upon a shipment of 1,099 barrels and 61 tcs. of lard, in the ship Maid of Orleans, from New Orleans to this port, in July and August, 1854. It was filed in the second case by the consignee against the respondent, to recover damages for a loss of part of the lard in the course of the shipment. Both cases depend upon the same evidence, and were heard together in the court below, and in this court. It is not denied but that a very heavy loss of lard occurred on board of the vessel during the voyage, which was discovered upon discharging the cargo at this port—a loss of about 60,000 pounds, worth some $6,000. The bills of lading are in the usual form—shipped in good order, &c., damages of the sea, &c., except to each is added at the foot, "Contents unknown." The weather was excessively hot in New Orleans in the month of July, 1854, when the lard was put on board and delivered by the shipper on the levee, which was done morning and evening to avoid the heat of the day. The delivery, however, was continued in the morning until 10 o'clock, and renewed between 3 and 4 p. m. And according to the weight of the testimony the lard was taken on board the vessel with all reasonable dispatch. When taken on board it was in a liquid state, and a few barrels leaked so badly at the levee that the hoops had to be tightened, and some of the barrels were found to be partially empty. The great deficiency that occurred in the course of the shipment, is attributable to the leakage of the casks which the libelant insists is chargeable alone to the condition and character of the article and to the excessive heat, whether at the time of the shipment or during the voyage. The proofs in the case taken at New Orleans and at this port, are very full and satisfactory that the lard was properly and skilfully stored, both in respect to the place in the hold of the vessel and the manner of the storage. And it is further shown that all due and proper care was taken in the course of the shipment, and I perceive nothing in the evidence, when critically examined and weighed, in the appearance or condition of the packages when discharged at this port, going to impair the proof of the libelant on this head. The barrels and tierces appear to have been well made and with proper material, and to have withstood any substantial injury, with the exception, that the seams were opened, and hence the leakage. But this is accounted for by nearly all the witnesses experienced in the shipment of the article, as resulting from the effect of the hot weather in connection with the tendency of the melted lard to shrink the staves and loosen the hoops. The proof is that the months of July and August were hot beyond those of the preceding years; and that on opening the hatches of the vessel at this port the heat in the hold was so excessive that no person could remain in it. It is well settled that the shipper takes a risk attendant upon the shipment of cargo of this character from the heat of the weather, unless some neglect or fault can be charged upon the vessel contributing to the loss [Clark v. Barnwell] 12 How. [53 U. S.] 272. And I must say, after a very careful examination of the evidence, that in my judgment, no such negligence or fault has been established. The decree of the court below must be affirmed.

[Appeals were then taken to the supreme court, where the decisions of both district and circuit courts were affirmed. 1 Black (66 U. S.) 156.]

[1] [Affirmed in 1 Black (66 U. S.) 156.]

Case No. 10,118.

The NEPTUNE.

[6 Blatchf. 193;[1] 8 Int. Rev. Rec. 114.]

Circuit Court, S. D. New York. Oct. 2, 1868.

SHIPPING—DAMAGE TO CARGO—NEGLIGENCE OF VESSEL—BURDEN OF PROOF—STOWAGE BETWEEN DECKS.

1. Where oil, in casks, was transported, on freight, from Boston to New York, by a steam propeller, and some of the oil was lost on the voyage, and, in a suit in rem, by the owner of the oil against the vessel, to recover for the loss, it appeared that the vessel encountered, on the voyage, an unusually violent storm, which fully accounted for the damage, within an exception in the bill of lading: *Held*, that the onus was on the shipper, to establish carelessness or negligence on the part of the vessel, leading to the loss.

[Cited in The Pharos, 9 Fed. 914.]

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

2. The main deck of a steam propeller, bulwarked entirely around and covered by the upper deck, and constructed specially for the purpose of carrying cargo, so that the cargo placed there is as completely protected from the weather and from storms as if it were in the hold, is a proper place in which to stow such cargo.

[Distinguished in The William Gillum, Case No. 17,693. Cited in The William Crane, 50 Fed. 445.]

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

This was a libel in rem, filed in the district court, against the steam propeller Neptune, by the owners of a quantity of oil in casks, shipped by that vessel, on freight, from Boston to New York, on the 29th of November, 1865, to recover for the loss of some of the oil. The district court dismissed the libel, and the libellants appealed to this court.

George T. Curtis and Smith & Hulse, for libellants.

Erastus C. Benedict, for claimants.

NELSON, Circuit Justice. The casks of oil, in this case, were of various sizes, containing from eighty to three hundred gallons each. The propeller encountered, on the voyage, an unusually violent storm, which fully accounts for the damage within the exception in the bill of lading, and throws the onus on the shippers, to establish carelessness or negligence on the part of the master or owners of the vessel, leading to the particular loss. This they have attempted to do, by charging, first, that the casks were badly stowed, and, secondly, that they were stowed between decks, when they should have been stowed in the hold.

As appears from the proofs, a large portion of the hold of such a propeller as this one was, is used for her engines, water, boilers, coal, &c., although there is some space left for freight; but much the greater part of the freight is carried between decks, or on the main deck, as it is called. This deck is constructed specially for the purpose of carrying freight. It is bulwarked entirely around, and covered by the upper deck, and is as completely protected from the weather and from storms, as if it were the hold; and freight can be stowed in it as securely as in the hold. It may, perhaps, require more care in the stowage of casks, and of packages of that description, to prevent their rolling in stormy weather, than if they were in the hold, the tendency to disturb the cargo upon this deck being greater than when it is below. I concur, therefore, with the court below, that no fault is chargeable to the vessel, in stowing the oil in the between decks.

There is much conflict of evidence in the case, on the subject of the proper stowage of the casks—much more than should be expected from the intelligent shipmasters, and other experts, who have been examined; but, in this conflict, I am not disposed to overrule the conclusion of the learned judge below, who has examined the case with great care and attention on both of the points to which I have referred. Decree affirmed.

Case No. 10,119.

The NEPTUNE.

[Blatchf. Pr. Cas. 367.] [1]

District Court, S. D. New York. June, 1863.

PRIZE—BLOCKADE—CONDEMNATION.

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

In admiralty.

BETTS, District Judge. This vessel was captured, as prize of war, April 19, 1863, on the Atlantic Ocean, off Charleston Harbor, S. C., by the United States sloop-of-war Housatonic. The vessel was, on her capture, appraised at the sum of $150, and left at Port Royal, S. C., by the captors. The cargo was brought to this port for adjudication, and was here libelled, on the 5th of May thereafter. It was on the same day arrested by due process of attachment and monition, returnable May 26, and on that day the writ was duly returned in court, and a decree by default was thereupon rendered in court. The ship's papers show that the vessel was, on the 4th of April, 1863, registered at Charleston, in the Confederate States, in the custom-house of the enemy, as the sole property of Samuel D. Stoney, of that place, and that she there shipped a crew for Nassau, N. P., with a manifest and bills of lading, dated April 11, 1863, of a cargo of cotton and spirits of turpentine, from that port to Nassau, N. P. The master of the vessel deposes, on his preparatory examination, that the vessel sailed from Charleston with the Confederate colors, and had no others on board; that she was captured off Charleston Harbor, April 19, 1863, in the night; that he was a resident of Charleston, and was appointed to the command of the vessel by her owner, in that port; that he, the master, owned part of the cargo, and the owner of the vessel the residue; and that both of them knew that the port was under blockade at the time by the United States forces. No question is earnestly maintained, upon the pleadings and proofs, as to the guilt of the vessel and cargo. A regular default against both has been taken, and a decree of condemnation and forfeiture must be entered against both. Decree accordingly.

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

Case No. 10,120.

The NEPTUNE.

[Olcott, 483; 16 Hunt, Mer. Mag. 603; 5 N. Y. Leg. Obs. 293.] [1]

District Court, S. D. New York. Feb. 27, 1847.

WITNESS—PARTY TO THE RECORD—COLLISION—BETWEEN STEAM AND SAIL—PRECAUTIONARY MEASURES—LIGHTS—CONFLICTING TESTIMONY—MASTER AND CREW WITNESSES FOR OWNER.

1. In actions in the federal courts, parties to the record cannot be examined as witnesses.

2. The federal courts will, upon motion and for good cause shown, authorize the name of a party to be stricken from the pleadings; and he can then be examined as a witness, subject to all legal objections.

3. Sailing vessels meeting steamers at sea must use due precautions to avoid coming in collision with them, as for example by taking care not to impede their course or embarrass their navigation.

4. In an action for damages incurred to a sailing vessel through collision with a steamboat, the libellants must prove the sailing vessel clear of all culpable conduct conducing to the collision. Steamers are not bound to guard sailing vessels against their own misconduct. It is the duty of a steamer to take prudential measures in ample season for avoiding a sailing vessel, when the two are approaching.

[Cited in The New Champion, Case No. 10,146; The Rocket, Id. 11,975.]

5. Sailing vessels are not bound to have lights suspended in the night time.

[Cited in The City of Savannah, 41 Fed. 893.]

6. The positive testimony of witnesses to their own acts, at the time of a collision, is entitled to outweigh the opinions and belief of out-numbering witnesses who judged of such acts from the opposite vessel.

[Cited in The Gray Eagle, Case No. 5,734; Nelson v. The Goliah, Id. 10,106; The Fannie, 11 Wall. (78 U. S.) 242.]

7. The master and crew of a vessel are competent witnesses for the owner of the vessel in a cause of collision.

This was a cause of collision. It came before the court upon the following pleadings: The libel and complaint of Zebulon Paine, owner of one-half part of the schooner Iola and owner of part of her cargo; Sarah Sherwood, owner of the other half part of the schooner; John Buchanan and Andrew Bradford, owners of part of the cargo; Joseph Sumner, master of the said schooner; James McCollin, mate; Ambrose Venelan, James Wooster, seamen; Henry Coff, cook; and Augustus Norten, a passenger on board of said schooner, allege that the said schooner Iola, on or about the 7th day of July, 1846, left the port of Eastport, in Maine, with a cargo of lathes, pickets, plaster, fish in barrels, and packages of money, bound for the port of New-York; that the schooner was tight and staunch and strong, and well manned and appointed; that in the evening of the 14th July she had proceeded about a mile to the south of the light-boat stationed off the Middle Ground, a shoal nearly opposite to Stratford Point, and that the schooner passed the light-boat, being about a mile to the southward thereof; that the said schooner was then steering about a west course, the wind being nearly from the north; that the night was clear, and the said vessel could be easily discerned at a considerable distance; that whilst sailing upon her course about west, with a fresh wind, going from six to eight knots an hour, between nine and ten at night she was negligently run against and into by the steamboat Neptune, which was then proceeding down the Sound from the city of New-York, and run and struck against the hull of the said schooner between the fore and main rigging on her larboard side, with such great force and violence as to break and tear open the hull of said schooner, and cut her nearly in two, so that she filled and sunk almost immediately, and the said vessel and her cargo, and the clothes, money and effects of the crew and passengers, were totally lost, and a female named Murphy and her child, were drowned; that Long Island Sound, where the disaster occurred, is very wide, and there was ample room for the steamboat to have passed and avoided the schooner; that the schooner was worth three thousand dollars; that that part of the cargo belonging to the said Paine was of the value of $550: that the value of the cargo belonging to John Buchanan was $117; that the owners of the schooner lost the freight and passage money, &c., and the other libellants set forth their losses as by annexed schedules; they pray for a decree in their favor, for their damages and costs.

The respondent in his answer says, that as to the ownership of the schooner Iola, the cargo and the other subjects of property, he knows nothing, and therefore leaves it to the libellants to make out proof of their allegations. He further alleges that the steamboat Neptune, being in good order, sufficiently equipped and manned, sailed from New-York, 14th July, 1846, bound to Newport and Providence, in Rhode Island, and proceeding upon her passage at her regular rate, about one mile from Stratford light-boat, about nine or ten o'clock in the evening, a vessel was seen about one-half of a quarter of a mile ahead, which vessel was the schooner Iola. That immediately upon seeing the schooner, the course of the steamboat Neptune was changed to windward of the schooner, for the purpose of giving the said schooner the course she was then running. That when the said steamboat was about ten or twelve lengths from said schooner, it was observed that the latter had changed her course, and was luffing up so as to cross the bows of the said steamboat. That when first seen, said schooner was running north by south, from which she changed suddenly to about northwest. That on seeing that said schooner had changed her course, the bell of the steamboat was imme-

[1] [Reported by Edward R. Olcott, Esq. 16 Hunt, Mer. Mag. 603, and 5 N. Y. Leg. Obs. 293, contain only partial reports.]

diately rung to stop her, and all efforts made to avoid the collision; but the said schooner came directly across the bows of the said steamboat, and the latter having some headway, a collision could not be avoided. That said schooner was struck about midships, and her crew at once jumped from the rigging on board the said steamboat. That hearing that a female and child were left on the schooner, a small boat was immediately lowered from the Neptune, sufficiently manned, and every effort made to save any persons on board said schooner. That the captain of the steamboat, and the men with him who manned the said small boat, continued to row about the place of the disappearance of the schooner for more than half an hour, and finding no person needing their aid, they returned to the Neptune. That the master, pilot and wheelsman of the Neptune were experienced and skilful, and that the crew were not inexperienced, careless and incompetent men; nor was the steamboat carelessly, improperly or unskilfully navigated at the time; nor was the loss of the schooner and cargo, nor the lives of any persons, if any such were lost, occasioned by the fault, carelessness or unskilful management of the steamboat. That the reason why the said schooner was not seen earlier was that a heavy, black cloud shut her out from view, and she had no lights visible on board. That the change of the course of said steamboat threw the broadside of the Neptune to view from the schooner, so that the man at the helm on the schooner saw the head and stern lights of the steamboat, and her course was plainly seen by him. That the wind was blowing fresh, and the "luffing up" of the schooner so as to cross the bows of the steamboat, when the position and course of the latter was evident to those on board, could not have been expected by any person on board the steamboat, and was contrary to all proper and lawful rules of navigation. That the accident aforesaid was occasioned by the great negligence and want of care of the officers and crew of the schooner in not providing proper lights on deck, and in changing the course of the schooner right across the bows of the steamboat, and not by any negligence, want of skill or care of the officers and crew of the steamboat. Wherefore they pray that the libel be dismissed with costs. The matters in controversy under the pleadings relate to damages sustained by the owners of the schooner Iola, who are a portion of the libellants, and also by the owners of the cargo and property on board, who are the other libellants, in consequence of her destruction by collision with the steamboat Neptune. The master and crew of the Iola are co-libellants, who sue for property owned by them which was lost on board the schooner; and they were offered as witnesses on the hearing to prove the damages they had sustained, and the liability of the steamboat therefor. Exceptions to their competency having been taken on the part of the claimants, the court permitted that question to be argued, preliminarily to the hearing of the cause upon the merits.

F. B. Cutting, on the part of the libellants, argued that the witnesses were competent ex necessitate, and also in conformity to the practice of admiralty courts in cases of wages and salvage. He cited 1 Greenl. Ev. 27; 12 Vin. Abr. 24, pl. 34; 12 Johns. 461; 6 Wend. 407, 409; 4 Wend. 483; 11 Wend. 568; 16 Wend. 595, 596; [M'Coul v. Lekamp] 2 Wheat. [15 U. S.] 111, 117 note; 2 Yeates, 254; [Seagrove v. Redman] 4 Dall. [4 U. S.] 153; 1 Greenl. Ev. §§ 348, 350; Dunl. Adm. Prac. 264; 2 Browne, Civ. & Adm. Law, 112; Dunl. Adm. Prac. 85, 89, 90; The Henry Ewbank [Case No. 6,376]; Bearse v. Three Hundred and Forty Pigs of Copper [Id. 1,193]; Dunl. Adm. Prac. 87; Betts, Adm. 57; 2 Hagg. Adm. 145.

L. B. Woodruff and George Wood controverted these positions, and cited [Oliver v. Alexander] 6 Pet. [31 U. S.] 143; 2 Browne (Pa.) 350; The Henry Ewbank [supra]; 2 Hagg. Adm. 154; Dunl. Adm. Prac. 264, 265; Thompson v. The Philadelphia [Case No. 13,973].

BETTS, District Judge. The rule in equity established in the courts of this state does not disqualify a party named on the record from being a witness in the cause, if he has no certain interest in the event. 1 Johns. 556; 2 Cow. 186–189; 1 Johns. Ch. 550; 6 Johns. Ch. 212. Some of the judges in those cases were indisposed to consider a mere contingent liability to costs as amounting to a disqualifying interest; but the present chancellor seems to hold a party incompetent for that cause. 6 Paige, 565. At law the rule is clearly so, and the parties to the record, who are merely nominal, or who consent to be sworn, are not admissible as witnesses when objected to. 4 Johns. 140; 20 Johns. 142; 1 Wend. 20; 4 Wend. 453; 7 Cow. 650; 19 Wend. 353. The rule of disqualification because of connection with the suit is not so stringent in all the states. The cases upon the subject exhibiting the diversity of the law in this respect are collected in Cowen & Hill's notes to Phil. Ev. pp. 134–145, 1548; Greenl. Ev. § 347; but this court is not called upon to estimate their relative authority, or at liberty to discuss the question made as an open one. The supreme court of the United States has settled the law definitely, for all the national tribunals, that a party to the record is an incompetent witness in the cause. This is placed upon grounds of policy which do not admit of the exceptions recognized by other courts. De Wolf v. Johnson, 10 Wheat. [23 U. S.] 367, 384; Scott v. Lloyd, 12 Pet. [37 U. S.] 145; Stein v. Bowman, 13 Pet. [38 U. S.] 209. A party is held disqualified to testify in such cause, although his interest be nominal, or entirely extinguished, or be protected by a deposit of money, equal

to any liability he may become subject to. Proceedings in maritime courts are governed by general rules applicable to cases at law and in equity, where no special course has grown up from long usage in those courts, or has not been appointed by positive law. The Boston [Case No. 1,673]. Prize causes and suits for salvage are prosecuted in the names of all parties interested in the recovery, and the suitors named in the pleadings are admitted as witnesses to sustain the action. This is put upon the ground of necessity; but it is also to be observed that those actions are founded in principles of public policy, and look to other results than the mere rights and rewards of individual suitors. They are equally anomalous in the permission to parties not having a common right and interest—on the contrary, often setting up interests hostile to each other—to unite in the same action, as in the admission of such parties to testify, not for each other alone, but each also for his personal interests. So by Act Cong. July 20, 1796, § 6, seamen are compelled to join in actions for wages earned in a common voyage, brought against the vessel; yet the suits are distinct and several, and have all the properties of actions prosecuted by parties independently of each other,—[Sheppard v. Taylor] 5 Pet. [30 U. S.] 714,—and the co-libellants, in such actions must accordingly be admissible witnesses for each other, as in separate suits. There is no common interest, even contingently, as to costs. If the decree be against the libel, one libellant is not chargeable with the costs incurred by the respondents on account of his co-libellant, and can only be made liable for those created by his individual claim. Neither the claim of necessity, of long usage and custom, or the appointment of positive law, applies to the position or quality of the witnesses offered in this case. They are not brought forward as indispensable parties in the cause, and who are the only witnesses present, and capable of giving evidence to the facts in question. They stand upon the record as common sufferers for a tort, and in that position are disabled from testifying for their associates. The case of The Catherine of Dover, 2 Hagg. Adm. 145, cited in support of the admissibility of these libellants to testify, stands on a different doctrine. The witnesses admitted in that case were not parties to the action, nor proved to be interested in its event. I think the objection ought to prevail, and that the libellants must be excluded as witnesses in the cause.

A petition being subsequently presented to the court, praying that the names of the master and crew of the schooner might be stricken from the record, an order to that effect was entered, and the testimony of these witnesses and other proofs were then offered in support of the allegations of the libel. The material facts will appear sufficiently in the opinion of the court.

George Wood and L. B. Woodruff, for claimants.

The burden of proof is on the libellants. The Iron Duke, 9 Jur. 477. The vessel complaining must be free from all blame. The Friends, 1 W. Rob. Adm. 485; Id. 488; 3 Car. & P. 531.

F. B. Cutting, in reply, for libellants.

The Neptune was palpably off her course; she must take the burden of accounting for her situation. The Perth, 3 Hagg. Adm. 417; Story, Bailm. §§ 608, 609, 611; 3 Hagg. Adm. 316; The Jupiter, Id. 320; 3 Car. & P. 528. Childs says he saw the schooner right ahead on her starboard, and he turned to windward. This was a violation of law. The H. B. Foster [Case No. 6,290]; Story Bailm. § 611; 3 Kent, Comm. 230; The Cynosure [Case No. 3,528]; Id., 3 Hagg. Adm. 320. The steamboat should have kept off to starboard. 1 W. Rob. Adm. 481; The Friends, Id. 487; The Shannon, Id. 467; The Cynosure [supra]; The Narragansett [Case No. 10,019]. If it was dark the Neptune was in fault in running at full speed. 3 Hagg. Adm. 417; Id. 176; [Stokes v. Saltonstall] 13 Pet. [38 U. S.] 181.

BETTS, District Judge. The importance which this controversy has assumed on account of the amount of loss incurred by the collision, and of the question of the right navigation of the respective vessels, has caused a more prolonged examination of testimony and a wider discussion at the hearing than would seem demanded by the intrinsic difficulties of the case. A sailing vessel and a steamboat running in opposite directions, came in collision on the Sound, in the night time. The injury was received chiefly by the schooner, which sunk directly after the collision. The libellants charge the act to have been wholly the fault of the steamer, and that they are entitled to full remuneration from her for their losses. The schooner is alleged to be worth $3,000, and the property on board her, totally lost, about $1,000. The particulars on which the action is grounded stated in the libel, are, that the schooner was on her passage from Eastport, Maine, to New-York, and on the night of July 14, 1846, was standing about west, running about six or eight knots the hour, the wind being fresh and nearly north, when, between nine and ten p. m., she was run into by the steamboat Neptune, proceeding down the Sound from the city of New-York. The schooner had passed the light-boat stationed on the middle ground nearly opposite Stratford Point, about one mile south of that boat. The night was clear, and the schooner could be easily discerned at a considerable distance from the steamer. The schooner was cut nearly in two by the collision, and sunk almost immediately; the vessel, cargo, clothes, money and effects of the crew and passengers were totally lost, and two passengers, a woman

and her child, were drowned. The libel alleges that the steamboat was carelessly, improperly and unskilfully navigated, and the disaster was occasioned solely thereby. That her crew, and those having her management, were inexperienced and incompetent, or else were careless or negligent; and that the disaster was occasioned without the fault of the schooner and her crew. The libellants are bound to prove their own conduct correct, both in what was done or omitted to be done on board their vessel. If their acts caused the collision, or essentially conduced to it, they must bear the consequences, and cannot call upon the steamer to contribute to their satisfaction, unless it appears she was equally in fault. The Catherine of Dover, 2 Hagg. Adm. 154; Id. 360. They must further show that the schooner was well found, manned and equipped for the navigation in which she was employed; and they have no exemption in any of these particulars because the injury was received from a vessel propelled by steam. The action is for a tort. The complaining vessel must appear clear of blame, and also prove fault or negligence on the part of the other directly leading to the disaster. The Ligo, Id. 356. The law in no way justifies the notion that steam vessels are burthened with the sole risks and responsibilities of encounters with sailing vessels. The rule is reciprocal, placing both classes of vessels under a common liability and privilege; except that steamers are regarded as always possessing the means of avoiding a sailing vessel with a free wind, with the additional advantage of being able to stop their headway or take a retrograde movement. Those means they are bound to employ to avoid a sailing vessel at anchor, or embarrassed in her position or movements, or when keeping her own course. This service is exacted of steam vessels in contribution to the common safety of navigation, and is due as well when a sailing vessel is under difficulties from the improvidence or unskilfulness of those managing her, as if brought upon her by mischance, or without fault on her part. A sailing vessel under way has no right to hold steamers approaching her, responsible under all circumstances, for her security against them. She has also an important duty to perform in preventing a collision. She must keep steadily the course she is running when near a steamer, or if she departs from it, the change must, if practicable, be made in a manner to aid the steamer in avoiding her.

If in this case the defence set up is established, that the schooner, when too near for the steamer by any manoeuvre to escape her, luffed suddenly across the bows of the Neptune, and received the injury in that manner, the action cannot be sustained, and the claimants should be discharged from it with costs. Upon this fact the pleadings and proofs are in direct conflict. That issue embraces the substantial merits of the case. The question upon the competency of the libellants' witnesses to testify in the cause will be afterwards noticed. Witnesses on the different vessels so habitually disagree in their opinions of the immediate or remote causes of a collision at sea, and of the incidents of the occurrence observed on both sides at the same time, that courts can place little confidence in their expressions of opinion, and can rarely feel it prudent to decide causes of collision upon testimony of that character. Receiving with great distrust, the opinions and judgments of witnesses so circumstanced, however intelligent and worthy the individuals may be, the court looks chiefly to facts stated by witnesses to have occurred within their personal knowledge. What a witness asserts he did at the time or did not do on his own vessel, is generally more satisfactory evidence of the fact than the opinions and belief of a dozen others, formed from what they supposed they saw or heard on another vessel.

(The court here analyzed and collected carefully the testimony of the various witnesses; but it is not deemed necessary to the clear apprehension of the principles of this decision to report that part of the opinion.)

The men on the deck and the one at the wheel of the schooner all testify positively that no movement of her helm or change of her course was made when the steamer was coming upon her. The effort of the claimants is to prove that the schooner suddenly luffed after the steamer had starboarded her helm and was going clear of her, and was thus thrown across the bows of the Neptune after it was too late for the latter to take any further measures to avoid her. It is to be remarked that no witness on the steamer says he observed any change of the schooner's course until the wheel of the Neptune had been starboarded, and she began coming up to the wind. This movement, in a moment of alarm and the obscurity of the night, might easily have been attributed to the schooner, so that the latter would seem to the witnesses to be luffing, when her broadside was brought to view only because of a change of direction by the steamer. I hold it is not proved upon this evidence that the schooner was guilty of any fault or neglect in her movements, conducing to the collision.

Only one other fact respecting her conduct need be noticed. It is alleged that the schooner was concealed from the view of the Neptune by a thick black cloud, hanging over the eastern horizon, and that under those circumstances it was a fault on her part to run without exhibiting a light as a warning to vessels approaching her. I shall not discuss the evidence upon this subject for the purpose of determining the degree of darkness occasioned by that state of the atmosphere. The witnesses differ widely in their estimates of that fact; but admitting the sky was in places or wholly overcast, di-

rectly before or at the time of the collision, the darkness is not proved to have been so dense as to prevent the schooner being seen far enough from the steamer to afford time to the latter to take precautions for avoiding her. The witnesses on the steamer state facts which afford a strong presumption that the schooner was in plain sight in sufficient time for the pilot to have stopped and backed the engine of the Neptune before the vessels came together; and it was a plain neglect of his duty not to take that precaution. 2 Hagg. Adm. 173; 3 Hagg. Adm. 414. There was, besides, a blameable want of prudence in the pilot in running the steamer at her full speed, if the obscuration of the sky was as great as he represents it to have been; and above all, there was culpable remissness in not placing a competent watch upon the forward deck, in a position giving the best advantage for a thorough look-out ahead. These were acts of gross carelessness, and of a character in themselves to cast upon the steamer the responsibility for the collision. I only add, in respect to the relative positions of the two vessels, that in my judgment the decided weight of evidence is that the Neptune was on a track to the south and leeward of the schooner, when her wheel was starboarded and her head veered to the north. This was a violation of nautical rules, and such want of care and skill as to render the steamer responsible for the consequences which followed. The Friends, 1 W. Rob. Adm. 478. The question of the competency of the master and crew of the schooner to testify for the libellants in the cause was incidentially adverted to in the decision upon the motion to exclude them because parties to the record. The point has been presented again to the attention of the court on this hearing, and after their names had been stricken from the pleadings. Witnesses of this class it would seem were always regarded as admissible in admiralty in causes of collision, although intimations are thrown out that it may be proper to take releases to obviate final objections. 3 Hagg. Adm. 323. I see no necessity for this. The witnesses stand merely in the relation of servants and agents to the owners of the ship and cargo, acting within the plain scope of their authority. That character does not render them incompetent witnesses for their principal when he is a party to the suit. 1 Greenl. Ev. § 416; 1 Phil. Ev. 56, Cowen & Hill's Notes, p. 1525.

The decree in this cause will accordingly be in favor of the libellants for the whole value of the schooner and cargo, with costs.

NEPTUNE, The (BROWN v.). See Case No. 2,022.

NEPTUNE, The (COULON v.). See Case No. 3,273.

NEPTUNE, The (JOLLY v.). See Case No. 7,439.

NEPTUNE, The (PAINE v.). See Case No. 10,120.

NEPTUNE, The (UNITED STATES v.). See Case No. 15,865.

NEPTUNE, The (WALTON v.). See Case No. 17,135.

NEPTUNE, The (WHITEMAN v.). See Case No. 17,569.

NEPTUNE INS. CO. (BRADSTREET v.). See Case No. 1,793.

NEPTUNE'S CAR, The (DOOLEY v.). See Case No. 3,997.

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